

# Commentary

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## Erasing The Hurdles: Offshore Outsourcing Of Litigation Services

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Document retention, collection and production in large-scale litigation matters continue to be one of the highest costs faced by corporate legal departments. In response to growing concern over these skyrocketing costs, there has been a huge amount of focus on legal service outsourcing to more competitive foreign markets. Indeed, according to recent reports, increased costs in the USA could result in the outsourcing of nearly \$4 billion worth of legal services to India alone by the year 2015 — a figure that represents nearly 80,000 jobs that could make their way to India.<sup>1</sup> Notwithstanding such balmy predictions, many law firms and lawyers continue to resist taking advantage of the cost savings involved in legal service outsourcing. Given the impact that offshore outsourcing may have on the domestic legal profession, this resistance is predictable, but not entirely well-founded. The most commonly noted concerns pertain to potential waiver of privilege, unauthorized practice of law, information security and quality control. This article addresses these concerns and discusses how these hurdles can be minimized, and even erased, by implementing procedures that

involve — not exclude — a pivotal role for domestic U.S. lawyers.

### I. The Advantages Of Offshore Outsourcing Of Legal Services

#### A. Decreased Cost

The key driver of outsourcing activities remain clients that are interested in cost reduction. As noted earlier, the largest category of expense for corporate law departments is litigation-related.<sup>2</sup> A large component of this expense rests in litigation support and basic legal functions — primarily the technology and human capital cost of procuring, preserving and reviewing relevant documents (physical and electronic) from various litigants and of sifting through volumes of internal documents (again both physical and electronic) in response to document requests from other parties. These activities (collecting, collating, organizing large volumes of data and performing multi-level reviews on such data) tend to be highly technology-dependent and process driven.

In the context of large or complex litigation, clients have traditionally charged their outside counsel with the responsibility of retaining, maintaining and supervising a fleet of contract or temporary lawyers to conduct review and analysis of either physical or electronically preserved documents. These lawyers in the U.S. usually bill anywhere from \$100 to \$250 per hour.<sup>3</sup> In turn, outside counsel have usually passed on the cost of training and housing temporary legal

staff by billing the client a premium over the base rate billed to outside counsel.

In light of the electronic nature of document review in large litigation matters and rapid advancements in information technology, offshore outsourcing has become an effective cost control alternative. Offshore outsourcing affords clients with rates that are roughly 20-30 percent of the starting salaries of their U.S. counterparts.<sup>4</sup> As one recent report in *The Economist* concluded, “[w]ith American lawyers costing \$300 an hour or more, Indian firms can cut bills by 75%.”<sup>5</sup>

In an effort to curtail litigation-related costs, some clients have begun to directly retain the required temporary legal staff and move document review and analysis functions “in-house.” While this may prove effective in specific circumstances, it also raises an added, but often ignored, cost-related advantage to offshore outsourcing. Offshore outsourcing permits clients (and U.S. law firms) to focus on their core competencies rather than attempting to undertake document-related functions and basic legal work that often divert considerable time, energy and resources away from the client’s chief business operations.<sup>6</sup>

#### B. Increased Responsiveness

Offshore outsourcing provides clients and their outside counsel with a virtual 24-hour support team. This is because, unlike a decade ago when most documents produced in litigation were hard copies and the physical presence of attorneys and paralegals involved in classifying or reviewing such documents was mandatory, modern developments in electronic security and technology have resulted in litigation discovery moving online. Indeed, it is fairly common, in large- and medium-sized litigation matters, to have most, if not all, litigation-related material hosted electronically with multi-level regulated access. This divorce between physical presence of reviewers and location of litigation documents is a major factor heralding outsourcing of review functionality in this industry.<sup>7</sup>

The time difference in countries such as India effectively means that two business days’ work can be completed in one. Real time communications via an electronic medium provides an assurance of reliability when responses are immediate.

#### C. Advantages Of Outsourcing To India

India, in particular, has catapulted to the forefront as a key player in the global legal service outsourcing arena for a variety of reasons.<sup>8</sup> In fact, according to a recent report, India’s potential in this arena is yet untapped.<sup>9</sup> Forrester estimates that legal outsourcing to India is currently less than 12,000 jobs, but is estimated to grow to 29,000 jobs in 2008, 35,000 jobs by 2010, and 79,000 jobs by 2015.<sup>10</sup>

The National Association of Software and Service Companies (NASSCOM), an Indian industry organization, recently estimated that the amount of U.S.-based legal outsourced work is currently worth about \$60 to \$80 million annually, but this will soon increase to \$3 to \$4 billion.<sup>11</sup> Two-thirds to three-quarters of these outsourced legal jobs are likely to go to India.<sup>12</sup>

India’s attractiveness as an outsourcing venue for legal services centers on six overarching factors:

1. India is the second largest pool of English speaking graduates in the world.
2. English is the language of the educated masses and post-graduate education (including the sciences and law) is based exclusively in English.
3. Indian law schools graduate more than 200,000 lawyers per year.
4. Cost of a legal service (on an annual Full Time Equivalent basis) is about 10 percent to 20 percent of their counterparts in the U.S.
5. Indian law graduates and the professional sector hold a positive view to the outsourcing industry in general, which makes recruitment and retention easier.
6. Indian central and state governments remain “outsourcing” friendly and provide outsourcing businesses with significant tax holidays and various financial incentives, which ultimately translates into competitive rates for corporate clients.

A growing number of companies have found that these factors have translated into the ability to find the

same level of quality in support services as in the U.S. at a much lower price. This alone makes India a very enticing opportunity to companies that are looking to outsource.

## II. Overcoming The Traditional Obstacles

Despite such rosy projections, there continues to be concern with, and sometimes outright resistance to, the offshore outsourcing of legal services. As to be expected, the most vociferous opponents of offshore outsourcing of legal functions are U.S. lawyers, who arguably stand to lose the most should the outsourcing model continue to increase in popularity. The concerns most often raised by critics of offshore outsourcing center on five main issues: (1) potential waiver of privilege; (2) potential disclosure of sensitive or confidential information; (3) unauthorized practice of law; (4) quality control; and (5) potential conflicts. In each case, however; there are arguments to suggest that the issues can be overcome by a systematic and careful approach to offshore outsourcing.

### A. Privilege

Opponents of outsourcing often contend that the use of third-party vendors to review and analyze documents in litigation creates a risk of inadvertent waiver of the attorney-client privilege that may attach to some of the documents at issue. In their opinion, since temporary lawyers and legal staff employed at offshore outsourcing vendors are not licensed to practice law in the United States, they are by definition third parties to the attorney-client relationship and the preservation of the attorney-client privilege would be at risk.<sup>13</sup> Rebutting this concern requires a fundamental understanding of the scope of the attorney-client privilege under the common law.

The attorney-client privilege is one of the oldest evidentiary principles of Anglo-American jurisprudence and is "intended to encourage 'full and frank communications between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice.'"<sup>14</sup> In the often-cited case of *United States v. United Shoe Machinery Corp.*,<sup>15</sup> the attorney-client privilege in federal court was defined as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the

communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services of (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Since the client, not the attorney, owns the attorney-client privilege, only the client can waive the privilege.<sup>16</sup> Waiver is generally defined as the "intentional relinquishment or abandonment of a known right or privilege."<sup>17</sup> Modern courts have however also recognized that when the conduct of the client is objectively inconsistent with protecting the privilege, the privilege may be lost by "implied waiver."<sup>18</sup> It is hornbook law that disclosure of a privileged communication to a third person eliminates the privilege that the communication might otherwise have enjoyed and the communication may hereafter be treated as public.<sup>19</sup>

When litigation-related document review is outsourced (whether domestically or internationally), a question may arise as to whether sharing documents that may contain confidential communications between a client and its counsel with the employees of a third party vendor (and not lawyers) may result in a waiver of the attorney-client privilege that protects them from disclosure. Although a thorough review of the published state and federal court decisions in the U.S. reveals no decisions squarely on point, there is significant precedent to suggest that privileged communications shared with third parties may remain privileged if such access is necessary or integral to the attorney-client relationship.

In other words, so long as the disclosure to an outsourcing vendor was only to assist the client's outside counsel in rendering legal advice, the vendor is deemed an "agent" of the attorney and the privilege may remain intact. The justification behind this principle stems from a line of cases that include *Cold Metal Process Co. v. Aluminum Co. of America*.<sup>20</sup> In *Cold*

*Metal*, a party sought to assert that the opinions of an expert (and former employee of the party) retained by the party's counsel were privileged. In affirming the privilege, the court explained:

It is well-established that such agents as an attorney uses in his office in the preparation of cases, such as clerks and stenographers, may not be compelled to testify as to interoffice activities or communications because they are covered by the privilege rule. VIII Wigmore on Evidence, 3d Ed., Sec. 2301, states that 'The assistance of these agents being indispensable to his work, and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.' Whether we say that we are extending the rule of privilege to cover a situation such as the one presented here, or whether we say the divulging of such confidential information is against public policy, we arrive at the same result.

This early decision has continued to resonate as courts have taken into account the modern realities of counsel using third party vendors in assisting them in their representation. More recently, in *In Re Consolidated Litig.*, the use of third-party legal support was construed as not demonstrating an intent, implied or otherwise, by the client to waive an attorney-client privilege:

Attorney-client communications disclosed to a third party for the purpose of assisting the attorney in rendering legal advice remain privileged, but those disclosed for other purposes do not. Whether such disclosures are viewed as indicating an intention to waive the privilege, to abandon confidentiality, or to use the communications for purposes other than seeking legal advice, the communications so disclosed cannot be withheld based on attorney-client privilege.<sup>21</sup>

In *Advanced Technology Associates, Inc. v. Herley Industries*,<sup>22</sup> the court offered further clarification, by cautioning that the privilege was not protected simply because access to privileged communication had been

given to a third party "for the purpose of obtaining legal advice from a legal advisor." To the contrary "disclosure of confidential information to a non-lawyer third party for the purpose of obtaining that party's advice on a legal matter is not protected unless the third party is a subordinate working for the attorney."<sup>23</sup>

In short, these cases suggest that the review and analysis of documents in litigation by a third party vendor (whether domestic or international) would be protected, so long as the vendor and its employees can be deemed as agents who the client's attorney uses in preparation of its case. Thus, counsel and their clients should be prepared to defend against a challenge to the privileged nature of such documents. As this will require them to be prepared to objectively demonstrate that the work done by the vendor is a necessity and is solely for assisting outside counsel in rendering legal advice in the litigation, it is highly recommended that the following practices be implemented in order to successfully demonstrate that the third party vendor was acting as outside counsel "agent" at all relevant times:

- The general protocol and review guidelines should be drafted by the client and its outside counsel, not by the vendor;
- The third party vendor should contractually agree to close supervision by the client's outside counsel;
- The general review process should be sanctioned and approved by the client's outside counsel;
- With the assistance of the client, outside counsel should provide screening instructions to the vendor and instruct them on the protocol for privilege determinations;
- At the very least, a two-stage screening process should be implemented that permits outside counsel to ensure that no privileged documents are being produced;
- Outside counsel should monitor, supervise and direct the review and analysis to ensure compliance with review protocol and screening instructions;

- Outside counsel should make all final decisions (and conducts a final review) of the analysis and personally review all final results of the privilege and relevancy review; and
- All final determinations of privilege and relevancy decisions should be made by the client's outside counsel.

While it is impossible to predict how a U.S. court in a particular action may rule on a challenge to the privilege enjoyed by communications reviewed by foreign-based vendors, implementation of these precautions will make it more likely that a client will be able to successfully defeat such challenges and avoid inadvertently waiving the attorney-client privilege.<sup>24</sup> As such, it is critical for clients and their outside counsel to interview and assess potential third party vendors, before retaining them, to ensure that they are willing to take the necessary steps to avoid endangering potential waiver of privileges that may protect the client's confidential communications with counsel.

#### **B. Unauthorized Practice Of law**

Even assuming the privileged nature of communications was to remain intact, critics of offshore outsourcing also contend that the use of foreign lawyers to conduct document review functions is essentially sanctioning the "unauthorized practice of law" in U.S. courts by foreign lawyers. These concerns are also probably unfounded, as they can be contained by close supervision by U.S.-licensed counsel.

Legal experts, such as ethicist Geoffrey Hazard Jr., a professor at the University of Pennsylvania School of Law, have generally found that concerns over the unauthorized practice of law by foreign lawyers at offshore outsourcing vendors are minimized by close supervision of their work by U.S.-licensed counsel.<sup>25</sup> In the context of opining on General Electric's retainer of Indian attorneys to draft legal documents, Professor Hazard noted that "If they're acting under the supervision of U.S. lawyers, I wouldn't think it would make a difference where they are."<sup>26</sup> Like paralegals, foreign lawyers retained by third party vendors would have to work under the supervision and guidance of U.S.-licensed lawyers to avoid the "unauthorized practice of law."

Recognizing this limitation, most reputable offshore legal service providers are careful to avoid any appearance that they are overseas lawyers practicing U.S. law and several affirmatively represent that they are not lawyers or do not practice U.S. law. That said, as in the case of the attorney-client privilege, close supervision by U.S. lawyers will insure against potential claims of such ethical violations. As noted by one prominent law professor, "It seems to me that the way they're going to characterize this as these are essentially paralegals. To the extent that you're treating them as non-lawyers, it isn't a multi-jurisdictional practice issue because their story is that they're not practicing law."<sup>27</sup>

This comfort likely stems from the ambiguous nature of the definition of the practice of law in the United States. Despite efforts from the ABA and individual state bars there is still no uniform definition for the "authorized" practice of law and it is increasingly understood that lawyers routinely engage legal support staff, including senior paralegals, technicians and forensic experts to assist in their representation of clients. As noted by one commentator, "Short of appearing at legal proceedings or representing oneself to be a lawyer, much of the everyday work of attorneys can be performed by consultants, paralegals, law students or interns without violation on the unauthorized practice of law. Because the offshore legal work is at the behest of lawyers admitted in U.S. jurisdictions, who are in turn providing the work to clients, there appears to be no unauthorized practice of law."<sup>28</sup> Once again, it would seem that close supervision by U.S. lawyers would serve to alleviate concerns over the unauthorized practice of law.

#### **C. Confidentiality**

Although similar to privilege, confidentiality is a concept that is broader and often entails sensitive business practices, financial information, product development and employment related information that are not typically released into the public arena. In the context of offshore outsourcing, as overseas vendors increase in sophistication they are increasingly willing to enter into tight confidentiality agreements to prevent against the disclosure of such information and sometimes even agreeing to the confidential nature of their own retainer. Confidentiality of information provided to outsourcer can be protected in a variety of ways not different to those followed by providers in the financial and accounting industries.

A key consideration in drafting such confidentiality agreements will be the enforceability of such confidentiality agreements and the parties that should enter into such agreements. Not only is it vital to clearly outline the nature of the information sought to be designated confidential and how this will be conveyed to the outsourcing vendor, but the confidentiality agreement should clearly designate the applicable law and venue for potential disputes.

Apart from just entering into a confidentiality agreement, a client and its outside counsel should undertake an exhaustive analysis of the prospective vendor's data storage, information security and disaster recovery methods and programs to ensure against data loss or theft.

#### D. Quality Control

Critics of offshore outsourcing sometimes also contend that the quality of the work performed by overseas vendors may be below par. It is impossible to say that the services offered by each and every overseas vendor is at the same level of excellence and proficiency, since this will depend entirely on the training, supervision and experience of the senior management of each outsourcing vendor. On the other hand, it is equally disingenuous to claim that these vendors do not have the necessary sophistication and expertise to provide a high-quality product (especially since many of the more recent organizations are founded and run by American-trained lawyers). As in the case of domestic law firms and vendors, it is important that clients carefully interview and investigate the proficiency and experience of each prospective vendor.

A secondary argument is often made by critics that the nature of the work involved — for example, litigation involving complex scientific, engineering or technological or intellectual property issues or patent applications or prosecutions — does not lend itself to foreign lawyers at offshore outsourcing. This argument fails to take into account that: (1) many of the functions undertaken by lawyers at the offshore companies are the same as those done by junior level lawyers at large firms and are therefore easily transferable; and (2) like domestic law firms, the work product of these junior level foreign lawyers is reviewed and approved by U.S. licensed lawyers. As to the basic ability of overseas lawyers in India, the fact that English is the language of business in India and that

some India-based legal talent is schooled in the U.S. renders any concern over the quality of education and proficiency unfounded.<sup>29</sup>

#### IV. Conclusion

As history has demonstrated, it is impossible to prevent innovation and businesses will continue to seek the most cost-effective solutions afforded to them. Outsourcing has changed the realities of the marketplace and has restructured a variety of industries. Increased offshore outsourcing of legal services is inevitable, as it offers our clients a very attractive means to contain litigation-related costs. Most of the concerns raised by the domestic bar can (and will) be overcome by carefully implemented procedures. Rather than opposing the increasing trend in offshore outsourcing of legal services, U.S. lawyers would be better served by understanding the needs of their clients and figuring out how they can play a meaningful role in this new world.

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#### Endnotes

1. *See e.g.* "Legal Outsourcing to India will Dramatically Increase," NewsReleaseWire.com, (November 11, 2005); "US Legal Services Firms Test Offshore Outsourcing," The Outsourcing Forum, (July 5, 2005).
2. Stephen C. Dillard and John M. Simpson, "What Matters Most? Expertise," Legal Times, (January 4, 2006).
3. Rashmi Agarwal, "India Courts Western Law Firms," Outsourcing-Asia.com, (May 2005). *See also* "Law Firms Show Moderate Growth in 2004 According to Leading Economic Survey," Altman Weil, Inc. (2005).
4. NASSCOM Market Intelligence Service Report, Issue #60 (July 2005).
5. "India's IT and remote-service industries just keep on growing," The Economist, (December 14, 2005).
6. Eric Bellman and Nathan Koppel, "Legal Services Enter Outsourcing Domain," The Wall Street Journal (September 28, 2005).

7. Chris O'Reilly & Jason Derting, "Electronic Discovery — The Way Ahead," ExpertLaw (November 2003).
8. Kenneth A. Cutshaw, "India: A Future Global Engine of Growth," Global Governance (November 2005).
9. See "79,000 Legal Outsourcing Jobs for India by 2015," ExpressIndia (November 12, 2005).
10. *Id.*
11. *Supra* note 2.
12. *Id.*
13. This article focuses on the "attorney-client privilege" and does not discuss other notable privileges such as the "work product privilege." Unlike the "attorney-client privilege," the "work-product privilege" is not necessarily waived by disclosure to a third party, so long as such disclosure of work product materials has not created any inherent unfairness. Thus, disclosure of documents containing work-product is arguably less at risk.
14. *Swidler Berlin v. United States*, 524 U.S. 399 (1998).
15. 89 F.Supp. 357, 358-59 (D. Mass. 1950).
16. *Swain v. Terry*, 454 So.2d 948, 953 (Ala.1984).
17. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
18. See *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975); *Allen v. West Point-Pepperell Inc.*, 848 F.Supp. 423 (S.D.N.Y.1994).
19. See *Status Time Corp. v. Sharp Electric Co.*, 95 F.R.D. 27, 34 (S.D.N.Y. 1982). Indeed, the attorney-client privilege has been deemed waived where a corporation disclosed privileged internal investigation reports to outside auditors and an attorney for an underwriter working on a securities offering for the corporation, on the ground that the privilege may be waived "no matter what the economic imperatives," if there is a decision is made to disclose a privileged communication." See *In Re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982).
20. 7 F.R.D. 684, 686 (D. Mass. 1947).
21. *In re Consolidated Litig.*, 666 F.Supp. 1148, 1156-1157 (N.D.Ill. 1987). See also, *Compulit v. Banctec, Inc.* 40 Fed. Serv. 3d. 831 (W.D. Mich. 1977) (disclosure to litigation support company whose efforts were necessary to attorney's representation of client is not waiver); *Advanced Technology Assocs. Inc. v. Herley Indus., Inc.*, 1996 WL 711018 (E.D. Pa. 1996) (privileged documents disclosed to third party for convenience of attorney-client communications rather than as a necessity results in waiver).
22. *Advanced Technology Assocs. Inc.*, 1996 WL 711018 at \*15.
23. *Id.*
24. These precautions are also helpful in protecting against the waiver of other privileges, such as the "work-product" privilege. Furthermore, although a confidentiality agreement may not relate to the use of third party vendors, entering into such an agreement is advisable to protect against any inadvertent waiver of privilege.
25. See Fried, J. "Offshore work; Law Departments Are Cutting Costs By Sending Work Abroad," *The American Lawyer*, Vol. 26, No. 37 (May 17, 2004).
26. *Id.*
27. See Rosenberg, G. "Offshore Legal Work Makes Gain," *The National Law Journal*, vol. 26, no. 30 (March 29, 2004), quoting Thomas D. Morgan, Professor of Law, George Washington University Law School.
28. *Id.*
29. *Supra* note 2. ■