

ABA Approval Of Offshore Outsourcing



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Is it a remedy or a death knell?

THERE HAS BEEN much discussion these past few years surrounding the rising costs of discovery, troublesome as they comprise only one facet of the litigation process. These rising costs have been further exacerbated by the passage of the oft-discussed amended Federal Rules of Civil Procedure, which mandate the inclusion of electronically stored information, or ESI, in the mountain of information that must be retained, reviewed, and exchanged between parties to civil litigation in federal courts. Companies and law firms have responded with a variety of approaches to address ESI-related discovery, including moving from keyword searching to concept searching, as well as creating dedicated e-discovery teams; all coming with larger-than-life price tags.

However, the fastest-growing, and most eye-opening trend is the outsourcing of legal work to non-U.S. attorneys and others operating offshore in countries that benefit from lower labor costs and cost of living. Legal Process Outsourcing, or LPO, has gained great momentum as foreign companies have leveraged opportunities abroad resulting from these costs. LPO gained widespread approval in August 2008 when the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 08-451, approving the use of offshore outsourcing.

This article provides a snapshot of the growing costs of discovery, the current state of and trends in the offshore legal outsourcing industry, as well as Formal Opinion 08-451, and its likely impacts on the practice of law in the United States.

RISING COSTS OF DISCOVERY • Discovery, particularly document review and production, has long been among the largest drains on litigation budgets, with discovery accounting for 50 to 90 percent of total civil litigation budgets. *Digital Information Inflation: Be Prepared for eDiscovery*, West.Thomson.com, <http://west.thomson.com/products/books-cds/ediscovery/default.aspx?promcode=540590>. The amended Federal Rules of Civil Procedure, which mandate the inclusion of all ESI in discovery productions, will inevitably increase discovery-related costs substantially.

Expenditures relating to e-discovery are tracked by Socha Consulting and Gelbmann & Associates, a consulting firm that since 2003 has annually reported the results of its survey relating to e-discovery costs and trends. According to the survey, commercial expenditures on Electronic Data Discovery, or “EDD” in 2007 increased to \$2.7 billion, up 43 percent from 2006. George Socha and Tom Gelbmann, *A Look at the 2008 Socha-Gelbmann Survey*, Aug. 11, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202423646479>. Socha Consulting predicts that those figures will grow by 20 percent in 2009 and 15 percent in 2010. *Id.* By way of example, in 2000, while dealing with one of its first e-discovery cases, Cisco Systems reportedly received a bill of \$23,500,000 for e-discovery services. Ralph Losey, *When and Why You Should Start an E-Discovery Team?*, 2008, <http://ralphlosey.wordpress.com/2008/02/10/when-and-why-should-you-start-an-e-discovery-team>. One can only imagine the impact on the cost of goods sold and therefore on prices and competition for companies governed by the new rules, as well as the advantages that foreign companies with ways to avoid the requirements of those rules will doubtless enjoy.

How do these costs translate to day-to-day litigation? Experts estimate that even a midsize case can generate as much as 500 gigabytes of potentially relevant data (or more than 800 CDs at 600 megabytes per CD), which could cost as much as

\$3.5 million to process and review *before* production. Institute for the Advancement of the American Legal System, 2008, *Electronic Discovery: A View From the Front* at 4, available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>. Note that this estimate excludes costs to restore and review information on backup tapes. *Id.* A law firm involved in a recent midsize lawsuit received a document production that contained 75 hard drives—processing quotes for that information ranged from \$400,000 to \$600,000. *Id.* at 5. Note that potential liability for the firm’s client ranged from \$750,000 to \$6 million. These figures were confirmed by Verizon, which collected data relating to the costs of e-discovery, and has created an internal benchmark for the costs of processing, reviewing, culling, and producing one gigabyte of data at between \$5,000 and \$7,000. *Id.* In a report released this year, the RAND Institute for Civil Justice warned that even in low-value cases, the costs of e-discovery “could dominate the underlying stakes in dispute.” *Id.* at n. 12 citing James N. Dertouzos et al., *The Legal and Economic Implications of Electronic Discovery: Options for Future Research* 3, 2008, http://rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

THE APPEAL OF OFFSHORE OUTSOURCING

• At the risk of being subjected to merciless ABBA jokes, the answer is simple: money, money, money! Or for those who prefer fancy jargon, discovery cost management. Offshore outsourcing has not been the only method by which law firms and their clients have combated this problem. (Others include switching from ‘keyword’ searching to ‘concept’ searching, hiring external e-discovery vendors to manage retention and production, and creating in-house e-discovery teams.) But offshoring has created more of a stir due to people’s inherent fear of sending work outside the US.

However, as domestic costs continue to rise, companies are rapidly moving away from the “keep the work in the ole’ U.S. of A.” mental-

ity. ValueNotes, a business-research firm based in Pune, India, noted that from 2006 to 2007, revenues from offshore LPO grew 49 percent to \$218 million. See Suzanne Barlyn, *Call My Lawyer—in India*, Apr. 3, 2008, <http://www.time.com/time/printout/0,8816,1727726,00.html>. The same company estimates that the figure will increase to \$640 million by 2010. *Id.* Forrester Research estimates that this figure may reach \$4 billion to India alone by the year 2015. Anthony Lin, *Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues*, Jan. 23, 2008, <http://www.law.com/jsp/article.jsp?id=1200996336809>. Forrester Research also estimates that 35,000 U.S. legal jobs will be moved offshore by 2010, and 79,000 will be moved by 2015. Niraj Sheth and Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, Wall St. J., Nov. 26, 2008, at <http://online.wsj.com/article/SB122765161306957779.html>.

Although these numbers seem staggering, it is not hard to believe when you consider that lawyers in Mumbai, Bangalore, and Gurgaon earn between \$6,000 and \$30,000 annually (Barlyn, *supra*), with 80,000 new law graduates every year in India. *Now, Testing Time for Lawyers*, The Tribune, Apr. 18, 2007, <http://www.tribuneindia.com/2007/20070418/jobs/main2.htm>. With salaries at such low levels comparative to U.S. salaries, legal work can be done at a fraction of the cost. For example, the cost of document review by lawyers in India is approximately \$1 per page; in the United States it is between \$7 and \$10 a page. Debra Cassens Weiss, *E-Discovery Rule Changes Boost Legal Outsourcing to India*, ABA Journal Law News Now, Apr. 4, 2008, http://www.abajournal.com/news/e_discovery_rule_changes_boost_legal_outsourcing_to_india. This \$6 to \$9 difference can amount to millions when your adversary produces 10 million emails you must review.

Companies have taken notice of these potential money savings. In 2006, DuPont reportedly saved \$500,000 by outsourcing work to a Chicago-based

company that uses facilities in India and the Philippines. Barlyn, *supra*. TransUnion, a Chicago-based credit and information management company currently has Indian attorneys reviewing more than a million litigation emails for the company at an aggregate cost of less than \$10/hour, as opposed to the \$65-\$85/hour it would spend on U.S. attorneys. *Id.* David Perla, co-founder of Pangea3, one of the largest LPO companies in the world, has said that many of the top 10 largest companies on the Fortune 500 are his company's clients. Lin, *supra*.

OVERVIEW OF ABA FORMAL OPINION

08-451 • On August 5, 2008, the ABA Standing Committee on Ethics and Professional Responsibility threw its hat into the LPO ring and issued Formal Opinion 08-451 (the “Opinion”). By way of the Opinion, the ABA approved the offshore outsourcing of legal support services, with the caveat that the outsourcing lawyer must remain ultimately responsible for rendering competent legal services to the client under Model Rule 1.1.

The Opinion, released to the public approximately one to two weeks following the issue date, reads in full:

“A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her professional obligations as a lawyer with ‘direct supervisory authority’ over them.

“In addition, appropriate disclosures should be made to the client regarding the use of lawyers and nonlawyers outside of the lawyer’s firm, and client consent should be obtained if those lawyers or

nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.”

The ABA also mandated that appropriate disclosures be made to the client if the lawyers outside the firm will be receiving information protected under Rule 1.6. *Id.* Finally, the ABA stated that the fees charged for such outsourcing must be “reasonable,” and in compliance with Rule 1.5. *Id.*

Although the ABA notes that there is nothing unethical about outsourcing legal work, it affirms that the real challenge for an outsourcing lawyer is to ensure that tasks are delegated to individuals who are competent to perform them. *See* Comments to ABA Formal Opinion 08-451, at 3. The outsourcing lawyer’s obligation does not end there, as he must then oversee the execution of the project “adequately and appropriately.” *Id.* Recognizing that such oversight can be difficult due to physical separation and time differences, the ABA says that at a minimum, an outsourcing lawyer should consider conducting reference checks and investigating the background of the lawyer providing the services. *Id.* The Opinion concludes with a number of additional factors that should be considered by the outsourcing lawyer, including legal landscape of country, similarity of country’s legal system to the U.S. legal system, and the effectiveness of country’s disciplinary enforcement system. *Id.*

Confidentiality of information going to outsourced lawyers is another topic addressed in the Opinion. “[w]here the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s consent.” *Id.* at 5. The ABA strongly emphasizes written confidentiality agreements, and advises outsourcing attorneys to pay careful attention to conflict checks between the

“foreign” lawyer and outside service providers and vendors. *Id.*

Finally, the Opinion addresses fees charged by outsourcing lawyer, and notes that these fees must be “reasonable.” *Id.* So long as the fee charged to the client is not unreasonable, the lawyer is not obligated to inform the client how much the firm is paying for a contract lawyer. *Id.* at 6. Worthy of note is that if the outsourcing law firm decides to pass those costs through to the client as a disbursement, *no markup is permitted.* *Id.* The outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services. *Id.*

ANTICIPATED IMPACT OF ABA FORMAL OPINION 08-451

• Given its infancy, it is difficult to anticipate just what the effect of the Opinion will be. It is interesting to note that although this is the ABA’s first official comment on offshore outsourcing, several individual states have already weighed in with their own opinions. For example, a New York State–New York City Ethics Opinion dated 2006 addressed offshore outsourcing. *See* Committee on Professional Ethics of the Association of the Bar of the City of New York Ethics Opinion 2006-3 (Aug. 2006), available at <http://www.abcnyc.org/Ethics/eth2006.htm>. In that opinion, the New York City Ethics committee stated that a lawyer may outsource legal support services to overseas lawyers and nonlawyers if the lawyer supervises the work rigorously. *Id.* This opinion is largely similar to the ABA opinion despite it pre-dating the ABA opinion by two years. It is interesting to note that New York is one of only three states that has not adopted the ABA Model Rules. The New York opinion further states, much like the ABA opinion, that client’s advance consent is needed if the lawyer will be sharing the client’s confidences and secrets. *Id.* Florida’s Bar issued a similar ethics opinion in July 2008 that approved offshore outsourcing, addressed client

confidences, and fees for offshore outsourcing. *See* Florida Bar Professional Ethics Committee, Op. 07-2, Jan. 18, 2008, approved July 25, 2008. Contrarily, the New Jersey Bar has remained silent on the issue, and has no rule on the books addressing offshore outsourcing. *See* Dana E. Sullivan, *Outsourcing Legal Work: ABA Says Its Time Has Come*, 17 N.J. Law. 1709 (Sept. 8, 2008).

It seems that even had the ABA not weighed in on the issue, offshore outsourcing was a speeding train that was gaining speed at each individual stop. The only thing that stood to derail the train was poor work product or breaches of confidentiality by the non-U.S. lawyers, but the ABA has now set forth the standard to which outsourcing lawyers must adhere. Put simply, the ABA now demands accountability. Such accountability will likely further stimulate offshore outsourcing because many lawyers who were hesitant to send work overseas may now feel more comfortable doing so. Further, clients may feel more comfortable with work going overseas as we get closer to a unified system of checks and balances governing the work.

However, it is also possible that attorneys may be hesitant to send work overseas knowing they will ultimately remain responsible for the work product of the overseas attorneys, who are working thousands of miles away. Our profession is still recovering and trying to learn from the mistakes made in the early days of e-discovery, and many attorneys may not want to put their licenses and reputations on the line, particularly when their “direct supervision” will largely be accomplished electronically or telephonically.

While a valid concern, it does not appear that risk to the outsourcing lawyers’ reputations will slow

offshore outsourcing. As discussed above, many states have had similar rules in place for years, and offshore outsourcing has continued its phenomenal growth. The cost savings available to clients are simply too sizeable to ignore, even if the client’s outside counsel must put themselves on the line to obtain the savings. Loyalty to outside counsel will ensure repeat work, but such loyalty may waver in the face of multi-million dollar cost savings. Lawyers nationwide who have been staunch opponents of offshore outsourcing may have to start changing their tunes, or risk losing work to competitors who will utilize LPO and pass the resultant cost savings on to their clients.

CONCLUSION • Although not the first to weigh in on the LPO battle, the ABA is the first unifying authority to take a clear position. The ABA calls for accountability, which will likely increase the time and money an outsourcing lawyer must spend. Such involvement may drive up the opportunity cost of offshore outsourcing, but the bottom line will still be lower than keeping all the work “in-house.” Requiring supervision of non-U.S. workers will not slow the growth of offshore outsourcing. United States companies have taken notice of the cost savings available by sending work overseas, and they expect their outside counsel to do the same. Although the supervisory obligations ensure that U.S. lawyers will not become obsolete, the ABA has guaranteed that the U.S. lawyers may play a vastly different role in certain aspects of their litigation.

PRACTICE CHECKLIST FOR ABA Approval Of Offshore Outsourcing

If you are contemplating sending legal work overseas, adhering to the following rules of thumb will minimize the chances of your committing any ethical violations:

- Do not rely solely on ABA Formal Opinion 08-451. Check your jurisdiction's local rules for the guidelines associated with offshore outsourcing;
- Consider the work you want to send overseas, focusing on standardized and defined processes that can be reproduced accurately and efficiently;
- Evaluate the legal system of the country where you will send work to ensure that the legal systems are comparable and that the country has an effective disciplinary enforcement system;
- Conduct reference checks and investigate the backgrounds of all non-U.S. workers you will send work to;
- Conduct careful conflict checks between non-U.S. workers and outside suppliers and vendors used by non-U.S. workers;
- Create a defined plan as to how you will supervise the non-U.S. work, including but not limited to: visits to the overseas suppliers, scheduled teleconferences, and regular status updates;
- Obtain client consent before sending any potentially privileged and/or confidential materials to non-U.S. workers;
- Enter into a written confidentiality agreement with supplier; and
- Ensure that fees charged to client for outsourcing are reasonable.

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