

Pitfalls of Sending Legal Work Overseas

Although outsourcing can save firms and companies money, it also raises sticky ethical issues.

Traditionalists may shriek: “Say it ain’t so.” But it *is* so. The lure of outsourcing work overseas where labor is cheaper is having its impact on the legal industry, too.

Most of this outsourcing goes to India, with its thousands of law school graduates each year. These graduates are fluent in English and their training is based on British common law, which is the foundation of much U.S. case law. In addition, the salaries of lawyers in India are a small fraction of those in the United States, and lawyers in India have far less extravagant expectations regarding working conditions and perks.

BY ARTHUR D. BURGER

Ethics

In-house legal departments of U.S. companies, ever-vigilant to find ways to reduce their legal budgets, have been farming out tasks that were previously sent to law firms. Legal departments have found that patent applications and patent research, which can be performed on the Internet, preparation of corporate compliance documents, and management of large volumes of documents produced in litigation can be outsourced.

U.S. law firms have made some use of outsourcing as well, but have been slower and more resistant to outsourcing than their corporate clients. *The Wall Street Journal* reports that more than 12,000 jobs have been created overseas through outsourcing of legal work.

Outsourcing of mere administrative tasks, such as coding of documents, does not raise significant ethical concerns because such work is rarely, if ever, done by lawyers and does not constitute the practice of law. This coding entails recording information about each document, such as date, number of pages, author, or recipient into a database, so that pertinent documents can be found. Some law firms may be participating in that sort of outsourcing without even knowing it, because the local companies they hire to scan and electronically organize vast volumes

of documents often use offices in India or other Asian nations for such labor-intensive work.

But outsourcing of work that is ordinarily done by lawyers raises significant ethical issues involving the unauthorized practice of law, the manner of billing, client disclosure, and a law firm’s obligations of competence, avoidance of conflicts of interest, and maintenance of confidentiality.

Two published ethics opinions address these questions and provide useful guidance as to the safeguards required: The Association of the Bar of The City of New York Formal Opinion 2006-3 and San Diego Bar Association Opinion 2007-1. Both opinions call for direct and meaningful supervision by a U.S. lawyer, client notification and consent, and other measures to ensure the propriety of the outsourcing arrangement.

One of the biggest concerns is that of unauthorized practice. Unauthorized practice issues arise whether or not the person employed overseas is a lawyer in his own country because in either event the person is not authorized to practice law in the United States. Under the New York opinion, unauthorized-practice concerns are satisfied if the New York lawyer retains full responsibility for the work and closely directs and supervises the work.

The New York opinion stresses that due to the geographical separation in outsourcing, lawyers must use particular vigilance for such supervision, including obtaining background information on the people hired and conducting interviews by telephone or e-mail with them, both before and during the work.

Similarly, the San Diego opinion, involving a California attorney’s use of a firm in India called “Legalworks” to perform legal research and prepare pleadings in connection with an intellectual property case, found that practice concerns were satisfied so long as the California lawyer “retained full control over the representation.”

Outsourcing firms themselves are sensitive to questions of unauthorized practice. Pangea3, an outsourcing firm that claims 10 Fortune 100 companies as clients, has a disclaimer on its Web site, stating that it is not a law firm and does not engage in the practice of law in the United States.

The manner in which a U.S. law firm bills its clients for off-

shore work is also part of the analysis of whether there is any unauthorized practice of law. In the New York opinion, the bar association stated that “the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.” Similarly, while not expressly required in the San Diego opinion, the facts presented showed that the California firm billed its client for the services of Legalworks by passing on Legalworks’ invoice as a “cost” incurred in their representation, rather than billing the client at an hourly rate, as they would for members and employees of their firm.

In addition, the practical consequence of requiring the lawyer to bill the client for such services is that the client—not the law firm—bears the labor cost, which is appropriate.

In my opinion, another element in avoiding charges of unauthorized practice and one consistent with the manner of billing discussed in the opinions is that the offshore company should have its contractual relationship with the law firm, rather than with the client. This arrangement helps to show that the law firm is retaining sole responsibility to the client and that the offshore services are merely to assist the law firm in doing its job efficiently.

Providing advance notice to the client also helps. The San Diego opinion states that outsourcing legal work to a foreign country ordinarily goes beyond the reasonable expectations of a client and so attorneys should provide advance notice and receive client approval. The New York opinion is more nuanced, stating that advance notice may be required only where circumstances make the retention important, such as where the outsourced work will be extensive, confidential client information will be shared, the retention is contrary to the client’s expectations, or the manner of billing will be something other than passing on the costs.

Clearly, the safe course, as always, is to avoid surprising the client.

In addition, outsourcing must not impair the law firm’s obligations to maintain the confidentiality of their clients’ material or their obligation to avoid retaining people who may be tainted by having access to confidential information of an adversary, thereby creating a potential conflict of interest.

Both the San Diego and New York opinions state that a law firm should contractually require the offshore company to maintain confidentiality and should provide periodic reminders of that requirement.

As to avoiding conflicts of interest, the New York opinion states that law firms should find out whether the offshore entity has a procedure for screening conflicts of interest and should follow up to ensure that they do not have confidential information from an adverse party.

Finally, a law firm must ensure that outsourcing does not compromise its obligation to provide competent legal services. This again implicates the degree of supervision that the law firm imposes on the work. The New York opinion states that the supervising lawyer must have sufficient knowledge of the subject to independently analyze the quality of the work. The San Diego opinion notes that, where work is outsourced overseas, such supervision “requires informed review, not blithe reliance.”

In short, law firms should be alert to possibilities for saving their clients’ money and therefore must look objectively at the option of outsourcing certain tasks. Law firms should explore the pros and cons with their clients and make recommendations with the best interests of the client in mind. When engaging in such outsourcing, law firms should consider the recommendations in these two ethics opinions and keep apprised of developments regarding this relatively new aspect of legal work.

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