

## NOTES

### BAD REPUTATION?: THE POTENTIAL NEGATIVE IMPACT OF OUTSOURCING ON THE LEGAL PROFESSION

Starting the first day of orientation new law students begin to hear a message that will be repeated regularly throughout the course of their legal education: reputation matters. The most important responsibility you have as an attorney is to protect, not only your personal reputation, but also the public perception of the legal community at large. The manner in which any one attorney conducts himself can significantly impact the way in which attorneys as a professional group are perceived.<sup>1</sup> In today's economic climate there is a high premium on minimizing overhead, reducing the costs billed to clients, and maximizing profits.<sup>2</sup> The success experienced by the information technology industry using outsourcing to achieve these goals has led to the practice of outsourcing in the legal profession.<sup>3</sup> There are a number of implications to this recent trend. One concern is that temporary legal services, which can include the outsourcing of many legal tasks will "reduce the professional image of lawyers and cheapen[] the sacred responsibility of lawyer to client."<sup>4</sup>

While there are a number of economic benefits to this growing trend, it would be a grave mistake to allow overuse of this resource to damage the reputation of the American legal profession. Clients of

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1. See LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 28 (2002), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/public\\_perception\\_of\\_lawyers\\_2002.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/public_perception_of_lawyers_2002.authcheckdam.pdf).

2. See generally Carlo D'Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or "Flattener"?*, 14 TEX. WESLEYAN L. REV. 167, 189 (2008).

3. See David Hechler, *Will Tough Economy Push Companies to Outsource Legal Work?*, LAW.COM CORP. COUNS. (Dec. 22, 2008), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202426925586>.

4. Darya V. Pollak, *"I'm Calling My Lawyer . . . In India!"*: *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 106-07 (2006).

American firms have been receiving a certain level of service, provided by attorneys who are all held to a uniform set of professional standards. We are operating in an increasingly globalized economy and it is important for the United States to participate in free enterprise across international borders.<sup>5</sup> However, until the countries that are providing outsourcing services for American law firms have established a legal framework and educational system comparable to that found in the United States, the practice should be strictly limited so that American consumers are not forced to compromise their expectations of quality, confidentiality, and professionalism.

In order for legal process outsourcing to genuinely be a viable option in today's market, it is essential to increase oversight and regulation of the process. Although some progress has been made in clarifying the safeguards firms should employ in order to avoid ethical violations,<sup>6</sup> more still needs to be done. As we will demonstrate, there are fundamental concerns regarding the feasibility of effective oversight of outsource companies and the possible reduced sensitivity to breaches of confidentiality in countries outside the United States. Furthermore, a reliable method to ensure that the quality of work provided by legal process outsourcing companies meets the standards that clients have come to expect from American law firms is needed. Later in this note proposed legislation from Connecticut will be discussed and analyzed.<sup>7</sup> This legislation was an attempt to limit the exposure that could result from improperly trained individuals providing legal services.<sup>8</sup> This particular legislation was overly broad, and did not adequately address the dangers of legal process outsourcing. However, it can provide a useful framework for a discussion about an effective and thorough legislative solution to this pressing concern. This note will identify the primary causes of uneasiness, and propose potential guidelines to address them.

Part I will provide a brief overview of outsourcing in the professional world and present information on two of the largest companies that provide legal process outsourcing services. It will also

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5. See Leonard Bierman & Michael A. Hitt, *The Globalization of Legal Practice in the Internet Age*, 14 *IND. J. GLOBAL LEGAL STUD.* 29, 29-30 (2007).

6. See Steven J. Mintz, *Ethics Opinions Allow Foreign Legal Outsourcing*, A.B.A. (July 2007), [http://www.abanet.org/litigation/litigationnews/2007/july/0707\\_article\\_outsourcing.html](http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html).

7. See *infra* text accompanying notes 207-24.

8. See *id.*; see also Christian Nolan, Conn. Bill Would Regulate Offshoring Document Review, *LAW.COM: LAW TECH. NEWS* (Jan. 19, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202478394479>.

look at the other professional industries that outsource on a regular basis. Part I will conclude with a discussion on the American Bar Association's (ABA) ruling on the ethics of outsourcing. The standards of education and compensation for American and Indian attorneys are vastly different. Part II will explore the possible negative implications of those differences. Part III will provide an overview of the laws that govern the employees of legal process outsourcing companies. Although these employees are located in India, they are still closely related to American firms and clients. The Indian laws governing labor and employment could still negatively impact the reputation of the American legal profession if the firms are thought to be associated with unfavorable employee working conditions. Part IV will discuss the effects of outsourcing on the legal profession as a whole, as well as the American economy. Part V will offer our suggestions for the specific ethical rules that should be required of all attorneys providing services to American clients as part of a broader goal of increasing the safeguards in place to protect the quality of services provided. Part VI will set forth our concluding thoughts about the wisdom of outsourcing legal services and will also summarize suggestions as to how to best regulate outsourcing.

## I. AN OVERVIEW OF OUTSOURCING

### A. *Use of Professional Outsourcing*

The use of outsourcing as part of a company's overall business plan is not a new practice in the United States. However, it has evolved and expanded over the past forty years. Manufacturing companies began outsourcing in the 1970s when the U.S. economy started to shift from an industrial economy to a technology based economy.<sup>9</sup> In the 1980s companies such as Texas Instruments and Motorola began outsourcing technology services to India, which was soon followed by the emergence of business process outsourcing.<sup>10</sup> The first recognized outsourcing of American legal work occurred in the early 1990s by Dallas law firm Bickel & Brewer.<sup>11</sup> Throughout the latter part of the twentieth century

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9. See Gary S. Clendenin, *Allaying the Outsourcing Tempest: A Candid Look at Outsourcing Vis-à-vis the Future of American Jobs*, 14 U. MIAMI BUS. L. REV. 295, 298 n.12 (2006).

10. See Lee A. Patterson, III, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177, 178 (2008).

11. See *id.* at 182.

the U.S. job market evolved from one characterized by job security and loyalty to one employer for the duration of a career, to one where workers changed jobs and companies continuously and at a rapid pace.<sup>12</sup> This change can be attributed to a combination of a move toward deregulation in the political sphere, a social structure that emphasized the primacy of the individual, as well as the re-focus of the U.S. economy from traditional manufacturing to knowledge and service based industries.<sup>13</sup> This shift is often credited with providing an atmosphere at least somewhat receptive to the practice of outsourcing.<sup>14</sup>

Outsourcing began as a cost-saving measure in traditionally blue-collar industries.<sup>15</sup> However, once it became apparent that outsourcing was a successful way to increase profits, it spread to traditionally white-collar professions.<sup>16</sup> Advances in technology have allowed for certified public accountants (CPAs),<sup>17</sup> radiologists, pathologists, and other professionals to outsource portions of their work to offshore locations, primarily India.<sup>18</sup> In an effort to minimize the risks associated with outsourcing, the American College of Radiology (ACR) created a task force and established guidelines designed to regulate the practice.<sup>19</sup> Similarly, the American Institute of Certified Public Accountants (AICPA) issued guidance to its members in order to deal with the logistics of outsourcing and the relationship between clients and the third parties providing services.<sup>20</sup>

One area of the medical field that is especially suited to outsourcing is medical transcription work. Transcription services are provided in a variety of places including the Philippines, India, Sri Lanka, Pakistan, and Barbados.<sup>21</sup> In addition to medical transcription, medical outsourcing can include surgeries or treatments that have been arranged

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12. See Clendenin, *supra* note 9, at 298.

13. See Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 3, 5, 7-8 (2009).

14. See *id.* at 2, 8; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 541-42, 548-56 (2001).

15. See Mark B. Baker, "The Technology Dog Ate My Job": *The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 FLA. J. INT'L L. 807, 810 (2004).

16. See *id.*

17. See generally Paul Cervantes, *Sarbanes-Oxley and the Outsourcing of Accounting*, 2 MICH. J. BUS. 99, 101 (2009).

18. D'Angelo, *supra* note 2, at 185-86.

19. See *id.* at 186.

20. Cervantes, *supra* note 17, at 101.

21. *Outsourcing of Medical Transcription*, MED. TRANSCRIPTION COMPANIES, <http://www.topmedicaltranscription.com/Content21/Outsourcing-of-medical-transcription.htm> (last visited May 17, 2012).

in advance to be performed outside a patient's country of residence.<sup>22</sup> Many people take part in this practice in order to obtain cosmetic surgical procedures, which would be prohibitively expensive in their country of residence, at significantly lower costs.<sup>23</sup> With confidential reports being transmitted from the country where the patient resides (like the United States) to a country that may not have laws about privacy and patient confidentiality, there was significant concern that patient privacy was not sufficiently protected.<sup>24</sup> These concerns were largely quashed when the Healthcare Information Portability and Accountability Act (HIPAA) became mandatory for all providers from outsourced countries.<sup>25</sup>

While the privacy concerns are somewhat less pervasive, the quality of the finished transcriptions remains at issue. In addition to not having the basic level of education necessary to perform their jobs with reasonable accuracy, many of the outsourced medical transcriptionists do not have the occupation-specific training in medical transcription.<sup>26</sup> Even the foreign medical transcriptionists who can speak English fluently have difficulty understanding the American expressions and jargon frequently used by doctors.<sup>27</sup> Foreign transcriptionists can also be unfamiliar with American names and places.<sup>28</sup> While outsourced transcripts can often be produced abroad for considerably lower rates than in the United States, some firms still choose to employ American medical transcriptionists because they believe they will receive higher quality work product.<sup>29</sup>

The issues faced by accounting firms that use outsourcing are the closest comparison among the white-collar professions to the issues faced by the legal profession outsourcing services. CPAs, like attorneys, are licensed professionals that provide a service based on a particularized area of knowledge and expertise.<sup>30</sup> They are also required to comply with certain standards of ethical and professional conduct.<sup>31</sup> In 2002 the Public Company Accounting Reform and

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22. Christopher J. Brady, Note, *Offshore Gambling: Medical Outsourcing Versus ERISA's Fiduciary Duty Requirement*, 64 WASH. & LEE L. REV. 1073, 1091 (2007).

23. *Id.*

24. *Outsourcing of Medical Transcription*, *supra* note 21.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See BLACK'S LAW DICTIONARY 22 (9th ed. 2009).

31. See, e.g., *Accountancy Regulations Title 8-Education Law Rules of the Board of Regents*,

Investor Protection Act (SOX) was passed in response to what was considered widespread fraud in the financial industry and corporate scandals such as Enron.<sup>32</sup>

It has been suggested that there may not be a significant difference between outsourcing legal work and outsourcing tax return preparation or reading x-rays.<sup>33</sup> However, there have been relatively few studies that examine the specific issue of legal outsourcing.<sup>34</sup> The legal community is entrusted to manage confidential matters, and has access to personal information on par with radiologists, or other medical professionals. The legal profession, through the ABA or a newly created authority, should consider instituting similar measures as the ACR and AICPA in order to ensure that the quality of services and security of client information is not unnecessarily compromised in an effort to minimize costs and maximize profits.

### *B. A Snapshot of Legal Process Outsourcing*

SDD Global Solutions was ranked as the top full-service legal outsourcing company in the world by a 2010 Black Book of Outsourcing survey.<sup>35</sup> SDD Global Solutions has offices in Mysore and Bangalore, as well as in New York and London.<sup>36</sup> The company's services include various types of legal research and analysis, the drafting of contracts and court papers, the handling of many types of commercial transactions, along with intellectual property work, such as patent, trademark, and copyright searches and applications.<sup>37</sup> SDD Global Solutions is the only legal outsourcing provider that is actually managed by a western law firm; the company is supervised by SmithDehn, LLP, a firm that is based in Los Angeles, New York and London.<sup>38</sup> SDD Global Solutions boasts of representing clients that include major film and television studios, law firms, retail brands, publishing houses, and manufacturers.<sup>39</sup>

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NYSSCPA.ORG, [http://www.nysscpa.org/prof\\_library/Ethics/accregs.htm](http://www.nysscpa.org/prof_library/Ethics/accregs.htm) (last visited May 17, 2012).

32. See Cervantes, *supra* note 17, at 103.

33. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2194 (2007).

34. See *id.*

35. *Profile*, SDD GLOBAL SOLUTIONS, <http://www.sddglobal.com/legal-outsourcing-firm-profile.htm> (last visited May 17, 2012).

36. *Id.*

37. *The SDD Global Advantage*, SDD GLOBAL SOLUTIONS, <http://www.sddglobal.com/> (last visited May 17, 2012).

38. *Id.*

39. *Id.*

SDD Global Solutions claims that offshore legal process outsourcing does not mean a compromise in quality.<sup>40</sup> The company claims that its services are not the “typical ‘legal process outsourcing’ work,” but are comparable to those of attorneys at top-tier law firms in the United States, Canada, and the United Kingdom.<sup>41</sup> According to SDD Global Solutions, its legal outsourcing services are managed on-site by SmithDehn, LLP and supervised by a team of both U.S.-licensed attorneys and United Kingdom professionals, something that is supposed to give “Western legal outsourcing clients both quality assurance and accountability.”<sup>42</sup> SDD Global Solutions claims that when legal work is outsourced to the company by corporations, law firms, or individuals, the work is handled by “top law graduates and experienced lawyers and/or former law professors from outstanding legal outsourcing companies, law firms and law schools.”<sup>43</sup> To further support this statement, SDD Global Solutions states that the company only hires “one out of every 900 job applicants.”<sup>44</sup> Once hired, the legal process outsourcing recruits are “trained and supervised by respected Western attorneys,” which, according to SDD Global Solutions, means “clients need not be concerned that their contract will be limited to foreign employees on the other end of the earth.”<sup>45</sup>

Another company that is a self-proclaimed leader in the legal process outsourcing industry is Pangea3.<sup>46</sup> Pangea3 was originally founded in 2004 and has grown to become the largest legal process outsourcing company in the world.<sup>47</sup> Pangea3 was founded by U.S. attorneys, and the attorneys that hold high level executive and management positions come from backgrounds in either American, British, or Indian legal educations.<sup>48</sup> The two Co-Chief Executive Officers both received their legal degrees from American law schools, and are admitted to practice in American states.<sup>49</sup> Pangea3 boasts that it provides its employees with a “robust training program that focuses on

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. See Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 645 (2010).

47. *About Us*, PANGEA3, <http://www.pangea3.com/company-overview.html> (last visited May 17, 2012).

48. See *Executive Team*, PANGEA3, <http://www.pangea3.com/company-management.html> (last visited May 17, 2012).

49. See *id.*

legal competency, a corporate culture, the opportunity to work with leading international clients, career advancement potential and equity participation.”<sup>50</sup>

Pangea3 provides legal outsourcing services to more than one hundred Fortune 1000 corporations and Am Law 200 law firms.<sup>51</sup> The company offers services in the fields of contract drafting and revision, contract management, compliance, risk management, intellectual property, patents, litigation support and legal research.<sup>52</sup>

In an effort to ensure the company is providing its clients with the highest possible quality services, Pangea3 relies on Sigma Six methodologies.<sup>53</sup> Sigma Six at many organizations is merely a term that is used to mean a “measure of quality that strives for near perfection.”<sup>54</sup> However, the implications of the method “go well beyond the qualitative eradication of customer-perceptible defects.”<sup>55</sup> The purpose of Sigma Six Quality is to “reduce process output variation” so that over the long term, output will “result in no more than 3.4 defect Parts Per Million (PPM) opportunities.”<sup>56</sup> Companies using the Sigma Six method must “quantify the process performance (Short Term and Long Term capability) and based on the true process entitlement and process shift, establish the right strategy to reach the established performance objective.”<sup>57</sup> As the value of process sigma gets higher, the process approaches what is known as “zero defects.”<sup>58</sup> Most of the Six Sigma programs developed among companies in the service industry have defined a defect as “a flaw in a process that results in a lower level of customer satisfaction or a lost customer.”<sup>59</sup> One of the main assertions of the Six Sigma method is that customers place a high premium on consistency, which is reduced by variations to the process of

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50. *People and Processes*, PANGEA3, <http://www.pangea3.com/people.html> (last visited May 17, 2012).

51. *About Us*, *supra* note 47.

52. *See Solutions*, PANGEA3, <http://www.pangea3.com/legal-outsourcing-services.html> (last visited May 17, 2012).

53. *See Document Review*, PANGEA3, <http://pangea3.com/document-review.html> (last visited May 17, 2012).

54. *See Statistical Six Sigma Definition*, SIX SIGMA, [http://www.isixsigma.com/index.php?option=com\\_k2&view=item&layout=item&id=1254&Itemid=110](http://www.isixsigma.com/index.php?option=com_k2&view=item&layout=item&id=1254&Itemid=110) (last visited Mar. 16, 2012).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Jim Biolos, *Six Sigma Meets the Service Economy - Six Sigma: It's Not Just for Manufacturing*, HARV. BUS. SCH. (Jan. 27, 2003), <http://hbswk.hbs.edu/archive/3278.html>.



production.<sup>60</sup> Six Sigma places a heavy focus on the detrimental impact of variations to processes, and tries to reduce them.<sup>61</sup> However, this focus on uniformity may not translate well into the legal profession. The practice of law is subject to constant changes to statutes, precedence, and client requirements. It also may require judgment, discretion or other intangibles that are difficult to quantify. The quality of work produced could easily suffer if a predetermined system is blindly relied upon.

Legal process outsourcing is gaining recognition as a viable method for cutting costs and maximizing profits.<sup>62</sup> Evidence of this is the recent announcement made by Thomson Reuters. On November 18, 2010 Thomson Reuters announced they had acquired Pangea3.<sup>63</sup> Peter Warwick, President and CEO of Thomson Reuters said, “legal process outsourcing adds a vital strategic complement to the Thomson Reuters portfolio of specialized information and workflow solutions, and will be key to helping law firms and corporate legal departments be more responsive and cost-effective.”<sup>64</sup> Additional support for this claim is offered by the Associated Chambers of Commerce and Industry of India, which report that legal services can be provided in India for thirty to seventy percent less than they can be obtained in the United States.<sup>65</sup>

There has been some concern that the claims of the companies providing legal process outsourcing services are overstated. One independent investigation of legal process outsourcing companies located in India, the Philippines, Singapore, and China produced alarming results.<sup>66</sup> The investigation conducted by Michael Simkus revealed that few foreign legal process outsource companies have Errors & Omissions insurance similar to the type of coverage maintained by U.S. law firms.<sup>67</sup> Additionally, there are a number of companies that

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60. See Joseph Wexler, *Sustaining Gains with Six Sigma*, CASINO ENTERPRISE MGMT. (Mar. 1, 2007), <http://www.casinoenterprisemanagement.com/articles/march-2007/sustaining-gains-six-sigma>.

61. See *id.*

62. See Sejal Patel, *Is Legal Outsourcing Up to the Bar? A Reevaluation of Current Legal Outsourcing Regulation*, 35 J. LEGAL PROF. 81, 81 (2010).

63. *Thomson Reuters Acquires Pangea3*, PANGEA3 (Nov. 18, 2010), <http://www.pangea3.com/thomson-reuters-acquires-pangea3.html>.

64. *Id.*

65. Patel, *supra* note 62, at 82.

66. See Lisa Solomon, *Ethics 20/20 Comments Show Preference for Domestic Outsourcing Among Solos/Small Firms and In-House Counsel, Stress Risk of Outsourcing Abroad*, LEGAL RES. & WRITING PRO (Nov. 30, 2010), <http://legalresearchandwritingpro.com/blog/2010/11/30/ethics-2020-comments-show-preference-for-domestic-outsourcing-among-solos-small-firms-and-in-house-counsel-stress-risk-of-outsourcing-abroad/>.

67. *Id.*

have their insurance policies “underwritten by foreign insurers that will not respond to U.S. law suits.”<sup>68</sup> The investigation further noted that many of the existing legal process service providers fail to comply with the ethics opinion guidelines and neglect to conduct conflict of interest interviews prior to hiring employees.<sup>69</sup> An issue of even greater concern is the failure of the Indian owners of these companies to appreciate the American concern for quality control. Sameep Vijayvergia, an attorney licensed to practice in both India and the United States, cautions that the owners of the legal process outsource companies “would even engage non competent lawyers and/or unqualified paralegals etc: [sic] to save a few bucks . . . .”<sup>70</sup>

### C. *Is It Ethical to Outsource Legal Work?*

With all forms of outsourcing, there are obvious concerns regarding client confidentiality and data security. With legal process outsourcing, however, there are more complicated issues such as the liability of service providers and violation of the attorney-client privilege. Many law firms hesitated to outsource their work during the early years of legal process outsourcing.<sup>71</sup> The doctrine of attorney-client privilege states that anything conveyed between an attorney and his or her client shall be treated with the utmost confidentiality and protects attorneys and their clients from being compelled to disclose these private conversations, even in a court of law.<sup>72</sup> However, the privilege is considered waived when either party discloses confidential information to a third party (who has “no legitimate need to know the information”), or when the communication occurs in public or some other “less than secure environment.”<sup>73</sup> Critics of legal process outsourcing claim that “since communication is being sent to a country other than the United States, the confidentiality is broken; hence, the privilege has been waived.”<sup>74</sup> However, the ABA clarified this issue, which “clear[ed] the

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68. *Id.*

69. *See id.*

70. *Id.*

71. *See generally* Hechler, *supra* note 3.

72. *See Attorney-Client Privilege Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/a/attorney-client-privilege/> (last visited May 17, 2012).

73. OFFICE OF GENERAL COUNSEL OF THE CALIFORNIA STATE UNIVERSITY, THE ATTORNEY-CLIENT PRIVILEGE 2-3 (Jan. 2010), *available at* <http://www.calstate.edu/gc/Docs/AttorneyClientPrivilege.pdf>.

74. KPO Consultants, *Legal Process Offshoring Regulation – US State Bills*, GLOBAL LPO CONF. (Sept. 18, 2011), <http://www.kpoconsultants.com/resources/blogs/2011/09/18/39-legal->

way for the development of legal process outsourcing.”<sup>75</sup>

In August 2006, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics held that

A . . . lawyer may ethically outsource legal support services overseas to a non-lawyer, if the . . . lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer’s work contributes to the lawyer’s competent representation of the client; (b) preserves the client’s confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.<sup>76</sup>

Bar committees in New York City, San Diego, and Los Angeles have explicitly or implicitly held that lawyers are allowed to contract with foreign lawyers who are not admitted to practice in any jurisdiction in the United States.<sup>77</sup> These authorities have also ruled that lawyers may contract with non-lawyers outside the United States to conduct legal work for United States clients.<sup>78</sup> The opinions state that “foreign legal outsourcing should be subject to the same ethical requirements as domestic use of non-lawyer services,” particularly the functions of supervising “the foreign lawyer’s work, preserv[ing] client confidences, avoid[ing] conflicts of interest, . . . bill[ing] only for the direct cost of outsourcing, and obtain[ing] advance client consent in certain circumstances.”<sup>79</sup> These authorities have held that “foreign legal outsourcing does not constitute aiding the unauthorized practice of law.”<sup>80</sup>

The issue of the unauthorized practice of law usually arises in the context of legal process outsourcing. Legal work is sent outside the United States to either foreign lawyers who are not permitted to practice law in the United States, or to vendors who hire foreign lawyers or non-legal professionals.<sup>81</sup> Courts and bar regulators see enforcement of the

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process-offshoring-regulation-us-state-bills.html.

75. *See id.*

76. Ass’n of the Bar of the City of NY Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3 (Aug. 2006), available at <http://www2.nycbar.org/Ethics/eth2006.htm>.

77. Mintz, *supra* note 6.

78. *See id.*

79. *Id.*

80. *Id.*

81. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401, 427

unauthorized practice of law as a matter of consumer protection.<sup>82</sup> For the most part, courts and bar regulators will focus “on non-lawyers who mislead unsophisticated clients about the clients’ rights in” particular areas like bankruptcy, real estate, and domestic relations.<sup>83</sup> When a lawyer fails to supervise his or her employees and that results in the unauthorized practice of law, the lawyer will be punished.<sup>84</sup> In order to avoid the unauthorized practice of law, a lawyer needs to “shoulder complete responsibility” for a non-lawyer’s work at every step along the way.<sup>85</sup> The lawyer also needs to “set the appropriate scope” for the work of the non-lawyer, and then scrutinize and ensure the quality of the non-lawyer’s work.<sup>86</sup> American lawyers are responsible for their employees whether they are located in the United States or abroad in India.<sup>87</sup> While a law firm might have supervisory safeguards in place to prevent the unauthorized practice of law, maintaining these when employees are located across the world and in another time zone might prove to be extremely difficult, if not impossible.<sup>88</sup>

The characterization of legal process outsourcing as not rising to the level of the unauthorized practice of law may not be entirely correct. The Model Rules have noted the types of tasks that constitute the practice of law are established by the laws of a particular jurisdiction and can vary.<sup>89</sup> A common element in the various state definitions is that the practice of law will include the giving of legal advice, the use of legal skills or knowledge, and the preparation of legal instruments.<sup>90</sup> The purpose of prohibiting the practice of law by unlicensed individuals is “the need of the public for integrity and competence of those who undertake to render legal services.”<sup>91</sup> If an attorney employed by an outsourcing company were asked to draft contracts or pleadings this would likely qualify as practicing law under the definitions recognized in many states, including California, Texas and New York.<sup>92</sup> Many of

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(2007).

82. *See id.* at 428-29.

83. *Id.* at 429.

84. *See id.*

85. *See* Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 *BYU L. REV.* 483, 504 (2007).

86. *See id.*

87. *See* Mintz, *supra* note 6.

88. *See* Patterson, *supra* note 10, at 188.

89. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (2011).

90. *See* Pollak, *supra* note 4, at 120-22.

91. *See* Woffinden, *supra* note 85, at 496.

92. *See* Pollak, *supra* note 4, at 121.

the companies that provide legal process outsourcing services advertise most of those examples as part of the services they can provide, as discussed earlier in this note.<sup>93</sup>

Even if companies were to confine themselves to legal research, the question of whether it would still qualify as the unauthorized practice of law would remain an open issue. In the State of California it has been determined that legal research will not constitute the unauthorized practice of law, unless it is “incorporated into pleadings or presented to clients in the context of legal advice.”<sup>94</sup> With the increased reliance on outsourcing it is less likely that services will be confined to simply research or other menial tasks, especially since outsourcing services already span a large portion of the legal profession. For example, a legal outsourcing company in India recently prepared a brief relating to the Due Process Clause of the Fifth Amendment which was filed by American attorneys before the Supreme Court.<sup>95</sup> In this case, the legal research provided by the outsourcing company in India would almost surely fall within California’s definition of the unauthorized practice of law, although it can still be considered legal research.

As previously discussed, the ABA has stated that the practice of legal process outsourcing is allowed and does not violate the ethical rules, “as long as the lawyer doing the outsourcing takes steps to ensure the protection of client confidences and . . . attorney-client privilege.”<sup>96</sup> Even though the use of legal process outsourcing has been deemed to be ethically valid by the ABA, it does not mean that the use of legal process outsourcing is without its concerns. Unless lawyers are being forced to give detailed accounts of their outsourcing practices, it will be hard to ensure that lawyers are fulfilling all five factors set out in the New York City Bar Association’s decision.<sup>97</sup> Until there is a standard put in place that confirms that American lawyers are following these ethical guidelines, the use of legal process outsourcing should be heavily curtailed.

To better safeguard the confidentiality of client information, the ABA should consider instituting some of the notice requirements and security measures that have been successful in the accounting profession. In order to avoid even the appearance of confidentiality issues, many companies in India that provide outsourcing services to

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93. See, e.g., *Solutions*, *supra* note 52.

94. Pollak, *supra* note 4, at 121-22.

95. Patterson, *supra* note 10, at 184.

96. See KPO Consultants, *supra* note 74.

97. See *supra* note 76 and accompanying text.

American accounting firms provide extremely rigid codes of conduct to their employees.<sup>98</sup> Some of the measures taken include: not allowing employees to bring personal electronic devices to the office, searches upon entry to the buildings, mandatory non-disclosure agreements, and blocking access to the internet for the purpose of checking personal email.<sup>99</sup> This level of security far exceeds what would be found in an American accounting firm. However, there is little room for doubt that the client's personal information is being handled with the utmost care and professionalism.

Additionally, the California Board of Accountancy (CBA) requires that any CPA using outsourcing services must provide their client with written notification and receive written permission from the client to use those services.<sup>100</sup> Implementing such a notice requirement in the legal profession would ensure that clients are given every opportunity to protect their personal information, and can make an informed decision about the type of service they are receiving. This notice requirement could also be a strong step toward protecting the American firm overseeing the company providing outsourcing services from potential legal action instituted by unhappy clients.

## II. COMPARING THE STANDARDS FOR INDIAN AND AMERICAN LAWYERS

Even though the ABA has determined that it is ethical to outsource legal work provided certain safeguards are put in place,<sup>101</sup> there are a number of discrepancies between the standards expected of American attorneys and Indian attorneys that make outsourcing less than desirable. American attorneys are subject to a much more rigorous process in order to become licensed attorneys than many of the foreign attorneys providing outsourcing services.<sup>102</sup> As a result, a client could easily conclude he will receive better, more competent services from an American trained attorney. Further, there is a significant difference in the level of compensation received by American as opposed to foreign attorneys.<sup>103</sup> This can also have a substantial impact on the way clients view the services they are receiving.

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98. See Cervantes, *supra* note 17, at 125.

99. See *id.*

100. See *CBA Issues Outsourcing Disclosure Regulation*, HIGHBEAM RES. (Aug. 1, 2004), <http://www.highbeam.com/doc/1G1-120772581.html> (discussing CBA regulation issued in 2004).

101. See KPO Consultants, *supra* note 74.

102. See *infra* pp. 589-92.

103. See *infra* Part II.B.

### A. Education

In the United States, in order to be admitted to a state bar (or numerous state bars) prospective attorneys must first earn a Juris Doctor (JD) from an ABA accredited law school.<sup>104</sup> The JD is a three-year degree that can be earned after completion of at least three years of college, and must be obtained through a specialized law school.<sup>105</sup> The Multistate Professional Responsibility Exam (MPRE) must be passed in order to be admitted to the bar in most states, and after graduation, the Multistate Bar Examination (MBE) and a state specific examination must also be passed.<sup>106</sup> These examinations are closed book and consist of a number of multiple choice and essay style questions.<sup>107</sup> The tests are generally administered over a two-day period.<sup>108</sup> There is also a character and fitness component of the bar in every American jurisdiction.<sup>109</sup> More than two-thirds of the state bar associations in the United States require attorneys to complete a certain number of Continuing Legal Education (CLE) credits.<sup>110</sup> For example, in New York thirty-two credits are required within the first two years after admission to the bar, and twenty-four credits every two years thereafter.<sup>111</sup> In California, twenty-five hours are required every three years.<sup>112</sup> The purpose of these requirements is to ensure that substandard attorneys are not permitted to practice law and risk injuring the public through the incompetent practice of law.<sup>113</sup>

In India, law degrees are conferred based on the Advocates Act of 1961.<sup>114</sup> There are two types of law degrees; either a three-year degree

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104. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 434-35 (2001).

105. See *id.* at 435 (“ABA accredited law schools can only accept students with three years of college study before law school. Some states also [require] a bachelor’s degree or equivalent”).

106. See, e.g., *The New York State Bar Examination*, N.Y. ST. BOARD OF L. EXAMINERS, <http://www.nybarexam.org/TheBar/TheBar.htm> (last visited May 17, 2012).

107. See *id.*

108. See *id.*

109. See Barton, *supra* note 104, at 435 & n.22.

110. See *id.* at 449.

111. See *Mandatory CLE—New York Requirements*, N.Y. ST. BAR ASS’N, [http://www.nysba.org/Content/NavigationMenu/CLE/MandatoryCLERules/Mandatory\\_CLE.htm](http://www.nysba.org/Content/NavigationMenu/CLE/MandatoryCLERules/Mandatory_CLE.htm) (last visited May 17, 2012).

112. See *Minimum Continuing Legal Education*, ST. BAR OF CAL., <http://mcle.calbar.ca.gov/> (last visited May 17, 2012).

113. See Barton, *supra* note 104, at 441.

114. See BAR COUNCIL OF INDIA, RULES OF LEGAL EDUCATION 36 (2008), available at <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf>.

after completing a Bachelor's degree, or a five-year integrated degree.<sup>115</sup> Both degrees are recognized equally by the Bar Council of India.<sup>116</sup> CLE credits are not required of lawyers in India at this time, but the Bar Council is considering instituting a CLE requirement.<sup>117</sup> The Bar Council is making strong efforts to address the educational standards for lawyers in India, partially in response to an Order by the Supreme Court of India noting the low standard of legal education.<sup>118</sup> One such effort was the creation of the All India Bar Examination, "an entry-level assessment to the [legal] profession."<sup>119</sup>

The first All India Bar Examination was scheduled for December 5, 2010.<sup>120</sup> The Advocates Act of 1961 had previously required completion of a course in practical training and passage of an examination, until 1973, when these requirements were removed.<sup>121</sup> The Bar Examination was an open book examination and was mandatory for law students graduating in the 2009-2010 academic year.<sup>122</sup> After many delays the Bar Examination was finally administered on March 6, 2011 and it resulted in a seventy-one percent pass rate.<sup>123</sup> In order to pass the examination students were required to achieve a raw score of forty percent.<sup>124</sup> The most recent examination was administered in January 2012 and resulted in an even lower pass rate of sixty three percent.<sup>125</sup> Establishing this Bar Exam is a positive first step towards elevating the

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115. *See id.*

116. *See id.*

117. *See* Prerna Chopra, *Continuing Professional Legal Education in India*, LEGAL INDIA, <http://www.legalindia.in/continuing-professional-legal-education-in-india> (last visited May 17, 2011).

118. *See* Letter from Gopal Subramaniam, Chairman, Bar Council of India, to Law Students (July 1, 2010), *available at* <http://www.barcouncilofindia.org/wp-content/uploads/2010/07/lettertolawstudents.pdf> [hereinafter Letter from Gopal Subramaniam].

119. *See id.*

120. *See id.*

121. *See* Shamnad Basheer & Sroyon Mukherjee, *Raising the Indian "Bar": Legality and Feasibility of a Proposed Exam*, LAW & OTHER THINGS (Apr. 5, 2010), <http://lawandotherthings.blogspot.com/2010/04/raising-indian-bar-legality-and.html>.

122. *See* Letter from Gopal Subramaniam, *supra* note 118.

123. Press Release, Bar Council of India, First All India Bar Exam Results Declared (Mar. 19, 2011), *available at* <http://www.barcouncilofindia.org/wp-content/uploads/2011/03/AIBE-Results-1-Press-Release-Final-.pdf>.

124. Kian Ganz, *Breaking: 71% Pass All India Bar Exam; 6,300 Grads Fail/to Retake*, LEGALLY INDIA (Mar. 19, 2011, 13:39), <http://www.legallyindia.com/201103191935/Law-schools/breaking-71-pass-all-india-bar-exam-6300-grads-fail>.

125. Kian Ganz, *Bar Exam Results Get Worse: 37% Fail AIBE With 70% of Repeaters; Next Exam May/June*, LEGALLY INDIA (Feb. 15, 2012, 11:15), <http://www.legallyindia.com/Graduates-Bar-Exam/bar-exam-results-get-worse-37-most-repeaters-fail-aibe-2-grace-marks-given-tamil-kannada-worst>.



standards Indian lawyers are held to. However, it is still far from the stringent standards of the American Bar Examination system. During the first examination administered in March of 2011 students reported widespread cheating.<sup>126</sup> There was also no system to check proof of the test takers identification, and exam takers were not prohibited from bringing mobile phones or electronic equipment into the exam.<sup>127</sup>

Attorneys in the United States are put through a rigorous course of study and are required to pass a comprehensive, closed book Bar Examination prior to being permitted to practice law.<sup>128</sup> The curriculum in American law schools is designed to teach law students the skills necessary to effectively function as practicing attorneys and comply with the normative standards of the profession.<sup>129</sup> The Indian Supreme Court and Bar Council admit that the education provided to prospective Indian lawyers is sub-par, and recognize that improvements are necessary to make Indian legal education comparable to that available in other developed nations.<sup>130</sup> Many significant problems plague the Indian legal education system including a lack of focus on ethics and social awareness, low (or no) law school admissions standards, and a lack of a standardized law school admissions examination.<sup>131</sup> Even without comparing the Indian system to that of the United States, the admission of the Indian authorities that their legal education and professional licensing standards are inadequate should give pause to companies considering using the services of Indian attorneys.

In order to ensure that the quality of work provided to American clients remains consistent and at the level that would be provided solely by American attorneys, a common standard needs to be applied. While significant steps have been taken, such as instituting a bar examination and placing stricter requirements on the quality of India's law programs, more improvements are still needed in order for the Indian requirements to reach the level of those within the United States. If American

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126. See Kian Ganz, 'Easy' and 'Cheating': How Was Bar Exam Day for You?, LEGALLY INDIA (Mar. 6, 2011, 14:08), <http://www.legallyindia.com/201103061879/Law-schools/easy-and-cheating-how-was-the-bar-exam-day-for-you>.

127. *Id.*

128. See *supra* text accompanying notes 104-13.

129. See Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 62-63 (2003).

130. Jayanth K. Krishnan, *Professor Kingfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 471 (2004).

131. See Laura D'Allaird, "The Indian Lawyer": *Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing*, PROF. LAW., 2007, at 1, 6 ("... law schools accept[] and giv[e] a degree to any student who applies").

companies send their legal work to lawyers who are held to such different standards than lawyers educated in America, it is highly probable that the quality of work will reflect this discrepancy.

### B. Compensation

According to the National Association for Law Placement, as of 2007 the average starting salaries for new lawyers in the United States were \$68,000 for firms of 2-25 lawyers; \$81,000 for firms of 26-50 lawyers; \$90,000 for firms of 51-100; \$105,000 for firms of 101-250; and \$130,000 for firms with over 250 lawyers.<sup>132</sup> Graduates from top Indian law schools are generally earning a starting salary of twelve lacs (100,000 rupees in one lac), which translates to \$23,210.80.<sup>133</sup> Graduates from smaller law schools and colleges are earning a starting salary of five lacs, which translates to \$9,671.18.<sup>134</sup>

The main reason that legal process outsourcing is gaining acceptance is economic incentives. While newly graduated American lawyers can earn upwards of \$70,000, newly graduated Indian lawyers are earning less than half of Americans.<sup>135</sup> An executive with a legal process outsourcing company has stated that the highest salary paid to Indian personnel is \$40,000.<sup>136</sup> This is just a little over half of what newly graduated American lawyers earn in the smallest firms.<sup>137</sup> Many Indian attorneys bill as little as \$20 per hour for legal research, while a junior associate at an American firm will bill an average of \$200 per hour for similar work.<sup>138</sup> Even though the purpose of legal process outsourcing is to help American law firms reduce costs to the client and maximize profits, it minimizes and undervalues the work of Indian lawyers.

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132. *How Much Do Law Firms Pay New Associates? A 12-year Retrospective as Reported by Firms*, NALP (Oct. 2007), <http://www.nalp.org/2007octnewassocpay?s=law%20firm%20starting%20salaries>.

133. See *Lawyer Salaries & Compensation in India*, VFRESHERS (Sept. 7, 2009), <http://www.vfreshers.com/lawyer-salaries-compensation-india/>; *Currency Converter*, OANDA, <http://www.oanda.com/currency/converter/> (last visited May 17, 2012); *Indian Rupee (INR) and United States Dollar (USD) Currency Exchange Rate Conversion Calculator*, COINMILL.COM, [http://coinmill.com/INR\\_USD.html](http://coinmill.com/INR_USD.html) (last visited May 17, 2012).

134. See *Lawyer Salaries & Compensation in India*, *supra* note 133; *Currency Converter*, *supra* note 133; *Indian Rupee (INR) and United States Dollar (USD) Currency Exchange Rate Conversion Calculator*, *supra* note 133.

135. See *supra* text accompanying notes 132-34.

136. See Patterson, *supra* note 10, at 186.

137. See *supra* text accompanying note 133.

138. See Patterson, *supra* note 10, at 186.

Another argument that is often presented in favor of outsourcing is that the global economy will strengthen and grow, as sending jobs overseas will increase capital in underdeveloped parts of the world.<sup>139</sup> However, it is very possible that outsourcing actually does more harm than good. A primary reason that American companies engage in outsourcing is the high levels of cost savings, which is accomplished in large part because the foreign employees are paid at such a low rate. Perpetuating the cycle of low wages may actually distress the global economy by preventing the natural evolution of other nations' economies.<sup>140</sup>

American attorneys as members of a profession have a certain reputation in the eyes of the public. Lawyers are highly trained professionals who "have mastered esoteric and inaccessible knowledge."<sup>141</sup> They are considered to be part of a profession that "requires substantial intellectual training and the use of complex judgments."<sup>142</sup> This reputation allows attorneys to charge a certain rate for their services, and the higher rate for their services is a direct reflection of the level of trust the clients have.<sup>143</sup> Part of the value of the services provided by an attorney is that they are offering their reputation on behalf of their clients to third parties.<sup>144</sup> A client will then pay a higher rate based on the reputation of the firm, or attorney, providing that service.<sup>145</sup> There is a real danger that if the public views legal services as the type of service that can be easily outsourced, the prestige of the legal profession will be severely diminished, along with the level of trust and confidence clients have in their counsel.

### III. APPLYING INDIAN AND/OR AMERICAN LABOR LAW

An American company operating in India cannot contract out of the

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139. Clendenin, *supra* note 9, at 300.

140. *See id.* at 300 n.23.

141. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1239 (1995).

142. ABA COMM. ON PROFESSIONALISM, "...IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/stanley\\_commission\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf).

143. *See* Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 21-22 (1995).

144. *See id.* at 23.

145. *See id.*

minimum protections established by Indian labor laws.<sup>146</sup> Employee protection laws are generally the result of public policy and are intended to protect everyone that works in a foreign country, regardless of that person's citizenship.<sup>147</sup> Choice of law clauses in employment agreements are generally ineffective, as are arbitration agreements that include a choice of forum outside of the host country.<sup>148</sup> Very often, these clauses are unenforceable unless the agreement was signed after the actual dispute arose.<sup>149</sup>

There are significant differences in the employment laws of India from those of the United States. For one, the Indian legal system does not recognize the concept of "at-will" employment.<sup>150</sup> In most cases, employers are only permitted to terminate an employee for cause or for misconduct.<sup>151</sup> Under an "at-will" system, an employer will not have to prove cause unless there is an employment contract in place.<sup>152</sup> This could potentially expose employers to increased litigation over the circumstances surrounding the termination of an employee.<sup>153</sup> The benefit of an at-will employment system is that employers have much greater control over the composition of their workforce, and more freedom to make decisions they deem to be in the best interest of the company.<sup>154</sup> Outside of the at-will employment framework, it is more likely that an employee who provides sub-par work product will be retained for a longer period of time, as a substantial case of dismissal for cause must first be established.<sup>155</sup> This would not be the case at an

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146. See Shardul S. Shroff, *Perspectives on Doing Business in India: Issues for US Companies*, in *DOING BUSINESS IN INDIA 2008: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES 2008*, at 276 (PLI Corporate Law Practice, Course Handbook Order No. 14595, 2008).

147. See Donald C. Dowling Jr., *Choice-of-Law Contract Clauses May Not Fly Abroad*, *SHRM LEGAL REP.*, Oct.-Nov. 2008, at 1, 1, available at <http://www.nishithdesai.com/Research-Papers/SHRM-HR%20law%20article.pdf>.

148. See *id.* at 2-3.

149. See *id.* at 3.

150. See Radhika Iyer & Vikram Shroff, *Ensure Compliance with Employment Laws in India*, *SHRM INDIA* (Oct. 28, 2008), <http://www.shrmindia.org/ensure-compliance-employment-laws-india-0>.

151. See *id.*

152. See Ellen Dannin, *Why At-Will Employment is Bad for Employers and Just Cause is Good for Them*, *LAB. L.J.*, 2007, at 5, 5.

153. See Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 *NEB. L. REV.* 62, 64-65 (2008) (stating that under the "just cause standard," "problems of proof force employers to waste large sums of money litigating terminations or paying very large, and often undeserved, severance payments").

154. See Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 *U. PITT. L. REV.* 295, 300 (2005).

155. See Porter, *supra* note 153, at 64-65.

American firm. In a United States firm, employees generally can be dismissed at any time,<sup>156</sup> thereby increasing the employer's autonomy to make employment decisions designed to ensure the best possible services to its clients.

Many of the Indian labor laws are specifically geared towards manufacturers, factories and other industrial companies.<sup>157</sup> The white-collar industries are a newer addition to the Indian economy, and many of the managerial and professional employees are specifically excluded from existing labor laws.<sup>158</sup> One such law is the Industrial Disputes Act ("IDA"), which provides the framework for dispute resolution between Indian employers and employees regarding matters related to layoffs, terminations, lockouts, and compensation.<sup>159</sup> However, the definition of "workman" under the IDA does not include those employed in a supervisory capacity, employees that make more than 1600 rupees per month, or those in a managerial or administrative capacity.<sup>160</sup> This definition excludes many of the employees of a legal process outsourcing company, therefore denying them the protections offered by the IDA.

Another Indian employment law that excludes professional employees is the Employees Provident Fund and Miscellaneous Provisions Act ("EPFMPA"), which was enacted to address the financial security of employees by providing for compulsory savings at mandated rates.<sup>161</sup> However, the Act only applies to establishments that are considered a factory, or to companies that are notified by the government that the EPFMPA applies to them.<sup>162</sup> This Act serves as the Indian equivalent of American social security legislation,<sup>163</sup> so employees in Indian legal process outsourcing companies will not have

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156. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 73 (2000) ("The employer's divine right to dismiss at any time, for any reason, and without notice has survived with vigor").

157. See Gaytri Devi Kachroo, *Outsourcing to India: Transnational Law and Culture*, INT'L Q., Oct. 2007, at \*1, \*18-19.

158. See *id.*; see also ERNST & YOUNG, DOING BUSINESS IN INDIA 76, 82 (Gaurav Karnik ed., 2006), *available at* [http://www.ey.com/Publication/vwLUAssets/Doing\\_business\\_in\\_India\\_2011/\\$FILE/Doing\\_business\\_in\\_India\\_2011.pdf](http://www.ey.com/Publication/vwLUAssets/Doing_business_in_India_2011/$FILE/Doing_business_in_India_2011.pdf) (noting that supervisors and managers are excluded from the Industrial Disputes Act, and that the Employees Provident Fund and Miscellaneous Provisions Act only applies to factory workers).

159. ERNST & YOUNG, *supra* note 158, at 75-76.

160. See *id.*

161. See *id.* at 82.

162. See *id.*

163. See Iver & Shroff, *supra* note 150, at 4-5.

the protection of employer-based social security benefits in the same way as their American counterparts, or even as Indian factory workers do. Thus, they may have to rely exclusively on private retirement plans, either through their employer or at their own initiative.

Many companies that provide legal process outsourcing services have offices both within the United States and overseas.<sup>164</sup> Firms who utilize services of these companies need to be assured that they are Fair Labor Standards Act (FLSA) compliant since, according to case law, the firms can be considered a joint employer for the purposes of the FLSA.<sup>165</sup> However, this requirement may not extend to the overseas employees.<sup>166</sup>

American companies that decide to do business with legal process service providers could potentially have to settle employment disputes within the Indian court system.<sup>167</sup> An American company subject to Indian domestic laws would be forced to operate on the timeframes of the Indian courts where civil suits take on average fifteen to twenty years before they are resolved.<sup>168</sup>

As of 2005, the Supreme Court of India had approximately 20,000 cases pending and approximately twenty-four million cases pending in the lower courts nationwide.<sup>169</sup> Part of the backlog of cases can be attributed to sheer volume. However, some is a result of “delay lawyers” who specialize in extending the length of civil litigation.<sup>170</sup>

This lack of efficiency could pose a number of potential issues. If the employees of the outsource service providers feel they have no means to address their grievances, the morale, and therefore the quality of work provided by the Indian attorneys may suffer.<sup>171</sup> Additionally, the lack of certainty when facing an employment dispute could translate

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164. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 20 (2009), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1299&context=intlaw>.

165. See generally *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 63-64, 79 (2d Cir. 2003).

166. See Borsand & Gupta *supra* note 164, at 17 (“While the FLSA may not extend to LPO providers overseas, in light of the *Zheng* opinion, those looking to outsource domestically should ensure their LPO provider is FLSA compliant”).

167. See Patel, *supra* note 62, at 87.

168. See D'Allaird, *supra* note 131, at 9.

169. See Krishnan, *supra* note 33, at 2222-23.

170. See *id.* at 2227.

171. See Terri Levine, *Boost Employee Morale*, SIDEROAD, [http://www.sideroad.com/Management/boost\\_employee\\_morale.html](http://www.sideroad.com/Management/boost_employee_morale.html) (last visited May 17, 2012); Alexis Writing, *What Are the Requirements for an Effective Grievance Management System Within an Organization?*, CHRON. SMALL BUS., <http://smallbusiness.chron.com/requirements-effective-grievance-management-system-within-organization-7.html> (last visited May 17, 2012).

into costly and time-consuming litigation.<sup>172</sup> If the American company is in a situation where a dispute must be resolved through the Indian court system, the resulting litigation costs could easily negate any economic benefit gained from outsourcing in the first place. Some of these potential issues could be avoided if American law firms made it a practice to enter into service agreements with outsourcing service providers that included an arbitration clause for the settling of all disputes according to American law, and either in American courts or in front of a binding arbitration committee.

#### IV. EFFECTS OF OUTSOURCING AND POLICY IMPLICATIONS

##### A. *Effects on American Lawyers and the Economy*

The majority of new associates are hired out of law school in order to perform “back office” functions such as research, discovery, and the preparation of briefs and legal memorandums.<sup>173</sup> In order to remain competitive, there is a growing focus on increasing billing hours and profitability among firms.<sup>174</sup> In 2008, legal process outsourcing was an \$80 million industry and 12,000 legal jobs were outsourced.<sup>175</sup> It is estimated that legal process outsourcing will grow to a \$4 billion industry and approximately 80,000 legal jobs will be outsourced to India by the year 2015.<sup>176</sup> The positions that are least likely to be subjected to outsourcing are the positions that involve direct client contact, or extensive involvement in determining strategy with senior partners.<sup>177</sup> Knowing this, there is a lessened sense of security and morale among young associates, who are now more likely to search for better paying jobs shortly after being hired at new firms.<sup>178</sup>

Senior associates see this trend and have less of an incentive to train young associates, especially now that there is another option for

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172. Robert J. Kriss & Brad L. Peterson, *A Litigator's Perspective on Outsourcing Relationships*, MAYER BROWN BUS. & TECH. SOURCING REV., Spring 2011, at 4, available at <http://www.mayerbrown.com/publications/article.asp?id=11031&nid=6>.

173. See Michael G. Owen, *Legal Outsourcing to India: The Demise of New Lawyers and Junior Associates*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 175, 188 (2008).

174. See D'Angelo, *supra* note 2, at 182.

175. See *id.* at 171.

176. See Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT'L L. 451, 452 (2010).

177. See D'Angelo, *supra* note 2, at 187.

178. See *id.* at 182-83.

completing “back office” tasks.<sup>179</sup> The primacy placed on growth and profitability leads many firms to ignore the importance of the mentoring relationship.<sup>180</sup> A decline in the direct mentoring relationship will have a significant negative impact on the quality of the American legal profession, and subsequently its reputation.<sup>181</sup> The education received by American lawyers focuses primarily on the theory of law, and entry-level associates receive the majority of their practical training during their first few years of employment.<sup>182</sup> Without the training received during those formative years, the next generation of American lawyers will not be prepared to sufficiently monitor the quality of work being provided by the legal process outsourcing companies, or complete those tasks themselves should the need arise.<sup>183</sup>

A major reason that outsourcing is so appealing is that a substantial amount of money can be saved. Outsourcing is widely used in the knowledge-based industries because of the increasingly high salaries demanded by professionals, including entry-level positions.<sup>184</sup> Some companies have decreased legal costs by up to fifty percent, while still obtaining work comparable to that of American attorneys.<sup>185</sup> However, this practice will impact the salaries of American lawyers since their foreign counterparts charge far less money for comparable services.<sup>186</sup> While many lawyers are reluctant to send work abroad, their corporate clients are not. Clients do not want to pay two hundred dollars per hour for simple work, and many young associates do not want to do the work either because they prefer more challenging assignments.<sup>187</sup>

Rising costs in India and the ever-increasing demand for legal process outsourcing in America are fostering the spread of outsourcing locations all over the world. The Philippines, New Zealand, Mauritius, Scotland, and Australia are other locations where legal process

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179. *See id.* at 183.

180. Jayanth K. Krishnan, *The Joint Law Venture: A Pilot Story*, 28 BERKELEY J. INT'L L. 431, 436 (2010).

181. *See* Owen, *supra* note 173, at 189.

182. *See* D'Angelo, *supra* note 2, at 188 & n.146.

183. *See* Owen, *supra* note 173, at 188-89.

184. *See* Mimi Samuel & Laurel Currie Oates, *From Oppression to Outsourcing: New Opportunities for Uganda's Growing Number of Attorneys in Today's Flattening World*, 4 SEATTLE J. FOR SOC. JUST. 835, 854-55 (2006).

185. Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. TIMES, Mar. 14, 2004, <http://www.nytimes.com/2004/03/14/jobs/corporate-america-sending-more-legal-work-to-bombay.html>.

186. *See id.*

187. *Id.*



outsourcing companies are operating.<sup>188</sup> If this trend is allowed to continue and grow, the threat to the reputation of the American legal profession will be magnified. While India is a country whose legal system is based on the same common law tradition as the United States, many of the countries that are beginning to have legal process outsourcing industries are not grounded in the same history of law.<sup>189</sup> Additionally, Indian attorneys are educated in English and practice law in English as well.<sup>190</sup> The language barrier, and therefore the possibility of error, is significantly less when the two countries share a common language. If the trend continues to spread to countries that speak a number of languages, especially languages not common in the United States, quality control could become an even greater challenge than it already is.

Many Americans find a large part of their personal identity and life goals in their career.<sup>191</sup> This is especially understandable in the professional fields such as law. Individuals invest many years and significant effort to achieve their status as an attorney, accountant, or doctor.<sup>192</sup> The professionals who find themselves out of work due to outsourcing will in some cases be forced to find another area of employment, often with a lower salary than their previous position.<sup>193</sup> In addition to the economic impact of outsourcing, the practice of outsourcing professional services will also have a significantly negative effect on national morale if trained and licensed professionals are forced to relinquish part of their identity in order to find employment.

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188. Samuel & Oates, *supra* note 184, at 857.

189. *See id.* at 858. Whereas New Zealand and Australia are common law countries, Mauritius, the Philippines, Scotland, and Israel have mixed legal systems that are not grounded in purely common law. *See Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems*, U. OF OTTAWA, <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php> (last visited May 17, 2012).

190. Samuel & Oates, *supra* note 184, at 858.

191. *See* Clendenin, *supra* note 9, at 295.

192. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, LAWYERS 1, 2 (2010-11 ed.), available at <http://www.bls.gov/oco/pdf/ocos053.pdf>; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, ACCOUNTANTS AND AUDITORS 2 (2010-11 ed.), available at <http://www.bls.gov/oco/pdf/ocos001.pdf>; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: PHYSICIANS AND SURGEONS 1, 2 (2010-11 ed.), available at <http://www.bls.gov/oco/pdf/ocos074.pdf>.

193. *See* Clendenin, *supra* note 9, at 296.

### B. Attempts to Regulate Outsourcing

There are two distinct positions with regard to outsourcing. There are “protectionists,” those who believe that preserving American jobs and supporting the American economy are far more desirable than any benefits that can be derived from outsourcing.<sup>194</sup> Opposing the protectionists are supporters of free trade and employer autonomy, who believe that outsourcing has many advantages and is a necessary part of a market economy.<sup>195</sup>

The issue of outsourcing rose to the forefront of the American political discussion in the beginning of the twenty-first century.<sup>196</sup> From 2003 to October 2005, 327 bills designed to regulate outsourcing were introduced in forty states.<sup>197</sup> Additionally, three laws were passed requiring the establishment of commissions to study the effects of outsourcing.<sup>198</sup> In the face of the failure of the majority of the proposed legislation, notably the SAFE-ID Act and the Personal Data Offshoring Protection Act, federal and state initiatives to regulate outsourcing have slowed considerably.<sup>199</sup>

One main issue surrounding the practice of outsourcing has been the obligations of the employer towards its employees. A number of initiatives have been proposed to encourage employers to provide employees who will be losing their positions to outsourcing with as much notice as possible, as well as opportunities for education, and re-training.<sup>200</sup> While this is a positive measure for many of the positions affected by outsourcing, this is not a feasible solution for members of a professional community. Doctors, lawyers, accountants and other professional employees invest significant time, money, and effort in completing the necessary requirements to enter their fields of practice.<sup>201</sup> This would make it impractical for them to completely change fields, even with advanced notice and additional training.<sup>202</sup> There is also relief

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194. *Id.* at 297.

195. *Id.*

196. See Beverley Earle et al., *A Finger in the Dike? An Examination of the Efficacy of State and Federal Attempts to Use Law to Stem Outsourcing*, 28 NW. J. INT'L L. & BUS. 89, 95 (2007).

197. *Id.*

198. *Id.*

199. See Patterson, *supra* note 10, at 199, 202-03.

200. See Clendenin, *supra* note 9, at 309-10.

201. See Jason R. Kerr & Jeffrey J. Brown, *Costs of a Medical Education: Comparison With Graduate Education in Law and Business*, J. AM. C. RADIOLOGY, Feb. 2006, at 1, 1.

202. See H.J. Cummins, *Globalization is Painful for Some Workers*, STARTRIBUNE, Sept. 6, 2004, <http://www.startribune.com/business/11203011.html?page=3&c=y>.

available under the Trade Adjustment Act (“TAA”).<sup>203</sup> Under the TAA, employees are provided with federal dislocated worker benefits and access to support services if the U.S. Department of Labor confirms that their position was lost due to overseas outsourcing.<sup>204</sup> This aid was originally implemented solely for members of the manufacturing industry, but was later extended to cover workers in the service sector.<sup>205</sup> However, this extension was only valid through the end of 2010, and, as of February 2011, the Act only applies to manufacturing jobs.<sup>206</sup>

In January 2011, Connecticut proposed a bill declaring that outsourcing legal documents to non-attorneys would constitute the unauthorized practice of law.<sup>207</sup> The bill stated that the “practice of law includes (1) drafting, reviewing or analyzing legal documents for clients in this state, and (2) researching and analyzing the law of this state and advising clients in this state of the status of such law . . . .”<sup>208</sup> The bill, proposed by Patricia Dillon who is a state representative of Connecticut, would charge “‘unlicensed’ offshore workers” with the unauthorized practice of law if they draft, review, or analyze any legal documents for Connecticut clients.<sup>209</sup> While there is a fear among the proponents of legal process outsourcing that other states might follow the lead of the Connecticut legislature, the CEOs of two of the major legal process outsourcing firms in India do not seem concerned.<sup>210</sup> One of the CEOs of the legal process outsourcing firm Pangea3, Sanjay Kamrani, says that this bill is “happening at a time when [U.S.] law firms are increasingly looking at LPOs strategically, as long-term partners, to offer more value to their clients.”<sup>211</sup> Russell A. Smith, who is not only the CEO of the Mysore-based legal process outsourcing firm SDD Global, but also a registered attorney in the United States, said that “tens of thousands of

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203. *See id.*

204. *See id.*

205. *See* EMPLOYMENT & TRAINING ADMINISTRATION, U.S. DEP’T OF LABOR, TRADE ADJUSTMENT ASSISTANCE FOR WORKERS: REPORT TO THE COMMITTEE ON FINANCE OF THE SENATE AND COMMITTEE ON WAYS AND MEANS OF THE HOUSE OF REPRESENTATIVES 2 (2010), available at <http://www.doleta.gov/tradeact/docs/AnnualReport10.pdf>.

206. *See id.* at 2-3.

207. H.R. 5083, 2011 Gen. Assemb., Jan. Sess. (Conn. 2011), available at <http://www.cga.ct.gov/2011/TOB/H/2011HB-05083-R00-HB.htm>.

208. *Id.*

209. Mini Joseph Tejaswi, *Connecticut Introduces Bill to Prevent Law Firms from Offshoring Work to India*, ECON. TIMES (Feb. 1, 2011), <http://economictimes.indiatimes.com/tech/ites/connecticut-introduces-bill-to-prevent-law-firms-from-offshoring-work-to-india/articleshow/7402541.cms>.

210. *See id.*

211. *Id.*

[U.S.] para-legals, who, like Indians, are not admitted to the bar, do exactly the same kind of work that the author of the bill says should only be done by lawyers.”<sup>212</sup> Smith, along with other U.S. lawyers, believes that even if the bill is passed, it will be overturned by the courts because it is an “unlawful restraint of trade and [it interferes] with the constitutional right to contract freely.”<sup>213</sup>

Some believe that the Connecticut bill is drafted sloppily and “ignores the substantial body of principled analysis of issues surrounding legal outsourcing in favour of facile protectionism that won’t cure the legal [profession’s] real ills.”<sup>214</sup> Many believe that the majority of U.S. legal jobs that have been lost have the poor economy to blame, rather than decreased hiring or the elimination of positions as a consequence of the outsourcing of legal work.<sup>215</sup> Going further, those opposing the Connecticut bill argue that Representative Dillon ignores the fact that, ultimately, the U.S. attorney who hires the offshore legal process outsourcing company is “responsible for ‘quality oversight.’”<sup>216</sup> While a lawyer in India may not be authorized to practice law in the United States, the review of the work by American lawyers “sanitizes the process.”<sup>217</sup>

Even though there are people in favor of legal process outsourcing, it is the anti-outsourcing legislation that makes the news. In 2003, similar legislation was discussed by the Connecticut House of Representatives, but it did not get past the Senate Judiciary Committee.<sup>218</sup> The National Foundation for American Policy released a report in 2007 stating that, since 2004, state legislation to regulate global outsourcing has decreased.<sup>219</sup> As an example, the Senate’s proposed anti-outsourcing legislation, the Creating American Jobs and Ending Offshoring Act, failed a cloture motion in September 2010.<sup>220</sup>

The United States has been under increased pressure due to the recent economy. In his State of the Union address, President Obama highlighted the need to improve education and increase energy and

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Connecticut State Legislature LPO Bill Lacks “Quality Oversight,”* PANGEA3 (Jan. 28, 2011), [http://www.pangea3.com/legalblog/index.php/links/2011/01/28/connecticut\\_lpo\\_bill](http://www.pangea3.com/legalblog/index.php/links/2011/01/28/connecticut_lpo_bill).

216. *Id.*

217. Rosen, *supra* note 185.

218. *See Connecticut State Legislature LPO Bill Lacks “Quality Oversight,” supra* note 215.

219. *Id.*

220. *Id.*

technology innovation, but avoided the topic of outsourcing.<sup>221</sup> In late January 2011, the CEO of General Electric, Jeffrey Immelt, nicknamed the “King of Outsourcing,” was appointed as a top economic advisor to the President.<sup>222</sup> Proponents of legal process outsourcing are quite excited about this development.<sup>223</sup>

Rather than passing legislation that will be primarily concerned with the restriction of global outsourcing, this note contends the more productive approach would be to develop legislation that would address the specific concerns the outsourcing process raises. The main danger that results from relying on outsourcing is the disparate standards that American and Indian lawyers are held to, and the potential this creates for lower quality work being provided to American clients. The law proposed in Connecticut, as previously discussed, attempts to address this issue by prohibiting legal work from being done by non-attorneys.<sup>224</sup> This is an unrealistic restriction both because of the reliance on paralegals in the American legal system, and because of the danger that the law would be overturned for interfering with the freedom of contract. Any legislation that would effectively mitigate the potential issues associated with outsourcing should focus on specific issues rather than broadly curtailing the practice.

One major obstacle to regulating outsourcing is that any regulation that hopes to be successful on a large scale will need to be at the federal level, as opposed to coming from state governments. State laws that attempt to create policies regulating or banning outsourcing outright will interfere with the power of the federal government to create and implement foreign policy as well as the federal power over foreign commerce.<sup>225</sup> Federal laws are able to avoid constitutional challenges for the same reason that state laws are vulnerable to them—the federal government specifically holds the power to regulate commerce.<sup>226</sup> Even in the absence of a clearly articulated federal position on matters that implicate foreign policy, states cannot make any law that infringes on those issues as a result of the dormant federal foreign affairs presumption.<sup>227</sup> When state statutes designed to limit outsourcing are viewed in light of the five factors the Supreme Court has consistently

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221. *Id.*

222. *Id.*

223. *Id.*

224. *See supra* text accompanying notes 207-09.

225. *See Earle et al., supra* note 196, at 97, 99.

226. Patterson, *supra* note 10, at 197-98.

227. Earle et al., *supra* note 196, at 98.

used to evaluate questionable statutes in the past, it is likely that few, if any, would be upheld.<sup>228</sup> The five factors used by the Court are:

(1) whether the state statute is meant to interfere with the affairs of a foreign country; (2) whether the state statute has the intent and ability to actually affect another country; (3) whether the state's action might spur more states to formulate statutes usurping federal powers; (4) whether the state law contradicts federal law on the issue in any way; and (5) whether targeted countries have complained.<sup>229</sup>

However, if the United States were to explicitly implement a policy on outsourcing via statute, states would be free to supplement this policy, provided the state law did not exceed or contradict the federal policy.<sup>230</sup>

Our proposed legislation would include specific regulations addressing the various areas of inequity between American and Indian lawyers, as well as designating some tasks that must be completed by licensed attorneys and some tasks that can appropriately be completed by non-attorney personnel, either paralegals or employees of foreign outsourcing companies. The fact that work performed by the legal process outsourcing companies are reviewed and overseen by American attorneys<sup>231</sup> does alleviate some of the concern that quality of the work will suffer. However, American clients will be more secure if there are concrete standards and regulations that must be followed.

The primary focus of the legislation needs to address the disparity between the education American lawyers and Indian lawyers receive and the difficulty level of the bar examinations each must pass in order to practice.<sup>232</sup> This must be resolved if they are going to be completing the same type of work. Any foreign lawyer that intends to essentially practice American law should be required to pass the American bar examination, or at the very least the sections of the bar that are pertinent to the areas of law the foreign lawyer intends to practice. Additionally, foreign lawyers who plan to work on behalf of American clients should also be required to pass the MPRE examination, as well as fulfill continuing education requirements commensurate with those required of American lawyers.<sup>233</sup> These requirements were instituted by the

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228. *Id.*

229. *Id.*

230. *Id.* at 99.

231. Owen, *supra* note 173, at 178.

232. *See supra* pp. 589-92.

233. *See supra* p. 589.

American Bar Association in order to ensure the work produced by American lawyers meets a certain minimum standard,<sup>234</sup> arguably leading to uniformity in the quality of work. It is not unreasonable to impose those same standards on any attorney who desires to practice American law.

#### V. PROPOSED ETHICAL RULE REQUIREMENTS

In addition to making arrangements for foreign and American lawyers to be held to comparable education standards, it is important that they meet the same ethical standards as well. American attorneys are expected to observe the ABA Model Rules of Professional Conduct.<sup>235</sup> Ideally, any foreign lawyer who will be practicing American law should also conduct themselves in accordance with the ABA Model Rules in their entirety. However, in the event that this is not a feasible option, we feel there are five essential Rules that all attorneys practicing American law should be required to uphold.

The first rule is Rule 1.1: Competence, which states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>236</sup> The standard of competence should be read to apply to foreign lawyers in the same way that it would for American lawyers. The duty of competence requires a law firm to evaluate whether the foreign lawyer or offshore vendor has the requisite knowledge and ability to complete the client’s objective.<sup>237</sup> The duty also requires the assessment of the foreign lawyer’s “on-the-ground, day-in day-out, capability . . . to deliver the promised service.”<sup>238</sup> Any foreign attorney providing services to American clients should receive training and supervision equivalent to their American counterparts.

The second rule is Rule 1.6: Confidentiality of Information, which pertains to when it is appropriate for a client’s information to be disclosed by their lawyer during representation.<sup>239</sup> The duty of confidentiality requires law firms to ensure that their foreign lawyers fully understand the requirement to preserve any information relating to

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234. See Barton, *supra* note 104, at 441.

235. MODEL RULES OF PROF’L CONDUCT pmb1. 12 (2011).

236. *Id.* R. 1.1.

237. See Daly & Silver, *supra* note 81, at 440.

238. *Id.*

239. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 1 (2011).

the representation of the client.<sup>240</sup> A breach of confidentiality is a violation of the Model Rules of Professional Conduct and may also lead to tort liability for both accidental and deliberate disclosures of client information.<sup>241</sup> It has been suggested that, in the course of an outsourcing assignment, a client's lawyer must garner the client's informed consent prior to the disclosure of client confidences to a non-lawyer overseas.<sup>242</sup> In doing this, the lawyer should advise the client about the differences in confidentiality laws and customs between the United States and foreign jurisdictions.<sup>243</sup> In terms of when a lawyer should disclose these facts to the client, the Committee on Professional Ethics of the New York State Bar Association stated that when a temporary attorney "makes strategic decisions or performs other work that the client would expect of the senior lawyers working on the client's matters," the law firm should disclose the type of work that will be done by the temporary/foreign lawyer and obtain the client's consent in advance.<sup>244</sup>

The unique confidentiality concern that arises as a result of outsourcing is the increased potential for confidentiality to be violated in a number of ways. The breaches of confidentiality could result either from disclosures by foreign employees who are unaware of the premium American law firms and clients place on confidentiality, or inadvertently as a result of the communication necessary because of the distance between people working on a particular case. Requiring foreign attorneys to follow this particular ethical rule will keep confidentiality at the forefront of the outsourcing companies' concerns, as well as ensuring that all of the attorneys working on a particular case understand exactly when disclosure is permitted and appropriate.

The third rule is Rule 5.2: Responsibilities of a Subordinate Lawyer, which states:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of

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240. See Daly & Silver, *supra* note 81, at 435-36.

241. *Id.*

242. Woffinden, *supra* note 85, at 505.

243. *Id.*

244. *Id.* at 507 (internal quotation marks omitted).



professional duty.<sup>245</sup>

Obligating foreign attorneys to follow this rule will serve two purposes. First, it will ensure that if attorneys take direction from other employees or managers at the legal process outsourcing company they cannot avoid ethical responsibility for the actions. Second, it will also protect the foreign attorneys from being held responsible for following the course of action set by the American attorneys responsible for overseeing and directing their work.

The fourth rule is Rule 5.3: Responsibilities Regarding Nonlawyer Assistants, which states in relevant part, “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer . . . .”<sup>246</sup> This rule will help to address some of the confidentiality concerns by ensuring support staff is held to the same strict standards that the attorneys are under Rule 1.6. It will also go a long way towards ensuring the overall professionalism of the non-lawyer support staff hired by the legal process outsourcing companies. If attorneys are responsible for the conduct of their assistants, it provides a greater level of oversight and increases the security for clients.

The final essential rule pertains to maintaining the integrity of the profession. Rule 8.4: Misconduct, specifically defines professional misconduct.<sup>247</sup> One of the most essential aspects of being an American lawyer is belonging to a profession that has a long tradition of upholding certain standards of behavior.<sup>248</sup> American attorneys are expected to present a certain public image for the profession at large and maintain a minimum level of professionalism.<sup>249</sup> If foreign attorneys are associated with American clients and providing work on American cases, they must be held to the same standards of conduct as other members of the American legal profession.

## VI. CONCLUSION

Protecting the reputation of the legal profession as a whole is one of the many duties that lawyers have. This duty is threatened with the advent of legal process outsourcing. While it is generally accepted that

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245. Model Rules of Prof’l Conduct R. 5.2 (2011).

246. *Id.* R. 5.3(b).

247. *Id.* R. 8.4.

248. *See, e.g.*, Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997) (“[O]ne’s professional reputation is a lawyer’s most important and valuable asset”).

249. *See* MODEL RULES OF PROF’L CONDUCT pmbl. (2011).

American law firms can legally outsource their work,<sup>250</sup> there are still many concerns with the practice. Issues of confidentiality, unequal educational requirements, non-uniform labor and employment standards, and differences in compensation<sup>251</sup> are all problems that need to be addressed in order to protect the legal profession's reputation. Not only is it important to protect the reputation of the legal profession for lawyers, but also for current and future clients. Clients put their trust in their lawyer and expect to receive the very best in service and quality of work. If the legal profession is negatively impacted by the practice of legal process outsourcing, the jobs of American lawyers will suffer, as will their relationships with their clients and their clients' faith in the quality of professional service they are receiving.

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250. *See supra* text accompanying note 101.

251. *See supra* text accompanying notes 24, 102, 135, 146.

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