

DISCOVERY: JUST HOW MUCH MONEY IS BEING SPENT, WHERE AND WHY

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ABA APPROVAL OF OFFSHORE OUTSOURCING: REMEDY OR DEATH KNOLL?¹

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I. INTRODUCTION

There has been much discussion the past few years surrounding the rising costs of discovery, most troublesome as it is only one facet of the litigation process. These rising costs were further exasperated by the passage of the oft-discussed amended Federal Rules of Civil Procedure, which mandated the inclusion of electronically stored information, or ESI, in the gamut of information that must be retained, reviewed, and exchanged between parties to civil litigation in federal courts. Companies and law firms have responded with a variety of approaches to address those requirements, including moving from keyword searching to concept searching, as well as creating dedicated e-discovery teams; all coming with larger-than-life price tags.

However, the fastest growing, and most eye-opening trend is the outsourcing of legal work to non-U.S. attorneys and others operating offshore in lower labor-cost countries, without direct on-site supervision by U.S. attorneys. Legal Process Outsourcing, or LPO, has gained great momentum as foreign companies have leveraged opportunities abroad resulting from substantially lower labor costs. The ultimate seal of approval came in August 2008, when the

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ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 08-451, approving the use of offshore outsourcing.

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

II. **RISING COSTS OF DISCOVERY**

Discovery, particularly document review and production, has long been among the largest drains on litigation budgets, with discovery accounting for 50% to 90% of total civil litigation budgets.³ The new Federal Rules of Civil Procedure mandating the inclusion of all ESI in discovery productions is guaranteed to increase those costs substantially.

Expenditures relating to e-discovery are tracked by Socha Consulting and Gelbmann & Associates, a consulting firm that since 2003 has annually reported the results of its survey relating to e-discovery costs and trends. According to the Survey, commercial expenditures on Electronic Data Discovery, or “EDD” in 2007 increased to \$2.7 billion, up 43 percent from 2006.⁴ Socha Consulting predicts that those figures will grow by 21 percent, 20 percent, and 15 percent in 2008, 2009, and 2010, respectively;⁵ astonishing information, especially as it relates to the costs of litigation predicted to be incurred by large corporations with millions of pages of ESI. By way of example, in 2000, while dealing with one of its first e-discovery cases, Cisco

³ Digital Information Inflation: Be Prepared for eDiscovery, West.Thomson.com, <http://west.thomson.com/products/books-cds/ediscovery/default.aspx?promcode=540590>.

⁴ George Socha and Tom Gelbmann, A Look at the 2008 Socha-Gelbmann Survey, Aug. 11, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202423646479>.

⁵ Id.

Systems reportedly received a bill of \$23,500,000 for e-discovery services.⁶ One can only imagine the impact on the costs of goods sold and therefore on prices and competition for companies governed by the new rules, as well as the advantages that foreign companies with ways to avoid the requirements of those rules will doubtless enjoy.

How do these costs translate to day-to-day litigation? Experts estimate that even a midsize case can generate as much as 500 gigabytes of potentially relevant data (or more than 800 CDs at 600 megabytes per CD), which could cost as much as \$3.5 million to process and review before production.⁷ Note that this estimate excludes costs to restore and review information on backup tapes.⁸ A law firm involved in a recent midsize lawsuit received a document production that contained 75 hard drives – processing quotes for that information ranged from \$400,000 to \$600,000.⁹ These figures were confirmed by Verizon, which collected data relating to the costs of e-discovery, and has created an internal benchmark for the costs of processing, reviewing, culling, and producing 1 gigabyte of data at between \$5,000 and \$7,000.¹⁰ In a report released this year, the RAND Institute for Civil Justice warned that even in low-value cases, the costs of e-discovery “could dominate the underlying stakes in dispute.”¹¹

⁶ Ralph Losey, When and Why You Should Start an E-Discovery Team?, 2008, <http://ralphlosey.wordpress.com/2008/02/10/when-and-why-should-you-start-an-e-discovery-team>.

⁷ Institute for the Advancement of the American Legal System, 2008, Electronic Discovery: A View From the Front at 4, available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁸ Id.

⁹ Id. at 5. Note that potential liability for the firm’s client ranged from \$750,000 to \$6 million.

¹⁰ Id.

¹¹ Id. citing James N. Dertouzos, The Legal and Economic Implications of Electronic Discovery: Options for Future Research 3, 2008, http://rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

III. THE APPEAL OF OFFSHORE OUTSOURCING

At the risk of being subjected to merciless ABBA jokes, the answer is simple – money money money! Or for those who prefer fancy jargon – Discovery Cost Management. Although offshore outsourcing has not been the only method by which law firms and their clients have combated this problem,¹² it has created more of a stir due to people’s inherent fear of sending work to foreign lands.

However, the statistical proof that companies are quickly getting over this “keep the work in the ole’ U.S. and A.” mentality is hard to ignore. ValueNotes, a business-research firm based in Pune, India, noted that from 2006 to 2007, revenues from offshore LPO grew 49% to \$218 million.¹³ The same company estimates that the figure will increase to \$640 million by 2010.¹⁴ Forrester Research estimates that this figure may reach \$4 billion to India alone by the year 2015.¹⁵

While these amounts seem staggering, it is not hard to believe when you consider that lawyers in Mumbai, Bangalore, and Gurgaon earn between \$6,000 and \$30,000 annually,¹⁶ with more than 80,000 new law graduates every year in India.¹⁷ With salaries at such low levels

¹² Aside from offshore outsourcing, companies and law firms have attempted to control rising discovery costs through an assortment of methods, such as: (1) switching from ‘keyword’ searching to ‘concept’ searching; (2) hiring external e-discovery vendors to manage retention and production; and (3) creating in-house e-discovery teams.

¹³ See Suzanne Barlyn, Call My Lawyer...In India, Apr. 3, 2008, <http://www.time.com/time/printout/0,8816,1727726,00.html>.

¹⁴ Id.

¹⁵ Anthony Lin, Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues, Jan. 23, 2008, <http://www.law.com/jsp/article.jsp?id=1200996336809>.

¹⁶ See infra FN 13.

¹⁷ Now, Testing Time for Lawyers, The Tribune, Apr. 18, 2007, <http://www.tribuneindia.com/2007/20070418/jobs/main2.htm>.

comparative to US salaries, legal work can be done at a fraction of the cost. For example, the cost of document review by lawyers in India is approximately \$1 per page; in the United States it is between \$7 and \$10 a page.¹⁸ This \$6 to \$9 difference can amount to millions when you receive and have to review 10 million e-mails sent by your adversary.

Companies have taken notice of these potential money savings. In 2006, DuPont reportedly saved more than \$500,000 by outsourcing work to a Chicago-based company which uses facilities in India and the Philippines.¹⁹ TransUnion, a Chicago-based credit and information management company currently has Indian attorneys reviewing more than a million litigation e-mails for the company at an aggregate cost of less than \$10/hour, as opposed to the \$65-\$85/hour it would spend on US attorneys.²⁰ David Perla, co-founder of Pangea3, one of the largest LPO companies in the world, has said that many of the top 10 largest companies on the Fortune 500 are his company's clients.²¹

IV. **OVERVIEW OF ABA FORMAL OPINION 08-451**

On August 5, 2008, the ABA Standing Committee on Ethics and Professional Responsibility threw its hat into the LPO ring and issued Formal Opinion 08-451 (the "Opinion"). By way of the Opinion, the ABA approved the offshore outsourcing of legal support services, with the caveat that the outsourcing lawyer must remain ultimately responsible

¹⁸ Debra Cassens Weiss, E-Discovery Rule Changes Boost Legal Outsourcing to India, ABAJournal, Apr. 4, 2008, http://www.abajournal.com/news/e_discovery_rule_changes_boost_legal_outsourcing_to_india.

¹⁹ See infra FN 13.

²⁰ Id.

²¹ See infra FN 15.

for rendering competent legal services to the client under Model Rule 1.1.²² In addition, the ABA also mandated that appropriate disclosures be made to the client if the lawyers outside the firm will be receiving information protected under Rule 1.6.²³ Finally, the ABA stated that the fees charged for such outsourcing must be “reasonable,” and in compliance with Rule 1.5.²⁴

While the ABA notes that there is nothing unethical about outsourcing legal work, it affirms that the real challenge for an outsourcing lawyer is to ensure that tasks are delegated to individuals who are competent to perform them.²⁵ The outsourcing lawyer’s obligation does not end there, as he must then oversee the execution of the project “adequately and appropriately.”²⁶ Recognizing that such oversight can be difficult due to physical separation and time differences, the ABA says that at a minimum, an outsourcing lawyer should consider conducting reference checks and investigating the background of the lawyer providing the services.²⁷ The ABA concludes by addressing a number of additional factors that should be considered by the

²² The Opinion, released to the public approximately one to two weeks following the issue date, reads in full: A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her professional obligations as a lawyer with “direct supervisory authority” over them.

In addition, appropriate disclosures should be made to the client regarding the use of lawyers and nonlawyers outside of the lawyer’s firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.

²³ Id.

²⁴ Id.

²⁵ See Comments to ABA Formal Opinion 08-451 at 3.

²⁶ Id.

²⁷ Id.

outsourcing lawyer, including legal landscape of country, similarity of country’s legal system to the US legal system, and the effectiveness of country’s disciplinary enforcement system.²⁸

Confidentiality of information going to outsourced lawyers is another topic addressed in the Opinion. “Where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s consent.”²⁹ The ABA strongly emphasizes written confidentiality agreements, and advises outsourcing attorneys to pay careful attention to conflict checks between the “foreign” lawyer and outside service providers and vendors.³⁰

Finally,³¹ the Opinion addresses fees charged by outsourcing lawyer, and notes that these fees must be “reasonable.”³² So long as the fee charged to the client is not unreasonable, the lawyer is not obligated to inform the client how much the firm is paying for a contract lawyer.³³ Worthy of note is that if the outsourcing law firm decides to pass those costs through to the client as a disbursement, no markup is permitted.³⁴ The outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.³⁵

²⁸ Id.

²⁹ Id. at 5.

³⁰ Id.

³¹ The Opinion also bars an outsourcing attorney from assisting others in the unauthorized practice of law. However, this topic is not germane to this article.

³² Id.

³³ Id. at 6.

³⁴ Id.

³⁵ Id.

V. ANTICIPATED IMPACT OF ABA FORMAL OPINION 08-451

Given its recent issuance, it is difficult to anticipate just what the effect of the Opinion will be. It is interesting to note that although this is the ABA's first official comment on offshore outsourcing, several individual states have weighed in with their own opinions well before the ABA – all with the apparent effect of stimulating offshore outsourcing. For example, a New York State – New York City Ethics Opinion dated 2006 addressed offshore outsourcing.³⁶ In that opinion, the New York City Ethics committee stated that a lawyer may outsource legal support services to overseas lawyers and nonlawyers if the lawyer supervises the work rigorously.³⁷ The New York opinion further states, much like the ABA opinion, that client's advance consent is needed if the lawyer will be sharing the client's confidences and secrets.^{38 39}

It seems that even had the ABA not weighed in on the issue, offshore outsourcing was a speeding train that was gaining speed at each individual stop. The only thing that stood to derail the train was poor work product or breaches of confidentiality by the foreign lawyers, but the ABA has now affirmed the standard by which outsourcing lawyers must adhere to. Put simply, the ABA now demands accountability. Such accountability may further stimulate offshore outsourcing because many lawyers who were hesitant to send work overseas may now look at the ABA's approval as the ultimate go-ahead. Further, clients may feel more comfortable with

³⁶ See Committee on Professional Ethics of the Association of the Bar of the City of New York Ethics Opinion 2006-3 (8/06), available at <http://www.abcnyc.org>.

³⁷ Id. This opinion is largely similar to the ABA opinion despite it pre-dating the ABA opinion by two years. It is interesting to note that New York is one of only three states that has not adopted the ABA Model Rules.

³⁸ Id.

³⁹ Florida's Bar issued a similar ethics opinion in July 2008 that approved offshore outsourcing, addressed client confidences, and fees for offshore outsourcing. See Florida Bar Professional Ethics Committee, Op. 07-2, 1/18/08, approved 7/25/08. Contrarily, the New Jersey Bar has remained silent on the issue, and has no rule on the books addressing offshore outsourcing. See Dana E. Sullivan, Outsourcing Legal Work: ABA says the time has come, New Jersey Lawyer, Vol. 17, No. 36, Pg. 1, Sept. 8, 2008.

work going overseas as we get closer to a unified system of checks and balances governing the work.

However, it is also possible that attorneys may be hesitant to send work overseas knowing they will ultimately remain responsible for the work product of the overseas attorneys. Our profession is still recovering and trying to learn from the mistakes made in the early days of e-discovery, and many attorneys may be hesitant to put their licenses and reputations on the line, particularly when their “direct supervision” will largely be accomplished electronically and/or telephonically.

While a valid concern, it does not appear that risk to the outsourcing lawyers’ reputations will slow the offshore outsourcing train. As discussed above, many states have had similar rules in place for years, and offshore outsourcing has continued to explode. The cost savings available to clients are simply too sizeable to ignore, even if the client’s outside counsel must put themselves on the line to obtain the savings. Loyalty to outside counsel will only carry so far, and it is no surprise that such loyalty may waver in the face of multi-million dollar cost savings. Lawyers nationwide who have been staunch opponents of offshore outsourcing may have to start changing their tunes, or risk losing work to competitors who will utilize LPO and pass the resultant cost savings on to their clients.

VI. CONCLUSION

Although not the first to weigh in on the LPO battle, the ABA is the first unifying authority to take a clear position on legal outsourcing. The ABA calls for accountability, which will likely increase the time and money an outsourcing lawyer must spend. Such involvement may drive up the opportunity cost of offshore outsourcing, but the bottom line will still be lower

than keeping all the work “in-house.” This required supervision will not slow the growth of offshore outsourcing. US companies have taken notice of the cost savings available by sending work overseas, and they expect their outside counsel to do the same. Although the outsourcing lawyer’s supervisory obligations ensure that US lawyers will not become obsolete, the ABA’s approval may prove to be the catalyst that propels offshore outsourcing to the next level.



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Joseph Ortego has approximately twenty-nine years of litigation and business experience. Mr. Ortego has tried over 100 cases to verdict for major corporations ranging from financial institutions to automotive and chemical companies, including Fortune 100 commercial, environmental, and toxic tort cases. He focuses in the areas of aggregated and class actions, commercial disputes, toxic tort, environmental, employment, intellectual property, and product liability matters. He serves as national trial counsel for a number of clients who desire a consistent approach to class action and aggregate litigation matters filed in multiple states, as well as representing small, mid-size, and publicly traded companies.

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