FROM NOBILITY TO NOVELTY: THE LEGAL PROFESSION AT A CROSSROAD AN APPRAISAL OF LEGAL PROCESS OUTSOURCING AND ITS 'CORPORATIZING' EFFECT ON THE PRACTICE OF LAW*

*Neil B. Nucup***

ABSTRACT

That the practice of law is a profession, not a business or trade, is universally recognized in the international legal community. With the advent of globalization, various trends permeated the legal profession, one of which is legal process outsourcing. Firms have grown in size, and have begun to establish offices abroad, expanding the number of jurisdictions in which they maintain offices. Through time, a legal market has been created leading to the 'corporatization' of the practice of law. This paper explores the novelty of outsourcing by foreign law firms. Whether or not the host country benefits is beside the point. Rather, how the emerging trend could affect the practice of law as a profession is the crux of the paper.

INTRODUCTION

People used to believe that the world was flat. Then came Aristotle, Eratosthenes and Ptolemy who said otherwise.[1] Finally, in 1492, Christopher Columbus set sail for India, going west. After his voyage, he reported to the king and queen his discovery – the Earth is round. More than five centuries later,

---

*This article was awarded Second Place in the Philippine Law Journal Editorial Examinations for Editorial Term 2010-2011. Cite as NEIL NUCUP, FROM NOBILITY TO NOVELTY: THE LEGAL PROFESSION AT A CROSSROAD *AN APPRAISAL OF LEGAL PROCESS OUTSOURCING AND ITS 'CORPORATIZING' EFFECT ON THE PRACTICE OF LAW*, 85 PHIL. L.J. 190 (page cited) (2011).

** Vice-Chair, Philippine Law Journal (2010). He is a graduate of B.S. Biology from the University of the Philippines Diliman. He is presently a fourth year evening student at the UP College of Law.

[1] L.B. Cormack, *Flat Earth or Round Sphere: Misconceptions of the Shape of the Earth and the Fifteenth-Century Transformation of the World*, 1 CULTURAL GEOGRAPHIES 363, 364 (1994).

Pulitzer Prize winning journalist Thomas Friedman also set off for India, but went east instead. Culminating his journey, he revived the old proposition, challenging Columbus's. The world is flat after all.[2]

In his work, Friedman explains how globalization has reached a phase in which the world is no longer just small, but tiny. By the term 'flat' he refers to the fast-paced horizontal interaction among individuals, companies and governments around the world, and their ability to connect with one another in ways that were unimaginable not so long ago. Friedman identifies ten forces that contribute to this 'flattening' of the world, one of which is outsourcing.[3]

Outsourcing is 'sending of work traditionally handled inside a company or firm to an outside contractor for performance.'[4] It is one of the ways in which business organizations attempt to situate themselves in the global market, forcing them to compete both domestically and internationally.[5]Continually developing communications technology has further expanded the phenomenon to encompass white-collar jobs,[6] including the legal profession.[7]

Proofreading, typing, legal coding and document review are areas where outsourcing has successfully adapted to the needs of the legal community. Such activities represent what may be termed 'legal support' services. Thus far, the relationship between international outsourcing and the law has primarily been restricted to legal support. Though not yet widespread, outsourcing has already

---

[2] T.L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 2 (2004).

[3] *Id.*, at 92.

[4] A.M. Kadzik, *Current Development 2005-2006: The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 732 (2006); M.L. Proctor, *Transactional Law: Considerations in Outsourcing Legal Work*, 84 MICH. B.J. 20 (2005).

[5] S. Borsand & A. 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, 2 (2009).

[6] J.K. Holcombe, *Solutions for Regulating Offshore Outsourcing in the Service Sector*, 7 U. PA. J. LAB. & EMP. L. 539, 540 (2005).

[7] D.V. Pollak, *I'm Calling My Lawyer... in India!: Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOR. AFF. 99, 102 (2006).

begun to impact the practice of law, while scholars and skeptics wait for regulation to keep pace with reality.[8] The spread of legal outsourcing, like its more traditional counterpart, cross-border practice, 'has vastly outpaced the theory of whether and how such practice should be regulated... despite the increase in scholarly writing on this topic..."[9]

This paper explores the novelty of outsourcing by foreign law firms. Whether or not the host country benefits is beside the point. Rather, how the emerging trend could affect the practice of law as a profession is the crux of the paper. It proceeds as follows: Part I discusses prevailing conceptions of the practice of law, highlighting its pivotal role in any society. Part II provides an overview of legal process outsourcing – what it is, and how it is being practiced. A thorough appraisal is presented in Part III, citing the advantages and disadvantages of outsourcing from the operational, legal, and ethical standpoints. Part IV then examines the dynamic between outsourcing and the legal profession, resulting in what will be referred to as the 'corporatization' of law. Finally, the paper concludes with an evaluation of whether or not to accept legal process outsourcing as a nascent trend in the legal community.

I. NATURE OF THE PRACTICE OF LAW

In *Cayetano v Monsod*,[10] the Court described the practice of law as 'any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience.' Generally, it is 'to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill.'[11] In support of its claim, the Court cites *Philippine Lawyers Association v Agrava*[12] where the Court ratiocinated,

---

[8] *Id.*

[9] L.S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1384 (1998).

[10] G.R. No. 100113, September 3, 1991.

[11] *Id.*

[12] 105 Phil. 173,176-177.

> Practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs... **No valid distinction**, so far as concerns the question set forth in the order, **can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office.'** (emphasis supplied)

Then again, carving out what the practice of law means is one thing; delineating how it ought to be discharged is another. In her dissenting opinion in *Presidential Commission on Good Government v Sandiganbayan*,[13] Justice Carpio-Morales qualified categorically '...the law is not (a) trade nor a craft but a profession, a noble profession at that.' Stressing the need to maintain its integrity, she expounds,

> The practice of law is a profession, a form of public trust... **If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize** that the legal profession is a profession and not a trade, and **that the basic ideal of that profession is to render public service and secure justice for those who seek its aid... The gaining of a livelihood is not a professional but a secondary consideration...**[14] (emphasis supplied)

Starkly juxtaposed with business or trade, the legal profession has four distinct attributes. First, its duty is one of public service. Emolument is a mere by-product, and one may attain the highest eminence without making much money. Second, as officer of the court, lawyers play a critical role in the administration of justice, and the practice of law involves thorough sincerity, integrity, and reliability. Third, it has a fiduciary relation in the highest degree to the client. Fourth, the

---

[13] G.R. No. 151809-12, April 12, 2005.

[14] *Id.,* (J. Carpio-Morales dissenting, *citing* R. AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT 3-5 (2004).

values of candor, fairness, and unwillingness to resort to current business methods of advertising are inculcated in those who choose to practice law.[15]

Needless to say, the privilege to practice law requires individuals to be competent not only intellectually and academically, but morally as well. Lawyers are expected to act with honesty and integrity in their professional dealings in a manner beyond reproach at all times. Their basic ideal is to secure justice for those who seek their aid, and not to reap large profits from the service they render.[16]

That there appears a business-profession interface in the practice of law can be explained by its dual role in society – democratic and economic. On the one hand, the practice of law plays a democratic function: to protect the architecture of democratic institutions and individual rights, and maintain the balance of power in pursuit of promoting human dignity, autonomy, fairness and well-being. On the other, it has a role in supporting efficient market transactions by facilitating contractual and organizational economic relationships in finance, innovation, production and trade. [17]

From a recognition of these democratic and economic functions of the practice of law eventually came an advocacy for prospective lawyers to merge the role of *corporation lawyer* and *people's lawyer*.[18] This resulted in the conception of the *lawyer-statesman*[19] who advises corporations on business matters and takes on the function of 'curbing the excesses of capital'[20] owing to his/her judicial and public-spirited perspective that the capitalist lacks.[21]

---

[15] *Id.*

[16] *Id.*

[17] G.K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 2008 UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL LAW AND ECONOMICS WORKING PAPER SERIES 101, 114 (2008).

[18] L.D. BRANDEIS, BUSINESS – A PROFESSION 313, 321 (1914).

[19] A.T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 322 (1996).

[20] *Id.*, at 323.

[21] D. Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717 (1988).

However, in today's era of globalization where even the practice of law has shifted from domestic to being outsourced offshore, the relevance and necessity of preserving the core values of the profession are now in question. To resolve this dilemma, one must answer what outsourcing is vis-à-vis the legal community, and how it is optimized by foreign firms. These questions shall be addressed in the next part of the paper.

II. AN OVERVIEW OF LEGAL PROCESS OUTSOURCING (LPO)

Who would have thought that even professions such as medicine, which require face-to-face interaction between the doctor and the patient, can now be practiced remotely with the aid of technological breakthroughs?[22] With these advancements, geography has almost become an extraneous variable in the efficient allocation and discharge of certain tasks.[23] Tasks which are of legal nature are no exception.

A. DEFINING LPO

To date many corporations continue to set up 'captive centers', or to relocate part of their legal department to countries where labor cost is often fifteen to twenty percent of what their domestic counterparts charge.[24] This trend is also known as legal process outsourcing, or 'the use of foreign lawyers to conduct, perform and apply domestic law, most often for cost-saving purposes.'[25] Recent studies reveal that the foremost host countries of LPO are the Philippines and India.[26] However, owing to possible negative press and public backlash, some

---

[22] M. Cross, *Face to Face With the Future of Remote Medical Consultations*, THE GUARDIAN, Feb. 7, 2008, *available at* http://www.guardian.co.uk/technology/2008/feb/07/it.research; Symposium, *Telemedicine and the Commoditization of Medical Services*, 10 DEPAUL J. HEALTH CARE L. 131 (2007).

[23] J. Bhagwati et al., *The Muddles over Outsourcing*, 18 J. ECON. PERSP. 93, 94 (2004).

[24] Cathleen Flahardy, *Overhyped, Underused, Overrated: The Truth About Legal Offshoring*, CORP. LEGAL TIMES, July 2005, *available at* http://www.mindcrest.com/news-events/mindcrest-oldnews/97.

[25] Borsand & Gupta, *supra* note 5, at 3.

[26] *Id.*

foreign companies still have misgivings about having their legal work outsourced to a company outside their home country.[27]

B. LPO MODELS

There are four models of LPO. These include the following: (1) the middleman control model; (2) the in-house model; (3) the firm-to-firm model; and (4) the international contract lawyer model.[28]

1. Firm-to-Middleman Model

Under this model, a foreign law firm or corporation contracts with an outsourcing provider that facilitates overseas operations. Usually, the providers have a physical site in the host country where the outsourcing takes place. They hire staff and design information technology systems in support of certain tasks. Although they normally have supervisory functions, in some cases, the foreign law firm retains control of the daily affairs of the overseas operation.[29]

2. In-House Model

Under this model, a foreign corporation transfers part of its in-house legal operations to a host country, which offers lower wages, making use of local attorneys to perform the legal work. This is exemplified by the two divisions of General Electric, plastics and corporate finance, which have outsourced some of their legal work to the company's office in Guragon, India since late 2001.[30]

---

[27] D. Brook, *Are Your Lawyers in New York or New Delhi?* LEGAL AFF. MAG. (2005), http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp. *See* ROBIN ELSHAM, OFFSHORING LEGAL WORK: U.S. CORPORATIONS WARM TO CONCEPT, PUTTING PRESSURE ON U.S. LAW FIRMS, LEGALEASE SOLUTIONS, LLC, *available at* http://www.legaleasesolutions.com/news/offshoring_legal_work.html.

[28] Pollak, *supra* note 7, at 106.

[29] Jennifer Fried, *Offshore Outsourcing Hits the Legal Market*, DEL. L. WKLY. (PHILA.), Sept. 1, 2004, at D5.

[30] *Id.*

3. Firm-to-Firm Model

Under this model, the foreign firm contracts with an already-established overseas firm. Some firms may prefer this model because it enables them to deal directly with an established, reputable law firm in another country that has the relevant legal expertise.[31]

4. International Contract Lawyer Model

A final outsourcing model involves the use of the home country's licensed attorneys who reside overseas. Under the model, the firm either contracts out work directly to an overseas attorney or relies on a middleman to recruit qualified lawyers. For the most part, this is not a viable model because instances of Western lawyers living abroad is sporadic, occurring when lawyers emigrate for climate, cost of living, or to follow a spouse abroad.[32]

What model is best for the law firm of the home country depends on the needs of the firm and its ability to transcend the challenges that come with LPO. Hence, knowledge of the advantages and disadvantages of LPO is imperative. The next part of the paper is an appraisal of these challenges from three standpoints – operational, legal, and ethical.

III. ADVANTAGES AND DISADVANTAGES OF LPO

A. OPERATIONAL CONSIDERATIONS

Foreign companies or firms perceive two main advantages in outsourcing work to countries such as India and the Philippines. These are convenience and

---

[31] *Id.*

[32] *Id.*

cost-savings.[33] With outsourcing abroad, the outsourced worker is able to perform the required tasks on a schedule that meets the company's or firm's needs.[34] To illustrate, the time difference between the U.S. and countries to which work is outsourced provides a convenience to U.S. law firms and gives the lawyer a sense of operating on a 24-hour-basis.[35]

Foreign companies also realize a financial advantage as the outsourced work is completed at lower rates,[36] with lower specific costs associated with employee salaries and office space rent than those incurred domestically.[37] Despite the occasional price markup of outsourced work, 'lawyers say that the financial incentive of outsourcing legal work is the factor that most impresses their clients.'[38] U.S. law firms typically bill for paralegal services at as much as $150 per hour to review, sort, and index documents in preparation for trial. In contrast, a Filipino lawyer can perform the exact same tasks for as little as $30 per hour. These numbers are tempting to the bottom-line conscious legal profession in light of the exorbitant costs associated with litigation.[39]

B. LEGAL CONSIDERATIONS

LPO, albeit nascent, also needs to be governed by law at an international level. This sub-section of the paper surveys three international agreements and analyzes whether their frameworks serve to restrict or to facilitate international legal outsourcing.

---

[33] Proctor, *supra* note 4, at 20.

[34] *Id.*

[35] H. Coster, *Briefed in Bangalore, First, Call Centers. Then, Back Office Operations. Now, Legal Services Are Moving Offshore. Will India's Lawyers Help Reshape the U.S. Legal Market?*, AM. LAW. 98 (2004).

[36] Proctor, *supra* note 4, at 20.

[37] J.S. Chanen, *Moving to Mumbai: More Firms Are Outsourcing Support Services to India. Will Legal Work Be Next?*, 90 A.B.A. J. 28 (2004).

[38] Coster, *supra* note 35, at 99.

[39] C.D. Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or "Flattener"?* 14 TEX. WESLEYAN L. REV. 167, 172 (2008).

1. General Agreement on Trade in Services (GATS)

In response to "the growing importance of trade in services for the growth and development of the world economy,"[40] GATS as an international treaty aims to provide a legal framework for international outsourcing.[41] Although all WTO member countries are signatories, not all have agreed to abide by the entire agreement nor do all countries recognize legal services as a service covered by GATS.[42]

Consistent with the principles of globalization, GATS is committed to a liberalization of trade in legal services. To illustrate, while licensing requirements for the practice of law remain domestically controlled, nevertheless GATS requires regulatory measures such as admission, licensing, and discipline measures to be administered in a reasonable, objective, and impartial manner, and that qualification requirements be not more burdensome than necessary.[43] As an added safeguard, GATS also requires member countries to "provide for adequate procedures to verify the competence of professionals of any other Member."[44] As long as these requirements do not become 'more burdensome than necessary,'[45] bar associations may continue to regulate licensing of foreign lawyers.

Moreover, GATS allows members to "recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country... (which) may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously."[46] Where lawyer licensing is regulated on a state level, states enter into agreements to facilitate the

---

[40] General Agreement on Trade in Services, *33 I.L.M. 28, 48 (1994)* [hereinafter GATS].

[41] L.S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 998 (2001).

[42] Trade Organization, The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, *available at* http://www.wto.org/english/tratop e/serv e/gatsqa e.htm (last visited Sept. 17, 2004); Terry, *supra* note 41, at 999.

[43] L.S. Terry, *supra* note 41 at 1002.

[44] GATS, *supra* note 40, art. VI, ß 6.

[45] *Id,* art. VI, ß 4(b).

[46] *Id,* art. VII, ß 1.

multi-jurisdictional practice of law. One attempt to create such an agreement is the one reached in 1994 between the American Bar Association and the Brussels Bar.[47] Said accord could serve as a model for future agreements with countries such as the Philippines where outsourced lawyers reside.

2. American Bar Association (ABA)-Brussels Bar Agreement (Agreement)

Hoping to negotiate agreements requiring foreign lawyers to register with one of the Brussels Bars and binding them to the Brussels Bars' ethics rules, the Brussels Bars approached several different bar associations in 1992.[48] They sought to address the risk of confusion on the part of clients and the perception that foreign lawyers were unfairly advantaged as they were not bound by restrictive Brussels ethics rules on advertising.[49] A case in point, one need not be licensed as a lawyer in providing legal advice in Belgium.[50]

After two years of negotiations, representatives of the ABA and the French and Dutch Orders of the Brussels Bar reached an agreement addressing the concerns abovementioned.[51] While compliance is voluntary, the Agreement is considered as an important first step towards addressing multi-jurisdictional practice issues.[52]

3. North American Free Trade Agreement (NAFTA)

Similar to GATS, NAFTA seeks to promote the trade of goods and services among the neighboring nations of U.S., Canada and Mexico. Signed in

---

[47] Agreement between the American Bar Association and the French Language Order and the Dutch Language Order of the Brussels Bar (Aug. 6, 1994) [hereinafter Brussels Agreement], reproduced in Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1384 (1998).

[48] Brussels Agreement, *Id.*, at 1407.

[49] *Id,* at 1406.

[50] *Id,* at 1401.

[51] Terry, *supra* note 41, at 1003.

[52] Brussels Agreement, *supra* note 47, at 1426.

1994, it also aims to address cross-border legal services. Specifically, it calls upon the member states to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations.[53] In 1998, the bar associations of the member states issued a joint report and model rule proposal.[54] The rule requires lawyers wishing to practice in a foreign jurisdiction to apply for a permit by demonstrating that they are in good standing in their home bar and complying with other criteria.

Both NAFTA and the joint opinion conceive of lawyers wishing to practice in foreign jurisdictions as 'foreign legal consultants.' They include those whose purpose is to offer advice on the laws of their home country, but are restricted by practice regulations.[55] Thus, as a general rule, foreign lawyers who are physically present in the U.S. may not advise clients on U.S. law or state law nor otherwise practice U.S. law. An exception to the proposed rule is when the foreign legal consultant is permitted to do so by the host country.[56] Moreover, a foreign lawyer may act as an arbitrator or as counsel in an arbitration under the proposed model rule.[57] Notwithstanding these restrictions, the proposed model rule is a useful tool for understanding the concerns of the various bar associations on the issue of LPO.

C. ETHICAL CONSIDERATIONS

Quite evidently, ethical concerns arise with the outsourcing and offshoring of legal work. The most notable of which are the following: (1) avoiding conflict of interest; (2) protecting confidentiality of information in

---

[53] North American Free Trade Agreement, Dec. 17, 1992, ch. 12, annex 1210.5(b) [hereinafter NAFTA].

[54] Joint Recommendations of the Relevant Canadian, Mexican and American Professional Bodies under Annex 1210.5, section B, (June 19, 1998) *available at* http://www.nysba.org/MSTemplate.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=2727&MicrositeID=60 [hereinafter Proposed Model R.].

[55] Proposed Model R. 6-7, *Id.*.

[56] Proposed Model R. 9, *Id.*

[57] Proposed Model R. 8a, *Id.*

relation to client representation; (3) adequate lawyer supervision; and (4) disclosure to client.[58]

1. Conflict of Interest

The rule on conflict of interest seeks to maintain a lawyer's loyalty and independent judgment in relation to his/her client.[59] As provided in Canon 15 of the Code of Professional Responsibility, 'a lawyer shall observe candor, fairness, and loyalty in all his dealings and transactions with his clients.'[60] In Nakpil v. Valdes,[61] the Court held that the test to determine whether there is a conflict of interest in the representation is probability, not certainty of conflict.[62] There is conflict of interest when:

> ...there is an inconsistency in the interests of two or more opposing parties. The test is whether or not in behalf of one client, it is the lawyer's duty to fight for an issue or claim but it is his duty to oppose it for the other client. In short, **if he argues for one client, this argument will be opposed by him when he argues for the other client**...[63] (emphasis supplied)

Clearly, the use of outsourcing raises potential ethical issues in terms of conflicts of interest. The risk of conflicts of interest increases as lawyers move from one firm to another firm, which represents the opposing side in a matter represented by the first firm.[64] The same applies to outsourced lawyers due to the possibility of working with multiple firms and lawyers on a variety of matters.[65]

---

[58] Kadzik, *supra* note 4 at 734.

[59] *Id.*

[60] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 15.

[61] 286 SCRA 758 (1998).

[62] *Id.*, at 773.

[63] Abaqueta v. Florido, A.C. No. 5948, 395 SCRA 569, 574-75, Jan. 22, 2003.

[64] Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1992-126 (1992).

[65] Pollak, *supra* note 7 at 127.

2. Protecting Client Confidentiality

Lawyers are expected to keep all client information confidential. Privileged communications and confidentiality of information are fundamental precepts enshrined in the fiduciary character of the client-lawyer relationship.[66] In the U.S., the principle of client-lawyer confidentiality is given effect by the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics, among others.[67] Problems can arise when foreign workers are employed by domestic firms because some cultures may not understand that revealing confidential client information about a matter handled by the firm can result in an ethical violation.[68]

A more substantial concern is the lack of secure information technology networks. Many U.S. firms have expressed reservations about outsourcing because of the perceived difficulty in maintaining sufficiently high levels of data security when transferring information overseas. Patent lawyers note additional concerns of "violating export control laws by transmitting sensitive or regulated technology information before it is made public by the U.S. Patent and Trademark Office."[69]

3. Providing Adequate Lawyer Supervision

The amount of guidance that the outsourcing company or firm has over the individuals abroad completing the work can have an impact on the ethical issues involved in the outsourcing process. Supervising lawyers with the firm or company have an obligation to make reasonable efforts to ensure that the overseas employee conforms to the rules of professional conduct, including those governing confidentiality of information relating to the representation of a client.[70]

---

[66] Model Rules of Prof'l Conduct R. 1.6(a) (2003).

[67] Model Rules of Prof'l Conduct R. 1.6, cmt. 3 (2003).

[68] M. L. Proctor, *Transactional Law: Considerations in Outsourcing Legal Work*, 84 MICH. B.J. 20 (SEPT. 2005).

[69] Molly McDonough, *IP Goes Indian*, 3 A.B.A. J. eReport 16 (2004).

[70] Darshana T. Lele, *Outsourcing of Legal Work Is Growing, But There's Still Little Ethics Guidance*, LAW.

Outsourcing raises ethical issues in providing adequate supervision because it is difficult for a supervising lawyer to maintain satisfactory supervision over an employee working in another country. It is unlikely that the supervising lawyer will have direct contact with the overseas employee; therefore, it is important that the supervising lawyer clearly explain all U.S. ethical rules and ensure that the employee complies with those rules. Further, the supervising lawyer should oversee all work completed by the employee and be willing to take full responsibility for the final product.[71]

4. Disclosure to Client

The outsourcing model raises several disclosure questions. Must the U.S. firm disclose that it employs outsourced lawyers generally? Must it disclose this information for each specific project and client involved? Must the client consent prior to hiring an outsourced lawyer? Do disclosure obligations run to parties beyond the firm's client?[72]

As a general rule, a client is entitled to know who or what entity is representing the client.[73] Although it seems that the rule would require that firms engaging in outsourcing inform their clients, the way this rule has been applied to temporary lawyers makes the issue of disclosure unclear. The ABA, through Formal Opinion 88-356, has made it clear that where a temporary lawyer is providing work for a client without the close supervision of a lawyer associated with the law firm, the client must consent to this arrangement. However, if the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the temporary lawyer's work on the client's matter does not need to be disclosed to the client.[74]

MANUAL PROF. CONDUCT, June 15, 2005, at 316.

[71] Kadzik, *supra* note 4 at 736.

[72] Pollak, *supra* note 7 at 131.

[73] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988); MODEL RULES R. 7.5(d).

[74] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

It is therefore unclear whether clients of a law firm must be informed that a portion of their legal work is being outsourced abroad to individuals employed by the firm. Additionally, it is questionable whether other information relating to the arrangement between the firm, the outsourced foreign-worker, and the third-party vendors to whom the work is being outsourced needs to be divulged to the client.[75]

IV. CORPORATIZATION OF THE PRACTICE OF LAW

Quite remarkably, the advent of LPO has come at a time when firms are also experiencing increased pressure on two fronts – one from clients and another from globalization itself. [76] These concurrent forces eventually led to the restructuring of the legal industry, resulting in what is known as the *corporatization* of the practice of law.[77]

A. PRESSURE FROM CLIENTS

The profitability of law firms is determined by six factors – productivity, leverage, rates, realization, lawyer growth, and expenses. Of these, the only 'lever of profitability' that appears to have worked in recent years as a significant driver of law firm profits has been rates or those primarily charged to corporations for the firms' services. However, limitations on the ability of firms to continue to increase rates are becoming apparent. Clients are gradually pushing back on the regular fee increases that firms used to impose in the past.[78]

---

[75] *supra* note 4.

[76] A. Sechooler, *Globalization, inequality, and the legal services industry*, 15 INT'L J. OF THE LEGAL PROFESSION 241 (2008).

[77] Niki Kuckes, The Short, Unhappy History of How Lawyers Bill Their Clients, Legal Affairs, October 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/review kuckes sepoct2002.msp; Bill Myers, Lateral Hiring Finds Favor in Chicago Firms, Chicago Daily L. Bull., April 18, 2005, *available at* http://kellogg.northwestern.edu/news/hits/050418cdlb.htm.

[78] Hildebrandt International (2007) 2007 Client Advisory (Chicago: Hildebrandt International), *available at*: http://www.hildebrandt.com/Documents.aspx?Doc_ID¼2508 (Apr. 14, 2007). P.6

In addition, law firm clients are taking measures to increase their control over their legal work. There has been a long-term trend of increasing reliance on in-house counsel for matters that would formerly have been delegated to outside counsel.[79] Moreover, corporate legal departments are engaging in 'efforts to reduce the number of firms with whom they do business.'

B. PRESSURE FROM GLOBALIZATION

Firms have responded to economic globalization by globalizing their practices. Transnational trade in legal services has expanded rapidly. Although law firms can benefit from outsourcing certain tasks, their ability to cut costs in offshoring legal services is fundamentally limited. There are two types of service outsourcing available to firms, both of which are present in LPO.[80]

The first refers to *vertical disintegration*, which occurs 'when a firm decides to buy rather than make, when it is cheaper to source inputs that go into the firm's final product or service in the market than make them in-house.'[81] An example of this form of LPO is when firms send work abroad such as document review, legal research, technical patent work, and, in some cases, even drafting briefs. However, the optimal use of vertical disintegration is curbed by regulations which typically limit who can practice law and from where it can be practiced. While considerable vertical disintegration is possible through offshoring, supervision of a licensed attorney in the appropriate jurisdiction is required. Also, the work cannot be represented as 'legal advice' *per se*.[82]

The second form of LPO is *unbundling of corporate functions*. This occurs through the outsourcing of 'business processes within corporate functions, rather

---

[79] GALANTER, M. & T. PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 49-50 (1991).

[80] M. Sako, *Outsourcing and Offshoring: Implications for Productivity of Business Services,* 22 OXFORD REVIEW OF ECONOMIC POLICY 4 (2006).

[81] *Id.,* at 504.

[82] Sechooler, *supra* note 76 at 242.

than of inputs that go into the final product or service of a company.'[83] This is exemplified by firms seeking to lower administrative costs by shifting 'back-office' work abroad.

In comparing the benefits that can be derived from the two kinds of LPO, firms generally stand to benefit more from the latter than from the former.[84] This is because law firms substantially earn their profits through their hourly billing system for services rendered by highly qualified experts. Hence, the possibility of law firms saving money from offshoring legal work is limited. Due to ethical requirements, firms ought to disclose to their clients who is doing the work and to bill accordingly. Not surprisingly, these ethical requirements can strictly hold in check the extent to which firms can have more work done overseas. To underscore the point, the New York City Bar Association opined,

> By definition, **the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees**... Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service. [85] (emphasis supplied)

Thus, while law firms can reduce labor costs by offshoring administrative tasks, there are limits to how much they can obtain savings from offshoring legal work. Firms that are willing and able to offshore legal work may be able to secure a competitive advantage over firms that are unwilling or unable. However, the expected rise in offshoring legal services can be better appreciated as the result of increased pressure from corporate clients to cut costs, and not of increased law firm profits. Consequently, offshoring of more sophisticated legal work is resorted

---

[83] Sako, *supra* note 80 at 505.

[84] Sechooler, *supra* note 76.

[85] New York City Bar (2006) Formal Opinion 2006-3 (New York: New York City Bar), *available at:* http://www.nycbar.org/Ethics/eth2006.htm(May 5, 2007).

to more frequently by corporate law departments than by law firms.[86]

From its beginnings, the structure of the big firm contained a seed of its undermining. Combined with exogenous factors, the 'partnership tournament' led to considerable firm growth, which undermined the partnership structure of firms. Changes in the law business continue to push firms away from a true partnership model, towards a structure resembling a large corporation. To cut costs and improve profits, firms will continue to expand the use of 'employees' and contract labor.[87]

CONCLUSION

In his book *The Law: Business or Profession?*,[88] Julius Henry Cohen notes the organizational structure of the law firm, having departments as many as there are branches of the law it practices in. The firm would also have a comprehensive library and a long list of senior or junior partners, each with his/her own particular specialty, a managing clerk, and a cluster of assistants, typewriters, telephone operators, secretaries, bookkeepers, and cashiers. As Cohen sees it, 'the lawyer's office is an office for the transaction of modern business.'[89]

The increasing number of large law firms serving the interests of business clients represents one of the most dangerous symptoms of the commercialization of the practice of law. The increasing alliance between lawyers and business poses a more practical and detrimental effect on the ethical conduct of lawyers. In a speech addressed to the ABA in 1910, Woodrow Wilson lamented lawyers' abandonment of their role as statesmen. Specifically, he stressed,

> Has not the lawyer allowed himself to become part of the industrial

---

[86] Brook, D. (2005) Made in India, Legal Affairs, May/June, *available at*: http://www.legalaffairs.org/issues/May_June/scene_brook_mayjune05.msp (April 14, 2007).

[87] ABEL, R., AMERICAN LAWYERS 235 (1989).

> development, has he not been sucked into the channels of business, **has he not** changed his connections and **become part of the mercantile structure rather than part of the general social structure of our commonwealths as he used to be?**[90] (emphasis supplied)

Globalization, combined with pressures on firms, means that firms will likely see continued movement toward a more corporatized structure. Partners may come to resemble other capitalists, with firms resembling closely held corporations rather than true partnerships. Perhaps more importantly, law firms themselves are coming under greater control of the corporations they service.

Indeed, flattening the world has influenced legal minds into creating novel approaches to service the same, if not greater, number of clients with less costs. However, this has come at the expense of tainting the noble culture of the legal profession. Even LPO host countries should be wary of the effects of such trend on their legal culture and not be content with their economic gains.

Perhaps, Columbus shared the same sentiment, which led him to challenge the early belief that the world was flat. Maybe, Columbus used to be a lawyer himself – a discovery *not* as shocking as flattening the legal profession.

-o0o-

[90] *Id.*