



## At Sidebar

by John Okray

# Legal Process Outsourcing— Coming to a Practice Area Near You?

### To the general counsels and law firm partners that

have championed legal process outsourcing (LPO) and to attorneys in other practice settings who think offshoring will never affect them, lyrics from a rock classic may be a premonition:

*All our times have come  
Here but now they're gone...  
Don't fear the reaper*

—Blue Oyster Cult

### Ten Years Ago

When I worked at a bank/trust company, we prepared various federal tax returns for our clients, such as fiduciary, estate and gift, partnerships, etc. These returns could be very time consuming. Since we had a small staff, we often hired outside tax preparation firms to assist us. Keep in mind tax rules, regulations, and interpretations change from year-to-year, and we were not preparing straightforward returns, such as 1040EZ forms.

After hearing stories from colleagues about receiving returns containing errors from outside preparers, we proposed standard language in our vendor contracts, essentially stating that no client information could be sent to a subcontractor or transmitted outside of the United States. Frankly, I was surprised to learn that many vendors were using personnel or subcontractors in emerging market countries to do a material amount of work preparing these complex returns.

This raised a number of questions. What are the educational standards and requirements of these professionals? Do they have the same ethics requirements and protections as U.S.-based attorneys or certified public accountants? What about privacy and confidentiality concerns? Would this arrangement increase the risk to our company, its professionals, and/or our clients? Is it reasonable and appropriate to send this work offshore? Is such an arrangement in the best interest of clients? On a related note, the vendors who were using offshore personnel were only disclosing this practice after we requested the contractual language described above, and their fee schedules were not less than the firms who did not send their work offshore.

### Current Scope of LPO

Fast forward to today. I recently received an invitation to a conference sponsored by an association involved in promoting global LPO. It piqued my curiosity more about current trends. According to the 2012 Deloitte Corporate Counsel Survey:

The opportunities for outsourcing in general, including offshore, are improving fast, with new technologies enabling access to a broader range of services from more countries than ever before. Outsourcing of legal work—by Corporate Counsel and their in-house legal teams, as well as by legal firms themselves—is not necessarily new but has become an increasingly important business process. And the legal profession has generally lagged behind other industries when it comes to outsourcing, including offshoring. Led by the US and UK, and the need to access better value and greater flexibility, outsourcing has become more popular as the industry offering has become more sophisticated and able to address traditional concerns around quality, security and risk mitigation in general. With 96% of respondents saying they outsource legal tasks to external providers, outsourcing for in-house lawyers is clearly the rule rather than the exception.<sup>1</sup>

You might think LPO is limited to ministerial functions not involving substantive work. Not so. One offshore LPO vendor website<sup>2</sup> and another industry article<sup>3</sup> promote the following services to law firms and corporations:

- Serving as outside general counsel
- Advising boards and senior management on legal risks
- Legal motions in the prescribed format
- Drafting, reviewing, negotiating, and managing contracts
- Preparing bankruptcy petitions (Chapters 7, 11, and 13)
- Legal publications
- Patent applications
- Immigration visas
- Incorporating businesses
- Drafting compliance and supervisory procedures
- Performing legal due diligence

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- Assisting in regulatory examinations
- Document review and e-discovery management
- Legal research and drafting for personal injury, medical injury, premises liability, accident, insurance litigation, employment law, mortgage law, and estate planning
- Proficient, precise, and comprehensive legal research for each of the different U.S. jurisdictions, using LexisNexis, WestLaw, online legal journals, etc.

### **Chief Legal Officers (CLOs)—Hunters Become the Hunted**

Many corporations have endorsed the use of offshore legal services to reduce costs. As companies transition more of their legal work offshore, at some point are those same companies compelled to consider whether the CLO/general counsel's office should also be offshore—to realize additional savings and to better supervise the legal work being performed outside of the United States? For example, executive and director compensation has remained a concern for shareholders of public companies. The 10 general counsels with the highest cash compensation at U.S. public companies had average total take home pay, including exercised stock options, of more than \$7.2 million in 2012.<sup>4</sup> Considering attorneys in India<sup>5</sup> earn, on average, less than US\$22,000 per year<sup>6</sup>, corporations could reduce operating costs through the natural extension of LPO to the CLO's office. As previously referenced, LPO providers are already advertising their outside general counsel capabilities.

### **Will Shareholders Scrutinize the Boardroom?**

While this article touches on executive compensation, an analysis of corporate directors and their compensation is equally fair game for shareholders to study. Corporate directors will often receive sizeable cash retainers, committee or committee chair retainers, equity grants, meeting attendance fees, or perquisites (medical and dental benefits, personal use of aircraft, spouse travel, matching gifts to charitable organizations, life insurance, tax gross ups, etc.). In 2012, full-value equity awards to directors at the top 100 companies ranged between \$41,000 and \$880,000, and 84 percent of the top 100 companies provided directors annual cash retainers between \$60,000 and \$150,000.<sup>7</sup> For lead directors or non-executive chairmen of top 100 companies, their annual retainers reached as high as \$408,424 and \$1,015,438, respectively.<sup>8</sup>

Shareholders continue scrutinizing companies with say-on-pay votes and other policies aimed at avoiding excessive compensation. To address this concern, as companies move more of their operations and highly skilled professional services offshore, can the same synergies be obtained with offshore directors? They might better understand the risks, customs, and business opportunities, including offshoring, in their own parts of the globe. Let us not forget, their compensation requirements would likely be far less, contributing to the company's bottom line. According to the India Board Report 2011, nonexecutive director compensation in India was less than US\$18,000 per year in more than half of the companies surveyed.<sup>9</sup> And unlike attorneys, there is not rigorous training or licensing requirements for corporate directors. On May 20, 2011, India's Ministry of Corporate Affairs published two circulars clarifying that shareholders and directors participating via videoconference in shareholder and board meetings, respectively, counted for purposes of satisfying meeting quorum requirements.<sup>10</sup> The intent was to facilitate the participation of foreign shareholders and directors with Indian companies; this same approach could be adopted for U.S. companies to attract and

retain board members living outside of the United States and reduce travel-related perquisite expenses.

As companies further globalize their operations, the definition of a well-diversified board of directors may also evolve. If a company has many of its professionals/professional services based in India and manufacturing and suppliers based in China, should it also have one or more well-qualified directors from/based in each of these countries? In terms of director recruitment, a well-respected executive from a company based in Boston might not bring the same insight and personal knowledge to a discussion of whether a company should expand its mining operations in Guinea as opposed to an executive who actually lives and works there.

### **The Judiciary—An Unlikely Target (In a Good Economy...)**

Just consider, if U.S. law firms and corporations have established a proof of concept that LPO is a best practice and the future of the legal profession, will proponents stop there? You often hear about the backlog in U.S. courts, not to mention the federal deficit and debt. For example, as of June 2013, U.S. courts had more than 300,000 pending immigration cases, with an average wait time of 560 days.<sup>11</sup> Acting out of desperation to further reduce federal spending, could the law be changed to allow parties to appear "before" a judge in an emerging market country via videoconference? To address Constitutional or other concerns, perhaps a U.S. judge could "oversee" the administration of the program the way U.S.-based companies and law firms supervise legal work they send offshore.

Everyone agrees that federal judiciary vacancies are a major concern today—could the problem be solved by offshoring to reduce the caseload? Some companies are using online auctions to get the lowest price for their outsourced legal services—could the courts do the same? Proponents could cite the reduction in case backlog and the potential savings to taxpayers. Alternative dispute resolution—who needs a former U.S. judge if you can find trained professionals in emerging market countries to perform an arbitration or mediation for a fraction of the price using videoconferencing and other technologies? LPO for the judiciary may sound far-fetched today, but it was similarly inconceivable for in-house counsel and law firm attorneys not too long ago.

### **Impact on Attorney Compensation and U.S. Law Students**

You might ask what the downsides are to all of this potential offshoring activity. For example, would this depress attorney wages and reduce employment opportunities in the United States? This could be particularly concerning for current law students. Among the 10 law schools with the most student loan debt, the average student indebtedness was \$147,717.<sup>12</sup> This burden is directly related to tuition costs. The average annual in-state public law school and private law school tuitions have risen from \$2,006 and \$7,526 in 1985 to \$22,116 and \$39,184 in 2011, respectively, far outpacing inflation.<sup>13</sup>

Like the "problem" of U.S.-based attorneys' compensation for law firms and corporations, salaries and benefits of professors are major expenses for law schools. Salaries and summer stipends for tenured professors can approach \$200,000 per year, not including fringe benefits.<sup>14</sup> Do state-run and private not-for-profit law schools need to be more accountable and adopt for-profit models similar to corporations? Like some corporations and law firms, should law schools investigate offshoring using videoconferencing? Do U.S. law schools need hundreds of professors teaching very similar contracts courses concurrently? U.S. schools at all levels are embracing teaching via vid-

eoconferencing. How hard could it be to add on-demand core course lectures from Harvard Law School to KhanAcademy.org? Again, compensation requirements would be far less, and the savings could go directly to the school's bottom line. What about professor tenure? Perhaps this concept will follow the fate of defined benefit pension plans in our society. Participating law firms and corporations have endorsed the quality of legal education in many foreign jurisdictions through their increasing use of LPO. According to the 2009 *Legal and Accounting Outsourcing to India* report:

Forrester Research projects that by 2015 more than 79,000 U.S. legal jobs will be offshored... It is estimated that Indian lawyers charge about 15–25% of that charged by their American counterparts. ... With Indian LPO growing at a steady rate, the industry is projected to achieve the \$4 billion mark by 2015. LPOs in India are making huge profits due to the large amount of litigation work that is coming from the U.S. In India, the employees work in state-of-the-art facilities at 1/43<sup>rd</sup> the cost of comparable space in major U.S. cities. ... There are about 200 million college educated, English speaking Indians. There is never a shortage of attorneys as there are 500 law colleges and about 200,000 law students graduating every year.<sup>15</sup>

Thus, law schools may have an opportunity, or be compelled, to tap into this talent pool, lower their overhead, and increase funds for scholarships and/or decrease tuition. Lower starting salaries for U.S. law school graduates could be offset in part by lower student loan indebtedness. Additionally, as the United States increases its use of attorneys from developing markets, these countries may liberalize their admission and practice requirements so that U.S.-based attorneys can practice law in their jurisdictions. As the wage gap between U.S. and foreign attorneys closes over time due to increased global supply and reduced domestic demand, this may be a more realistic option for U.S.-based attorneys seeking legal employment. In the near term, the continued liberalization of multijurisdictional practice rules to permit individuals who have received their primary law degrees from non-U.S. law schools to practice law in U.S. jurisdictions is likely.

If you can't beat them, join them. Some U.S.-based firms are trying to compete with offshore LPOs by offering low-cost domestic LPO services:

Wage inflation abroad and soft labor markets domestically in the United States and United Kingdom have significantly narrowed the cost differential for the legal professionals performing LPO services. Frontierion has observed that offshore LPOs charge clients \$25–35 per hour for basic legal services while contract review attorneys in the U.S., particularly in the Midwest, often are charging comparable rates of \$25–30 per hour.<sup>16</sup>

## Looking Ahead

Will all of this offshoring of U.S. jobs hurt the middle class, reduce consumer spending power, and/or reduce income tax collections by federal and state governments? Or is LPO a rising tide that will lift all boats? It would seem counterintuitive for corporations and law firms to knowingly harm the sustainability of the country's long-term economy in pursuit of short-term profits.

Is the push by some toward LPO an overzealous approach to maximize shareholder value at any cost? In 2009, Jack Welch, chairman and

CEO of General Electric between 1981 and 2001, said, "On the face of it, shareholder value is the dumbest idea in the world. Shareholder value is a result, not a strategy ... your main constituencies are your employees, your customers and your products. Managers and investors should not set share price increases as their overarching goal. ... Short-term profits should be allied with an increase in the long-term value of a company."<sup>17</sup> Interestingly, some credit GE Plastics as being the first U.S. corporation to outsource legal services in 2001.<sup>18</sup>

Alternatively, is LPO part of a global socialist conspiracy to redistribute America's wealth so workers of the world enjoy equal pay? After all, Vladimir Lenin reportedly said, "The capitalists will sell us the rope with which we will hang them."

Hopefully decision-makers are giving this issue careful consideration and studying the outcomes from other industries that have looked offshore to save money. What has been the long-term impact on those companies, their employees, and the U.S. economy? To LPO proponents who have yet to be personally impacted by LPO:

*The door was open and the wind appeared  
The candles blew and then disappeared  
The curtains flew and then he appeared  
Saying don't be afraid...  
Don't fear the reaper<sup>19</sup> ☺*

## Endnotes

<sup>1</sup>See *Deloitte Corporate Counsel Survey 2012* 7 (Deloitte) available at [www.deloitte.com/assets/Dcom-NewZealand/Local%20Assets/Documents/Services/Forensics/DeloitteCorporateCounselSurvey2012.pdf](http://www.deloitte.com/assets/Dcom-NewZealand/Local%20Assets/Documents/Services/Forensics/DeloitteCorporateCounselSurvey2012.pdf).

<sup>2</sup>See VEE LPO, [www.legalprocessoutsourcing.com](http://www.legalprocessoutsourcing.com) (last visited Aug. 4, 2013).

<sup>3</sup>See *Legal and Accounting Outsourcing to India* INDIA REPORTS (Oct. 2009) [books.google.com/books?id=BFjmdyWQu18C&pg=PA3&lpg=PA3&dq=legal+and+accounting+outsourcing+to+india&source=bl&ots=2KvJEjp70Y&sig=s-ymUOsmOteAHe3e6k-F91Pis8&hl=en&sa=X&ei=3wWRUZSKJYf00gG1u4DwBg&ved=0CFQQ6AEwAQ#v=onepage&q=legal%20and%20accounting%20outsourcing%20to%20india&f=false](http://books.google.com/books?id=BFjmdyWQu18C&pg=PA3&lpg=PA3&dq=legal+and+accounting+outsourcing+to+india&source=bl&ots=2KvJEjp70Y&sig=s-ymUOsmOteAHe3e6k-F91Pis8&hl=en&sa=X&ei=3wWRUZSKJYf00gG1u4DwBg&ved=0CFQQ6AEwAQ#v=onepage&q=legal%20and%20accounting%20outsourcing%20to%20india&f=false). Hereinafter referred to as "India Report."

<sup>4</sup>See *The 2012 GC Compensation Survey* CORPORATE COUNSEL [www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202562613886&The2012GCCompensationSurvey](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202562613886&The2012GCCompensationSurvey) (last visited Aug. 4, 2013).

<sup>5</sup>This article makes several references to offshore legal services in India because of the availability of information about these vendors and for consistency purposes. However, it should be noted that LPO is offered in many major developed and developing markets.

<sup>6</sup>See LLM Info, *Attorney Salaries Around the World*, (Sept. 19, 2012) [llminfo.com/attorney-salaries-around-the-world](http://llminfo.com/attorney-salaries-around-the-world).

<sup>7</sup>See *How Has Compensation Governance Evolved? 10<sup>th</sup> Annual Survey Corporate Governance of the Largest U.S. Public Companies* 49 (Shearman & Sterling LLP, 2012) available at [www.shearman.com/corpgov.com/corporategovernance/DirExecComp2012](http://www.shearman.com/corpgov.com/corporategovernance/DirExecComp2012).

<sup>8</sup>*Id.* at 65.

<sup>9</sup>See Sonia Jaspal, *Can Compensation Committees in India Decide Executive Pay?* SONIA JASPAL'S RISKBOARD (May 19, 2012) [soniajaspal.wordpress.com/2012/05/19/can-compensation-committees-in-india-decide-executive-pay](http://soniajaspal.wordpress.com/2012/05/19/can-compensation-committees-in-india-decide-executive-pay).

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<sup>16</sup>*McNeill v. New York City Dept. of Corr., et al.*, 950 F.Supp. 564, 569-70 (S.D.N.Y. 1996). See also, *Fejes v. Gilpin Ventures, Inc.*, 960 F.Supp. 1487, 1492 (D.Colo. April 25, 1997) (“I conclude that the PDA only provides protection based on the condition of the mother—not the condition of the child. Also, I conclude that breastfeeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”).

<sup>17</sup>*Equal Employment Opportunity Comm’n v. Houston Funding II, Ltd., et al.*, 2013 U.S.App. LEXIS 10933 at \*3 (5th Cir. May 30, 2013), *rev’g* 2012 U.S.Dist. LEXIS 13644 (S.D.Tex. Feb. 2, 2012).

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at \*7.

<sup>20</sup>*Id.* at \*13-14 n. 6.

<sup>21</sup>29 U.S.C. § 207(r)(1)(A).

<sup>22</sup>29 U.S.C. § 207(r)(1)(B).

<sup>23</sup>*Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION (December 2010).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>29 U.S.C. § 207(r)(4). Many states have adopted more favorable provisions for nursing mothers, including the application of such provisions to both exempt and non-exempt employees. See, e.g., 21 V.S.A. § 305 (Vermont) (requiring employer to provide employee with reasonable break time to express milk for three years after the child’s birth); 26 M.R.S. § 604 (Maine) (requiring employer to provide adequate break time to express milk for three

years following childbirth); C.R.S. 8-13.5-104 (Colorado) (requiring employer to provide reasonable break time to express milk for up to two years after birth); H.R.S. § 378-2 (Hawaii) (making it a discriminatory practice to, *inter alia*, refuse to hire, discharge, or penalize lactating employee who breastfeeds or expresses milk at the workplace). For further information on protections afforded under state laws, see National Conference of State Legislatures, *Breastfeeding Laws*, available at [www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx](http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx).

<sup>27</sup>29 U.S.C. § 207(r)(3).

<sup>28</sup>*Salz v. Casey’s Mktg. Co.*, 2012 U.S.Dist. LEXIS 100399, \*7 (N.D. Iowa July 19, 2012).

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 9-10 (internal citations omitted). See also, *Falk v. City of Glendale*, 2012 U.S.Dist. LEXIS 87278, n. 8, 11 (D.Colo. June 25, 2012) (intimating that an FLSA retaliation claim could lie to redress a violation of the break time provisions).

<sup>31</sup>*Falk*, 2012 U.S.Dist. LEXIS 87278, n. 7. This comment is consistent with the Fifth Circuit’s finding in *Equal Employment Opportunity Comm’n v. Houston Funding II, Ltd., et al.*, *supra*.

<sup>32</sup>*Id.* at 14.

<sup>33</sup>Breastfeeding Promotion Act of 2011, H.R. 2758, S. 1463, 112th Cong. (2011).

<sup>34</sup>*Id.*

<sup>35</sup>See *The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite, Easy Steps to Supporting Breastfeeding Employees*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION.

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<sup>10</sup>See Priya Mehra, Jai S. Pathak, *Directors and Shareholders of Indian Companies Are Permitted to Attend Board Meetings and Shareholder Meetings via Video Conference* MARTINDALE.COM (June 8, 2011) [www.martindale.com/corporate-law/article\\_Gibson-Dunn-Crutcher-LLP\\_1293978.htm](http://www.martindale.com/corporate-law/article_Gibson-Dunn-Crutcher-LLP_1293978.htm).

<sup>11</sup>See TRAC Immigration, *Immigration Court Backlog Tool* (June 2013) [trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>12</sup>See U.S. News and World Reports, *Which Law School Graduates Have the Most Debt?* (2013) [grad-schools.usnews.rankings-andreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings](http://grad-schools.usnews.rankings-andreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings).

<sup>13</sup>See American Bar Association Section of Legal Education and Admission to the Bar, *Law School Tuition 1985–2012* [www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/ls\\_tuition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf) (last visited Aug. 4, 2013).

<sup>14</sup>See *2011–2012 SALT Salary Survey*, SALT EQUALIZER, May

2012 available at [www.saltlaw.org/userfiles/SALT%20salary%20survey%202012.pdf](http://www.saltlaw.org/userfiles/SALT%20salary%20survey%202012.pdf).

<sup>15</sup>See India Report.

<sup>16</sup>See *Ten for 2012: Top Ten Trends for Legal Outsourcing in 2012 2* (Fronterion LLC) available at [fronterion.com/wp-content/uploads/2011/12/Fronterion-Ten-For-2012-Top-Ten-Trends-for-Legal-Outsourcing-in-2012.pdf](http://fronterion.com/wp-content/uploads/2011/12/Fronterion-Ten-For-2012-Top-Ten-Trends-for-Legal-Outsourcing-in-2012.pdf).

<sup>17</sup>See Francesco Guerrero, *Welch Condemns Share Price Focus*, FINANCIAL TIMES, March 12, 2009, available at [www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz1eiLpL2PZ](http://www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz1eiLpL2PZ).

<sup>18</sup>See Sasha Boursand, Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance 3* (on file with Pace University) available at [www.pace.edu/seidenberg/sites/pace.edu.seidenberg/files/media/files/ssrn/AG%20Reviewed%20Version3.pdf](http://www.pace.edu/seidenberg/sites/pace.edu.seidenberg/files/media/files/ssrn/AG%20Reviewed%20Version3.pdf).

<sup>19</sup>BLUE OYSTER CULT, (DON’T FEAR) THE REAPER. (Columbia, 1976).

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