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# A COLLABORATIVE MODEL OF OFFSHORE LEGAL OUTSOURCING

Cassandra Burke Robertson\*

*International outsourcing has come to the legal profession. The ABA and other bar associations have given it their stamp of approval, and an ailing economy has pushed both clients and firms to consider sending more legal work abroad. This article integrates research from the fields of organizational behavior, social psychology, and economic theory to analyze the effectiveness of the legal outsourcing relationship. It identifies organizational pressures in the practice of law that affect how legal work is performed in a transnational context, and it examines how individuals on both sides of the outsourcing process influence the success or failure of a globalized practice. Ultimately, the article recommends that parties involved in legal offshoring should move away from a model of disaggregation and toward a model of collaboration. Unlike a disaggregation model that assumes outsourcing vendors will autonomously complete discrete legal tasks, a collaborative model would explicitly focus on cooperation, communication, and renegotiation of status and resources.*

## INTRODUCTION

In the spring of 2010, the dismissal of a libel case involving Sacha Baron Cohen's "Ali G" character was affirmed on appeal.<sup>1</sup> By itself, the dismissal was nothing unusual; Cohen's comedic style has made him a target for defamation lawsuits arising from the films *Borat*, *Bruno*, and the television

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\* Associate Professor, Case Western Reserve University School of Law. Thanks to Sanjay Bhatia, Troy Brown, Kevin Colangelo, Tiffani Darden, Michelle Harner, Jacqueline Lipton, Larry Martin, Andrew Pollis, William Rhee, Carole Silver, Matthew Sullivan, David Wilkins, and participants in the Ohio Legal Scholarship Workshop, the Michigan State University College of Law Junior Faculty Workshop, and the International Legal Ethics Conference IV for their valuable input and suggestions. Jeremy Schirra provided outstanding research assistance.

1. Doe v. Channel Four Television Corp., No. B217145, 2010 Cal. App. Unpub. LEXIS 2468, at \*1, \*11, \*23 (Cal. Ct. App. Apr. 6, 2010).

show *Da Ali G Show*.<sup>2</sup> Cohen's domestic broadcaster twice settled libel suits based on an Ali G skit<sup>3</sup>—a typical litigation strategy when the cost of a nuisance settlement is cheaper than paying to defend against a meritless claim.<sup>4</sup> But when the U.K. distributor was sued in California over the same skit,<sup>5</sup> it decided to handle the suit differently. Rather than spending a great deal of money defending the claim—or agreeing to settle for a fee less than the cost of a traditional defense—the defendant outsourced its defense to an Indian firm associated with the defendant's U.S. counsel.<sup>6</sup> The Indian firm drafted a motion for summary judgment, which was filed by an associated

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2. See, e.g., *Palestinian Files Libel Suit Over "Bruno"*, HOLLYWOOD REPORTER, Dec. 9, 2009, available at <http://www.hollywoodreporter.com/news/palestinian-files-libel-suit-bruno-92191>.

3. Leigh Holmwood, *Ali G: US Judge Throws Out Woman's \$800,000 Libel Claim*, GUARDIAN UK, Apr. 22, 2009, available at <http://www.guardian.co.uk/media/2009/apr/22/ali-g-libel-win>; see also *Channel Four Television Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at \*4–5 (noting that HBO had settled for \$40,000 in 2004 and settled for \$50,000 in 2006).

4. Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1576 (1996) (“Frivolous claims often yield nuisance settlements, which represent nothing more than the nuisance value of the suit—the expense, harassment, and embarrassment that the defendant may endure in defending the suit. These nuisance settlements provide enough of an incentive for plaintiffs to pursue them and, therefore, for investors to invest in them.”).

5. The California court described the skit in question as follows:

Ali G interviewed Gore Vidal (Vidal) regarding the United States Constitution and Amendments thereto. In the course of that discussion, Ali G referred to appellant by her full name, stating: “Ain’t it better sometimes, to get rid of the whole thing rather than amend it [the Constitution]? Cos like me used to go out with this bitch called [appellant’s name] and she used to always trying [to] amend herself. Y’know, get her hair done in highlights, get like tattoo done on her batty crease, y’know, have the whole thing shaved—very nice but it didn’t make any more difference. She was still a minger and so, y’know me had enough and once me got her pregnant me said alright, later, that is it. Ain’t it the same with the Constitution?” During the episode, Ali G also stated that Vidal was a world famous hairstylist and that the Constitution was written on two stone tablets with Moses’s involvement. In other portions of the same episode Ali G stated that Denzel Washington lived in George Washington’s former Mount Vernon home; that John Paul Jones had no arms or legs; that the world is running out of gravity, which was discovered by “Sir Isaac Newton-John” after shooting an apple from William Tell’s head; that euthanasia means the killing of elderly people by youth in Asia; and that Ali G’s face was added to Mount Rushmore.

*Channel Four Television Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at \*3–4. The court agreed with the district court’s conclusion that “the statements could not reasonably be understood as statements of fact.” *Id.* at \*7.

6. *SDD Global Helps Win Unanimous California Appellate Victory in “Ali G” Libel Case*, SDD GLOBAL SOLUTIONS, [http://www.sddglobal.com/legal-outsourcing-lpo-legal-process-outsourcing-news.htm#Ali\\_G](http://www.sddglobal.com/legal-outsourcing-lpo-legal-process-outsourcing-news.htm#Ali_G) (last visited Mar. 15, 2011).

U.S. attorney and ultimately granted by a Los Angeles judge.<sup>7</sup> The Indian firm also drafted briefs defending the decision on appeal and won a unanimous ruling sustaining the case's dismissal.<sup>8</sup>

The Ali G case demonstrates some of the complexities of legal offshoring. Offshoring the defense in that case did not merely replace domestic legal services with a lower-cost alternative elsewhere; instead, it changed the nature of the defense entirely. It took a case that would likely have been handled outside the court system through a nuisance settlement and brought it within the formal adjudicatory system. As a result, the case was decided on the merits and the decision is publicly available, potentially discouraging further meritless claims.

While the Ali G case shows that international outsourcing can transform individual lawsuits, it also demonstrates how outsourcing is quickly becoming a part of mainstream legal practice. Clients who experiment with outsourcing tend to continue their contracts and institutionalize the practice.<sup>9</sup> SDD Global's success in the Ali G litigation was one example of this phenomenon, as it led to a longer term relationship between the offshore firm and Sacha Baron Cohen's onshore legal team.<sup>10</sup> Among other work, the Indian firm researched local defamation and obscenity rulings of jurisdictions in which the comedian planned to film scenes for the movie *Bruno*.<sup>11</sup>

Given the rapid growth of transnational legal outsourcing—and the large cost-savings associated with that growth—it seems safe to say that outsourcing is not going away anytime soon. The legal profession will have to adapt to incorporate this new way of providing legal services. A number of recent articles<sup>12</sup> and student notes<sup>13</sup> have looked at the ethical

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7. See *id.*; *Channel Four Television Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at \*1, \*6–8.

8. See *Channel Four Television Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at \*1, \*6–8; SDD GLOBAL SOLUTIONS, *supra* note 6.

9. Approximately 70% of outsourcing contracts are renewed after fulfillment of the initial contract. Charles Christian, *Rumpole of Mumbai—PwC LPO/Outsourcing Survey*, THE ORANGE RAG (Jan. 15, 2010, 3:57 PM), [http://www.theorangerag.com/blog/\\_archives/2010/1/15/4429192.html](http://www.theorangerag.com/blog/_archives/2010/1/15/4429192.html).

10. Interview with Sanjay Bhatia, Head of Operations, SDD Global (June 18, 2010).

11. *Id.*

12. Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L. REV. 479 (2009); 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 (2007); Carlo D'Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or "Flattener"?*, 14 TEX. WESLEYAN L. REV. 167 (2008); Brandon James Fischer, *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 (2010); James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal*

implications of international outsourcing, addressing issues such as the supervision of foreign legal professionals, confidentiality, and competence. But very little research has been done into how socioeconomics, organizational structure and social psychology influence lawyers in the outsourcing process as they attempt to comply with these duties.<sup>14</sup> The organizational setting is important, however; research has repeatedly shown that the social and organizational factors significantly influence behavior.<sup>15</sup> This article seeks to bridge that gap in the literature by analyzing legal outsourcing through the lens of organizational and socioeconomic theory and by giving attention to situational influences affecting the outsourcing process. This analysis can shed light on the practices and structures needed to ensure compliance with ethical duties in the outsourcing context.

Part I examines the current—and rapidly developing—practice of international contracting for legal services. In it, I examine the financial incentives that led to the growth of legal outsourcing, the mechanics of the outsourcing process, and the current level of client satisfaction.

Part II offers an overview of standard theories from economics, organizational behavior, and social psychology. It explains how these theories illuminate parties' differing incentives in the contracting process. Understanding how parties react to different incentives—at both a rational

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*Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 27 PENN. ST. INT'L L. REV. 323 (2008); Aaron R. Harmon, *The Ethics of Legal Process Outsourcing—Is the Practice of Law a “Noble Profession,” or Is It Just Another Business?*, 13 J. TECH. L. & POL'Y 41 (2008); Lee A. Patterson, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177 (2008); Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825 (2010).

13. Jose A. Arambulo, Comment, *O Where, O Where Has My Legal Job Gone?: Examining the Realities of “Offshoring” Legal Work and Why States Can Regulate the Practice Despite Congress' Broad Power Under the Foreign Commerce Clause*, 38 SW. L. REV. 195 (2008); Joshua A. Bachrach, Note, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(H)*, 21 GEO. J. LEGAL ETHICS 631 (2008); Alexandra Hanson, Comment, *Legal Process Outsourcing to India: So Hot Right Now!*, 62 SMU L. REV. 1889 (2009); Courtney I. Schultz, Note, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639 (2010); Keith Weffinden, 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 (2007).

14. One notable exception is Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2184 (2010) (examining the economic theory behind disaggregation of legal services and analyzing empirical work on outsourcing, both across industries and within the legal profession).

15. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 154 (2003).

level and at an unconscious psychological level—can help predict where risks will arise in the process.

Part III looks beyond the contracting process to examine the situational context of outsourcing arrangements and identify risks that arise from gaps in the allocation of responsibility or from cultural misunderstandings. It looks at the most common models for allocating responsibility within the outsourcing relationship, and it examines how the employment conditions of outsourcing professionals influence the quality of legal services rendered. It also analyzes cultural and status barriers that can impair the effectiveness of the outsourcing relationship.

Finally, Part IV recommends a shift in framework from an outsourcing model of disaggregation to one of collaboration. Under a traditional disaggregation model, each participant is expected to work autonomously, thus leaving significant gaps in the chain of responsibility and incentives for opportunistic behavior. Under the collaborative model I propose, by contrast, participants would actively focus on cooperation, communication, and negotiation of status and resources. This collaborative focus would help close the gaps in the chain of responsibility, facilitating compliance with ethical duties and improving the quality of the legal services rendered.

## I. THE CURRENT STATUS OF LEGAL OFFSHORING

Because legal offshoring is such a new part of the legal services landscape, it is unfamiliar to most Americans—even to most lawyers. They may have trouble picturing how the offshoring arrangements are made and how the work is actually done. And indeed, the answers to both of these questions are rapidly changing and differ significantly depending on who is sending the work and who is contracting to perform it. Nevertheless, it is possible to get a sense of how the process works in general and some of the various options available to parties seeking to take advantage of offshoring arrangements. This section provides an overview of current international outsourcing practices, examining who sends legal work offshore, what types of legal work are sent, and the perceived benefits and detriments of this global labor arbitrage.

### A. *The Genesis of Legal Process Outsourcing*

Transnational legal process outsourcing grew out of more general business and information technology outsourcing. Information technology outsourcing, especially to India, grew dramatically in the 1990s. Companies needed to retrofit their software to avoid the so-called “millennium bug” or

“Y2K problem,” in order to avoid software failures from failing to program dates with a four-digit year.<sup>16</sup> United States companies ultimately spent around \$100 billion preparing for Y2K.<sup>17</sup> Given the huge expense of re-writing the software code, many companies looked for ways to save money.<sup>18</sup> India proved to have capable, low-cost programmers and software professionals who could do the work quickly, and the growth of the Internet and communications technologies in the 1990s made it possible to collaborate globally on software projects.<sup>19</sup> As a result, Indian firms booked billions of dollars in business from American companies.<sup>20</sup>

After the turn of the millennium, global outsourcing did not end—instead, it picked up steam.<sup>21</sup> The success of the Y2K efforts established a paradigm for international collaboration. It was a classic example of a “temporary economic shock that produces a permanent change.”<sup>22</sup>

Based on the success of the software model, firms began outsourcing other types of work to India. Technology firms in particular began to outsource more general business, seeing a growth in what was called “business process outsourcing” or “BPO.”<sup>23</sup> The “process” in the phrase refers to the idea “there is delegation of ‘control over the process’ which implies that the supplier becomes the ‘owner of the business process.’”<sup>24</sup> Typical business process outsourcing might include payroll processing or employee benefits management.<sup>25</sup>

Soon, businesses began to offshore ever-more-complex processes. Those requiring the greatest expertise and skill were known as “knowledge process outsourcing” or “KPO.”<sup>26</sup> So, for example, while BPO might require a vendor to perform data entry of insurance claims forms, KPO might require the vendor to “evaluate new insurance applications based on a

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16. Farhad Manjoo, *Apocalypse Then: Was Y2K a Waste?*, SLATE (Nov. 11, 2009), <http://www.slate.com/id/2235357/entry/2235359>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. SHASHI SHEKHAR PANDEY, *THE LAW AND PRACTICE OF LEGAL PROCESS OUTSOURCING* 6–7 (2009).

24. *Id.* at 6.

25. *BPO—What Is Business Process Outsourcing?*, SOURCINGMAG.COM, [http://www.sourcingmag.com/content/what\\_is\\_bpo.asp](http://www.sourcingmag.com/content/what_is_bpo.asp) (last visited Mar. 15, 2011).

26. *Id.*

set of criteria or business rules.”<sup>27</sup> Technology has brought outsourcing options even to specialized fields such as medicine<sup>28</sup> and law.

Legal process outsourcing, or “LPO,” arose from KPO and operates as a specialized form of KPO occurring in the legal field.<sup>29</sup> It benefited from fortuitous timing and the intersection of two trends. Just as technological and business outsourcing grew in the past two decades, the legal field changed at the same time, as law firms and clients began to rely more and more on temporary and contract workers.<sup>30</sup> Legal work was increasingly outsourced onshore to staffing agencies or to specialized e-discovery agencies.<sup>31</sup> Offshore outsourcing combined these trends, taking work that might have been given to a temporary attorney or an e-discovery vendor, and sending it to be performed abroad.

### B. *The Variety of Legal Offshoring Work*

Just as the millennium bug sparked an increase in technology offshoring, the “Great Recession” beginning in 2008 sparked a significant increase in the offshoring of legal work, pushing both clients and law firms to consider sending more legal work abroad.<sup>32</sup> After the ABA and a number of state and local bar associations issued opinions approving the practice, legal offshoring grew even faster.<sup>33</sup>

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27. *Id.*

28. See Amar Gupta & Deth Sao, *The Unconstitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of Its Relationship to National and International Health Care Reform*, 21 HEALTH MATRIX (forthcoming 2011).

29. Abdul Latheef Naha, *It’s India for Legal Services*, THE HINDU (Nov. 26, 2007), <http://www.hindu.com/edu/2007/11/26/stories/2007112650610300.htm> (“LPO is part of high-end knowledge process outsourcing (KPO) . . .”).

30. Michael D. Goldhaber, *Tempting Work: Contract Lawyers Are Growing in Numbers As Well As Status*, 156 N.J. L.J. 469 (1999) (“Lawyer temping came into its own after the recession of the early ‘90s, when firms got burned by overhiring associates and the market brimmed with unemployed lawyers.”).

31. See, e.g., Amy Miller, *UPS’s Legal Department Brainstorms a Package Deal to Save a Parcel of \$\$\$*, CORP. COUNSEL (Nov. 10, 2009), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202435291170&hubType=Top%20Story&UPSs\\_Legal\\_Dept\\_Brainstorms\\_a\\_Package\\_Deal\\_to\\_Save\\_a\\_Parcel\\_of\\_](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202435291170&hubType=Top%20Story&UPSs_Legal_Dept_Brainstorms_a_Package_Deal_to_Save_a_Parcel_of_) (noting that UPS has hired King & Spaulding to coordinate its e-discovery, including managing contracts with staffing agencies and e-discovery vendors).

32. D’Angelo, *supra* note 12, at 189; Mike Dolan & John Thickett, *The Financial Crisis: How Can Corporate Legal Departments and Law Firms Manage the Aftermath?*, ANDREWS FIN. CRISIS LITIG. REP., Nov. 25, 2008.

33. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008) [hereinafter ABA Opinion 08-451] (discussing lawyers’ obligations when outsourcing legal and nonlegal support services), available at <http://meetings.abanet.org/webupload/commupload/IC100123/relatedresources/opinion8-451.pdf>; Ohio Supreme Court Bd. of Comm’rs on



The type of legal work sent offshore is both varied and changing rapidly.<sup>34</sup> In general, approximately fifteen percent of LPO professionals were performing work equivalent to a junior attorney, and approximately eighty-five percent were performing work equivalent to what a paralegal or administrative support professional might do in the United States.<sup>35</sup> For intellectual property work, however, the trend has shifted to include offshoring of more high-end work; in this area, “more than 50% of the [offshored] work is high end.”<sup>36</sup> The percentage of work involving high-level outsourcing is likely to continue to grow in other areas of the law.<sup>37</sup>

In terms of administrative support, outsourcing professionals perform low-level legal work, such as filling out legal forms like summonses, warrants, or bankruptcy forms, and transcribing depositions.<sup>38</sup> Much outsourced legal-administrative work relates either to the discovery process,

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Grievances & Discipline, Op. 2009-6 (2009), available at [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/index/o.asp](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/index/o.asp); Colo. Bar Ass’n, Formal Op. 121 (2009) (discussing use of temporary lawyers and other professionals not admitted to practice in Colorado (“outsourcing”)), available at <http://www.cobar.org/index.cfm/ID/386/subID/25320/CETH/>; Prof’l. Ethics of the Fla. Bar, Formal Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/b2b76d49e9fd64a5852570050067a7af/792dd018996bf2498525749400624f7a!OpenDocument>; N.C. St. Bar, 2007 Formal Ethics Op. 12 (2008) (discussing outsourcing legal support services), available at <http://www.osqs.com/images/Resourcespages/barethics/NC%202007%20Formal%20Ethics%20Opinion%2012.pdf>; San Diego Cnty. Bar Ass’n, Ethics Op. 2007-1 (2007), available at <http://cobralealsolutions.com/pdf/San%20Diego%20County%20Bar%20Association.pdf>; L.A. Cnty. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 518 (2006), available at <http://www.lacba.org/showpage.cfm?pageid=427>; N.Y. City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2006-3 (2006), available at <http://www.abcnyc.org/Ethics/eth2006.htm>. The ABA subsequently drafted a more in-depth report on domestic and offshore outsourcing. See ABA, ABA COMM’N ON ETHICS 20/20 DISCUSSION DRAFT, 10–15 (2010) [hereinafter ABA Discussion Draft], available at [http://www.americanbar.org/content/dam/aba/migrated/ethics2020/pdfs/discussion\\_draft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/ethics2020/pdfs/discussion_draft.authcheckdam.pdf).

34. See Keith Ecker, *The Offshore Option*, INSIDE COUNSEL, Jan. 2009, at 41.

35. Kian Ganz, *India LPO Inc Headcounts to Triple as 15% of Work at US/UK Associate Level*, LEGALLY INDIA (May 6, 2010), <http://www.legallyindia.com/20100506778/Legal-Process-Outsourcing-LPO/india-lpo-inc-headcounts-to-triple-as-15-of-work-usuk-associate-level>. The “85%” figure most likely includes document review.

36. Evalueserve, *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.asp?id=24227&deptid=3>.

37. The *Economist* has noted that although low-level outsourcing activities currently dominate the Indian market, high-level activities are growing rapidly. See *Passage to India*, ECONOMIST, June 24, 2010, available at [http://www.economist.com/node/16439006?story\\_id=16439006&source=hptextfeature](http://www.economist.com/node/16439006?story_id=16439006&source=hptextfeature) (“Although still dominated by low-value process outsourcing, such as call-centres, the fastest growth is in companies offering highly skilled work, from medicine to engineering and information technology (IT).”).

38. Rosemary Ambale, *What Do I Need to Join an LPO?*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (Jan. 10, 2009, 12:01 AM), <http://rosemary-outsourcing.blogspot.com/2009/01/what-do-i-need-to-join-lpo.html>.

to intellectual property work, or to contract management.<sup>39</sup> As a result, tasks such as document review, coding, contract review, and management of contracts databases are often sent offshore.<sup>40</sup>

In terms of more complex legal work, foreign attorneys perform legal research support, including “multijurisdictional surveys of state and local case laws, statutes, ordinances, and regulations,” in addition to providing assistance in brief writing and analysis of statutory and case law, citation checking, document drafting, and preparing drafts of patent applications.<sup>41</sup> While this higher-level legal work represents only fifteen percent of the LPO market right now, it is quickly growing; as LPO firms become more established, they tend to take on increasingly more sophisticated work.<sup>42</sup> And although the more complex LPO work is typically performed for large corporations who are sophisticated consumers of legal advice, some LPOs will even offer their assistance to *pro se* litigants in the United States.<sup>43</sup>

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39. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 766 (2010) (“[L]egal outsourcing currently focuses on the commodity end of legal work, including risk management, contract review, and patent searches, rather than the sophisticated transactional work that is Big Law’s comparative advantage”); see also PANDEY, *supra* note 23, at 11–12; Ambale, *supra* note 38.

40. PANDEY, *supra* note 23, at 11–12; Ambale, *supra* note 38.

41. PANDEY, *supra* note 23, at 11–12.

42. Jordan Furlong, *The Blind Side*, SLAW (Apr. 3, 2010), <http://www.slw.ca/2010/04/03/the-blind-side/> (“LPOs, it has to be emphasized, are not just doing first-year associates’ grunt work, not anymore. They are moving up the value chain steadily and with surprising speed, taking on the work of second-, third- and fourth-year lawyers—not just by using lower-cost labour, but by doing the work more systematically and efficiently.”). *But see* Ron Friedmann, *LPO as a Driver of Law Firm Innovation*, INTEGREON (July 27, 2010), <http://www.integreon.com/blog/2010/07/lpo-as-a-driver-of-law-firm-innovation.html> (noting that at Integreon, “We do not practice law nor is that part of our corporate strategy. So we see a clear limit to how far ‘up the value chain’ an LPO can go before it practices law and is therefore no longer an LPO.”).

43. *Legal Outsourcing in California Helps Hollywood Win Cases*, SDD GLOBAL SOLUTIONS, <http://www.sddglobal.com/legal-process-outsourcing-in-California.htm> (last visited Mar. 15, 2011) (noting that “clients include production companies, film studios, corporations, solo practitioners, law firms, training institutions, individuals and pro se litigants in California”). The pro se client who hired SDD Global was himself a licensed attorney in California who sought assistance from the firm. Other firms, however, may work directly with non-lawyer pro se litigants. See Brent Howard, *Testimonials*, SUNLEXIS, <http://www.sunlexis.com/testimonials.html> (last visited Mar. 15, 2011) (containing a client testimonial stating: “I am a Pro Se litigant in a case against the State of Nevada local government. . . . I found SunLexis through the internet and in a little over two week they read my complaint, their motion to dismiss, my draft of a response and did amazing research.”). Others have theorized that technological innovation may shift the boundaries of regulated law practice. See, e.g., Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 324 (2004) (“[T]he fact that Internet law practice can provide effective legal assistance on routine matters to a low-income clientele makes opposition by the ABA politically

While the types of legal services that LPOs perform are very broad, they are not without limit entirely: state law in the United States prohibits non-state-licensed individuals from “the practice of law.”<sup>44</sup> Indian law likewise prohibits foreign-owned LPOs from practicing law in India.<sup>45</sup> The definition of practicing law is broader in the United States than it is in India, however. In the United States, legal advice is included within the ambit of legal practice, whereas Indian law typically considers the practice of law as “appearance before any court, tribunal, or similar authority.”<sup>46</sup> Historically in India, the practice of law was thought to exclude “legal advice, documentation or seeking alternative routes for dispute-resolution,”<sup>47</sup> though recently the Mumbai High Court has ruled that the term “practice of law” under Section 29 of the Indian Advocates Act is “wide enough to cover” legal practice “in non litigious matters.”<sup>48</sup> Even under the broader U.S. definition, however, most jurisdictions allow legal work to be delegated to non-lawyers as long as a U.S.-licensed attorney takes ultimate responsibility for the legal work.<sup>49</sup>

Legal work is offshored to a number of countries, including China, the Philippines, and Sri Lanka,<sup>50</sup> but India is by far the most common destination. Indian revenue from legal process outsourcing (LPO) was valued at \$320 million in 2008, and expected to grow to \$640 million by 2015;<sup>51</sup> 80% of this revenue comes from U.S. clients, while the remainder comes from other countries such as Australia and the U.K.<sup>52</sup> Work is performed by Indian attorneys who have graduated from the top law schools

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unattractive. In general, these new business methods demand a clearer theory of the appropriate scope of regulation than is provided by the existing analytical framework.”).

44. See Daly & Silver, *supra* note 12, at 427–30.

45. Lawyers Collective v. Ashurst, (2009) W.P. No. 1526/1995 (India), available at <http://www.barandbench.com/userfiles/files/File/Lawyers%20Collective%20foreign%20firms%20Bbay%20HC.pdf>.

46. PANDEY, *supra* note 23, at 63.

47. *Id.*

48. *Lawyers Collective*, at ¶ 60.

49. See Daly & Silver, *supra* note 12, at 429–30 (“Lawyers are punished only when their failure to supervise their employees facilitates the employees’ UPL activities or when the lawyers deliberately assist the UPL activities of affiliated organizations. . . . [L]aw firms, in deciding to offshore legal services, likely face few, if any, UPL hurdles as a practical matter.”).

50. Christian, *supra* note 9; see also American Discovery, *About Us*, <http://www.americandiscovery.com/about/> (last visited Mar. 5, 2011) (offering discovery support services from the Philippines).

51. Viren Naidu, *LPO In India Is Expected to Lead the Offshore Field In the Next Three-Five Years*, ECON. TIMES (Apr. 14, 2010, 10:48 AM), <http://economictimes.indiatimes.com/opinion/interviews/lpo-in-india-is-expected-to-lead-the-offshore-field-in-the-next-three-five-years/articleshow/5800286.cms>.

52. PANDEY, *supra* note 23, at 96.

in India.<sup>53</sup> These law schools provide common-law legal instruction conducted primarily in English.<sup>54</sup> Thus, even though the Indian attorneys may be working with foreign law, the legal systems are similar enough that the attorneys transition relatively easily. In fact, as one LPO manager noted, Indian attorneys employed by LPOs sometimes have greater familiarity with U.S. law than they do with Indian law:

Training young lawyers in an LPO firm, I was amazed to find that they knew more about US and UK laws than the laws in India. They could tell me about euthanasia provisions for animals in the UK but had no idea if similar provisions existed in India. They knew all about insurance law in the US, but asked if we have anything like this here, they were unsure.<sup>55</sup>

### C. *The Financial and Mechanical Aspects of Outsourcing*

Legal process outsourcing results in monetary savings for the law firms and companies who engage in it. The cost savings are significant. One in-house attorney reported asking for quotes for customizing a residential lease

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53. Interviews with Kevin Colangelo, Pangea3, and Sanjay Bhatia, SDD Global (noting that their LPO firms hire only from the top schools). *But see also* Mark Ross, *Is Everything What It Seems in the India Offshore Legal Outsourcing Space?*, LEGAL PROCESS OUTSOURCING (Aug. 16, 2007, 10:20 AM), <http://blog.law-scribe.com/2007/08/is-everything-what-it-seems-in-india.html> (noting that “legal process outsourcing companies, law firm captives and Western companies with their own captive arrangements in India all maintain that they only hire the most highly qualified candidates from the best law schools in India” but expressing doubt that “everyone can be telling the truth” about hiring only the most qualified graduates). However, at this time, the number of attorneys working in LPOs is still a tiny fraction of the law graduates in India. There are more than one million law graduates in India, with only an estimated 7,500 to 32,000 working in LPOs. Therefore, it seems quite possible that LPOs can afford to hire only top graduates at this time, though that may change in the future as the industry continues to expand at current rates. *See id.*; Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 61 (2010).

54. *See* Marc Galanter, *When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School*, 36 J. LEGAL EDUC. 292, 293 (1986) (noting that the Indian legal system “operates in English”). *But see* Laura D’Allaird, “*The Indian Lawyer*”: *Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing*, 18 PROF. LAW. 1, 6, 12 n.70 (2007) (noting that “even though legal education was officially mandated in English due to English being the official language of India,” some language difficulties persist).

55. Rosemary Ambale, *Quality in LPOs*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (Nov. 19, 2009, 7:06 AM), <http://rosemary-outsourcing.blogspot.com/2009/11/quality-in-lpos.html>.

in each of the fifty states.<sup>56</sup> The company's law firm offered to do it for \$400,000; an Indian LPO firm offered to do it for \$45,000.<sup>57</sup> The company's chief operating officer chose to outsource.<sup>58</sup> Much of the savings come from an enormous salary differential: an LPO salary for an Indian attorney is approximately \$10,000—or 1/16 of the \$160,000 base salary earned by a first-year associate at a large U.S. law firm.<sup>59</sup> Similarly, for higher level contract drafting and legal research, the difference may be \$400 an hour for a London-based attorney versus \$50 an hour for a Gurgaon-based attorney.<sup>60</sup>

Mechanically, parties outsource in two primary ways.<sup>61</sup> The first way, adopted primarily by very large corporations, is to establish a “captive center”—essentially, an offshore branch of the company in a lower-cost location.<sup>62</sup> General Electric adopted this strategy in 2005, employing thirty Indian lawyers to support the corporation's legal work.<sup>63</sup> Currently, approximately fifteen large corporations have established such centers.<sup>64</sup> The second and more common way of outsourcing is to hire a “third party LPO service provider.”<sup>65</sup> Major providers include Pangea3, Clutch Group, Integreon, and CPA Global.

Interestingly, even though many of the ethics opinions and legal scholarship dealing with outsourcing seem to assume that law firms will be the ones leading the way, this is not the case.<sup>66</sup> Instead, it is corporations in need of legal services—rather than the law firms that have traditionally provided that service—that so far have taken the lead in sending work

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56. Cynthia Cotts & Liane Kufchock, *Jones Day, Kirkland Send Work to India to Cut Costs*, BLOOMBERG (Aug. 21, 2007, 4:49 PM), <http://www.bloomberg.com/apps/news?pid=20601103&sid=aBo8DnfekWZQ>.

57. *Id.*

58. *Id.*

59. Anthony Lin, *Legal Outsourcing to India Is Growing, But Still Confronts Fundamental Issues*, N.Y. L.J., Jan. 23, 2008; see also Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Firms*, 28 NW. J. INT'L L. & BUS. 527, 537 (2008) (“LPO salaries for Indian lawyers are generally well below \$10,000 a year. By comparison, a U.S. contract lawyer usually earns around \$30 an hour while associate base salaries at major firms in New York start at \$160,000 a year.”).

60. *Passage to India*, *supra* note 37.

61. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2195 n.16, 2201–02 (2007) (discussing additional outsourcing methods, including U.S. companies who hire Indian law firms and hiring U.S.-licensed attorneys who work abroad).

62. PANDEY, *supra* note 23, at 46.

63. *Id.*

64. Ganz, *supra* note 35.

65. *Id.*

66. See, e.g., Fischer, *supra* note 12, at 476 (advocating a new ABA rule requiring lawyers to disclose international outsourcing arrangements to clients).

offshore.<sup>67</sup> Companies' outside law firms may participate in the process of offshoring if their clients demand it, but most law firms are unlikely to initiate it without client participation.<sup>68</sup> The few law firms who do initiate outsourcing arrangements are more likely to be plaintiffs' firms working on contingency fees.<sup>69</sup> When attorneys bill hourly, savings from outsourcing accrue to the client; but when attorneys contract for a percentage of the recovery, savings from outsourcing can accrue to the attorney.

Corporations choosing to send work offshore will rarely publicly announce that they are doing so.<sup>70</sup> First, there is a risk that competitors will follow suit, thus diminishing any competitive advantage gained from outsourcing.<sup>71</sup> Second, there is also a risk that the outsourcing company will be punished in the marketplace by U.S. residents politically opposed to outsourcing in general.<sup>72</sup> However, a few large corporations have been willing to go public about their offshoring practices. Microsoft, for example, revealed that it spent \$3 million in 2008 on patent LPO services in

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67. Daly & Silver, *supra* note 12, at 414 (quoting an outsourcing manager as saying that “[c]orporate law departments . . . are much more apt [than law firms] to make use of outsourced legal staff, often because other corporate divisions also have cut costs through outsourcing”); see Evalueserve, *supra* note 36 (“More than 90% of the LPO work is either being directly outsourced by Corporate Counsels or on behalf of Corporate Counsels (by their preferred law firms).”).

68. See, e.g., Cotts & Kufchock, *supra* note 56 (quoting David Perla, co-chief executive of a major outsourcing provider: “Some firms are coming to us because in-house clients suggested it or pressured them. . . . Others want to come to the client first and offer a solution.”); see also Kit Chellel, *Slaughters in Talks Over Outsourcing Plans*, THE LAWYER, Oct. 5, 2009, at 1 (discussing mounting client pressure to outsource, causing top firms in England to send legal work offshore).

69. FIRST RESEARCH, INDUSTRY PROFILE: LEGAL SERVICES (2009), available at <http://www.tba.org/benefits/FirstResearch-LegalServices.pdf> (“Some law firms, especially contingency firms, cut costs by outsourcing legal processes overseas.”).

70. George S. Geis, *An Empirical Examination of Business Outsourcing Transactions*, 96 VA. L. REV. 241, 243 (2010); see also Press Release, PRLog, Wall of Silence Surrounds Emerging Legal Outsourcing Industry (July 7, 2010), available at <http://www.prlog.org/10781658-wall-of-silence-surrounds-emerging-legal-outsourcing-industry.html> (“In a Fronterion survey of 30 top US firms in the Am Law 50, some 83 percent declined to comment on whether they had used legal process outsourcing (LPO) providers, despite the fact that responses were confidential.”).

71. Geis, *supra* note 70, at 243. But see Rees Morrison, *To What Degree Do General Counsel Hoard Their Management Innovations and Not Share Them with Others, Especially Competitors?*, LAW DEP'T MGMT. BLOG (Dec. 31, 2010, 9:12 AM), [http://www.lawdepartmentmanagementblog.com/law\\_department\\_management/2010/12/to-what-degree-do-general-counsel-hoard-their-management-innovations-and-not-share-them-with-others-especially-competitors.html](http://www.lawdepartmentmanagementblog.com/law_department_management/2010/12/to-what-degree-do-general-counsel-hoard-their-management-innovations-and-not-share-them-with-others-especially-competitors.html) (“It has not been my impression that general counsel conceal their management efforts and experiences from each other because of a concern for proprietary value or a competitive edge. When general counsel talk among themselves in trade groups or at other gatherings, they seem willing to share openly and completely.”).

72. *Id.*

India, including prior art searches, invalidity searches, and project mapping—work that would have cost it \$9.5 million in the United States.<sup>73</sup>

International outsourcing is often publicly criticized as eliminating U.S. jobs.<sup>74</sup> It can be difficult to estimate the actual impact of offshoring on U.S. employment. Although some assume that outsourcing results in one-to-one impact where one U.S. job is lost for every job sent offshore,<sup>75</sup> this is not actually the case: instead, the process of offshoring can lead to higher global employment overall.<sup>76</sup> Because outsourcing allows services to be provided at lower costs, it allows consumers of those services to purchase more services than they otherwise would, thereby “slowly chang[ing] client behavior.”<sup>77</sup> Just as the introduction of low-cost European airlines allowed customers in Europe to “now think nothing of going abroad for the weekend, or even of commuting to another country for the workweek,” outsourcing can similarly increase the services demanded in new areas.<sup>78</sup>

This effect almost certainly carries over into the legal field, as offshoring creates the ability to pursue and/or defend more claims than could otherwise be litigated affordably. If not for outsourcing, the Ali G litigation might have settled instead of going to court. Likewise, at least one high-profile criminal defendant, Denis Field, the former Chairman and CEO of the

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73. CPA GLOBAL, *OUTSOURCING AS A BUSINESS MODEL*, available at [http://www.cpaglobal.com/sites/default/files/2008\\_microsoft\\_case\\_study.pdf](http://www.cpaglobal.com/sites/default/files/2008_microsoft_case_study.pdf) (last visited Mar. 15, 2010).

74. See, e.g., Andrew S. Ross, *Obama Riles High-Tech Exec Over Outsourcing*, S.F. GATE (May 5, 2009), [http://articles.sfgate.com/2009-05-05/business/17201203\\_1\\_international-tax-dla-piper-cisco-systems](http://articles.sfgate.com/2009-05-05/business/17201203_1_international-tax-dla-piper-cisco-systems) (noting that “President Obama promis[ed] to end overseas tax breaks for U.S. companies that ‘create a job in Bangalore, India, (rather than) one in Buffalo, N.Y.’”).

75. See, e.g., Krishnan, *supra* note 61, at 2206 n.81 (noting that one study estimated that 79,000 people will be employed in the legal outsourcing field in India but that only 40,400 U.S. attorneys will lose their jobs, and concluding that the estimate “ostensibly mean[s] that the remaining ‘legal’ jobs outsourced will be paralegal and more secretarial in nature”). While many legal outsourcing firms do indeed employ Indian attorneys to perform paralegal and secretarial work, an alternative interpretation of the data is simply that offshoring will increase the amount of legal work performed, thus employing more Indian attorneys.

76. A McKinsey report estimated that every \$1 spent on offshoring by U.S. companies created “US\$1.45–1.47 of value to the global economy, with the USA capturing US\$1.12–1.14 and the receiving country capturing on average 33 cents.” MARK KOBAYASHI-HILLARY & RICHARD SYKES, *GLOBAL SERVICES: MOVING TO A LEVEL PLAYING FIELD* 124 (2007). Thus, higher global employment levels may arise from an increase in the global economy as well as from lower salary costs offshore. See also Jagdish Bhagwati, Arvind Panagariya & T.N. Srinivasan, *The Muddles Over Outsourcing*, 18 J. ECON. PERSP. 93, 99 (2004) (“[E]ven if outsourcing sometimes reduces jobs proximately at certain firms or in certain sectors, in other cases it can help to create new U.S. jobs.”).

77. *Innovators at the Barricades*, ADAM SMITH ESQ. (July 19, 2010, 10:50 PM), <http://www.adamsmithesq.com/archives/2010/07/innovators-at-the-barricades.html>.

78. *Id.*

accounting firm BDO Seidman, has hired an Indian firm to provide additional research and drafting services in the defense of his tax-shelter prosecution—services that he could not afford at typical U.S. rates.<sup>79</sup> Thus, on the whole, offshoring likely creates more jobs than it eliminates.<sup>80</sup> Furthermore, the cost savings achieved from offshoring lower-level work may create more high-end jobs onshore.<sup>81</sup>

Just as outsourcing may create new jobs domestically rather than merely transitioning work abroad, the financial benefits of outsourcing are also felt both onshore and off.<sup>82</sup> Generally, researchers have found that seventy to eighty percent of the economic benefits from offshoring remain with the country sending work offshore—only twenty to thirty percent accrue to the country accepting the work.<sup>83</sup> From the client's perspective, legal outsourcing is likely to create similar economic gain, as lower legal costs allow companies to reinvest savings into production and profit.

While legal offshoring may result in a net economic gain, particular subsets of U.S. attorneys have been detrimentally affected by the trend.<sup>84</sup> Junior attorneys and contract attorneys who work as temporary employees have seen wages decline as corporate clients press for ever-lower rates.<sup>85</sup> Much of the work that is currently subject to outsourcing—including document review and basic legal research—is work that junior attorneys in

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79. Vidya Devaiah, *Embattled Ex-Head of 5th Largest Accounting Firm Turns to Indian Legal Outsourcing*, LAW WITHOUT BORDERS (July 7, 2010), <http://lawwithoutborders.typepad.com/legaloutsourcing/2010/07/denis-field-hires-indian-legal-outsourcing-company-embattled-exchairmanceo-of-fifth-largest-accounti.html>.

80. *Outsourcing Creates Jobs, Study Says*, CNNMONEY.COM (Mar. 30, 2004), <http://money.cnn.com/2004/03/30/news/economy/outsourcing/index.htm>.

81. Larry E. Ribstein, *Where Have All the Lawyers Gone*, FORBES, Aug. 8, 2010 (“The legal services industry will soon look very different from what we’re used to. While there will always be a need for high-end legal talent, wage workers and machines will be able to do much of the rest of the rest [sic] of what is now law practice. On the positive side, lawyers will meet a better fate than the soldiers in Pete Seeger’s song: gone to India, or to jobs that are more worthy of their talents than the more routine types of law practice today.”).

82. Bhagwati, Panagariya & Srinivasan, *supra* note 76, at 99 (explaining that because outsourcing can make new projects financially viable, those projects can lead to increased employment both domestically and overseas). In one case, for example, an engineering project “seemed financially nonviable” in the absence of outsourcing. *Id.* With outsourcing, however, the project became viable, and “[f]or each engineer in India, the firm now employs six engineers in the United States.” *Id.*

83. KOBAYASHI-HILLARY & SYKES, *supra* note 76, at 91.

84. 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).

85. Julie Kay, *Contract Lawyers: Cheaper by the Hour: Use of Contract Attorneys Grows, As Do the Complaints*, NAT’L L.J., Jan. 12, 2009.



the United States would typically perform.<sup>86</sup> Furthermore, in other industries, individuals whose jobs were lost to globalization did not recover economically in the long term.<sup>87</sup> To young attorneys displaced by globalization, the creation of jobs in foreign countries and rising corporate profits may be of little consolation.<sup>88</sup>

#### D. *Quality and Satisfaction in Legal Offshoring*

Clients generally report satisfaction with their offshoring effort. Approximately seventy percent of outsourcing deals in general are renewed after the expiration of the first contract, suggesting that most outsourcing clients are satisfied both with offshoring practices in general, as well as satisfied with the particular vendors supplying the work.<sup>89</sup> With regard to legal outsourcing in particular, a recent survey of offshoring clients—both corporations and law firms—reported that only 7.7% of U.S. law firms and 6.8% of corporations experienced “strong dissatisfaction” with their offshoring experiences.<sup>90</sup> Thus, it seems likely that LPO clients will engage in ongoing outsourcing relationships as their counterparts in other industries have done.

In general, companies report that LPO vendors provide high quality services.<sup>91</sup> An attorney from Baker McKenzie conducted a comparison of first-level document review at onshore and offshore locations, comparing cost, quality, learning curve, and productivity.<sup>92</sup> The attorney concluded that the Indian LPO ranked better on cost, slightly worse on length of the learning curve, and ranked comparably on quality and productivity.<sup>93</sup> David Perla, co-founder of Pangea3, also had clients conduct “bake-offs” where

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86. Owen, *supra* note 84, at 189 (noting that junior attorneys will lack opportunities for training when low-level work is outsourced).

87. Srinivas Durvasula & Steven Lysonski, *How Offshore Outsourcing Is Perceived: Why Do Some Consumers Feel More Threatened?*, 21 J. INT’L CONSUMER MKTG. 17, 29 (2009) (“The Bureau of Labor Statistics found that of those whose jobs were displaced by overseas trade from 1979 to 1999, 31 percent were not fully reemployed and 55 percent were making 85 percent or less than their former wages.”).

88. See, e.g., Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES, Aug. 4, 2010 (reporting “hostility toward the practice” of offshoring from junior associates).

89. Christian, *supra* note 9.

90. *Report: Key Findings From Legal Process Outsourcing Survey*, M2 PRESSWIRE, Feb. 2, 2010.

91. Lin, *supra* note 59; Gavin Birer, *The Results are in and the Winner Is . . .*, SLAW (Apr. 20, 2009), <http://www.slw.ca/2009/04/20/the-results-are-in-and-the-winner-is%E2%80%A6/>.

92. Birer, *supra* note 91.

93. *Id.*

they compared the results of document review completed by Indian attorneys and by U.S. contract attorneys.<sup>94</sup> Clients found that the Indian teams “soundly trounced” the Americans.<sup>95</sup>

Again, however, there are some reports of dissatisfaction. For example, one U.S. company ended its practice of offshoring deposition summaries after it spent too much time changing British-English idioms into American English; the company reported that the Indian employees “would use words like ‘fortnight’ (to describe a two-week period) and ‘bonnet’ (for the hood of a car).”<sup>96</sup> The company also found quality to be inconsistent, with some deposition summaries being excellent, and others being unacceptable.<sup>97</sup> Others have noted that many LPO applicants may not have the precise technical and legal vocabulary to succeed in providing legal support services for Western attorneys.<sup>98</sup>

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94. Lin, *supra* note 59.

95. *Id.*

96. Petra Pasternak, *When Outsourcing Proves Too Expensive, Bring It on Home*, LEGAL PAD (May 17, 2010, 9:00 AM), [http://legalpad.typepad.com/my\\_weblog/2010/05/when-outsourcing-proves-too-expensive-bring-it-on-home.html](http://legalpad.typepad.com/my_weblog/2010/05/when-outsourcing-proves-too-expensive-bring-it-on-home.html); *see also* Rosemary Ambale, *Are Indian Lawyers Turning into Clerks?*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (Aug. 9, 2009, 4:21 AM), <http://rosemary-outsourcing.blogspot.com/2009/08/are-indian-lawyers-turning-into-clerks.html> (noting that some Indian attorneys may struggle with technical legal English: “Not understanding the difference between ‘referring’ and ‘referral’, ‘consistent’ and ‘consisting’, ‘verily’ and ‘verify’, ‘at’ and ‘on’, can indeed, like Cleopatra’s nose, decide fates.”).

97. Pasternak, *supra* note 96.

98. Excerpts from cover letters sent from job applicants included the following statements:

- “I went thru yr ad in job portal and am very much interested in offering services to yr esteemed organ.”
- “Dear Responsible, I heard as a vacancy in your Organization for the Legal Designation. The Organization may adobt me in yourself if I eligible as a Employee.”
- “Respected sir/madam, i am interesting to join lpo job for hike of my career in corporate legal firms . . . .”
- “sir, Here attached my resume for your vision if you have any suitable job, please contact my mobile.”
- “DEAR MADAM/SIR, KINDLY CHECK MY CV IN ATTACHMENT ALSO SUGGEST ME A LEGAL JOBBY WHICH I WILL LEARN LOT LEGAL ACT.”
- “Res. sir, This application apply for the above subject matter of the E-mail. other description attached on the file attached. . . . And it was while having the privilege to work for certain reputed corps. Of international fame, I got a well fermented atmosphere to process in search of reformative thesis to sooth the conduct of regulation of policy and legislations which minimized the disputes to considerable limits . . . .”

Sanjay Bhatia, *Starting Your Own LPO? Here’s How to Do It. And How Not to.*, LAW WITHOUT BORDERS (July 16, 2010), <http://lawwithoutborders.typepad.com/legaloutsourcing/2010/07/starting-your-own-lpo-heres-how-to-do-it-and-how-not-to.html>.

Because of the possible risks of dissatisfaction, most LPO participants recommend the clients begin outsourcing on a small scale at first: “No matter how convinced a law firm is of the ability of an LPO to meet its efficiency and due-diligence standards, prudence dictates that it test the waters by sending out smaller jobs initially, and then graduate slowly to larger ones.”<sup>99</sup> LPO firms are also taking additional measures to reduce the dissatisfaction rate further, focusing on improving quality control by adding additional levels of review, improving training programs, and integrating teams of Indian and Western attorneys.<sup>100</sup>

## II. SOCIOECONOMIC AND ORGANIZATIONAL THEORY

Given that legal offshoring seems here to stay, participants in the offshoring process must find ways to ensure that it is done effectively. Both ethics opinions and legal scholars have stressed the need for outsourced legal services to comply with the duties of competence, confidentiality, and avoidance of conflicts of interest. Some have offered some concrete suggestions.<sup>101</sup> But many questions remain. The ethics opinions are unanimous that offshored legal work must still comply with ethical duties—a licensed attorney must supervise the work, clients’ information must be kept confidential, and the legal services must be competently rendered.<sup>102</sup> The opinions, however, give little guidance as to how the parties to the outsourcing transaction should ensure that these duties are met.

Socioeconomic and organizational behavior theory can help shed light on where problems in the outsourcing process are likely to arise and how those problems can be minimized. This section focuses on outsourcing risks that arise from the contracting process generally, given that each party to a

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99. Rosemary Ambale, *Obama and the Indian in the LPO*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (May 23, 2009, 10:17 AM), <http://rosemary-outsourcing.blogspot.com/2009/05/obama-and-indian-in-lpo.html>.

100. See E-mail from Sabyasachi Ghosh, Vice-President, Legal Operations, SKJ Legal (June 7, 2010) (recommending a “2nd level QC [quality-control check] of the Indian LPO work products by an American attorney, whether he is sitting in India or in the US, before the work reaches the clients”); Interview with Kevin Colangelo, General Counsel and Vice President, Legal Services, Pangea3 (June 9, 2010) (emphasizing the need for institutionalized training); Bhatia, *supra* note 98.

101. See, e.g., Daly & Silver, *supra* note 12, at 425–47 (recommending strategies to ensure compliance with the rules of professional responsibility); see also ABA Opinion 08-451, *supra* note 33 (recommending that lawyers involved in the outsourcing decision interview prospective legal services providers, conduct reference checks on individual service providers, investigate the security of LPO offices, and, in some cases, visit those offices personally).

102. See, e.g., ABA Opinion 08-451, *supra* note 33.

contract has different interests.<sup>103</sup> It examines leading theories in both the socioeconomic and organizational realms that have been applied to the analysis of outsourcing decisions, and it explains how the theories interrelate in the outsourcing context.<sup>104</sup>

### A. *Socioeconomic Theory*

Socioeconomic theory can help illuminate the costs and benefits of outsourcing. Traditionally, scholars looking at outsourcing outside the legal industry have applied an economic and strategic lens to the question of “why and what” to outsource.<sup>105</sup> Such analysis is also helpful inside the legal industry, where it can help predict where problems may arise and suggest ways of addressing those problems.

This section sets out basic principles from three socioeconomic theories. First, agency theory explains how the interests of a principal (here, the client) and an agent (the service provider) may differ, creating risks of opportunistic behavior.<sup>106</sup> Second, transaction cost theory builds on agency theory to examine when the cost savings obtained from outsourcing are sufficient to offset the control of keeping work in-house.<sup>107</sup> Finally, resource dependence theory helps explain the conditions under which an agent will be most responsive to the client’s needs.<sup>108</sup> Together, these theories shed light on the different incentives driving each of the parties in the outsourcing transaction.

#### 1. Agency Theory

Agency theory focuses on the relationship between the principal (in an outsourcing arrangement, the client purchasing the outsourced service) and the agent (the service vendor).<sup>109</sup> Agency theory posits that clients and

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103. Other risks arise from the disaggregation of legal services into component parts and from the possibility of cross cultural misunderstanding; the next section deals with these in greater depth.

104. See Jens Dibbern et al., *Information Systems Outsourcing: A Survey and Analysis of the Literature*, 35 ACM SIGMIS DATABASE 6 (2004) (conducting a literature review).

105. *Id.*

106. See *infra* Part II.A.1.

107. See *infra* Part II.A.2.

108. See *infra* Part II.A.3.

109. See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1735–38 (1998) (discussing agency theory in the context of law firm employment); Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1793–94 (1998); see also Subrata Chakrabarty, *Real-Life Case Studies of Offshore Outsourced IS Projects: Analysis of Issues and Socio-*

vendors seek to fulfill different interests.<sup>110</sup> One of the main conflicting interests is financial: for example, one recent outsourcing survey found that clients expected an outsourcing contract to provide a five to twelve percent profit margin to the service provider, while the service provider sought a profit margin of fifteen to twenty-five percent.<sup>111</sup>

Agency theory has long been a staple of legal practice generally, as lawyers are expected to act as agents representing the client, though the agency model does not explain the lawyer/client relationship entirely.<sup>112</sup> In a legal outsourcing arrangement, the client's two main interests are receiving quality legal work and minimizing the cost associated with that work.<sup>113</sup> The client may also value flexibility, including the ability to have legal support when required, without needing to carry permanent employees on the payroll. The vendor, on the other hand, has an interest in maximizing the amount earned.<sup>114</sup> The vendor may also value stability over flexibility. Because the vendor is likely to incur costs in recruiting and training the workers, a stable workflow minimizes the costs associated with employee turnover. These conflicting interests will be reconciled, though imperfectly, by contract.<sup>115</sup> The client, who serves as the principal in the agency relationship, and the vendor, who serves as the agent, allocate responsibility in an attempt to allow both to maximize their interests.

Like other agency relationships, the client/vendor agreement creates costs in excess of the client's financial payments.<sup>116</sup> Total agency costs are

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*Economic Paradigms*, in HARBHAJAN S. KEHAL & VARINDER P. SINGH, *OUTSOURCING AND OFFSHORING IN THE 21ST CENTURY: A SOCIO-ECONOMIC PERSPECTIVE* 248, 272 (2006) (discussing agency theory in the context of information-services outsourcing).

110. Chakrabarty, *supra* note 109, at 252.

111. PRICEWATERHOUSECOOPERS, *OUTSOURCING COMES OF AGE: THE RISE OF COLLABORATIVE PARTNERING* 12 (2008), available at [http://www.pwc.com/en\\_GX/gx/operations-consulting-services/pdf/outsourcingcomesofage.pdf](http://www.pwc.com/en_GX/gx/operations-consulting-services/pdf/outsourcingcomesofage.pdf).

112. See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2075 (2010) (noting that “[e]lite lawyers never conceived of themselves . . . as ‘deferential servants’ who merely carry out the client’s bidding”) (quoting ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 15 (1993)).

113. See George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 *NOTRE DAME L. REV.* 955, 1002–03 (2007) (noting that falling interaction costs can give rise to growth in outsourcing, as “business activity is moved to low-cost markets,” but also arguing that reduced monitoring costs may also be part of that equation, as clients may be better able to control the quality of the final product, “mitigat[ing] the dark side of outsourcing”).

114. *Id.* at 992 (“The vendor has no incentive to tackle a project in a cost-effective manner because she will be paid for shirking or other inefficient behavior.”).

115. Chakrabarty, *supra* note 109, at 272.

116. See Geis, *supra* note 113, at 978 (“Outsourcing deals thus generate agency risk under a very familiar logic: the entity that controls a business activity does not ultimately ‘own’ the

said to equal the sum of the monitoring costs, bonding costs, and residual loss.<sup>117</sup> Monitoring costs fall upon the client who outsources work; the client must monitor the quality of the work being done and the reasonableness of the charges for that work.<sup>118</sup> Bonding costs, on the other hand, fall upon the vendor performing the work.<sup>119</sup> Bonding costs are defined as expenditures that the agent makes “to guarantee that the agent will not take certain actions [which would] harm the principal,”—for example, the vendor may purchase insurance or otherwise “create some pool of resources or a legal obligation from which the principal can be compensated for detrimental actions of the agent.”<sup>120</sup> Finally, residual losses arise from any remaining disparity between the principal’s and agent’s interests that is not eliminated by contract.<sup>121</sup>

While agency theory has a long scholarly history, most researchers agree that agency theory alone does not fully explain business decisions. Agency theory has been criticized for a “narrow view of rationality” and, specifically, its inattention to ethical norms.<sup>122</sup> However, agency theory makes a strong contribution to understanding the differing interests and incentives of each party in the relationship, and when combined with other theories discussed below, can aid in understanding some of the risks that arise in the outsourcing process.

## 2. Transaction Cost Theory

Transaction cost theory, first developed by Ronald Coase, examines why some activities are “executed across markets” while others “are

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economic result . . . . Unless resources are spent on monitoring, bonding, or other contractual protection, business outsourcing breeds a host of distorted incentives.”).

117. See Chakrabarty, *supra* note 109, at 272; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (“[A]gency costs [are] the sum of: (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss.” (emphasis omitted) (footnote omitted)).

118. Jensen & Meckling, *supra* note 117, at 308.

119. *Id.*

120. Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 538–39 (2007).

121. *Id.*

122. Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265, 277 (1998) (citing Daniel Levinthal, *A Survey of Agency Models of Organizations*, 9 J. ECON. BEHAV. & ORG. 153, 154 (1988)).

internalized within the unitary firm.”<sup>123</sup> Given that the decision to outsource involves that very question, it is not surprising that transaction cost theory has frequently been applied to analyze outsourcing arrangements.<sup>124</sup>

Transaction cost theory asserts that “coordination by exchange” on the open market is the default position, and is “generally more efficient.”<sup>125</sup> But when the market fails and transaction costs are high, then firms will internalize the activity.<sup>126</sup> Firms are “less sensitive and responsive to changes in price or demand” than market actors, but firms also possess strong administrative controls to direct the activity and ensure results.<sup>127</sup>

Thus, transaction cost theory suggests that a client will decide to outsource—either on or off shore—when the savings gained from that transaction outweigh the administrative control the client would retain by keeping the service in-house. The question of how to measure these transaction costs has given rise to a great deal of scholarship.<sup>128</sup> Transaction costs include both the “direct costs of managing relationships and the opportunity costs of suboptimal governance decisions,”<sup>129</sup> as well as “search and information costs, bargaining and decision costs, [and] policing and enforcement costs.”<sup>130</sup> These transaction costs have also been usefully categorized as “coordination costs” which are “associated with collecting and integrating information into the decision process” and “transaction risk” costs “associated with the possibility that other parties will fail to meet their contractual obligations due to opportunism.”<sup>131</sup>

Regardless of how the transaction costs are categorized, they are held to include the agency costs identified above, such as the cost of monitoring performance, the increased cost of the contract from bonding activity, and

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123. Jeffery Atik, *Technology and Distribution as Organizational Elements Within International Strategic Alliances*, 14 U. PA. J. INT’L BUS. L. 273, 282 (1993) (citing Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA (N.S.) 386 (1937)).

124. Dibbern et al., *supra* note 104, at 14 (noting that transaction cost theory is one of the “main reference theory or theories embraced in the research articles” examining outsourcing).

125. Atik, *supra* note 123, at 286.

126. *Id.*

127. Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2349 (2004).

128. George S. Geis, *The Space Between Markets and Hierarchies*, 95 VA. L. REV. 99, 107 (2009).

129. *Id.* at 107 n.28 (citing OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, AND RELATIONAL CONTRACTING* (1985); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975)).

130. Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979).

131. Jeff K. Stratman, *Facilitating Offshoring with Enterprise Technologies: Reducing Operational Friction in the Governance and Production of Services*, 26 J. OPERATIONS MGMT. 275, 278 (2007).

residual loss. In this way, transaction cost theory and agency theory can work together to explain outsourcing decisions. Both theories are “concerned with similar issues and appear to be moving toward even more common conceptual ground.”<sup>132</sup> As a result, it is helpful to consider the theories in conjunction; scholars have suggested that “blending constructs and propositions from the two theories may further improve our understanding of market[] phenomena.”<sup>133</sup>

Just as agency theory has been criticized for its inattention to behavioral and ethical considerations, transaction cost theory has been subject to similar criticism. Specifically, researchers have argued that transaction cost theory may fail in practice when “managers are incapable of implementing” the rules of behavior upon which transaction cost theory depends.<sup>134</sup> However, while researchers have criticized transaction cost theory’s ability to provide normative guidance, they agree that the theory has merit for “descriptive and analytical purposes”—that is, it can help explain why choices are made, even if it cannot effectively guide those choices at the outset.<sup>135</sup> And indeed, in the outsourcing context, empirical study has found “modest evidence” in support of transaction cost theory, noting that “parties write contracts with more hierarchical governance features when a deal involves complex business functions or imposes stricter barriers to exit.”<sup>136</sup>

### 3. Resource Dependence Theory

Resource dependence theory focuses on the environment of organizations.<sup>137</sup> It examines firms within their external environments, and examines their dependence on actors outside the firm for critical resources.<sup>138</sup> The theory “argues that organizations are other-directed, involved in a constant struggle for autonomy and discretion, confronted with constraints and external control.”<sup>139</sup>

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132. Mark Bergen et al., *Agency Relationships in Marketing: A Review of the Implications and Applications of Agency and Related Theories*, 56 J. MARKETING 1, 8 (1992).

133. *Id.*

134. Sumantra Ghoshal & Peter Moran, *Bad for Practice: A Critique of the Transaction Cost Theory*, 21 ACAD. MGMT. REV. 13, 16 (1996).

135. *Id.* at 40.

136. Geis, *supra* note 70, at 293.

137. Ben L. Kedia & Somnath Lahiri, *International Outsourcing of Services: A Partnership Model*, 13 J. INT’L MGMT. 22, 30 (2007).

138. *Id.*

139. JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* 257 (1978).



Resource dependence theory also can be integrated with agency theory and transaction cost theory. One theme of both agency theory and transaction cost theory is opportunism—the idea that contracting parties have an incentive to act in their own interest, which may well conflict with the interest of their contracting partner.<sup>140</sup> Resource dependence theory links some of these interests. It suggests that organizations will “respond most quickly and substantively to those stakeholders upon whom they depend for resources.”<sup>141</sup> Thus, large corporate clients like Microsoft may find LPO vendors to be especially responsive to meeting their needs. On the other hand, smaller clients who supply only a fraction of the vendors’ resources may find the vendors to be less responsive.

Resource dependence theory helps to explain why many large corporations are beginning to reduce the total number of firms performing legal work for them. As one lawyer noted, when work was spread among a large number of law firms, the firms had little incentive to offer discounted fees or to “give close management attention to the work.”<sup>142</sup> Because each firm had little to gain from the relationship, general counsels also believe that the “firms had little incentive to cooperate with one another on our behalf by sharing information and collaborating.”<sup>143</sup> Law firms themselves may simply drop smaller clients—in some cases, lawyers “serving smaller, more local clients were expressly told to drop these matters and to refocus their efforts on providing support for the firm’s large global clients.”<sup>144</sup>

For large corporate clients, the solution to the resource dependence problem may involve consolidating work so that a smaller number of outside firms perform their work, thus allowing the company to retain

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140. See Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 654 (1993) (“Parties to agency relationships often adopt private strategies to overcome opportunism and minimize transaction costs—to address the barriers to fully contingent bargains between principals and agents.”); G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 228 (1991) (“The term ‘opportunism’ is not defined precisely in either the legal or economic literature. As commonly used, however, the term carries negative connotations, describing instances in which someone reneges on an agreement or understanding to take advantage of a new opportunity.”).

141. Mary E. Graham & Julie L. Hotchkiss, *A Systemic Assessment of Employer Equal Employment Opportunity Efforts As a Means of Reducing the Gender Earnings Gap*, 12 CORNELL J.L. & PUB. POL’Y 169, 184 (2002); see also PFEFFER & SALANCIK, *supra* note 139; Melissa W. Barringer & George T. Milkovich, *A Theoretical Exploration of the Adoption and Design of Flexible Benefit Plans: A Case of Human Resource Innovation*, 23 ACAD. MGMT. REV. 305, 305–24 (1998).

142. Wilkins, *supra* note 112, at 2086.

143. *Id.*

144. *Id.* at 2091.

“trophy client” status.<sup>145</sup> Smaller clients are unlikely to have this option—they likely do not generate enough work to obtain trophy client status. These smaller companies may have better luck seeking out a more specialized vendor.<sup>146</sup> Even if no particular client is supplying the majority of the vendor’s resources, the vendor may otherwise focus on the client’s business category, for example, working with particular types of small firms or cases (*e.g.*, small bankruptcy firms or no-fault insurance cases<sup>147</sup>). Because the clients are similar, the vendor can supply similar services to all of them, thus gaining the responsiveness benefit suggested by resource-dependence theory.<sup>148</sup>

Resources need not be monetary. There are at least four different species of capital that play a role in the outsourcing equation—economic, intellectual, social, and symbolic.<sup>149</sup> Economic capital is the funding that clients pay for outsourcing services.<sup>150</sup> Intellectual capital consists of specialized knowledge and competence in the field;<sup>151</sup> both clients and vendors possess such intellectual capital, and, at least in the case of high-level legal outsourcing, the client is paying the vendor specifically for sharing the vendor’s legal knowledge and competence. Social capital includes access to stakeholders and decisionmakers.<sup>152</sup> When a client hires an onshore law firm as an intermediary to manage the outsourcing process, the law firm has access to valuable social capital because it deals directly with the client.<sup>153</sup> When the corporate client hires an offshore vendor directly, the offshore worker may have greater access to this social

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145. *Id.* at 2087 (noting that “companies hope to leverage their status as a ‘trophy client’ to exact deeper discounts and package rates”).

146. Indeed, some LPOs advertise that they specialize in serving smaller businesses. *See, e.g., Why Mangalam*, MANGALAM INFORMATION TECHNOLOGIES, <http://www.mangalaminfotech.com/whymangalam.php> (last visited Mar. 15, 2011) (“We have a conscious focus to serve small & medium sized enterprises . . . Small and medium size clients do not get the kind of attention from large out sourcing companies for more than one reason. . . . At Mangalam, since our focus is serving the small and medium business, we go the extra mile to understand and align our service offerings with our clients.”).

147. *See* Roy A. Mura, *New York No-Fault Insurance Law Blogs*, COVERAGE COUNSEL (Feb. 17, 2010, 6:10 PM), <http://nycoveragecounsel.blogspot.com/2009/03/new-york-no-fault-blogs.html> (noting that some no-fault insurance work is currently being outsourced to India).

148. Greg C. Cheyne, Comment, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, 2009 U. CHI. LEGAL F. 459, 470 (2009) (making the same point in the context of homeless shelter providers seeking to offer services to “homogeneous clients”).

149. Natalia Levina & Emmanuelle Vaast, *Innovating or Doing as Told? Status Differences and Overlapping Boundaries in Offshore Collaboration*, 32 MIS Q. 307, 323 (2008).

150. *Id.*

151. *Id.*

152. *Id.*

153. *See infra* Part III.A.1 (describing the law firm quarterback outsourcing model).

capital.<sup>154</sup> Finally, symbolic capital includes measures of status and the “authority to judge outcomes.”<sup>155</sup> Symbolic capital most often resides with the outsourcing client, though balancing the power inherent in symbolic capital will likely improve the quality of the outsourcing relationship.<sup>156</sup>

### B. *Organizational Behavior Theory*

The socioeconomic theories discussed above are helpful in understanding some of the parties’ differing incentives, capabilities, and resources in the outsourcing relationship. But these aspects, which depend heavily on rational choice, are insufficient to explain why outsourcing projects succeed or fail.<sup>157</sup> Organizational and psychological factors also play a large role in explaining the outcome of outsourcing projects. This section examines theories from organizational behavior and social psychology to look more closely at the human side of the outsourcing process.

Organizational behavior studies human behavior and psychology within the situational and institutional setting.<sup>158</sup> It can help fill some of the gaps in traditional economic theory, which has been criticized for its “narrow view of rationality” and inattention to ethical norms.<sup>159</sup> In this section, I examine three particular ways in which the human element interacts with organizations in the outsourcing process. First, social exchange theory helps explain how parties to a contract engage each other over time, attempting to create balance and mutuality.<sup>160</sup> Second, research on the psychological contract describes how employees’ unspoken assumptions and expectations can influence the quality of the work they perform.<sup>161</sup> Third, the concepts of exit, voice, and loyalty can help illuminate how employees will react when problems arise.<sup>162</sup>

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154. See *infra* Part III.A.2–3 (describing the corporate extension and service provider models).

155. Levina & Vaast, *supra* note 149, at 323.

156. See *infra* Part IV.D.

157. REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGEMENT AND DECISION MAKING* 20 (2d ed. 2010) (“Not only do the choices of individuals and social decision-making groups tend to violate the principle of maximizing expected utility; they are also often patently irrational.”).

158. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 154 (2003).

159. Orts, *supra* note 122, at 277 (citing Levinthal, *supra* note 122, at 154).

160. See *infra* Part II.B.1.

161. See *infra* Part II.B.2.

162. See *infra* Part II.B.3.

### 1. Social Exchange Theory

Social Exchange Theory focuses on the relationship between actors—either firms or individuals—over time.<sup>163</sup> It defines “social exchange” as “the voluntary actions of individuals that are motivated by the returns they are expected to bring and typically do in fact bring from others.”<sup>164</sup> Social exchange theory assumes that people will, over time, act in ways that maximize positive outcomes and minimize negative ones.<sup>165</sup> It further assumes that the relationship arises from “mutual dependence”—that is, “both parties have some reason to engage in exchange to obtain resources of value.”

Four concepts underlie social exchange theory. The first, reciprocity, focuses on the mutuality of benefit.<sup>166</sup> The second, balance, examines how dependent each actor is on the other—a condition that is likely to change over time.<sup>167</sup> Cohesion, the third factor, measures the strength of the relationship and its ability to survive conflict.<sup>168</sup> Finally, the fourth factor, power-balancing, arises from the assumption that “actors are motivated to maintain or increase their power in exchange relations to increase benefits and to minimize losses.”<sup>169</sup>

Social exchange theory is useful in analyzing outsourcing relationships over time. Although the practice of legal offshoring is still relatively young, the field is characterized by ongoing relationships. Approximately seventy percent of offshoring contracts in general are renewed,<sup>170</sup> and clients’ overall satisfaction with legal outsourcing relationships suggests that most outsourcing relationships will continue past the initial contract. The complexity of the legal services performed grows as the relationship lengthens. Companies typically start out with simpler contracts for simpler services that grow over time as the client develops trust in the vendor.<sup>171</sup> Social exchange theory’s discussion of “mutual dependence” applies

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163. Karen S. Cook, Coye Cheshire & Alexandra Gerbasi, *Power, Dependence and Social Exchange*, in CONTEMPORARY SOCIAL PSYCHOLOGICAL THEORIES 194, 196 (Peter J. Burke ed., 2006).

164. PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 91 (1964) (quoted in Chakrabarty, *supra* note 109, at 254).

165. Linda D. Molm & Karen S. Cook, *Social Exchange and Exchange Networks*, in SOCIOLOGICAL PERSPECTIVES ON SOCIAL PSYCHOLOGY 209, 210 (Karen Cook et al. eds., 1995).

166. Lyn H. Lofland, *Social Interaction: Continuities and Complexities in the Study of Non-Intimate Sociality*, in SOCIOLOGICAL PERSPECTIVES, *supra* note 165, at 176, 197.

167. *Id.*

168. *Id.*

169. *Id.* at 196–97.

170. Christian, *supra* note 9.

171. Interview with Kevin Colangelo, *supra* note 100.

forcefully in the outsourcing context, where scholars report that trust on both sides is critical to the ongoing relationship:

Clients need to trust their providers with regard to desired quality and timing of service delivery, maintenance of confidentiality and security of inside information, and non-display of opportunistic behavior that might lead to loss of control over the outsourced activity or even *double outsourcing* that involves subcontracting work elsewhere for additional profits. Likewise, providers need to trust their clients in the matters of demand stability, timely payment of contract amounts, release of promised incentives, and adherence to ethical and legal standards particularly when disputes arise.<sup>172</sup>

When two contracting parties focus on long-term strategies, each has “an incentive to invest in the long-term health of the other.”<sup>173</sup> But in order to make the long-term relationship work, both parties must avoid short-term opportunism in the interest of developing a longer-term beneficial alliance.<sup>174</sup>

## 2. The Psychological Contract

While the theories described above focus on the relationship of the two firms involved in the outsourcing process, other theories focus more attention on the individual employees involved in the process. These employees are critical to the success of any outsourcing venture. Thus, the next two subsections focus on the relationship between the employees and the firms that employ them.

Organizational behavior theory suggests that all employees—whether full-time, part-time, or contract employees—form unwritten “psychological contracts” with their employer.<sup>175</sup> When the employer does not share the same understanding, conflict can arise. Thus, such a psychological contract for temporary employees may include the possibility of being hired on full-time once the employees have proved their skills.<sup>176</sup> Likewise, full-time employees may have an expectation that their jobs will be secure as long as

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172. Kedia & Lehiri, *supra* note 137, at 31–32 (citations omitted).

173. Wilkins, *supra* note 112, at 2115.

174. *Id.* at 2116 (citing BENJAMIN GOMES-CASSERES, *THE ALLIANCE REVOLUTION: THE NEW SHAPE OF BUSINESS RIVALRY* 95 (1996)).

175. Judi McLean Parks et al., *Fitting Square Pegs into Round Holes: Mapping the Domain of Contingent Work Arrangements onto the Psychological Contract*, 19 J. ORG. BEHAV. 687, 723 (1998); see also Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 980–81 (2007).

176. Parks et al., *supra* note 175, at 723.

they perform competent work, and this conception may be threatened when they see the organization hiring contingent workers.<sup>177</sup> When there are multiple employers involved in a contract, “employees may face conflicting psychological contracts with each employer,”<sup>178</sup> as the employers may have different expectations of the employee and may have conflicting interests in regard to the employee.<sup>179</sup>

In outsourcing, the psychological contract comes into play among employees of both onshore and offshore entities. Onshore, many young attorneys are worried about the stability of their jobs. They have seen numerous rounds of layoffs, and may feel that their jobs are threatened by international outsourcing.<sup>180</sup> Attorneys working offshore are likely to internalize the psychological contract differently.<sup>181</sup> Full-time offshore employees, like their onshore counterparts, may expect stable work, reliable hours, and opportunities to advance into a management role.<sup>182</sup> Contingent contract workers hired overseas, by contrast, may or may not have the same expectations.

The psychological contract depends upon cultural variations potentially affected by outsourcing. An employee may, for example, expect to be accorded respect according to age. At least one LPO provider specifically notes that such an expectation will not necessarily bear out in practice: an executive noted that “designations are not proportional to age but only to merit and performance. A 40-year-old may have to report to a 27-year-old, depending on their individual experiences and performance in the company. . . . It’s more like the work culture in the West.”<sup>183</sup> While this arrangement promotes flexibility, it may also cause employees to feel discomfort when the unstated psychological contract is violated.

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177. *Id.*

178. *Id.* at 719.

179. *Id.*

180. See, e.g., Elie Mystal, *Outsourcing: It’s Not Just About the Money*, ABOVE THE LAW (June 9, 2010, 10:09 AM), <http://abovethelaw.com/2010/06/outsourcing-its-not-just-about-the-money/> (referring to “the coming junior associate apocalypse that is legal outsourcing”).

181. Rosemary Ambale, *Is “Contract Attorneys” a Really Good Idea?*, WITCHCRAFT (Oct. 19, 2008, 4:00 PM), <http://rosemary-witchcraft.blogspot.com/2008/10/is-contract-attorneys-really-good-idea.html> (noting that offshore contract employees may feel more tempted to engage in disloyal conduct than do full-time employees).

182. *Id.*

183. *Behind the Indian Hiring Boom for Legal Services Outsourcing: The Economic Times Interviews Sanjay Kamlani of Pangea3*, LAW WITHOUT BORDERS: ADVENTURES IN LEGAL OUTSOURCING TO INDIA AND BEYOND (May 31, 2010), <http://lawwithoutborders.typepad.com/legaloutsourcing/2010/05/behind-the-indian-hiring-boom-for-legal-services-outsourcing-the-economic-times-interviews-sanjay-ka.html>.

### 3. Exit, Voice, and Loyalty

Albert Hirschman famously observed that there are two main ways actors can deal with dissatisfaction in an ongoing relationship: exit (leaving employment) and voice (articulating discontent in order to promote change).<sup>184</sup> He notes that voice can act as an alternative to exit or a complement to it; exit may be a last resort after voicing discontent failed to achieve the desired changes.<sup>185</sup> Loyalty will affect how those choices play out; according to Hirschman, “as a rule . . . loyalty holds exit at bay and activates voice.”<sup>186</sup>

Research on outsourcing arrangements suggests that the arrangements affect employees’ decision to engage in both “exit” and “voice.”<sup>187</sup> For example, researchers found that when workforces were blended, so that standard full-time employees worked side-by-side with contingent employees, the blending “worsened relations between managers and employees, decreased standard employees’ loyalty, and increased their interest both in leaving their organizations and in exercising voice through unionization.”<sup>188</sup> While these results would not necessarily carry over into the offshoring context where there is greater distance between the different types of employees, it is possible that offshoring would lead to a similar result. As other scholars have pointed out, outsourcing can be a “subtle reminder to employees [of the client firm] of their potentially uncertain job status.”<sup>189</sup> Employee satisfaction—and options for exercising dissatisfaction—should be considered both at the client and vendor level when engaging in outsourcing agreements.

The exit/voice/loyalty relationship can also interact with the psychological contract. When employees’ unstated expectations are not met, employees are less likely to feel loyal to the employer. Again, such expectations can vary by culture. Because attorneys in the United States are acculturated to associate the practice of law with prestige and power, an employment relationship that breaches this expectation may engender negative feelings. One attorney who worked as a temporary employee doing

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184. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES 21–30 (1970).

185. *Id.* at 37.

186. *Id.* at 78.

187. Alison Davis-Blake, Joseph P. Broschak & Elizabeth George, *Happy Together? How Using Nonstandard Workers Affects Exit, Voice, and Loyalty Among Standard Employees*, 46 ACAD. MGMT. J. 475, 482 (2003).

188. *Id.* at 475.

189. Regan & Heenan, *supra* note 14, at 2184.

document review at a major U.S. law firm reported feeling subjugated and belittled by the employment conditions at the firm:

The environment here is god-awful—literally. We have 10 people in a room of less than 200 square feet of space. It's in the middle of the floor where “real people” actually walk by and stare.

It's almost as though we're looked at as animals. I could go on and on, but I need to hit my number of docs per hour just so I can keep my “legal” job.<sup>190</sup>

Similar work conditions at an Indian LPO may be interpreted very differently. As noted above, the practice of law does not carry the same expectation of prestige and power that it does in the U.S.<sup>191</sup> In addition, Indian attorneys working at LPOs may value different aspects of the document review job. To LPO employees, the positions offer relatively good salaries by Indian standards, maintain “a corporate atmosphere that [i]s ‘safe’ for women,” and offer a coveted opportunity to perform “global” work while developing transferable skill sets.<sup>192</sup> As a result, document review work may fulfill the psychological contract for Indian employees while not fulfilling it for American employees—thus creating higher satisfaction and loyalty in India.

Finally, exit, voice, and loyalty can come into play at the client/vendor level as well. Just as an employee can choose to leave employment, so too can a client choose whether to renew a contract with the legal services vendor. When problems arise, will the client voice dissatisfaction? And will the vendor respond to the client's concerns in a way that encourages the contractual relationship to continue? Loyalty, built over time and through close communication, may encourage the client to voice concerns without exiting the contractual relationship.

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190. David Lat, *Skaddenfreude: A Look Inside the Life of a Kirkland & Ellis Contract Attorney*, ABOVE THE LAW (Aug. 17, 2010, 10:04 AM) <http://abovethelaw.com/2010/08/skaddenfreude-a-look-inside-the-life-of-a-kirkland-ellis-contract-attorney/#more-31259> (reproducing an email from a U.S. attorney working as a contract employee).

191. See PANDEY, *supra* note 23, at 60.

192. David B. Wilkins, Swethaa Ballakrishnen & Shaun J. Mathew, *Putting India Back Into the Indian LPO Debate*, Presentation at the International Legal Ethics Conference IV, Stanford Law School (July 16, 2010) (language taken from powerpoint presentation used during speech), available at <http://blogs.law.stanford.edu/ilec4/files/2010/07/Panel-5F-Wilkins-and-Ballakrishnen-ppt-.pdf>.



### III. SITUATIONAL INFLUENCES ON LEGAL OFFSHORING

The theoretical constructs described in the prior section can help understand many of the dynamics at play in the offshore outsourcing relationship, but situational influences are equally important, and often overlooked.<sup>193</sup> Scholars have adopted an approach called “situationism” to examine the power of the external environment and circumstances to influence behavior. Situationism “challenges the notion that ethical behavior is primarily the work of good character . . . [and] instead suggests that behavior is highly context-dependent and often differs based on what seem to be trivial differences between one situation and another.”<sup>194</sup> Likewise, the impact of outsourcing on lawyers’ ethical duties of competence, confidentiality, and conflicts of interest will be significantly influenced by the situational context in which legal services are rendered.

While the prior section focused on general risks of contracting within the legal services industry, this section focuses on risks that arise from the particular context of offshore outsourcing. It first examines the benefits and costs of three different models of allocating responsibility. Second, it examines risks that arise from varying employment contexts and conditions. Finally, it analyzes problems that can arise from cross-cultural status and hierarchy differences with the outsourcing process.

#### A. *Allocation of Responsibility*

When legal work is outsourced, it is also disaggregated by necessity. Instead of having a single lawyer—or even a single law firm—responsible for the legal work in its entirety, outsourcing means that part of the legal work will be separated and performed elsewhere. Thus, by definition, there will be some diffusion of responsibility. How this responsibility is allocated will affect the organizational dynamics involved in the provision of legal services, thereby affecting the overall quality of those services. This section examines the most common models for allocation of responsibility and analyzes costs and benefits of each model.

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193. See Hanson & Yosifon, *supra* note 15; see also Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 328–38 (2008).

194. Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1963 (2006).

### 1. The Law-Firm Quarterback Model

In the “quarterback” model, the corporate client relies heavily on an outside law firm to direct the outsourcing process. This model, especially popular in the UK, Australia, and New Zealand, puts the law firm in a “quarterback” or “foreman” role.<sup>195</sup> The law firm functions as an intermediary between clients and LPO firms, directing the legal representation and ensuring that each piece of the representation is handled by the provider best suited to complete the work. Some law firms may set up a captive center offshore, while others work with independent vendors.<sup>196</sup> Having the law firm take this central role helps to improve the coordination of legal services by ensuring that legal strategy is directed by a central source.

Having a law firm quarterbacking the outsourcing arrangement can mediate some of the agency costs. The client, for example, wants to reduce expenses, while the LPO provider wants to maximize revenue. As between the LPO vendor and the client, the law firm can be in a more neutral position, able to direct assignments, monitor productivity, and evaluate work product.<sup>197</sup> The model is also more expensive, however, because the client must pay the onshore firm for the time spent coordinating and supervising these services.

### 2. The Corporate Extension Model

In the “extension” model, often also called a “captive center” model, corporate law departments work directly with offshore legal professionals, viewing them as an extension of the in-house legal department.<sup>198</sup> Under this model, offshore workers are generally employed directly by a corporate subsidiary, as in the GE case.<sup>199</sup> Furthermore, there is still one overarching organization, and it is not unreasonable to consider the offshore site an extension of the corporate legal department.

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195. Jordan Furlong, *The Evolution of Outsourcing*, LAW21 (June 8, 2010), <http://www.law21.ca/2010/06/08/the-evolution-of-outsourcing/>.

196. See Evalueserve, *supra* note 36 (noting that Clifford Chance has a captive center in India that provides IT, finance, and accounting support, and Baker & McKenzie has a captive in the Philippines that provides desktop publishing support).

197. While the law firm may be in a good position to mediate between client and vendor interests, it also has its own interests that differ from each, and those interests may also add to the overall agency costs. See *supra* Part II.A.1.

198. Furlong, *supra* note 195.

199. See Evalueserve, *supra* note 36 (noting that in addition to GE, Motorola, DuPont, and Phillips also have captive centers offshore).

The corporate extension model cuts some of the costs present in the law firm quarterback model, as the client does not have to pay for an onshore law firm to coordinate services. The corporate extension model may also enhance communication between the corporate client and offshore workers, as there are fewer layers between the client and the legal service professionals, and there is more likely to be a continuously ongoing relationship between the corporation and its offshore partner. In this sense, the client is able to realize the advantages of resource-dependence—because the subsidiary is fully dependent on a single corporate client, it will be maximally responsive to client’s needs.<sup>200</sup> On the other hand, the extension model may be available only to the largest corporate clients, as it requires large economies of scale for a company to independently recruit, train, and employ offshore employees.

### 3. The Service-Provider Model

Under the “service-provider” model, corporations will contract with a third-party LPO vendor. In this model, the corporate client pays somewhat more to hire an intermediary firm to hire and train offshore employees. This model has the benefit of familiarity; the corporation has most likely used a service-provider model in other contexts, such as contracting for software development, printing services, and other business operations.<sup>201</sup>

The service-provider model may offer greater flexibility to corporate clients. The corporation will not need to sustain its own offshore workforce, but can instead hire only the hours of labor needed from the LPO vendor. This flexibility is offset by substantial supervision responsibilities, however. Because the legal service providers are neither directly employed by the corporate client nor supervised by outside counsel, the general counsel’s office will have to undertake the burden of supervising the legal services.<sup>202</sup>

#### B. Working Conditions of LPO Professionals

When a client hires an LPO firm to provide legal services, it is likely to focus primary attention on the firm itself—its consideration of LPO

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200. See *supra* Part II.A.3.

201. Daly & Silver, *supra* note 12, at 413–14 (“[C]orporate general counsel (GCs) may be more likely to try offshore outsourcing than law firms because they are influenced by the successful experiences of other corporate departments that have outsourced work overseas.”).

202. See *id.* at 445 (noting that GCs who outsource directly “may be comfortable judging competence and capability according to their own criteria and on the basis of their knowledge of the firms and lawyers”).

employees may be limited to verifying their credentials and experience.<sup>203</sup> Nevertheless, the employment conditions of LPO employees can significantly affect the legal services offered. Employee working conditions that contravene social norms may lead to emotional distress and breakdown of working relations.<sup>204</sup> This breakdown, in turn, can shift the exit/voice/loyalty calculation, ultimately affecting compliance with ethical duties.

Even non-malicious employment decisions such as hiring temporary rather than permanent employees can lead to consequences that ultimately harm client interests. As one LPO professional noted, utilizing contract employees can raise the risks of disclosure of confidences and can open the door to conflicts of interest.<sup>205</sup> Because the contract employees suffer periods of unemployment between jobs, and because they also migrate between LPO providers who might be hired by opposing parties, the employees may have incentives to share confidential information:

In such a situation, a contract employee learning of a defense tactic employed by the defendant in a particular litigation, might well be tempted to disclose the same to the opposite party in the same litigation or in a subsequent suit, if he happens to be working subsequently in an LPO that is handling litigation for that opposite party.<sup>206</sup>

If employees had an expectation of continued employment that was not borne out in practice, they may feel betrayed when additional work is not forthcoming and thus believe they are justified in behaving opportunistically. In this regard, it may matter whether the contingent employee was hired with a particular end date to the contract; without such an anticipated end date, the employee may have a greater psychological expectation that work will continue.<sup>207</sup> The employer need not have created such an expectation of future work; it may have been part of the employee's unarticulated psychological contract.<sup>208</sup>

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203. See ABA Opinion 08-451, *supra* note 33, at 3 (recommending that attorneys managing an outsourcing process pay particular attention to the employment conditions of offshore workers); see also Matthew Sullivan, *Working with LPO Vendors: Relationship or Transaction?*, GLOBAL LEGAL (Oct. 28, 2009, 11:28 AM), <http://globallegal.wordpress.com/2009/10/28/working-with-lpo-vendors-relationship-or-transaction/> (noting that UK attorneys appear “more prepared to accept and manage LPO teams than their U.S. counterparts”).

204. See, e.g., text accompanying note 183 (discussing different norms of authority by age, experience, and performance).

205. Ambale, *supra* note 181.

206. *Id.*

207. See Regan & Heenan, *supra* note 14, at 2181–83.

208. See *supra* Part II.B.2.

Similar breaches of confidential information have been threatened by contract workers involved in other types of outsourcing. For example, one contract worker in Pakistan threatened to post patient health records online if a San Francisco hospital failed to pay her for medical transcription services.<sup>209</sup> Interestingly, the hospital had not offshored the transcription work—but it did outsource it to a Florida vendor.<sup>210</sup> The Florida vendor then allegedly subcontracted the work to a man in Texas, who then hired the contractor in Pakistan, and failed to pay for the work performed.<sup>211</sup> In this case, the employee’s opportunistic—and damaging—behavior was not caused by the breach of an underlying psychological contract, but rather by the breach of an explicit contract, when the worker was not paid as promised.

Unauthorized disclosure in legal offshoring is rare, and LPO vendors’ strict controls on the information provided to employees reduce some of the risk of such disclosure. It is typical for the LPO firms to institute mechanical controls on employee access to confidential information; at Evalueserve, one of the larger firms, “employee computers don’t have functional USB ports. All paper in the office is color coded, and employees aren’t allowed to take even bits of paper out of the office.”<sup>212</sup>

These mechanical controls are a type of agency cost; they allow parties to minimize the risk of ethical breaches by adding monitoring costs that control employee access to information.<sup>213</sup> The control may also contribute to the client/vendor relationship over time. As long as the controls are consistently implemented and effective, they may aid the process of building mutual trust between client and vendor.<sup>214</sup>

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209. David Lazarus, *Looking Offshore: Outsourced UCSF Notes Highlight Privacy Risk: How One Offshore Worker Sent Tremor Through Medical System*, S.F. CHRON., Mar. 28, 2004, at A1, available at [http://articles.sfgate.com/2004-03-28/news/17417090\\_1\\_ucsf-medical-center-patient-records-privacy/7](http://articles.sfgate.com/2004-03-28/news/17417090_1_ucsf-medical-center-patient-records-privacy/7).

210. *Id.*

211. *Id.*

212. Ben Frumin, *\$250 Billion Legal Outsourcing Business from the West Eyed by India*, BIZ INDIA (Apr. 2008), <http://www.bizindia.net/news/News.asp?NewsID=142&Page=4>; see also ABA Discussion Draft, *supra* note 33, at 13 (“Exploring the range of additional guidance currently available to lawyers, the Commission reviewed materials from domestic and international outsourcing providers themselves, finding substantial evidence that the providers are also focused on the ethical considerations and obligations identified in the organized bars’ ethics opinions, and that they are motivated to do so. Protocols developed by the providers of outsourced legal and non-legal services evidence their use of ever more sophisticated technology to ensure quality control of the outsourced work, to provide adequate security over personnel and information, and to increase the opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.”).

213. See *supra* Part II.A.1.

214. See *supra* Part II.B.1.

What these controls cannot accomplish, however, is to secure the employee's loyalty. With such strict controls in place, the employees may feel that they are not trusted, and may have no personal stake in contributing to the relationship. In such a case, the employer's attention to the psychological contract takes on an even more important role. If the employee expects stable employment, he or she may feel betrayed if the LPO employer terminates employees when work is slow—and that sense of betrayal may diminish loyalty, increasing the risk that the employee will take action adverse to the employer's interest. For this reason, at least one LPO professional recommends that firms hire full-time employees "whose loyalties are secured."<sup>215</sup>

### C. Status Barriers

As noted above, some LPOs are hiring U.S.-licensed attorneys to provide quality review before outsourced work is delivered to the client.<sup>216</sup> While such an organizational structure may increase client comfort,<sup>217</sup> it may also exacerbate perceived disparities in status; LPO employees may feel uncomfortable if they perceive "US and UK attorneys metamorphosing into top management honchos overnight."<sup>218</sup>

US and UK attorneys who would never otherwise have dreamed of visiting the Orient are making a beeline for India and China and happily playing leading roles in LPOs. At home, they would probably still be struggling juniors, serving summonses and recording EBTs. Here, they manage large teams of Indian lawyers and head ambitious projects. Their salaries may not be as high as what they might have earned in the US even at the lowest rung of their careers, but the lower cost of living both in India and China more than makes up for that. Furthermore, LPOs in India are based in metros where the standard of living can be even more lavish than abroad, what with malls, multiplexes, and in-house help for every chore.<sup>219</sup>

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215. Ambale, *supra* note 181.

216. Rosemary Ambale, *Sala Main to Sahab Ban Gayaa*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (Aug. 25, 2009, 6:59 AM), <http://rosemary-outsourcing.blogspot.com/2009/08/sala-main-to-sahab-ban-gayaa.html> ("With the ABA mandating strict legal supervision on all legal work that is outsourced, many LPOs set up in India have begun hiring US attorneys not only to satisfy compliance with due diligence procedures but also to increase the comfort levels of their clients.").

217. *Id.*

218. *Id.*

219. *Id.*

In general, scholars report that the legal profession in India does not possess the same prestige that it does in the United States.<sup>220</sup> Specifically, they have noted a “prevailing disparity in this field” as “lawyers in the top bracket are becoming increasingly wealthy even by international standards” while the “vast majority are struggling to make both ends meet despite being otherwise competent.”<sup>221</sup>

Indian attorneys who work for LPOs, however, tend to be at the higher end of the spectrum. Many LPOs report that they hire only from the top twenty law schools in India—given that there are more than 500 law schools in the country, this is quite a small fraction.<sup>222</sup> Thus, working closely with U.S.-licensed attorneys may cause discomfort, especially when “[t]he salaries paid to these attorneys are invariably twice and thrice what an Indian lawyer is paid for the same job.”<sup>223</sup>

These pay disparities lead to status disparities. Outsourcing research from other industries has found that even when offshore salaries were high for their locality, those salaries were still “miniscule compared to the salaries of onshore people.”<sup>224</sup> The onshore/offshore disparities led to a “perception of onshore participants” that “low pay was associated with low status,” leading onshore participants to view their offshore partners “as cheap, low quality worker-bees who could be ordered around.”<sup>225</sup>

Such status barriers can be even greater when combined with pre-existing prejudice on the part of onshore clients:

I can vouch that . . . Indian lawyers are performing as well and in some cases better than their US counterparts. What is really dampening is that where both US and Indian lawyers happen to be working on the same matter, the US lawyer automatically assumes that any error in the case is the work of the India team. Maybe he has reason. But what is worse is that the Indian team is quite willing to assume that somehow it must be their fault. This, I

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220. PANDEY, *supra* note 23, at 60; *see also* Krishnan, *supra* note 53, at 62 (noting that Indian legal culture has an overall focus on courtroom litigation, but “[t]he overall reputation of these courtroom advocates in India is mixed. A common belief is that lawyers who practice at the district court level are poorly reputed. . . . But recent work has shown variation in this group’s perception by clients and the community.”).

221. PANDEY, *supra* note 23, at 60.

222. Interview with Kevin Colangelo, *supra* note 100; *see also* James Dean, *How Legal Process Outsourcing Is Changing the Legal Landscape*, L. SOC’Y GAZETTE (Feb. 25, 2010), <http://www.lawgazette.co.uk/in-business/a-first-hand-look-a-legal-process-outsourcer-provider-india> (noting that “CPA only recruits lawyers with degrees from ‘tier-one or tier-two’ law schools, of which there are 20 to 25”).

223. Ambale, *supra* note 216.

224. Levina & Vaast, *supra* note 149, at 316.

225. *Id.*

think, is the effect of years of British rule which has left us with a definite inferiority complex.<sup>226</sup>

Research on the psychological contract and on exit, voice, and loyalty suggests that these status barriers will be most keenly felt when U.S. and Indian attorneys work side-by-side. Just as the presence of contingent employees reminded the permanent employees that their employment arrangement was fragile,<sup>227</sup> so too can the presence of U.S. attorneys change the frames of reference for Indian attorneys. An LPO salary that appears excellent in light of the salaries earned by law school classmates<sup>228</sup> may not seem quite as good when compared to the much higher salaries of U.S. attorneys doing the same or similar work.

Some elements of the status disparity may be a necessary cost of doing business; after all, supervision of the work by U.S. attorneys is required by the ethics opinions approving outsourcing arrangements.<sup>229</sup> Nevertheless, both vendor and client should be aware of the possibility of employee discomfort, and should try to minimize status barriers when possible. At a minimum, both the client and the vendor should be aware of the dangers of implicit bias,<sup>230</sup> and should be wary of too quickly assigning blame to the non-U.S. employees. Other strategies for minimizing the negative effect of status barriers on collaboration are discussed more fully in Part IV.B.

#### IV. SHIFTING FRAMES OF REFERENCE: FROM DISAGGREGATION TO COLLABORATION

As discussed in the prior sections, understanding the socioeconomic and organizational theories related to outsourcing can help predict where risks will arise from differing incentives in the contracting process.<sup>231</sup> Understanding the situational context of legal outsourcing can help predict risks that arise from gaps in the allocation of responsibility or from cultural

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226. Ambale, *supra* note 55.

227. Davis-Blake et al., *supra* note 187, at 475; Parks et al., *supra* note 175, at 723.

228. In a large law firm in India, junior attorneys may earn roughly the equivalent of \$220 to \$400 a month. If apprenticed to an individual lawyer (a solo practitioner) they would likely earn only \$100 to \$220 a month. PANDEY, *supra* note 23, at 75.

229. See ABA Opinion 08-451, *supra* note 33.

230. See, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 143 (2004) (noting that “individuals who belong to socially advantaged groups typically exhibit more implicit preference for their ingroups and bias against outgroups than do members of socially disadvantaged groups”).

231. See *supra* Part II.



misunderstandings.<sup>232</sup> Once potential risks have been identified, the parties to the outsourcing process can take steps to minimize those risks.

Successful outsourcing has been said to require “good communications skills, along with the ability to motivate workers from different organizations, negotiate and administer service contracts, assemble effective teams, and plan for and respond to contingencies.”<sup>233</sup> Each of these skills is undoubtedly important: a client that focuses only on the financial cost of outsourcing will miss important factors that influence the ultimate success or failure of the legal venture. To integrate consideration of those organizational and personal factors, this section recommends that clients considering offshoring legal services move from a disaggregation model to a collaboration model. It argues that a collaborative model can better align incentives, improve working conditions, smooth cultural differences, and thereby improve the quality and effectiveness of outsourced legal services.

#### A. *The Disaggregation Model*

Legal outsourcing began with disaggregation: discrete tasks were carved out of the overall legal representation and sent off-site, first to contract attorneys in the United States, and more recently to other countries.<sup>234</sup> Recently, a number of articles have begun to examine the disaggregation phenomenon generally, offering a definition of the practice and general insight into the disaggregation process.<sup>235</sup> Disaggregation involves the (usually sophisticated) client “break[ing] legal representations into pieces and assign[ing] responsibility for different tasks to an appropriate service provider.”<sup>236</sup> Clients view disaggregation as a way to cut costs, but also as a way to increase specialization, sending discrete tasks to the provider best able to manage that particular piece of the process. For example, the client might contract with a specialized e-discovery firm to process electronically-stored information for discovery.<sup>237</sup> Disaggregation also involves an element of what Richard Susskind has termed “commoditization of legal

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232. *See supra* Part III.

233. Regan & Heenan, *supra* note 14, at 2189.

234. *See id.* at 2188–89 (describing the disaggregation of legal tasks and use of contract lawyers).

235. *See, e.g., id.*; Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?*, 98 KY. L.J. 461 (2010); Molly E. Crane, Note, *Let's Be Reasonable About It: Defining the Reasonable Inquiry in an Age of Disaggregation*, 23 GEO. J. LEGAL ETHICS 555 (2010); John Steele, *Disaggregation: An Emerging Issue*, BEAZLEY BRIEF (2009), available at [http://www.legaethicsforum.com/files/beazleybrief\\_0109-3.pdf](http://www.legaethicsforum.com/files/beazleybrief_0109-3.pdf).

236. Steele, *supra* note 235, at 1.

237. *Id.* at 1–2.

services”—the idea that “a legal service or offering is very readily available in the market, often from a variety of sources, and certainly at a highly competitive price. . . . a raw material that can be sourced from one of various suppliers.”<sup>238</sup>

Outsourcing itself cannot exist without some disaggregation and commodification of legal services, as multiple parties are necessarily involved in the provision of those services. But the disaggregation model is more psychological than structural. It assumes an outlook in which each legal provider will function independently and autonomously. In the words of a legal services director at an Indian LPO, firms would be “perceived as product suppliers/vendors,” instead of being perceived as “service providers.”<sup>239</sup> The disaggregation model focuses on the ultimate product, such as a completed document review, a contract database, or a legal brief, rather than the process that created that product.

Disaggregation as an organizational model of legal service is larger than disaggregation as a component of outsourcing. The disaggregation model comes into play when responsibility is diffused between various legal service providers, with each operating autonomously.<sup>240</sup> Even without any offshore participation, large-scale litigation is likely to be disaggregated into various components.<sup>241</sup> Responsibility is often divided between “national, regional, and local representation, in addition to in-house counsel participation.”<sup>242</sup>

Because of its focus on autonomy, the disaggregation model leaves open gaps in the chain of responsibility.<sup>243</sup> When mistakes occur—such as when a party fails to disclose relevant material in discovery—it can be difficult to ascertain who is responsible for the lapse.<sup>244</sup> The attorney responsible for signing the discovery disclosure may be subject to sanctions, but that attorney might be local counsel hired for court appearances, and might not

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238. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 27, 29–30 (2008).

239. Sunita Shah, *The Law Firm of the 21st Century*, SUNITASHAH’S BLOG (July 8, 2010), <http://sunitashah.wordpress.com/2010/07/08/the-law-firm-of-the-21st-century/>.

240. See Regan & Heenan, *supra* note 14, at 2148 (“Law firms, however, have been decomposing their work within the firm for quite some time. They delegate responsibility for discrete aspects of a case or a transaction to a variety of people, both lawyers and nonlawyers, in what we may think of as a supply chain.”).

241. See Wilkins, *supra* note 112, at 2094 (“[O]utside firms are increasingly being invited to become part of the multidisciplinary project team that carries out the company’s core functions. . . . [I]n the modern corporation, ‘relations between inside and outside counsel . . . may be summarized in one word: “partnering.””).

242. Crane, *supra* note 235, at 559.

243. See, e.g., *id.* at 560.

244. *Id.*

have been involved in the decisionmaking that led to the failure to disclose requested information.<sup>245</sup>

The disaggregation model can also lead to opportunistic behavior. With multiple parties involved, there may be incentives to “skirt the rules” knowing that someone else is more likely to be held responsible.<sup>246</sup> Both innocent mistakes and unchecked opportunistic behavior are part of the residual loss predicted by transaction cost theory—they are costs that are not allocated by the parties’ contract.

The problems of disaggregation are magnified when legal work is sent offshore. Overseas service providers may not obtain feedback on the quality or success of their work; employees may not have stable employment or feel loyalty to either client or employer; status barriers may further inhibit loyalty.<sup>247</sup> Each of these difficulties increases the transaction costs of the outsourcing arrangement.<sup>248</sup> Increased monitoring, bonding, and policing expenditures may offset some of those costs, but cannot, by themselves, increase employee loyalty or provide the balanced social exchanges needed to build a strong client/vendor relationship.

### B. *The Collaboration Model*

Moving toward a model of collaboration allows parties to obtain some of the advantages of disaggregation while reducing the risks that arise from gaps in the chain of responsibility. Within the practice of law, three primary types of collaboration have been identified: lawyer to lawyer; lawyer to client; client to client.<sup>249</sup> The outsourcing process largely focuses on the first two models, though there is some room for all three.

In lawyer-to-lawyer collaboration, the corporate client’s outside law firm may collaborate with offshore attorneys at an LPO vendor. Both onshore counsel and offshore LPO firm act as agents in carrying out the client’s legal instruction, and both collaborate together to ensure that the client’s needs are met. In lawyer-to-client collaboration, the client (usually, in the outsourcing realm, the corporate general counsel) will collaborate with outside legal services providers, whether onshore, offshore, or both. And finally, in client-to-client collaboration, clients may discuss their legal needs

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245. *Id.* at 561–65.

246. *Id.* at 566.

247. *See supra* Part II.B.3.

248. *See supra* Part II.A.2.

249. Jordan Furlong, *Metamorphosis: Five Forces Transforming the Legal Services Marketplace*, 36 LAW PRAC. 44, 47 (2010).

with each other.<sup>250</sup> While direct economic competitors may not want to share competitive advantages, general counsel in non-competing firms may be willing to share some information about their experience with offshoring, possibly by recommending particular providers or by sharing cautionary tales. Finally, vendors of legal outsourcing services also share general information, news, and strategies for best practices through networking forums.<sup>251</sup>

Under a collaborative model of outsourcing, work would still be disaggregated in the sense that it is shared among various legal services providers, both on- and off-shore. But unlike the disaggregation model's focus on autonomy and independent work, the collaborative model would focus on cooperation, communication, and negotiation of status and resources.<sup>252</sup> While these activities may appear relatively uncontroversial, they are often overlooked by the disaggregation model—and this exclusion leads less to effective legal representation.

### 1. Cooperation

A focus on cooperation would assist the client, the outsourcing vendor, and (if involved in the transaction) outside counsel in developing a stronger relationship over time. Social exchange theory suggests that maintaining a balanced, mutual relationship will assist the parties in maximizing positive

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250. Client-to-client collaboration may involve clients in unrelated litigation communicating with each other—essentially crowdsourcing legal advice in a particular area. See Jeff Howe, *The Rise of Crowdsourcing*, WIREd, June 2006, at 176, 178–79 (coining term “crowdsourcing” to describe “everyday people” collaborating to solve problems that in the past might have required the assistance of paid professionals); see also *Can I Please Just Ignore These Tickets?*, ASK METAFILTER (Jan. 27, 2010, 1:27 PM), <http://ask.metafilter.com/142563/Can-I-please-just-ignore-these-tickets> (individual seeking others' advice about the legal consequences of ignoring tickets for fare evasion on public transit). Conversely, it may involve opposing clients working together with counsel in a non-adversarial manner, seeking to achieve a mutually satisfactory result without resort to formal adjudication. See, e.g., Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 505–06 (2003).

251. For example, there are several legal outsourcing forums on LinkedIn.com, with active discussions and forum posts. Interestingly, this collaboration does not seem to fit neatly within either the lawyer-to-lawyer or client-to-client models. On the one hand, the participants are indeed lawyers, but on the other hand, they are not working together on a case—and indeed, they may be economic competitors.

252. Two of these principles—cooperation and communication—are also foundations of traditional collaborative lawyering (i.e., non-adversarial client-to-client legal problem solving) outside the outsourcing context. See, e.g., Fairman, *supra* note 250, at 522.

outcomes.<sup>253</sup> The more confidence the parties have in the relationship, the more they are willing to continue it.<sup>254</sup>

Cooperation begins with the choice of outsourcing partner. As noted, resource dependence theory suggests that vendors will be more responsive to clients who provide significant resources.<sup>255</sup> A large corporation with a correspondingly large outsourcing budget may find many vendors that meet its needs. Smaller companies, on the other hand, may do better with more specialized outsourcing vendors.

Cost alone should not drive the choice of vendor. A client focused on disaggregation may be more likely to choose a vendor based only on cost and formal qualifications—after all, if the vendor is expected to work autonomously, competence and cost may be the most important factors.<sup>256</sup> For a one-time contract, price and basic competence may be of overriding importance. However, when contracting opportunities extend over time between repeat players, social exchange theory suggests that the parties' mutual dependence precludes such a narrow focus.

David Wilkins reports that Chrysler experienced a similar phenomenon in purchasing automotive components.<sup>257</sup> When Chrysler purchased from the lowest bidder “with little attention to prior history or performance,” it maintained supplier relationships “characterized by mutual distrust and suspicion.”<sup>258</sup> When Chrysler shifted to a model that allowed long-term contracts based on performance and adopted pricing models based in part on sustainable profits for suppliers, the company was able to reduce overall costs and improve supplier performance.<sup>259</sup> The lesson for outsourcing participants is that long-term cooperation may matter even more than short-term costs. In choosing legal service providers, the client should look beyond bid price to other factors that go into that relationship, ideally choosing a vendor that can act as a partner—not just a product supplier.

Once the contract has been signed, cooperation should continue. At a basic level, power dynamics favor the client. After all, the client controls

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253. See *supra* Part II.B.1.

254. Ji-Ye Mao et al., *Vendors' Perspectives on Trust and Control in Offshore Information Systems Outsourcing*, 45 INFO. & MGMT. 482, 483 (2008).

255. See *supra* Part II.A.3.

256. The ABA's formal outsourcing opinion also recommends that lawyers hiring outsourcing firms pay attention to the employees of service providers, suggesting that the outsourcing client “consider interviewing the principal lawyers” and “inquire into [the] hiring practices” of LPO firms. See ABA Opinion 08-451, *supra* note 33.

257. Wilkins, *supra* note 112, at 2098 (quoting Jeffrey H. Dyer, *How Chrysler Created an American Keiretsu*, HARV. BUS. REV., July–Aug. 1996, at 42, 43).

258. *Id.*

259. *Id.*

the outsourcing budget and chooses a vendor to hire. As social-exchange theory suggests, however, one-sided power dynamics are not stable. If the relationship continues over a longer term, the parties will take actions to balance power within the contracting relationship.<sup>260</sup>

Clients can assist that power-smoothing by giving “voice” to their offshore counterparts and by treating them as partners in collaboration. A recent study by PriceWaterhouseCoopers looked at shared elements of successful outsourcing arrangements and found certain characteristics to be particularly important.<sup>261</sup> Unsurprisingly, parties to successful outsourcing were likely to report that their dealings with each other were “honest and transparent.”<sup>262</sup> In addition, particular measures of collaboration also ranked highly.<sup>263</sup> More than half the respondents reported that “[m]atters of mutual interest [were] decided jointly,” and forty percent reported that their “[j]oint governance structures [were] working effectively.”<sup>264</sup> Smaller, but still significant, numbers of respondents also reported that “[r]isks and rewards [were] shared” (31%) and “[s]uppliers [were] proactively innovative” (27%).<sup>265</sup> Again, learning from the Chrysler experience, regularly meeting with suppliers and establishing mechanisms by which the suppliers could provide advice “produce[d] impressive dividends.”<sup>266</sup> These techniques can be applied in the legal services context as well; contract negotiations should be transparent, with both parties participating in joint decisionmaking, and both parties bearing some of the risk and reaping potential reward.

Clients should also encourage proactive innovation from legal service suppliers. In spite of their experience and knowledge, outsourcing vendors across industries are rarely asked for feedback about improving the outsourcing process.<sup>267</sup> One study found a “subtle but universal status difference” between offshore and onshore participants in the outsourcing process, in which “offshore participants were never asked to judge the quality of the collaboration or the quality of the systems that were developed” and “were never asked to report on the vendor’s view of the how the project was going.”<sup>268</sup> On one occasion when feedback was offered, “useful design suggestions were ignored as offshore developers were

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260. See *supra* Part II.B.1.

261. PRICEWATERHOUSECOOPERS, *supra* note 111, at 15.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Wilkins, *supra* note 112, at 2099.

267. Levina & Vaast, *supra* note 149, at 317.

268. *Id.*

thought to be uninformed about the business.”<sup>269</sup> This failure to seek input from offshore participants may arise from ethnocentrism and implicit cultural biases.<sup>270</sup> Because these failures operate unconsciously,<sup>271</sup> outsourcing clients should institutionalize processes for seeking feedback from offshore partners.<sup>272</sup>

## 2. Communication

Communication between all the parties involved in the outsourcing relationship is one of the most important aspects of a successful outsourcing arrangement. It is likely to enhance the long-term relationship of client and vendor by increasing cohesion and ensuring reciprocity.<sup>273</sup> It is thereby likely to promote employee loyalty and improve the overall quality of legal services rendered. Empirical work has confirmed the importance of communication in outsourcing within the information technology sector. One recent study found that an outsourcing client “can increase vendor’s trust and thus improve customer relationship and project quality by ensuring effective communication and increasing the range and depth of information transfer.”<sup>274</sup>

In spite of these advantages, some LPO professionals report that clients do not always expect to engage in two-way communication.<sup>275</sup> In particular, clients may not expect to engage in further communication after their offshore partners complete assignments.<sup>276</sup> When clients do update LPO providers on the results of their work, however, the offshore attorneys report that it is extremely helpful.<sup>277</sup> One attorney reported that her team had worked for a client performing patent invalidity searches, and noted that the

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269. *Id.* at 315.

270. *See infra* Part III.C.

271. Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 401 (2009) (“[S]tudies show that even when individuals attempt to look beyond their own partisan biases, they are unable to; those biases are buried so deeply in the unconscious that they cannot be called up at will. Attempts to overcome unconscious partisan biases may even backfire, as asking people to focus on potential partisan biases can reinforce prior positions.”).

272. *See* Regan & Heenan, *supra* note 14, at 2153 (noting that information found even in basic processes such as document review can change the objectives of the legal representation, and articulating the importance of communication and feedback processes within the disaggregated legal services).

273. *See supra* Part II.B.1.

274. Mao et al., *supra* note 254, at 489.

275. David Hechler, *Passage to India: Some Companies See Big Savings in “Offshoring” Legal Work. But How’s the Quality?*, CORP. COUNS. (Jan 1, 2009).

276. *Id.*

277. *Id.*

attorneys “were often able to find documents that seemed to prove elements of a patent invalid.”<sup>278</sup> Because the clients never updated LPO providers on the status of the matter after those searches, “they never knew if their work stood up in court.”<sup>279</sup> The attorney’s current employer, by contrast, offers such updates within the training process.<sup>280</sup>

Sometimes the disaggregated nature of legal offshoring makes it difficult for offshore attorneys to understand the larger picture behind the work they are doing. But a sense of the ultimate goal can help even in basic tasks like document review. As one LPO manager reported, attorneys who understand the nature of the project will have a better sense of how to avoid mistakes:

[I]n order for the quality procedures to be put in place, this first step of getting the team to recognize what is an error for that particular process, is vital. . . . I realized that the team was not really aware of what the process was all about. They were merely performing the tasks told like automatons without the faintest idea of why they were doing it. An explanation of the whys and wherefores of client requirements serves to bring the team to an understanding of why a particular document needs to be done in a particular manner. Once the team sees the reason and logic in the work they are engaged in, they can then see for themselves what the client means when she cries ‘error.’<sup>281</sup>

Taking the time to provide feedback and communication about offshored work may be viewed as an additional cost for the client that is added to the already-existing monitoring costs. However, it is a cost that may reduce other transaction costs, especially if it increases the overall quality of the work over time. Such communication may also help in the relationship-building realm; given how many offshore outsourcing contracts are renewed after their expiration, it makes some sense to pay attention to the long-term relationship of the client and vendor. Furthermore, such individual feedback may help ensure that offshore employees feel that they are valued by the client, thus increasing overall loyalty and reducing the likelihood that disgruntled employees will engage in harmful acts, such as breaching confidentiality.<sup>282</sup>

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278. *Id.*

279. *Id.*

280. *Id.*

281. Rosemary Ambale, *Pins in Underwear & Quality Set-Ups Part II*, LEGAL OUTSOURCING—THIS SIDE OF THE POND (Oct. 13, 2009, 6:54 AM), <http://rosemary-outsourcing.blogspot.com/2009/10/quality-set-ups-part-ii.html>.

282. *See supra* Part II.B.2–3.



### 3. Negotiating Status and Resources

Moving toward a collaborative model will require all parties in the outsourcing relationship to renegotiate relative status and resources. Social exchange theory tells us that parties in a business relationship will engage in power balancing over time in order to stabilize the relationship.<sup>283</sup> Within the outsourcing context, actively working toward such power balancing can improve the parties' collaboration and thus improve quality outcomes.<sup>284</sup>

Status and power are closely related.<sup>285</sup> In the outsourcing context, however, onshore workers are typically viewed as having higher status than offshore workers.<sup>286</sup> Improving collaboration requires that these status differences be smoothed out. One outsourcing manager in the banking industry stressed that, due to cultural prejudices, onshore employees sometimes "want to treat Indians as second class citizens" and that much of his job was to "make sure that did not occur" because allowing such status differences to affect the project would destroy offshore employees' innovation.<sup>287</sup> This reaction may result from the unspoken psychological contract: when onshore clients demonstrate respect for the intellectual contributions of their offshore partners, offshore employees perceive such contributions to be a valued part of the employment contract. When such contributions are not valued, they will not become part of the psychological contract, regardless of what the written contract may say.

Negotiating status also requires attention to the elements of the psychological contract that may vary by culture. For example, employees may have very different expectations about how deeply managers should become involved in the day-to-day work. One observer who spent time in England, France, and India, found that "in London and Paris, the team hated interference from a manager," as the team members "wanted to be steered in the right direction and then just left alone to get on with their work."<sup>288</sup> In India, on the other hand, "the same tactic created a group of disgruntled colleagues who felt that their manager was distant and uninterested."<sup>289</sup>

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283. See *supra* Part II.B.1; see also Shane R. Thye, *A Status Value Theory of Power in Exchange Relations*, 65 AM. SOC. REV. 407 (2000) (noting that power dependence theory also predicts that "power imbalanced relations [will] evolve toward a balanced state by activating one or several power-balancing operations").

284. Levina & Vaast, *supra* note 149, at 320–25 (discussing the importance of renegotiating status differences).

285. Thye, *supra* note 283, at 408.

286. Levina & Vaast, *supra* note 149, at 320; see also *supra* Part III.C.

287. Levina & Vaast, *supra* note 149, at 320.

288. KOBAYASHI-HILLARY & SYKES, *supra* note 76, at 149.

289. *Id.*

Thus, management strategies aimed at empowering employees requires sensitivity to these cultural differences.

There is a risk, however, that sensitivity to cultural management styles will bleed over into cultural bias and a hardening of status differences. Cultural stereotypes can provide a convenient excuse for collaborative failures on both sides.<sup>290</sup> One outsourcing study of software development found that “[i]t was easy for onshore developers to say their Indian colleagues failed to collaborate because ‘they were expect[ing] to be spoon-fed specifications’ and for the Indian participants to blame failure on poorly specified requirements from onshore ‘higher-ups.’”<sup>291</sup>

Acknowledging cultural differences without resorting to stereotypes requires some amount of cultural blending.<sup>292</sup> Cultural blending represents “an effort to create shared values, norms, and beliefs and is considered a critical element of control in offshore outsourcing.”<sup>293</sup> Outsourcing managers can use symbolic capital (“the power to name things and institute an order among things”) to negotiate these boundaries.<sup>294</sup> In one case, “stereotypical descriptions of attitudes to authority in India and Russia exhibited themselves when the individuals in question insisted on maintaining them rather than reflecting upon them to arrive at joint norms.”<sup>295</sup> However, as the parties collaborated over time with each other, “collaborative projects led to the accumulation of shared capital.”<sup>296</sup>

Successful managers played a key role in developing this shared capital; they were “willing and able to use the economic, intellectual, social, and symbolic capital they ha[d] accumulated to renegotiate status hierarchies.”<sup>297</sup> They used the “symbolic significance” of their management positions to encourage collaborative attitudes, used their technical competence to train onshore and offshore team members and develop their intellectual capital, used financial resources to integrate team members through visits and meetings, and drew on social connections to assist in the process.<sup>298</sup> Such a renegotiation of status and resource requires significant effort, but reciprocal visits, cultural immersion, and training aid the process of cultural blending across the onshore and offshore team members.<sup>299</sup>

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290. Levina & Vaast, *supra* note 149, at 324.

291. *Id.*

292. Mao et al., *supra* note 254, at 489.

293. *Id.* at 484.

294. Levina & Vaast, *supra* note 149, at 324.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Mao et al., *supra* note 254, at 484.

*C. Barriers to Collaboration*

Although a collaborative model of outsourcing has significant advantages over the disaggregation model, it is subject to criticism in several respects. First, some industry participants have a sense that collaboration may be unnecessary for more straightforward, repetitive tasks such as first-level document review<sup>300</sup>—the type of work that, in Susskind’s terms, is already “commoditized.”<sup>301</sup> Certainly, low-level work (still 85% of the non-IP legal outsourcing field<sup>302</sup>) may require a lower degree of collaboration than more complex legal research and drafting. But while it is true that tasks such as document review can be carried out much more autonomously than brief writing or legal strategy, even commoditized work can benefit from a collaborative perspective, as parties work together to fit the commoditized work within the broader legal strategy. As the employees of outsourcing firms have noted, they can do better work when they understand the context in which they are doing it.<sup>303</sup> Collaboration in document review, database management, or administrative support tasks may involve simply communicating the nature of the project, listening when the vendor offers suggestions, and providing feedback regarding the client’s level of satisfaction with the work. The collaborative activity does not have to be extensive or time-consuming—even these minor actions can improve the overall representation.

A more significant problem with the collaboration model is financial: adopting a collaborative model may raise concerns about shared malpractice liability for negligent representation. As one commentator has pointed out, an explicit disaggregation model that clearly “spell[s] out . . . the division of responsibilities” of the various parties may insulate against claims of joint or vicarious liability.<sup>304</sup> When the client hires the outsourcing firm, the risk of vicarious liability may be lessened.<sup>305</sup> However, when the U.S. counsel performs a more collaborative “quarterbacking” function,<sup>306</sup> directing the legal strategy and determining which party (inside counsel, U.S. counsel, or

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300. Stratman, *supra* note 131, at 285 (suggesting that “[w]ell-understood, standardized service processes, that are not core capabilities of the firm” can be “successfully decoupled” or disaggregated).

301. See SUSSKIND, *supra* note 238, at 27–33.

302. See Ganz, *supra* note 35.

303. See *supra* Part IV.B.2.

304. Richmond, *supra* note 235, at 495.

305. *Id.* (“[T]here are times when clients, rather than lawyers, retain co-counsel. In such matters, it is generally the case that neither lawyer should be vicariously liable for the other’s alleged negligence or misconduct.”).

306. See *supra* Part III.A.1.

an LPO vendor) should perform the various components, then the risk of vicarious liability may be greater.

Transaction cost theory suggests that this risk can be managed by “tighten[ing] control through well-designed contracts.”<sup>307</sup> The potential liability risk is one cost of the outsourcing relationship. Because the corporate client benefits from greater collaboration among legal service providers, it may be willing to contract for a malpractice exclusion that limits liability only for the individual party’s negligence or misconduct. To the extent that outside counsel plays a significant role in directing the outsourcing activity, it should request such a contract provision.

Finally, another risk of the collaborative model is that U.S. corporations’ “collaboration” with offshore entities will be viewed by the American public in the term’s pejorative sense.<sup>308</sup> Those with a protectionist ideology may view collaborative outsourcing as “traitorous cooperation.”<sup>309</sup> And indeed, attorneys who believe their jobs to be at risk from outsourcing have used just this rhetoric to describe other U.S. attorneys in the outsourcing business.<sup>310</sup> Even former presidential candidate John Kerry referred to businesses that engage in offshore outsourcing as “‘Benedict Arnold’ companies and CEOs,” in a reference to the famous traitor of the American Revolutionary War.<sup>311</sup> Perhaps in response to some of these concerns, companies and law firms involved in offshore outsourcing have kept their efforts quiet.<sup>312</sup> In a recent survey of large law firms, eighty-three percent refused to say whether they had engaged in offshore outsourcing.<sup>313</sup>

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307. Mao et al., *supra* note 254, at 483.

308. Clifford S. Zimmerman, “Thinking Beyond My Own Interpretation:” *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957, 963 n.21 (1999) (“Collaboration developed a pejorative connotation surrounding World War II, commonly referring to those who worked with the enemy.”).

309. *Id.* (noting that the second definition of collaboration is “traitorous cooperation with the enemy”).

310. See David Perla—*Anti-American Traitor*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Jan. 29, 2008), <http://temporaryattorney.blogspot.com/2008/01/david-perla-anti-american-traitor.html> (“David Perla (UPenn undergrad/J.D.) in a vain attempt to gain publicity and promote his traitorous and fledging outsourcing business, boasts about shipping American legal jobs overseas in a recent law.com article . . .”).

311. Saritha Rai, *An Industry in India Cheers Bush’s Victory*, N.Y. TIMES (Nov. 4, 2004), [http://www.nytimes.com/2004/11/04/business/worldbusiness/04outsource.html?\\_r=1&ref=wiproldt](http://www.nytimes.com/2004/11/04/business/worldbusiness/04outsource.html?_r=1&ref=wiproldt).

312. Geis, *supra* note 70, at 243.

313. *Wall of Silence Surrounds Emerging Legal Outsourcing Industry*, *supra* note 70 (“In a Fronterion survey of 30 top US firms in the Am Law 50, some 83 percent declined to comment on whether they had used legal process outsourcing (LPO) providers, despite the fact that responses were confidential.”).

In the long run, however, it seems unlikely that legal outsourcing will significantly harm the reputations of either corporate clients or the law firms who assist them in outsourcing projects. First, outsourcing in other sectors has become too commonplace to seriously impair corporate reputations.<sup>314</sup> Second, as Professor Vikramaditya Khanna noted in a recent presentation, the American public is less likely to sympathize with the plight of displaced lawyers, who are still seen as more privileged than the average worker.<sup>315</sup> Finally, globalization—both in and out of the legal field—is rapidly increasing.<sup>316</sup> Studies have shown that lower levels of ethnocentrism are correlated with more favorable attitudes toward outsourcing.<sup>317</sup> Thus, as the legal profession continues its transnational growth, it appears likely that controversy over legal offshoring and outsourcing will diminish.

#### D. *Moving Toward Collaboration*

The disaggregation/collaboration dichotomy is ultimately a secondary concern to clients in need of legal services. Their primary concerns are that the legal services will be rendered cost effectively without sacrificing competence, quality, or other ethical duties. Disaggregating the legal process by sending some work offshore greatly reduces legal costs, but a true disaggregation model also carries enhanced risks of ethical failure. Agency theory suggests that residual loss arises when the disparity between a principal's and agent's interests is not eliminated by contract.<sup>318</sup> As disaggregation increases the numbers of contracted agents, the risks of such residual loss increase. These risks include the possibility that offshore employees may breach confidentiality, that disaggregated responsibility will

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314. See, e.g., Rose Brady, *Growth in Outsourcing, Like It or Not*, BLOOMBERG BUSINESSWEEK (Aug. 26, 2009), [http://www.businessweek.com/managing/management\\_innovation/blog/archives/2009/08/growth\\_in\\_outso.html](http://www.businessweek.com/managing/management_innovation/blog/archives/2009/08/growth_in_outso.html) (noting that a recent survey of corporate executives “found that while 79% of executives recognize that outsourcing may have a poor public perception, most (72%) nonetheless decide to go ahead with it” and “74% of executives think outsourcing helps a company survive in today’s economy; 70% say that money saved by outsourcing can help a company grow, and 60% believe outsourcing makes a company more agile and flexible”).

315. Vikramaditya S. Khanna, *Exploring the Effects of Legal Process Outsourcing to India*, Presentation at the International Legal Ethics Conference IV, Stanford Law School, July 16, 2010.

316. Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT’L LAW. 943, 967 (2009) (noting the “ever increasing volume of transnational legal practice” and discussing various global initiatives in the legal field).

317. See Durvasula & Lysonski, *supra* note 87, at 28 (“Consumers who exhibit higher levels of ethnocentrism and greater economic threat are likely to show less favorable attitudes toward offshoring.”).

318. See *supra* Part II.A.1.

allow crucial tasks to fall through the cracks, or that failure to properly supervise the legal process will produce substandard work.

Moving to a collaborative model can minimize some of these risks. Focusing on long-term cooperation and building institutional mechanisms to seek feedback from offshore partners can improve the quality of services rendered. Offshore employees who are closely involved in the day-to-day work are likely to have valuable suggestions for managing risks and enhancing quality. Communication is crucial to this endeavor—in addition to accepting feedback from offshore partners, clients should also provide feedback regarding the success or failure of individual assignments. Regardless of whether the offshored work involves high-level research or low-level document review, the offshore attorneys will more fully understand the context of the work and will feel more invested in the process. Finally, outsourcing managers should make efforts to smooth out status differences among onshore and offshore employees, avoiding reliance on cultural stereotypes, investing economic, intellectual, social, and symbolic capital in team members, and assisting with cultural blending.

There are a number of concrete steps that parties can take to create a more collaborative outsourcing environment. First, institutionalized training programs can help build collaboration. Unlike single-location firms where junior employees may be expected to absorb key information informally, outside service providers will almost certainly need to be trained on the background and specific needs of the client.<sup>319</sup> Formalizing the training program may take time at the front end, but it is likely to pay off in greater productivity. Institutional training programs are a way of sharing intellectual capital through the development of technical skills. Such training programs also provide a mechanism for sharing social capital, as employees form connections with the more senior people leading the training sessions.<sup>320</sup>

Second, onshore and offshore partners can engage in employee exchanges to deepen personal relationships. Although technology can assist in the outsourcing process generally, some amount of face-to-face contact may deepen collaboration in ways that technology alone cannot. Pangea3, for example, reported that one U.S. client invited an Indian attorney to spend several months on-site in the United States; the individuals involved in the legal work got to know each other better, and training could be provided at the client's home site.<sup>321</sup>

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319. Interview with Kevin Colangelo, *supra* note 100.

320. *See supra* Part II.A.3.

321. Interview with Kevin Colangelo, *supra* note 100. Of note, Pangea3 was recently acquired by the major legal publisher Thomson Reuters. *See* Press Release, Thomson Reuters,

Third, clients should discuss outsourcing vendors' internal employment practices.<sup>322</sup> The conditions under which the individual employees work can make a significant difference to the end result. Employees with unmet expectations may feel little or no loyalty to the employer, and may be more likely to engage in disloyal or opportunistic conduct.<sup>323</sup>

Finally, clients hiring offshore legal service providers should work to develop a shared understanding of the project at all levels. One legal professional suggested that the best way to do this is to “[g]ive the [f]irst [a]ssignment to [y]ourself”—that is, for the client to share early on in the outsourced work.<sup>324</sup> For a document review project, that might mean that the client would actually “sit down and code documents [them]self for an hour, a day, a week or even a month.”<sup>325</sup> Sharing in the work builds a shared understanding, as the client would better understand whether the review parameters were reasonable, how fast employees could be expected to review the documents, and whether additional training was needed.<sup>326</sup> Such a practice could also smooth status differences, as onshore workers shared in the same work performed offshore.<sup>327</sup>

#### CONCLUSION

International outsourcing is quickly reshaping the practice of law. Sending legal services offshore does not merely shift existing legal practice to a lower-cost provider. Instead, as in the *Ali G* case, it can change the nature of the services rendered, moving cases from settlement to adjudication on the merits and making additional legal services affordable. Cost savings from outsourcing may mean that a libel defendant can afford to fight a frivolous case rather than submit to a nuisance settlement or that a criminal defendant can fully litigate procedural motions and substantive defenses.

While cost difference may drive the initial outsourcing decision, however, cost differences alone cannot sustain it in the long run. If

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Thomson Reuters Acquires Pangea3 (Nov. 18, 2010), *available at* [http://thomsonreuters.com/content/press\\_room/legal/318316](http://thomsonreuters.com/content/press_room/legal/318316).

322. See Wilkins, *supra* note 112, at 2111 (noting that clients are beginning to take a greater interest in the “internal practices and procedure” of their law firms).

323. See *supra* Part III.B (describing situations in which unpaid contractors threatened to reveal confidential information).

324. Julia Staunton Hardinger, *Accountability Cannot Be Outsourced*, ORG. LEGAL PROF., <http://www.theolp.org/Default.aspx?pageId=512198> (last visited Mar. 15, 2011).

325. *Id.*

326. *Id.*

327. See *supra* Part II.B.1.

offshoring is to be strategically effective as well as cost effective, parties must not limit their attention to financial cost alone. Instead, they should be aware of other factors that influence the success or failure of the outsourcing relationship. Socioeconomic and organizational theories related to outsourcing can help predict where risks will arise from differing incentives in the contracting process. In addition, understanding the situational context of the outsourcing process can help predict risks that arise from gaps in the allocation of responsibility or from cultural misunderstandings. Once potential risks have been identified, the parties to the outsourcing process can take steps to close those gaps and to improve compliance with professional duties.

If legal offshoring is to be a viable and sustainable option, clients should not view it as merely disaggregating legal work and sending it to the lowest bidder. Parties seeking a successful offshoring practice should instead adopt a collaborative model that builds relationships with both onshore and offshore legal service providers, working cooperatively with the provider best able to complete the projects, maintaining reciprocal communication, managing cultural differences, and acknowledging each participant's contribution to the whole.