

DANCING IN THE MINEFIELD: OUTSOURCING EDD REVIEW ABROAD

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There is a certain “je ne sais quoi” about dancing in a minefield. It is a reckless, daredevil sort of act. So why are so many lawyers beginning to dance in a minefield by outsourcing the review of electronic evidence abroad? The answer is simple – the risks of outsourcing abroad are outweighed by the vast savings in costs – and the retention of corporate clients hell bent on slashing those costs.

If you want a crystal clear example of how dramatically costs can be lowered, many experts agree that in the U.S., you will spend \$7-\$10 per document for EDD review. Abroad, the cost can diminish to just \$1-\$3 per document. No wonder corporate counsel, in particular, has looked with such favor on outsourcing!

Let us step back and take a historical perspective. Legal process outsourcing (LPO) has been around for a long time. Until recently, most of the outsourcing was domestic and involved the hiring of contract attorneys. Of course, other processes (billing, IT, staffing, etc.) have been outsourced as well, but for the purposes of this article, we will focus on the specific problems associated with EDD review.

At the outset, we want to thank Brandon Daniels and Stephen Kong of CPA Global for spending a lot of time answering our formidable warehouse of questions. CPA Global, a well respected LPO firm which has specialized in intellectual property outsourcing since 1969, began to offer document review and evidence organization services about two years ago.

Let's talk about the money in LPO overall. In 2006, revenues for all legal offshoring were approximately \$146 million, which rose to \$180 million in 2007. Those numbers are expected to grow exponentially. Exact numbers for EDD review are not available, but everyone in the industry agrees that it is growing quickly. Lots of countries are involved in EDD review, but none more than India, where LPO has become a burgeoning industry. One of the most striking photos we've seen was a recent photo from space taken at night. As you would expect, there is a lot of light on the east and west coasts of the U.S. and in Europe. Startling to us was the light now coming from India at night – the fourth brightest spot on the planet. We suppose it is no surprise – we have all joked that calling IT support is often a matter of saying “Hello, Mumbai?”

Unsurprisingly, law firms have not moved to outsourcing EDD review as fast as corporations have. Lumbering slowly forward, law firms seem to believe that they can keep selling clients their higher rates, though the clients themselves are pushing the envelope by, in some cases, simply end running the law firm and taking the review away from the law firms and outsourcing directly. Some law firms are reluctant to disturb the status quo and believe that they offer higher quality service, albeit at higher prices. The

shift is a work in progress, sometimes requiring months of due diligence and multiple pilot projects.

According to Daniels, CPA Global has over 400 associates in India, about 30 of whom are dedicated to document review. The number is expected to grow fairly quickly. CPA uses only attorneys, not paralegals, although that is not true of all firms. Sometimes, subject matter specialists, who are not attorneys, are also utilized. Each lawyer at CPA receives 200 hours of initial training and continuing legal education thereafter, as well as training in the handling of special data such as HIPAA, SOX, GLB, FERPA, etc. CPA's process for screening applicants is rigorous, including several kinds of tests and interviews – in the end, its acceptance rate is only 6%. Previous to the Quality Control Review, CPA seeks a 98% accuracy rate for document review. Acceptable review rates, accuracy rates and error “severity” rates are actually agreed to contractually with the client.

Daniels reports that, currently, most clients ask for hourly billing. But he is seeing a drift toward per document and fixed fee arrangements for processing, hosting and reviewing, which is offered as an option.

CPA's facilities are ISO 27001 certified for physical and data security. As you read the ABA opinion cited hereafter, keep in mind the kind of physical and data security that might be necessary to outsource EDD abroad. What are you looking for in terms of security? Are there security guards, biometric access, segregated access rights to various portions of the building, checking of all bags, shredding of all documents, access controllers and access readers? Is there a tightly configured firewall, tight virus/malware protection, password control, automated operating system patching, monitoring of Internet traffic, VPN only access to client/third party information, use of Citrix and “dummy terminals,” disabling of USB ports and drives, a prohibition against the use of portable storage devices and strictly enforced confidentiality agreements?

As the allure of American dollars grows, and other LPO firms continue to spring up, it will be particularly important for law firms in the U.S. to ask hard questions to ensure that whatever LPO firm they choose similarly meets this sort of standard.

Recently, the so-called *Newman* case attracted a lot of attention. In this case, the LPO industry dodged a possible bullet but missed a chance for court clarification last when the lawsuit was withdrawn. Here's the background: On May 7th, Maryland law firm Newman McIntosh & Hennessey, LLP filed suit in the U.S. District Court for the District of Columbia against President Bush, an Indian outsourcing firm and others, seeking guidance on whether electronic evidence transferred to a litigation support service in India waives Fourth Amendment protections. The Fourth Amendment does not traditionally protect foreign nationals when the government is engaged in surveillance of electronic data submitted to foreign nationals. The lawsuit sought injunctive relief and declaratory judgment stating whether client data transmitted loses its Fourth Amendment protection when sent overseas, whether a law firm needs to ask for client permission before sending the information overseas, and whether President Bush has an obligation to

establish protocols for such a process. The suit was widely regarded as an anti-outsourcing suit and viewed with dismay by the burgeoning LPO industry.

13 days after Acumen Legal Services (the Indian firm in question) filed its motion to dismiss the outsourcing lawsuit, the Newman law firm withdrew its case. Prior to this, confronted with the motion to dismiss, Newman had requested permission to further amend its complaint and expand the case into a class action on behalf of multiple U.S. law firms. The day after that permission was denied, the law firm withdrew the lawsuit.

One of the authors blogged about this case and received the following note from Joe Hennessy, one of the original plaintiffs:

I have joined John J. Beins and Seth D. Goldberg who have significant expertise in litigating consumer class action lawsuits -- as well as other business litigation. John Beins, Seth Goldman, Anthony Newman, Ernie McIntosh and I will be combining our various areas of expertise to identify those who have been victimized by the use of foreign legal process outsourcers. Collectively, we decided that rather than litigate an academic declaratory judgment action, we would bring an action for damages on a class wide basis. We have, for example, already heard a person who believes their HIPAA rights were violated when Indian doctors were video-conferenced to consult and make recommendations about a surgical procedure -- a procedure that went horribly wrong. Not only did this person not consent to consultation, but all of this person's private medical records were transferred to these Indian-based doctors -- a transfer that violated her HIPAA rights.

So, stay tuned -- we are not at the end of this issue, we are at the beginning. I'll keep you posted as we proceed."

Kong's reaction to this case was that the plaintiff here "hit the Triple Crown of meritless arguments" and attempted "to prey on fear of the unknown, capitalize on the unpopularity of the Bush Administration's policies and head off potential competition at the pass." That statement made us smile, as we are not fans of the Bush policies regarding interception of a wide range of communications with little or no meaningful scrutiny. However, we don't believe that this problem is necessarily a red herring. While we agree with Kong that "no one is obligated to make a 'Fort Knox' 100% guarantee" of security and that reasonableness is a major factor, it is hard to know what is reasonable when the current government's invasion of private communications is blatantly unreasonable.

So what sayeth the ABA? On August 5th, the American Bar Association released Formal Opinion 08-451, regarding a lawyer's obligation when outsourcing legal and nonlegal support services. There was initially quite a ballyhoo over the fact that the ABA had endorsed outsourcing in its opinion. LPO companies were quick to trumpet the news, eager for a lot of new business, including EDD review. But after carefully reading the opinion, we're not sure all the news is terrific for lawyers who want to outsource – especially abroad.

While the opinion is a clear win for law firms who outsource work to U.S. based firms and lawyers (though that comes with its own set of problems unique to hiring contract lawyers here – note the recent Law.com article at <http://www.law.com/jsp/article.jsp?id=1202424640798>), it is a lot muddier when it comes to foreign firms. In fact, the more we read it from the point of view of a lawyer determining whether to outsource abroad, the more nervous we got about complying with the opinion.

Though not everything is absolutely mandated, we are talking about the following being either required or advisable:

1. reference/background checks for the lawyers and their firms
2. interviews with the principal lawyers of the firm
3. assessments of their educational background
4. assessing whether the system of legal education is comparable to the U.S.
5. investigating the security of the provider's premises and its computer security, perhaps even including its recycling and refuse disposal procedures
6. paying a personal visit to the provider's facility
7. becoming familiar with the data laws in the provider's country, including whether data might be subject to seizure by a court and whether adequate privacy laws are in force
8. learning whether the judicial system in another country would protect client data in the event of a dispute between the service provider and the lawyer
9. advising the client of the engagement and securing consent
10. exercising appropriate supervision of the work done
11. ensuring that the provider does not work for adversaries of the lawyer's clients

We would add to that list, as we mentioned above, that a lawyer better know whether the U.S. government takes the stance that it can monitor data outside the U.S. whether stored or in transmission.

Daniel's suggests also checking the provider's financial stability, the extent and quality of its infrastructure, whether it has experts in legal, outsourcing and project management and its ability and willingness to interface easily with attorneys working on the project.

We don't see the ABA's opinion as a slam dunk for the LPOs located abroad. Many lawyers will no doubt conclude that it is simply safer to outsource here. But since money makes the world go 'round, no doubt the opinion will allow the growth of the foreign LPOs, irrespective of the fairly stringent requirements. It's just plain cheaper, a lot cheaper, to do many things abroad, especially the review of electronic evidence. Especially for large law firms, an initial investment may reap great rewards – and keep clients happy. Kong believes that this may be a great differentiator for law firms as clients look at whether to hire/retain law firms. He also points out that many corporate RFPs already ask if a law firm has offshore legal capabilities, which certainly indicates that it might be prudent to acquire such capabilities. Finally, he suggests that small and

mid-size firms using LPO services might be able to look “bigger” and take on larger projects.

Don't expect this LPO move to come without hiccups. Recently, we read a quote from Sheila Kari, founder of Moti International, a company which helps U.S. companies do business in India. As she well knows, there are cultural issues when you seek to work with India. As she notes,

“In India, the word ‘yes’ doesn’t necessarily mean ‘I agree with you.’ People don’t like to say ‘no’ in India – it’s considered rude. ‘Yes’ may mean ‘yes, I heard the words you said.’

We chuckled when we read that quote – somewhere down the line, we know big league litigators at the NLJ 250 will be tearing their hair out when this cultural nuance comes home to haunt them.

In the meantime, outsource carefully, exercise a very high degree of due diligence, oversee carefully and document every step you take as you dance in this minefield!

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