



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Trust Is Key When Outsourcing E-Discovery: Experts

By **Ryan Davis**

Law360, New York (August 20, 2009) -- With the American Bar Association and other groups giving the practice their blessing, the idea of outsourcing e-discovery work to foreign countries has been gaining traction among law firms over the past few years. For those that decide to give it a shot, there are several points to keep in mind when selecting an offshore vendor, experts say.

"The fundamental thing attorneys need to remember is that the buck stops with them," said Josh Fowkes of Arent Fox LLP, a member of the firm's e-discovery task force. "When outsourcing, they're responsible for the work done by offshore vendors."

Offshoring e-discovery work can take a few different forms, some of which are likely to be more popular than others, Fowkes said, noting that one area that initially got a lot of attention was technical work such as converting and formatting documents.

Over the past several years, however, the prices for technical vendors in the U.S. have dropped dramatically, to the point where the cost savings for using offshore rather than U.S. vendors for that kind of work is negligible, he said.

Offshoring document review, which can offer greater cost savings, appears to be more viable, Fowkes said, and while "it's not widespread yet, I think it's growing, as companies and outside legal counsel think about whether they can trust offshore vendors."

"I'm not sure the trust is there yet, but it's something people are looking at," he said.

Sirisha Gummaregula, chief operating officer of QuisLex, a legal services provider with about 250 employees in India, said she had seen less reluctance on the part of law firms to offshore e-discovery work since her company began offering the service about three and a half years ago.

"Three or four years ago, I think there were a lot more concerns," Gummaregula said.

Since then, the ABA and other groups have issued opinions saying it is not unethical for attorneys to offshore legal work, which has put people more at ease about the process, she said.

Today, QuisLex's pool of clients is made up of about half law firms and half companies, she said, and include eight of the 10 largest law firms and many Fortune 50 companies.

And Greg McPolin, vice president and managing director for litigation services at legal outsourcing firm Pangea3, which has around 300 employees in India, said he had seen growing acceptance of offshoring among American law firms.

Pangea3 works mostly with corporations, but law firms have begun to make up a greater proportion of its clients over the past six to nine months, McPolin said.

He attributed the increase to economic forces requiring firms to become more innovative, with a nudge from corporate clients, who have been quicker to embrace offshoring.

"As corporate legal departments see the value of offshoring, they are forcing their law firms along," McPolin said. "Firms are realizing that they should be ahead of that curve and know about offshoring before their clients do."

Still, Susan Salmon, a member of the records retention and electronic discovery team at Quarles & Brady LLP, said her sense was that offshoring e-discovery work had not yet become widespread among law firms.

She said she didn't know of any lawyers who had outsourced document review overseas and was skeptical of the process herself.

"I think it's something to be wary of at this point, unless you have such a comfort level with the vendor," Salmon said. "There may come a point where it's so commonplace, but I don't see that yet. I would be doing a lot of research and homework before I did something like this."

Likewise, Joseph Ortego, a partner at Nixon Peabody LLP, said he had no interest in offshoring e-discovery tasks, given the loss of control over the information.

However, he said he would be more comfortable with the idea of working with a U.S. e-

discovery vendor that contracted some of its work with an overseas company it trusted.

While it's difficult to measure how widespread the practice is now, "with e-discovery costs the way they are, you're going to see some form of offshoring," Ortego said.

That may increasingly involve U.S. vendors affiliating with overseas firms, rather than lawyers making offshoring arrangements themselves, he said.

Lawyers should put a great deal of preparation and thought into selecting an offshore e-discovery vendor, given the fact that whatever the vendor does, the lawyer will be responsible for their work in court, and will be liable for sanctions if there is a problem, experts said.

"Judges are not interested in hearing your excuses: 'I sent it offshore because I thought it would be cheaper,'" Ortego said.

One of the key concerns lawyers should keep in mind when offshoring e-discovery work is making sure the documents they send overseas remain secure and confidential, Fowkes said.

That includes the physical security of the building in the foreign country where the work is being done, meaning that no one can break in and steal documents, as well as the electronic security of the vendor's computer system, meaning that it is protected from hackers, experts said.

There are still security risks when outsourcing document work to a U.S. vendor, "but when it's people thousands of miles away that you don't have direct contact with, it raises some issues," Ortego said.

Security is especially important given the nature of offshoring, according to Fowkes, who noted that "if the project is so big you want to save money by offshoring, I would imagine it's a pretty important project."

Lawyers using offshore vendors should also keep a close eye on the documents the vendor is handling, Salmon said.

While many lawyers are justifiably concerned about documents erroneously becoming public that could be a smoking gun in the case, they should also be sure that the vendor is not withholding documents that shouldn't be withheld, she said.

Lawyers have to be sure to closely scrutinize the background and references of the vendor and its employees, experts said.

"If you're trusting lawyers overseas, you have to make sure the group you're outsourcing to is not a fly-by-night organization," Fowkes said. "I suspect this type of work is very lucrative for people in poorer countries, so you need to make sure the vendor is an established company that's been around for a while and will be around for a while."

If possible, it's a good idea to conduct a test run with the vendor using material you've already completed, in order to see how the vendor's work compares to what you're used to before making a decision, Salmon said.

With highly technical issues, vendors may have engineers or other experts on staff to help with the project, which can make offshoring a more attractive option, she said.

In those cases, in addition to cost savings, there is also a value added, Salmon added.

McPolin, who was an attorney in the antitrust practice at Howrey LLP before joining Pangea3, said law firms should make sure that the vendor has American attorneys who supervise the work of the lawyers in India and who have worked on the kinds of large-scale litigation being outsourced.

Those attorneys can train Indian lawyers on e-discovery rules, privilege and other nuances of U.S. law, he said.

It's also important for law firms put a clear plan in place with the vendor, outlining quality control measures for the project and how it will be managed, including possible on-site visits by the firm, video conferences and other communications measures, McPolin said.

"More communication in the beginning of the project has a very positive impact on the overall project," he said.

Many offshore legal services companies have also been certified by data security groups, which has lessened the hesitation factor among potential clients, Gummaregula said.

QuisLex, like many of its competitors, has ISO 27001 information security certification from the International Organization for Standardization, she said.

Gummaregula, who spent nine years as an attorney in the mergers and acquisition and

corporate finance practices at Shearman & Sterling LLP before joining QuisLex, said she once had to explain the certification to law firms, but that it had become an accepted industry standard.

In addition to the fundamental cost benefits of offshoring legal work, foreign vendors are also often more willing than U.S. vendors or law firms to quote a fixed price at the outset of a project, she said.

"Because of the amount of data we collect, we can predict how a project with progress" and offer a fixed price based on the amount of data to be processed, Gummaregula said.

Fowkes said he had not hired an offshore vendor for any of his own work and didn't personally know any lawyers who'd given it a try, although it was something lawyers at his firm had considered.

Before he hired an offshore vendor, however, "I'd really want to evaluate and scrutinize the background of the lawyers I'm trusting legal work to," he said. "The level of trust would have to be high."

All Content © 2003-2009, Portfolio Media, Inc.