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Document Automation Software: Solving the Dichotomy Between Meeting Attorney's Financial Needs and Ethical Obligations

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DOCUMENT AUTOMATION SOFTWARE: SOLVING THE DICHOTOMY BETWEEN MEETING ATTORNEYS' FINANCIAL NEEDS AND ETHICAL OBLIGATIONS

A windmill is a device of ancient origin that taps the energy of the wind by means of sails mounted on a rotating shaft. It translates energy that is often abundantly present all around us into a form that can be harnessed for human purposes, like pumping water, cutting wood, and grinding grain Even if we can't directly exploit the abundance of hot air that blows around law offices with little desktops windmills, there is a continuous flow of information and knowledge that can be harnessed. Lawyers and other legal professionals are constantly acquiring and dispensing knowledge. Without proper management, much of this knowledge flows away without performing useful work. New technologies provide ways to enable knowledge gathered for one purpose to do intellectual labor in collateral projects. . . . We can use information technology to capture intellectual energy before it dissipates; bottle it up, as it were; and redeploy that energy in later contexts when it can do some good. These knowledge [windmills] can gather energy in slow times that can help meet demand in boom periods- that is, capture potential energy.¹

I. INTRODUCTION

Outsourcing work is not new in the United States as it has been around since the late 1980s.² Outsourcing legal work had already been around for more than a decade when Dallas-based litigation firm, Bickel &

¹ MARC LAURITSEN, THE LAWYERS GUIDE TO WORKING SMARTER WITH KNOWLEDGE TOOLS 13-14 (2010).

² See Michael G. Owen, *Legal Outsourcing to India: The Demise of New Lawyers and Junior Associates*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 175, 181 (2008) (discussing start of outsourcing in United States); see also Ashok Deo Bardhan & Cynthia A. Kroll, *The New Wave of Outsourcing*, UNIV. OF CAL. BERKLEY FISHER CTR. FOR REAL ESTATE AND URBAN ECON., 1 (2003), http://www.haas.berkeley.edu/news/Research_Report_Fall_2003.pdf (discussing how outsourcing of manufacturing jobs became mainstream in late 1980s).

Brewer, began outsourcing legal work to Hyderabad, India in 1995.³ Gradually, larger companies such as General Electric (“GE”) and Microsoft began outsourcing their work to places like India.⁴ The economic downturn in America combined with the effects of globalization, client demand for lower costs, and the lure of increased profits using high skilled cheaper labor, has led the practice of legal outsourcing to grow much faster than when it started in 1995.⁵ The practice of legal outsourcing has been confronted with a great deal of resistance.⁶ Part II of this note will examine federal and state laws, as well as ethical rules established by the American Bar Association (“ABA”) and the North Carolina state bar association which attempt to address the practice of legal outsourcing.⁷ Part III will

³ See Owen, *supra* note 2, at 181 (noting outsourcing began with firm Bickel & Brewer who were looking to simplify case management system); see also Daniel Brook, *Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS, (May/June 2005) available at http://legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp (noting Bickel & Brewer needed to find efficient ways to handle millions of pieces of information).

⁴ See Owen, *supra* note 2, at 181 (discussing GE’s outsourcing work to India). GE expanded an existing branch in India to handle legal compliance and research for its subdivisions GE Plastics and GE Consume Finance. *Id.*; see also Brook, *supra* note 3 (discussing how General Electric began outsourcing legal work to India for two of its subdivisions); Helen Coster, *Briefed in Bangalore*, THE AMERICAN LAWYER (Nov. 1, 2004) <http://www.quislex.com/files/OurClientsinAmericanLawyer.pdf> (discussing how Microsoft began outsourcing to India to prepare patent applications).

⁵ See Thomas W. France, *Seeing Beyond The Cycle: Understanding the Long- and Short-Term Effects of the Economic Downturn*, 2009 WL 1614250, at * 2 (Apr. 2009) (stating how economic downturn will accelerate globalization). The economic downturn in America, along with globalization, is causing law firms of all sizes to contract more work overseas because of the intense competition for deals in the United States. *Id.*; see Marcia Pennington Shannon, *Best Practices for Managing People*, 37 No. 6 LAW PRAC. 56, 57 (2011) (cutting costs is necessary for firms in order to meet client demand); K. William Gibson, *Outsourcing Legal Services Abroad*, LAW PRACTICE (July/August 2008), available at http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v34_is5_pg47.html (outsourcing grew as result of client demand for cutting costs); Owen, *supra* note 2, at 176-77 (providing prices charged for Indian legal services). Prices for low skilled legal work can vary from ten dollars to twenty-five dollars an hour to twenty-five dollars to ninety dollars an hour for high-end work. *Id.* at 176-77. Between 2005 and 2007 the number of offshore legal services companies grew from twenty to one-hundred. *Id.* at 181; see also Ken Wollins, *Outsourcing Legal Services Overseas: Choosing the Solution That’s Best for You*, 17 A.B.A. BUS. L. TODAY 2 (Nov.-Dec. 2007) (discussing growth of legal outsourcing market). Forrester Research, a research group, projects that nearly eighty-thousand U.S. legal jobs will be filled offshore by 2015 to create a four-billion dollar market. *Id.*; see Dan Slater, *Another View: In Praise of Law Firm Layoffs*, N.Y. TIMES, (July 1, 2009), available at <http://dealbook.blogs.nytimes.com/2009/07/01/another-view-in-praise-of-law-firm-layoffs> (explaining how prominent N.Y.C. law firm laid off twenty percent of its lawyers). In 2008, one of the oldest firms on Wall Street, Cadwalader, Wickersham & Taft, laid off a total of 131 lawyers. *Id.*

⁶ See *infra* Part II (discussing federal and state attempts to limit legal outsourcing).

⁷ See *infra* Part II (discussing federal and state law as well as opinions regarding ethics of legal outsourcing).

discuss the practice of legal outsourcing itself, highlighting the type of legal work that is outsourced, the advantages and disadvantages of legal outsourcing, and document automation software, a resource from within the private sector that can better address the needs of lawyers.⁸ Part IV of this note will address whether the federal and state laws, ABA rules, and state bar association rules adequately address the issues related to legal outsourcing.⁹ Ultimately, this note will illustrate that document automation software, which comes from within the private sector, is a resource that can and should be used by lawyers and law firms to better address their financial needs as well as their ethical obligations by allowing them to correct the current inefficient business model into a more efficient and cost-effective system.¹⁰

II. HISTORY

The United States Congress has attempted to regulate outsourcing in numerous ways.¹¹ Congress is authorized to regulate outsourcing because it possesses the power to regulate both interstate and international commerce; however, Congress has a broader scope of regulation with foreign commerce.¹² Given the broad power that Congress possesses to regulate foreign commerce, coupled with the fact that outsourcing involves

⁸ See *infra* Part III (providing explanation of legal outsourcing and document automation software).

⁹ See *infra* Part IV (discussing adequacy of attempts to limit legal outsourcing).

¹⁰ See Anne P. Huffman, *The Legal Assistant's Role in Automated Litigation Support*, in 44 AM. JUR. TRIALS 79, § 75 (2013) (explaining concept of value billing); Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 INT'L J.L. & INFO. TECH 170, 176 (2007), available at http://www.kentlaw.edu/faculty/rstaudt/classes/justicetech_fall2010/darryl%20mountain%20document%20assembly170.pdf (explaining how current law firm model is inefficient).

¹¹ See Sejal Patel, *Is Legal Outsourcing Up to The Bar? A Reevaluation of Current Legal Outsourcing Legislation*, 35 J. LEGAL PROF. 81, 89-90 (2010) (evaluating federal attempts to regulate legal outsourcing); Lee A. Patterson, III, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177, 197 (2008) (pointing to Congress's numerous attempts to regulate outsourcing).

¹² See U.S. CONST. art. I, § 8, cl. 3 (establishing Congress's commerce clause power). The United States Constitution gives Congress the power to regulate foreign commerce, interstate commerce, and commerce of the Indian tribes. *Id.* The Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." *Id.*; see also THE FEDERALIST NO. 42, at 187 (James Madison) (Jim Manis ed., 2014), available at <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf> (affirming powers of "General Government"). Madison stated that the General Government has powers to regulate the intercourse with foreign nations, which was an essential aspect of the federal administration. THE FEDERALIST NO. 42, *supra*, at 187 (James Madison); see also *Gibbons v. Ogden*, 22 U.S. 1, 228-29 (1824) (discussing how Congress has exclusive power to legislate commerce with other nations).

work being transferred from the U.S. to other countries and vice versa, the federal government should be able to legislate on legal outsourcing with ease.¹³ Federal attempts to limit legal outsourcing have ranged from bans or severe restrictions on the performance of federal contract work overseas to having government contractors employ their workers domestically or fulfill some domestic requirement.¹⁴ Furthermore, when Congress has tried to address legal outsourcing it has done so at the periphery with legislation that tries to provide a back-door solution to the problems.¹⁵ Despite Congress's absolute power with regard to the Foreign Commerce Clause, federal legislation has not addressed private outsourcing because it would most likely violate some international agreement that the United States is bound by.¹⁶

¹³ See *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974) (holding Congress's plenary authority over foreign commerce "is not open to dispute"); see also *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904) (affirming "complete power of Congress over foreign commerce"); *United States v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006) (asserting that Supreme Court has never struck down federal law as exceeding Foreign Commerce power); Patel, *supra* note 11, at 90 (recognizing Congress's ability to legislate on outsourcing issues).

¹⁴ See Mark B. Baker, "The Technology Dog Ate My Job": *The Dog-Eat-Dog World of Off-shore Labor Outsourcing*, 16 FLA. J. INT'L L. 807, 835 (2004) (asserting corporations are not going to be stopped from outsourcing by federal legislation); Beverley Earle et al., *A Finger In The Dike? An Examination Of The Efficacy Of State and Federal Attempts To Use Law To Stem Outsourcing*, 28 NW. J. INT'L L. & BUS. 89, 100-01 (2007) (summarizing outright federal bans on legal outsourcing); Shannon Klinger & M. Lynn Sykes, *Legislation That Bans Or Severely Restricts Outsourcing Raises Serious Policy Questions, May Violate The U.S. Constitution, and Risks Jeopardizing U.S. Obligations Under International Trade Agreements*, 9 NO. 1 ELEC. BANKING L. & COM. REP. 1, (2004) (questioning various federal attempts to limit outsourcing). Corporations outsource because of the financial rewards along with the necessity for the entity to compete in the world marketplace and federal legislation simply does not address this. See Baker, *supra*.

¹⁵ See Patel, *supra* note 11, at 89 (pointing to failure of federal legislation to address outsourcing directly). For example, legislation will target the job loss issue resulting from outsourcing by using indirect immigration control and teaching workers who are out of jobs new skills. *Id.*; see also Baker, *supra* note 14, at 828-29 (stating immigration legislation has been used to target outsourcing issue but is ineffective).

¹⁶ See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§ 3501, 3511-13, 3521-24, 3531-39, 3551-56, 3571-72, 3581, 3591-92, 3601-02, 3611, 3621-24 (2012)) (providing for liberalization of world trade and allowing members to negotiate international terms of competition); see also WORLD TRADE ORGANIZATION, *Government Procurement: Opening up for Competition*, (2014), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt (stating Agreement on Government Procurement ("GPA") attempted to liberalize discriminatory state and federal provisions). The original GPA signed during the Tokyo Round was intended to open up as much domestic business as possible to international competition. *Id.* The GPA was also "designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers." *Id.* The Uruguay Round reflects the present agreements and commitments, which took effect on January 1, 1996. *Id.* The renegotiated GPA reinforces the rules guaranteeing fair and non-discriminatory conditions of international competition. *Id.*; see also Jennifer L. Dauer, *A Sum-*

The Thomas-Voinovich Amendment is one example of federal legislation that restricts the offshoring of government contracts.¹⁷ U.S. Senators Craig Thomas of Wyoming and George Voinovich of Ohio proposed the Thomas-Voinovich Amendment in 2004.¹⁸ The Amendment was a part of the 2004 Omnibus Spending Bill signed by President Bush that was intended to limit the offshoring of government contracts.¹⁹ The scope of the amendment is limited to jobs associated with the U.S. Department of Treasury and the U.S. Department of Transportation, which means that it does not address the issue of private contracts and is completely irrelevant to legal outsourcing in particular.²⁰ Although the amendment's scope is limited, in 2004 Senator Christopher Dodd of Connecticut proposed the Dodd Amendment, which attempted to expand the scope of the Thomas-Voinovich Amendment.²¹ The Dodd Amendment was eventually dropped, but it stands as evidence of Congress's attempt to limit outsourcing.²² The

mary of Issues Raised in "Offshoring" Legislation, 40 PROCUREMENT LAW. 10, 12 (2005) (explaining how offshoring legislation is likely to violate international agreements); James Emilcar, Note, *A Proposal to Prevent Offshoring: An Analysis of the Latest Anti-Offshoring Proposals*, 11 J. INT'L BUS. & L. 205, 219 (2012) (criticizing federal legislation that deals with offshoring as violating trade agreements). The United States may be violating the Uruguay Round Agreements and the GPA with outsourcing legislation. Emilcar, *supra*, at 219-20.

¹⁷ See Baker, *supra* note 14, at 834 (discussing Thomas-Voinovich Amendment).

¹⁸ See Baker, *supra* note 14, at 834 (pointing to how Thomas-Voinovich Amendment restricts offshoring of government contracts).

¹⁹ See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 647, 118 Stat. 362 (2004); see also Wilson P. Dizard III, *New Law Limits Offshoring of A-76 Work*, GCN NEWS (Jan. 29, 2004), <http://gcn.com/articles/2004/01/29/new-law-limits-offshoring-of-a76-work.aspx> (explaining Thomas-Voinovich Amendment bars companies from shifting federal work to other countries). The Thomas-Voinovich Amendment states:

An activity or function of an executive agency that is converted to contractor performance under Office of Management and Budget Circular A-76 may not be performed by the contractor at a location outside the United States except to the extent that such activity or function was previously performed by government employees outside the United States.

Consolidated Appropriations Act § 647(d).

²⁰ See Baker, *supra* note 14, at 834 (highlighting scope of Thomas-Voinovich Amendment); see also Earle, *supra* note 14, at 101 (arguing scope of Thomas-Voinovich Amendment is limited).

²¹ See Patterson, *supra* note 11, at 200-01 (indicating that Dodd Amendment tried to expand Thomas-Voinovich Amendment); see also NATIONAL FOUNDATION FOR AMERICAN POLICY, *Anti-Outsourcing Efforts Down But Not Out*, NFAP POLICY BRIEF 1, 8 (April 2007), available at <http://www.nfap.com/pdf/0407OutsourcingBrief.pdf> (describing Dodd Amendment's attempt to expand Thomas-Voinovich Amendment). The Dodd Amendment would have expanded and also made permanent the Thomas-Voinovich Amendment, but it was later dropped in conference between the House and Senate. *Id.*

²² See NATIONAL FOUNDATION FOR AMERICAN POLICY, *supra* note 21, at 8 (stating Dodd Amendment was intended to limit outsourcing).

language of the Thomas-Voinovich Amendment indicates that it would violate the GPA, to which the United States is a party.²³ The amendment not only directly violates the GPA, but it also has instigated criticism from India's leaders, whom the amendment greatly affects.²⁴

Unlike the Thomas-Voinovich Amendment, Congress has indirectly addressed outsourcing by regulating immigration.²⁵ Congress's rationale was that focusing on immigration reform could theoretically be as effective as targeting legislation against outsourcing because jobs are going to the same groups of people and thus harming the same sectors.²⁶ To implement this idea, in 2003, Congress changed the cap of H1-B visas, which are specialty occupation visas issued to foreign hi-tech workers, from 195,000 to 65,000 and this cap still stands today.²⁷ The purpose of the statutory change was to address the exact problem highlighted by Dan Stien, the executive director of FAIR, and specifically to make sure that more jobs went to Americans.²⁸ The issue, however, with this type of legislation is that be-

²³ See Shannon Klinger & M. Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, THE NAT'L FOUND. FOR AM. POLICY, 2 (Apr. 2004) available at http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf (suggesting Thomas-Voinovich Amendment may violate GPA). According to the study, the Thomas-Voinovich Amendment may violate the GPA because the GPA prohibits member countries from treating domestic firms less favorably based on the country in which the good or service was produced. *Id.* Furthermore, the amendment may also violate the GPA because it fails to comply with the GPA's non-discrimination and national treatment principles. *Id.*

²⁴ See Baker, *supra* note 14, at 835 (citing criticism against Thomas-Voinovich Amendment). from India's Minister of Information Technology). Arun Shourie, the Indian Minister of Information Technology, expressed how the U.S.'s legislation would endanger the revival of the Doha round in Cancun and that it is nothing short of hypocritical. *Id.* All nations experience the negative effects of globalization; however, while the United States benefits from free trade, it also wants to limit the benefits that other countries, such as India, may receive. *Id.*

²⁵ See Baker, *supra* note 14, at 828-29 (criticizing immigration regulation for failing to prevent jobs from going overseas). The change in the H1-B visa cap, which limits the number of immigrants who are allowed to enter the U.S., does not itself prevent jobs from going overseas, but rather tries to limit the number of people who can come from overseas to take U.S. jobs domestically. *Id.*

²⁶ See Baker, *supra* note 14, at 829. (suggesting that theoretically change in H1-B visa cap can address outsourcing issue). Dan Stein, the Executive Director of Federation for American Immigration Reform ("FAIR"), stated that the issue is American jobs are outsourced to cheaper labor, and the corollary to the exportation of jobs is the importation of lower-wage workers to do the jobs that remain in the country. *Id.*

²⁷ See Baker, *supra* note 14, at 829 (explaining change to H1-B visa cap). The H1-B visa is for individuals who are employed in specialized fields that require theoretical or technical expertise. See *H1-B Fiscal Year (FY) 2014 Cap Season*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD> (last visited March 29, 2014) (listing qualifications for H1-B visa and its current cap).

²⁸ See *id.* (explaining rationale for lower H1-B visa cap). But see Robert B. Reich, *High-*

cause jobs are directly going offshore, there is less of a necessity for workers to come to the U.S., which means that immigration reform does not actually address the loss of American jobs.²⁹ In particular, this kind of immigration reform does not focus on American jobs lost to legal outsourcing because the work is sent abroad while workers do not actually travel to the U.S. to perform the work.³⁰

The Trade Adjustment Assistance Program (“TAA Program”) is an even more indirect approach at addressing legal outsourcing than the H1-B visa cap change.³¹ The TAA Program is a Federal program that assists U.S. workers who have lost or may lose their jobs as a result of foreign trade.³² The program tries to provide workers who have been adversely affected by foreign trade obtain skills, credentials, and resources, and provides support necessary to become reemployed.³³ Individuals who qualify must first file a petition with the U.S. Department of Labor.³⁴ The Department of Labor then initiates an investigation to determine whether the circumstances of the layoff meet the eligibility requirement established in the Trade Act of 1974.³⁵ Once the Department of Justice finds an individual

Tech Jobs Are Going Abroad! But That's Okay, WASH. POST, Nov. 2, 2003, available at <http://prospect.org/article/high-tech-jobs-are-going-abroad-thats-okay> (arguing that immigration policy will not protect American jobs). Robert B. Reich, who served as Secretary of Labor during President Clinton's first term, states that “it makes no sense for us to try to protect or preserve high-tech jobs in America or block efforts by American companies to outsource. Our economic future is wedded to technological change, and most of the jobs of the future are still ours to invent.” *Id.* Furthermore, immigration regulation may not be the solution because workers are actually moving back to places like India rather than coming to America. See Baker, *supra* note 14, at 829.

²⁹ See Bob Bellinger, *Outsourcing Causes Jitters: Is My Job Next?*, EE TIMES, (Aug. 20, 2003), available at <http://www.eetimes.com/story/OEG20030827S0014> (last visited Nov. 17, 2012) (explaining how total number of Indians granted H1-B visas fell from 2001 to 2003); Baker, *supra* note 14, at 830 (suggesting there is less need for workers to come into the U.S.).

³⁰ See Baker, *supra* note 14, at 830 (stating how legislation targeting immigration may be ineffective at targeting outsourcing).

³¹ See Baker, *supra* note 14, at 831-32 (explaining TAA Program); see also THE DEP'T OF LABOR, *The Trade Adjustment Assistance Program: Getting Back to Work After a Trade Related Layoff*, http://www.doleta.gov/tradeact/pdf/2011_brochure.pdf (last visited Nov. 17, 2012) (explaining eligibility requirements and goals of TAA Program).

³² See THE DEPARTMENT OF LABOR, *supra* note 31, at 2 (elaborating on TAA Program).

³³ See *id.* (stating objective of TAA program).

³⁴ See *id.* at 2 (explaining qualification criteria for TAA Program). A petition may be filed by three or more workers in the same firm or subdivision, the workers' employer, a union official or other duly authorized representative of such workers, or American Job Center operators or partners (including state workforce agencies and dislocated worker units). See *id.*

³⁵ See Trade Act of 1974, 19 U.S.C. §§ 2101-2497(b) (2009); see also THE DEPARTMENT OF LABOR, *supra* note 31, at 2 (providing eligibility requirements).

A group of workers may be eligible for TAA if their jobs are lost or threatened due to trade-related circumstances as determined by the DOL investigation. These circum-

eligible, that individual is able to receive benefits and services at a local American Job Center.³⁶ One major issue with the Trade Adjustment Assistance Program is whether society as a whole has to pay for all of the workers' retraining, or whether individuals should retrain themselves in an increasingly global economy.³⁷

States have also tried to address outsourcing through various legislative attempts, but unlike the federal attempts, states have been much more aggressive to minimize or ban offshoring.³⁸ State bills can be generalized

stances may include: [i]ncreased imports of either articles or services; [a] shift in production to or an acquisition of services or articles from any foreign country by a worker's company; [a] worker's employer's loss of business from a customer with TAA-certified workers; or [a] worker's employer is identified as trade-injured by the International Trade Commission (ITC).

THE DEPARTMENT OF LABOR, *supra* note 31, at 2.

³⁶ See THE DEPARTMENT OF LABOR, *supra* note 31, at 2 (highlighting benefits and services available for workers). If a worker is a member of a worker group certified by the Department of Labor, then the individual can get training of up to one-hundred and thirty weeks of full-time or part-time, and up to one-hundred and thirty weeks of wage subsidies for workers enrolled in full-time training within twenty-six weeks of their trade-related layoff or certification, whichever is later. *Id.* A worker can also get a tax credit covering seventy-two and a half percent of the worker's monthly premium for qualified health insurance, a wage subsidy for up to two years is available to workers age fifty or over who are reemployed at annual wages of fifty-thousand or less, and reimbursement for job search costs outside the worker's local area, and for relocation costs for a job outside the worker's local area are also available. *Id.*

³⁷ See Baker, *supra* note 14, at 832-33 (questioning effectiveness of TAA Program). Retraining programs are difficult to implement because there involve high skilled workers who have been working in their profession for years and cannot easily learn a new profession. See *id.* In addition, there is concern as to whether giving displaced workers more money is really the solution, as it would be a better investment of money to create new jobs that could utilize the workers. See *id.* Critics also question whether education would really be an effective remedy because many displaced workers are already highly educated. See *id.* Other critics have stated that the idea that education is the answer for U.S. high tech workers who are laid off is a flawed argument because someone still has to pay for that education and the possibility of the previously laid off workers losing their job to outsourcing still exists. See Jeff Nachtigal, *Educating the Outsourced: Is it the Answer?*, WASHTECH NEWS, (Mar. 8, 2004), available at http://archive.washtech.org/news/industry/display.php?ID_Content=4656 (questioning whether education is solution for displaced workers).

³⁸ See *State by State Status of Legislative Efforts to Curb Offshore Outsourcing and Visa Abuse*, WASHTECH NEWS (Feb. 28, 2005), available at http://archive.washtech.org/news/legislative/display.php?ID_Content=4653 (listing a comprehensive overview of state-by-state legislation); Patel, *supra* note 11, at 88-89 (describing evolution of state legislation). In 2003, only four states including North Carolina, Indiana, New Jersey and Michigan had introduced outsourcing bills. See Patel, *supra* note 11, at 88-89. Yet, by the end of 2004 state legislators had introduced more than two-hundred outsourcing bills in more than forty states. See *id.*; see also NATIONAL FOUNDATION FOR AMERICAN POLICY, *supra* note 21, at 2 (commenting on number of states that had introduced outsourcing bills). Between 2005 and 2006 one-hundred and ninety bills were introduced. See NATIONAL FOUNDATION FOR AMERICAN POLICY, *supra* note 21, at 4; see Baker, *supra* note 14, at 821 (explaining how states have tried to also address outsourcing).

into two categories.³⁹ Some bills prevent state contract work from being performed overseas; some require the work to be done by individuals who are authorized to work in the U.S., and some give incentives for performing work in the U.S.⁴⁰ Although states have proposed more bills than the federal government, most bills have not passed for various reasons, including a strong resistance against outsourcing bills from politicians in addition to Constitutional obstacles.⁴¹

The most restrictive state attempts, such as Arizona's Procurement Services bill, prohibited work from being done outside the United States entirely.⁴² Arizona's Procurement Services bill required that the work be completed in the United States and that vendors who submitted a contract certify that the contract work was performed in the United States.⁴³ If the

³⁹ See Amar Gupta & Deth Sao, *Anti-Offshoring Legislation and United States Federalism: The Constitutionality of Federal and State Measures Against Global Outsourcing of Professional Services*, 44 TEX. INT'L L.J. 629, 635 (2009) (comparing two types of state legislation).

⁴⁰ See *id.* at 635. State bills that restrict public contract work are under the control of the state and limit how private entities can perform the work. *Id.* State restrictions vary with the most extreme requiring the site of the contract work to be in the United States with the work completed by an authorized U.S. worker, and less restrictive bills that require a preferential treatment of U.S. goods and services and sometimes requiring vendors to disclose the location of their sites. *Id.* at 635-36; see also THE NATIONAL FOUNDATION FOR AMERICAN POLICY, *supra* note 21, at 4-6 (examining various types of state legislation).

⁴¹ See Patel, *supra* note 11, at 89 (providing reasons why state bills have not passed). Some state bills have not passed because politicians believe it restricts free trade and has an adverse impact on the nation's foreign relations. See *id.* In 2004, Governor Arnold Schwarzenegger expressed his opinion against outsourcing bills when he stated, "There is a right way and a wrong way to expand economic opportunity in California ... [t]he wrong approach is to implement measures that restrict trade, invite retaliation or violate the United States Constitution or our foreign trade agreement." See Steve Lawrence, *Schwarzenegger Vetoes Bills to Prevent Outsourcing of Jobs*, CONTRACOSTATIMES.COM, (Sept. 30, 2004), available at http://www.calchamber.com/Chamber_in_the_news/09-30-04_outsourcing_contracosta.htm; Dauer, *supra* note 16, at 12 (providing Governor of Maryland's reaction to outsourcing legislation). The Governor of Maryland, in response to a House Bill, stated:

Many of the goods and services enjoyed by the citizens of Maryland were manufactured in foreign countries. The services that the citizens of Maryland have come to expect, such as 24-hour, on-call information technology assistance, are made possible because of contracts outsourced to foreign countries. House Bill 183 could hinder the ability of State agencies to procure the services that provide round-the-clock customer assistance by utilizing the "follow-the-sun" system of service.

Dauer, *supra*.

⁴² See Ariz. S.B. 1449, 47th Cong. (2005), available at <http://www.nfap.com/researchactivities/globalsourcing/legtext/ArizonaSB1449.pdf> (examining bill proposed by Arizona).

⁴³ See *id.* (discussing Arizona's Procurement Services bill). A portion of the bill provides that a state governmental unit cannot award a contract or development assistance to a vendor, bidder, contractor or subcontractor or an applicant for development assistance that performs the work at a site outside of the United States. *Id.*

work was ever performed overseas, then the contract was terminated for noncompliance.⁴⁴ Furthermore, not only was the contract terminated, but the contractor was charged a penalty that was equal to the amount of state government work that was performed outside the U.S.⁴⁵ The contractor was also prohibited for five years after the date of the termination of the contract from entering into state contracts.⁴⁶ Arizona's Procurement Services bill was ultimately held up in various committees and did not pass; this sort of state legislation is problematic because it encounters many constitutional issues and, more importantly, does not address legal outsourcing because it is limited in scope to public contracts.⁴⁷

Another category of state attempts includes anti-outsourcing legislation that is designed to give tax incentives and state subsidies to counter outsourcing, which makes this kind of legislation broader than Arizona's Procurement Services bill.⁴⁸ State legislation that gives tax and subsidy incentives is much different than other legislative attempts because the scope

⁴⁴ See *id.* (explaining how contract can terminate). The bill states, "[i]f, during the life of the contract, the vendor, contractor, subcontractor or development assistance recipient shifts work that is funded under the contract overseas, the state governmental unit shall terminate the contract for noncompliance." *Id.*

⁴⁵ See Ariz. S.B. 1449, 47th Cong. (2005), available at <http://www.nfap.com/researchactivities/globaloutsourcing/legtext/ArizonaSB1449.pdf> (explaining contractor's penalty after termination of contract).

⁴⁶ See *id.* (penalizing contractor occurs after his contract is terminated). The bill states: In addition, the vendor... shall incur penalties... an amount equal to the amount paid by the state governmental unit for the percentage of work that was performed with workers outside of the United States. Any contractor... that violates this article is not entitled to receive any state contracts or development assistance for a period of five years after the date of determination of the violation.

Id.

⁴⁷ See U.S. Const. art. VI, cl. 2 (establishing federal preemption doctrine). Article VI, clause 2 states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (holding state power touching on foreign relations must yield to National Government's policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (asserting Congress has power to preempt state law); Gupta & Sao, *supra* note 39, at 636 (discussing constitutional issues with regard to public contract outsourcing legislation). Gupta and Sao also discuss how this kind of legislation imposes restrictions on contracts between state and private entities. See Gupta & Sao, *supra* note 39, at 635.

⁴⁸ See Earle, *supra* note 14, at 113 (pointing to states' attempts to use tax and subsidy incentives to counter outsourcing).

may include private contracts as opposed to public contracts.⁴⁹ In 2004, New York proposed a bill titled, “An Act to Amend the Business Corporation Law” which attempted to prohibit entities from receiving state financial assistance to outsource those jobs.⁵⁰ The bill went further and required entities that outsourced jobs to return the state’s financial assistance.⁵¹ Furthermore, the bill prohibited individuals from receiving state benefits for five years from the date the outsourcing was discovered.⁵² New York’s bill received no votes and was not enacted, but bills such as New York’s are less problematic than others that restrict outsourcing because states have the authority to dictate how resources are allocated.⁵³ States, however, do not have an absolute power to legislate outsourcing, which explains why bills similar to New York’s face Constitutional obstacles.⁵⁴

Where federal and state legislation has come up short with outsourcing laws, the ABA has tried to compensate.⁵⁵ The ABA was established on August 21, 1878 to be the legal profession’s national representative and it has been adopted by most states.⁵⁶ One of the ABA’s major

⁴⁹ See Earle, *supra* note 14, at 100-01 (2007) (discussing how these types of state efforts will affect private contracts). The state subsidy and tax incentive bills force entities to calculate whether they will make more money by accepting state subsidies or by moving workers and operations to a locale where the cost of doing business is significantly cheaper. See *id.* at 114. The result of these kinds of bills is that they have more potential to restrict private as well as public contracts. *Id.*

⁵⁰ See N.Y. A. 9567, 2004 Leg. 227th Sess. (N.Y. 2004), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A09567&term=2003&Summary=Y&Text=Y (proposing incentives against outsourcing). The bill “prohibits the outsourcing of jobs by business entities receiving state developmental assistance.” *Id.*; see also Earle, *supra* note 14, at 114 (discussing how New York’s bill prohibits outsourcing).

⁵¹ See N.Y. A. 9567 (explaining how bill provides for repayment of state assistance); see also Earle, *supra* note 14, at 114 (discussing repayment of state assistance provision of bill).

⁵² See A. 9567 (providing that violation of bill creates five-year prohibition from receipt of state assistance); see also Earle, *supra* note 14, at 114 (discussing five-year prohibition provision in bill).

⁵³ See *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) (holding states have great latitude to allocate their resources). The Court acknowledged the state’s finite resources and gave the state great latitude in allocating its resources when examining the constitutionality of Maryland’s welfare benefits program. *Id.*

⁵⁴ See Earle, *supra* note 14, at 116 (emphasizing how state tax and subsidy incentive bills may violate Congress’s Foreign Commerce Clause powers). A state’s financial incentive legislation may violate Congress’s Foreign Commerce Clause powers because ultimately the state is affecting whether private contracts would be made with international entities, which is a power reserved for Congress. See *id.*

⁵⁵ See AMERICAN BAR ASSOCIATION, *Mission and Goals*, http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Jan. 10, 2013) (discussing intended goals of ABA).

⁵⁶ See AMERICAN BAR ASSOCIATION, *History of the American Bar Association*, http://www.americanbar.org/utility/about_the_aba/history.html (last visited Apr. 17, 2014); AMERICAN BAR ASSOCIATION, *State Adoption of the ABA Model Rules of Professional Conduct*,

roles is to establish rules of professional conduct for lawyers.⁵⁷ Some rules are imperative and make the lawyer's performance obligatory, while others are permissive and allow the lawyer to exercise professional judgment.⁵⁸ A violation of a rule of conduct is addressed by a disciplinary agency.⁵⁹ In 2008, the ABA released an opinion on legal outsourcing, which established the practice of legal outsourcing as ethical.⁶⁰ Although the ABA acknowledged that the practice was ethical, it also created a list of specific guidelines and rules of conduct that lawyers must follow when outsourcing their work.⁶¹ The 2008 ABA opinion states that the lawyer ultimately remains responsible for providing competent legal services to her client in accordance with Model Rule 1.1, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁶² A lawyer who engages lawyers or non-lawyers to provide outsourced legal or non-legal services is also required to comply with Model Rules 5.1 and 5.3, which instruct lawyers to make reasonable efforts to comply with all Model Rules when sending their work out to lawyers or non-lawyers.⁶³ The opinion also states that lawyers should make appropriate disclosures and should

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Apr. 17, 2014).

⁵⁷ See AMERICAN BAR ASSOCIATION, *supra* note 55 (discussing how ABA is national representative of legal profession).

⁵⁸ See MODEL RULES OF PROF'L CONDUCT, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last visited Jan. 10, 2013) (listing Model Rules of Professional Conduct).

⁵⁹ See MODEL RULES OF PROF'L RESPONSIBILITY R. 8.5 (1983) (subjecting lawyers to disciplinary action for Model Rule violations).

⁶⁰ See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 08-451 (2008), available at <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf> (establishing practice of legal outsourcing as ethical); see also Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L. REV. 479, 481 (2009) (restating ABA's position that "there is nothing unethical" about outsourcing).

⁶¹ See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 60, at 1 (establishing rules of conduct that lawyers must follow when outsourcing work).

⁶² See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 60, at 1 (establishing lawyers must provide competent legal services when outsourcing work); see also MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013). Model Rule 1.1 states, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

⁶³ See MODEL RULES OF PROF'L CONDUCT R. 5.1 (1983) (requiring lawyers to make reasonable efforts to comply with Model Rules when outsourcing to other lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983) (indicating lawyers must make reasonable efforts to comply with Model Rules when outsourcing to non-lawyers); ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 60, at 1 (establishing that lawyers who outsource must comply with ABA MODEL RULES 5.1 and 5.3).

obtain client consent if the lawyer plans to outsource protected information.⁶⁴ Finally, lawyers cannot charge unreasonable fees or assist in the unauthorized practice of law.⁶⁵ The ABA's Model Rules are unique because unlike federal and state legislation they directly address legal outsourcing.⁶⁶ The Model Rules still do not actually solve the problems created by legal outsourcing, and, in fact, the ethical guidelines set forth by the ABA and the North Carolina State Bar, as discussed later in this note, only perpetuate the lawyers' and law firms' inefficient mode of production.⁶⁷

Unlike the ABA, state bar associations have more legal influence on lawyers via particular state laws.⁶⁸ For example, many states require

⁶⁴ See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 60, at 1 (requiring lawyers to obtain client consent from, and disclose appropriate information to, clients); see also MODEL RULES OF PROF'L CONDUCT R. 1.4, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html (requiring lawyers to reasonably consult with clients regarding means with which work is accomplished); MODEL RULES OF PROF'L CONDUCT R. 1.6, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (requiring lawyers to obtain consent before disclosing information about clients).

⁶⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html (requiring lawyers to charge reasonable fees); MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html (requiring lawyers to avoid in assisting unauthorized practice of law); ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, *supra* note 60, at 1 (requiring lawyers to charge reasonable fees and avoid engaging in unauthorized practice of law); see also Wesley Romine, *Legal Fees: Gross Overcharging By An Attorney Warranting Disciplinary Action*, 2 J. LEGAL PROF. 119 (1977-1988), available at http://www.law.ua.edu/pubs/jlp/files/issues_files/vol02/vol02art09.pdf (explaining how lawyers should only be allowed compensation proportionate to professional efforts).

⁶⁶ See ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, *supra* note 60, at 1 (discussing that lawyers can outsource legal work in accordance with model rules).

⁶⁷ See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 60, at 2 (discussing how lawyers only need to meet guidelines for legal outsourcing). When a lawyer is providing legal services, the Rules only require that the lawyer perform the work competently. *Id.*; see also Alexandra Hanson, *Legal Process Outsourcing to India: So Hot Right Now!*, 62 SMU L. REV. 1889, 1889 (2009) (discussing how ABA opinion 08-451 fails to adequately consider nuances of outsourcing); Patel, *supra* note 11, at 90 (criticizing ABA opinions because they are non-binding on lawyers). The ABA Model Rules are only binding if the state that the lawyer is practicing in has adopted the ABA rules. See Patel, *supra* note 11, at 90. The other problem with the ABA rules is that most jurisdictions have not legislated on the issue of legal outsourcing and thus the potential to circumvent the ethical considerations is high. See *id.* at 91; see also Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 INT'L J.L. & INFO. TECH 170, 180 (2007) (stating outsourcing simply sustains current business model).

⁶⁸ See Patel, *supra* note 11, at 90 (evaluating difference between ABA and state bar associations).

lawyers to pass the state's bar exam before they can practice law in that state, thus adherence to the state bar association's rules is mandatory for any lawyer who wishes to practice in the state.⁶⁹ Over the years, various states have released ethics opinions addressing legal outsourcing.⁷⁰

In 2007, the North Carolina State Bar released an ethics opinion acknowledging that legal outsourcing is ethical.⁷¹ In support of the determination that outsourcing is ethical, the North Carolina State Bar adopted the ABA's outsourcing guidelines.⁷² In particular, North Carolina noted that the same considerations apply whether a lawyer uses foreign assistants or the services of any non-lawyer assistants domestically.⁷³ As a result, the North Carolina State Bar mirrors the ABA's guidelines and requires that the lawyer: (1) takes steps to make sure that a non-lawyer assistant is competent; (2) provides appropriate supervision, and uses his own professional judgment; (3) obtains consent from the client to use foreign assistants; (4) avoids conflicts of interest; (5) preserves the clients' interests; and (6) does not charge a clearly excessive fee.⁷⁴ Based on these guidelines, as long as the lawyer's use of non-lawyer assistants is in accordance with the Model Rules, the non-lawyers' location is irrelevant.⁷⁵

The number of disciplinary actions reported by the North Carolina State Bar with regard to lawyers who outsource work reveals the enforce-

⁶⁹ See *id.* (discussing mandatory adherence to a state bar association's rules). The article also explains how some states, such as California, have gone even further to write the state bar of California into their Constitution. See *id.* at 91.

⁷⁰ See Patel, *supra* note 11, at 90 (pointing to how ethics opinions have tried to legislate outsourcing). Federal and state legislation has faced obstacles with regards to legal outsourcing and thus ethics opinions have tried to fill that gap. See *id.*

⁷¹ See NORTH CAROLINA STATE BAR, Formal Op. 12 (2007), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (establishing legal outsourcing is ethical).

⁷² See *id.* (setting forth outsourcing guidelines for lawyers in North Carolina).

⁷³ See *id.* (comparing ethical guidelines for foreign assistants and non-lawyers).

⁷⁴ See *id.* (discussing supervision of foreign assistants). With regards to supervising foreign assistants, the opinion requires the lawyer review the foreign assistant's work on an ongoing basis to review its quality, reliability, and have ongoing communication with the foreign assistant to ensure that the assignment is produced in accordance with the lawyer's directions and expectations. See *id.* The opinion even goes further in establishing when a lawyer should refrain from using foreign assistance by stating, "if physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services." *Id.*; see also N.C. RULES OF PROF'L CONDUCT R. 1.5: Fees, available at <http://www.ncbar.gov/rules/rules.asp?page=8> (last visited Feb. 25, 2013) (providing language of fee requirements for lawyers in North Carolina).

⁷⁵ See N.C. RULES OF PROF'L CONDUCT R. 1.5 (stating that lawyers only need to comply with Model Rules to use non-lawyer assistants).

ment issues deriving from the ethics opinion.⁷⁶ The North Carolina State Bar has dealt with many disciplinary actions related to subpar supervision of work, violations of the competence requirements, lack of clients' consent, excessive fees and conflicts of interests; yet the state bar has not posted any disciplinary actions of lawyers who have outsourced work.⁷⁷ The number of disciplinary actions related to domestic work versus outsourced work shows just how ineffective ethical guidelines are at addressing legal outsourcing.⁷⁸

III. FACTS

Legal outsourcing is simple in theory but raises complex issues in practice.⁷⁹ India is the major hub of outsourced legal work, and the type of work outsourced involves intensive time and labor, such as document review and production.⁸⁰ Outsourcing work has many advantages for both

⁷⁶ See Patel, *supra* note 11, at 91 (explaining how ethics opinions raise enforcement difficulties); *infra* note 77 and accompanying text (providing examples of reported disciplinary actions in North Carolina).

⁷⁷ See, e.g., *Disciplinary Actions*, NORTH CAROLINA STATE BAR, vol.14, no. 3 (Sept. 2009) available at <http://www.ncbar.gov/discipline/actions.asp?page=5&keywords=supervision> (suspending attorney for failing to supervise an assistant); *Disciplinary Actions*, NORTH CAROLINA STATE BAR, vol. 15, no. 3 (Sept. 2010) available at <http://www.ncbar.gov/discipline/actions.asp?page=3&keywords=competence> (suspending lawyer for assisting in the unauthorized practice of law and more); *Disciplinary Actions*, NORTH CAROLINA STATE BAR, vol. 17, no. 2 (June 2012) available at <http://www.ncbar.gov/discipline/actions.asp?page=44&keywords=consent> (suspending lawyer for failing to get client's consent when settling case); *Disciplinary Actions*, NORTH CAROLINA STATE BAR, vol. 18, no. 4 (Dec. 2013) available at <http://www.ncbar.gov/discipline/actions.asp?page=60> (stating that Henry Barnette III was disbarred for billing hours not actually performed).

⁷⁸ See Patel, *supra* note 11, at 91 (claiming weakness of ethics opinions is their uncertainty of enforcement).

⁷⁹ See Hanson, *supra* note 67, at 1890 (explaining concept of legal outsourcing).

⁸⁰ See Hanson, *supra* note 67, at 1893 (describing where and type of work outsourced); see also Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 537 (2008) (explaining type of work that is outsourced). The work sent offshore includes, "litigation document review, portions of patent applications, drafting of pretrial motions and briefs, due diligence, parts of mergers and acquisition deals and even briefs prepared for submission to the U.S. Courts of Appeal and the U.S. Supreme Court." Terry, *supra*, at 537; see also Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 733 (2006) (explaining that work outsourced is usually "commodity work"). Examples of work typically sent offshore—sometimes called "commodity work"—includes, document review and drafting, legal research, patent applications, and litigation support. Kadzik, *supra*, at 733. But see Laura D'Allaird, "The Indian Lawyer": *Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing*, 18 NO. 3 PROF. LAW. 1, 3, 5 (2007) (discussing how outsourced work includes sophisticated tasks). Outsourcing providers also pro-

clients and lawyers, but it also raises many issues.⁸¹ One tool that has emerged from the private sector is document automation software, which allows lawyers to be more efficient and can help meet their financial and ethical obligations.⁸²

Legal outsourcing is an arrangement where a company that provides services obtains a third party to provide those services situated in a more efficient and cost-effective location.⁸³ In 2001, the legal outsourcing industry generated approximately two-hundred sixty million dollars and, by 2007, became over a three billion dollar industry.⁸⁴ By 2015, it is estimated that forty-thousand legal jobs will be outsourced, thus U.S. law firms are projected to lose over four billion dollars from legal outsourcing.⁸⁵

Generally, legal work is sent to a third party outsourcing provider located in India.⁸⁶ One provider of legal outsourcing is Pangea3, which was founded in 2004 by U.S. attorneys.⁸⁷ The company provides legal outsourcing solutions for “litigation support, corporate transactional work, [intellectual property], and governance, risk management and compliance.”⁸⁸ There are many more providers of legal outsourcing who all provide the

vide more complex work, such as brief writing. *Id.* at 5; *see also* Interview with Puneet Mohey, President, Lexadigm (May 1, 2005), *available at* <http://www.npr.org/templates/story/story.php?storyId=4626716> (asserting that outsourcing providers can perform more sophisticated work). During an interview, Puneet Mohey, the president of Lexadigm, stated that Lexadigm has prepared a brief for the U.S. Supreme Court and many briefs for the U.S. Circuit Court of Appeals. Interview with Puneet Mohey, *supra*.

⁸¹ *See* Hanson, *supra* note 67, at 1893-94 (outsourcing provides low cost work); *see also* Patrick McFadden, *The First Thing We Do, Let's Outsource All The Lawyers: An Essay*, 33 PUB. CONT. L.J. 443, 443-45 (2004) (pointing to cost savings as advantage of outsourcing); Kadzik, *supra* note 80, at 734-37 (explaining disadvantages of outsourcing). There are many ethical concerns raised by outsourcing, which include conflicts of interests, protecting client confidentiality, providing adequate lawyer supervision, and disclosure issues with clients. *See* Kadzik, *supra* note 80, at 734-37.

⁸² *See* Kadzik, *supra* note 80, at 733 (explaining why outsourcing is so efficient for law firms).

⁸³ *See* Fred Greguras, Steven Levine & S.R. Gopalan, *Legal Structures For Outsourcing*, 9 No. 8 CYBERSPACE LAW. 3 (2004) (discussing how outsourcing works); Hanson, *supra* note 67, at 1890 (describing legal outsourcing's basic arrangement).

⁸⁴ *See* Donna Leinwand, *More Legal Legwork Gets Outsourced to India*, USA TODAY (Oct. 14, 2008, 9:27 PM), http://usatoday30.usatoday.com/money/economy/employment/2008-10-14-outsourcing_N.htm (explaining growth of legal process outsourcing industry).

⁸⁵ *See* 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, 60 (2008) (stating year 2015 projections for legal outsourcing).

⁸⁶ *See* D'Allaird, *supra* note 80, at 1 (pointing to India's dominance of outsourcing market).

⁸⁷ *See* PANGA3, *About Us*, <http://www.pangea3.com/about/company-overview.html> (last visited Nov. 23, 2012) (discussing history and creation of company).

⁸⁸ PANGA3, *Solutions*, <http://www.pangea3.com/solutions/legal-outsourcing-services.html> (last visited Apr. 18, 2014) (listing types of work Pangea3 provides).

same basic services.⁸⁹

Firms generally outsource their work to India because it provides an abundance of benefits for them.⁹⁰ The first major reason has to do with the qualified labor pool.⁹¹ India provides qualified lawyers who speak English and are educated in a common-law system.⁹² Furthermore, many Indian lawyers have studied at U.S. law schools, which only adds to their understanding of the U.S. legal system.⁹³ Even if Indian lawyers are not educated in America, Legal Process Outsourcing (“LPO”) providers hire U.S. attorneys to train and supervise Indian attorneys.⁹⁴ The Indian work force is not just well-educated, but also has a strong work ethic and a growing middle class with a desire to succeed.⁹⁵ In 2007, Rainmaker, a recruitment and training firm that focuses on the LPO industry, introduced the Global Legal Professional (“GLP”) certification test.⁹⁶ The test adds an-

⁸⁹ See, e.g., ATLAS LEGAL RESEARCH, <http://www.atlaslegal.com/about-us.html> (last visited Feb. 24, 2014); INTEGREON, <http://www.integreon.com> (last visited Feb. 24, 2014); LEXADIGM SOLUTIONS, <http://rsg-india.com/legal-process-outsourcing/profiles/lexadigm-solutions-llc> (last visited Feb. 24, 2014). But see D’Allaird, *supra* note 80, at 3 and accompanying text; see also Interview with Puneet Mohey, *supra* note 80 (claiming that companies are starting to provide more sophisticated work).

⁹⁰ See D’Allaird, *supra* note 80, at 1 (putting India high on list for outsourcing legal work); Wollins, *supra* note 5, at 62 (stating how India controls about two-thirds of legal outsourcing market).

⁹¹ See Carlo D’Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or “Flattener”?*, 14 TEX. WESLEYAN L. REV. 167, 172-73 (2008) (explaining qualifications of Indian lawyers); see also Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2208 (asserting legal process outsourcing providers hire top qualified Indian workers). India has an extremely qualified labor pool that legal process outsourcing providers generally use to provide assurances of legitimacy to their clients and to also safe guard their own interests. See Krishnan, *supra*, at 2208.

⁹² See D’Angelo, *supra* note 91, at 172-73 (highlighting pool of qualified, English-speaking Indian lawyers educated on common law principles); see also D’Allaird, *supra* note 80, at 1 (discussing how lawyers in India are educated in English and common law); Krishnan, *supra* note 91, at 2207-08, 2210 (clarifying how Indian lawyers speak fluent English and have graduated from top Indian law schools). Indian lawyers are also quite familiar with the presence of American case law in India because the Indian rule of law draws not only from British common law, but also from American constitutional principles and Indian judges often cite to American case law in their opinions. See Krishnan, *supra* note 91, at 2211.

⁹³ See Daniel Brook, *Made In India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS (June 2005), available at http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp (reiterating Indian lawyers are college educated and English speaking); D’Angelo, *supra* note 91, at 173 (noting that many Indian lawyers have U.S. law degrees).

⁹⁴ See Courtney I. Schultz, Note, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 654-55 (2010) (explaining how LPOs recruit and train Indian attorneys).

⁹⁵ See D’Angelo, *supra* note 91, at 173 (describing how India offers well-educated lawyers with strong work ethic).

⁹⁶ See Schultz, *supra* note 94, at 655 (explaining GLP certification test).

other advantage to outsourcers because it is designed to screen individuals and provide a standard measure of skill.⁹⁷ The GLP tests individuals in areas of English fluency, technology, professional skills, personal effectiveness, and legal knowledge, all of which allow for more efficient work processes.⁹⁸ Another major advantage of outsourcing is efficiency.⁹⁹ Outsourcing is efficient for law firms because the outsourcing provider can complete the work on a schedule that meets the law firm's needs.¹⁰⁰ This is because of the difference in time between the U.S. and India, which allows law firms in America to essentially operate on a twenty-four hour basis.¹⁰¹ Furthermore, advancements in communication, transportation, and free trade have widened and expedited the range of services that can be rendered by LPO providers.¹⁰²

The final major advantage, and possibly the most alluring, is the amount of money that can be saved, which ultimately results in increased profits for U.S. firms.¹⁰³ The catalyst for investment in India and the potential for huge economic gains started in the early 1990s with then Prime Minister Narasimha Rao.¹⁰⁴ Prime Minister Rao launched a wave of economic reforms, which liberalized trade, moved to free-market economics, imposed government spending cuts, and promoted foreign investment.¹⁰⁵ As a result of Prime Minister Rao's economic reforms, India became the destination for economic gains in outsourcing legal work.¹⁰⁶ Today, the Indian government provides multiple year tax breaks, exemptions from import and export duties to U.S. legal outsourcers, and assurances that the bu-

⁹⁷ See *id.* (pointing to added advantage of GLP test to outsourcers).

⁹⁸ See Schultz, *supra* note 94, at 655 (stating areas that are tested in GLP test). The article, however, does mention that the GLP does not solve all the issues. See *id.* There is no standard test, such as the bar exam for U.S. attorneys, for LPO employees because the GLP test is only used by three reported LPO providers. See *id.* The GLP test would only be effective if it were fully standardized and used by all LPO providers. See *id.*

⁹⁹ See Kadzik, *supra* note 80, at 733 (explaining why outsourcing is efficient for law firms).

¹⁰⁰ See *id.* (claiming outsourcing providers can meet schedule of outsourcers, which leads to efficiency).

¹⁰¹ See Kadzik, *supra* note 80, at 733 (discussing how time difference between U.S. and India allows for constant work flow); see also Wollins, *supra* note 5, at 63 (pointing to how India can offer twenty-four hour support).

¹⁰² See Kadzik, *supra* note 80, at 735 (advancing technology has created more efficiency in services provided).

¹⁰³ See Kadzik, *supra* note 80, at 733 (explaining how potential for increased profits is major advantage to outsourcing); McFadden, *supra* note 81, at 443-45 (listing cost-savings as advantage of outsourcing).

¹⁰⁴ See Krishnan, *supra* note 91, at 2209 (evaluating impact of Prime Minister Rao's economic policy on India).

¹⁰⁵ See *id.* (describing economic reforms initiated by Prime Minister Rao).

¹⁰⁶ See Krishnan, *supra* note 91, at 2210 (suggesting economic reforms attracted businesses to India).

reaucratic regulations, for which India is notorious, will not impede LPOs.¹⁰⁷

With the Indian government's support, U.S. outsourcers can take full advantage of the economic advantages that India has to offer.¹⁰⁸ With regard to patent applications, the savings for U.S. firms is clear.¹⁰⁹ High-tech patent work can cost between eight-thousand to ten-thousand in the Midwest, up to twelve-thousand in Silicon Valley, but only between five-thousand to six-thousand in India.¹¹⁰ U.S. firms can charge approximately one-hundred and fifty dollars an hour for a paralegal to review, sort, and index documents, but in India that same work can cost thirty dollars an hour.¹¹¹ U.S. firms that outsource back-office tasks, such as document review, will make money directly from the work that is outsourced and indirectly by allowing higher level attorneys to focus on more sophisticated tasks.¹¹²

Legal outsourcing's potential to provide cheap, qualified, and efficient labor is attractive, but the concerns raised by the practice are also legitimate.¹¹³ The major concern with outsourcing revolves around the lawyer's ability to satisfy his professional and moral obligations set forth by the ABA and his respective state bar association.¹¹⁴ Model Rule 1.6 requires U.S. attorneys to keep client information confidential, but outsourcing may directly lead to violations of that rule.¹¹⁵ This is because in foreign cultures, such as in India, it may be common to brag about business ventures, share work information with coworkers and family, or talk about a

¹⁰⁷ See *id.* at 2209 (discussing how current economic policies attract outsourcers); see also Julie Forster, *Law Firm Cuts Rates by Outsourcing to India*, THE SAINT PAUL PIONEER PRESS (Mar. 3, 2004), available at http://www.bearcave.com/misl/misl_other/legal_outsourcing.html (describing one LPO company that received tax break from Indian Government). One LPO provider, Intellevate, was given a seven-year tax break from import and export duties from the Indian Government. See Forster, *supra*.

¹⁰⁸ See Krishnan, *supra* note 91, at 2209 (claiming Indian government's policies are advantageous to outsourcers).

¹⁰⁹ See Krishnan, *supra* note 91, at 2206 (describing costs saved by outsourcing patent work to India).

¹¹⁰ See Krishnan, *supra* note 91, at 2206 (comparing patent work costs between U.S. and India).

¹¹¹ See D'Angelo, *supra* note 91, at 172 (calculating cost savings by outsourcing back office tasks).

¹¹² See *id.* (comparing direct and indirect advantages of outsourcing).

¹¹³ See Kadzik, *supra* note 80, at 734 (pointing out how not all lawyers are convinced of legal outsourcing's advantages).

¹¹⁴ See Kadzik, *supra* note 80, at 734 (discussing how one major obstacle for lawyers are requirements of U.S. legal profession).

¹¹⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983) (requiring lawyers to keep client information confidential); see also Patel, *supra* note 11, at 96 (highlighting privacy issues raised when lawyers outsource work).

client's net-worth.¹¹⁶ Aside from the cultural concerns, another privacy concern includes the difficulty in maintaining secured information technology networks, which could also leak valuable information.¹¹⁷ When work is sent abroad, U.S. firms question whether the data security levels are high enough to send valuable information.¹¹⁸ Furthermore, Model Rule 5.3 requires lawyers to make reasonable efforts under the circumstances to ensure the quality of the work when outsourcing to non-lawyers, but this obligation is difficult to fulfill considering the distance between the lawyer and the non-lawyer overseas.¹¹⁹

Another major issue created by legal outsourcing involves the loss of American jobs.¹²⁰ In 2008, twelve thousand American jobs were outsourced as a result of legal outsourcing, and the number is projected to increase to eighty-thousand jobs by 2015.¹²¹ The loss of American jobs from outsourcing impacts the whole legal profession.¹²² Senior associates and partners have less of an incentive to train younger associates because the back-office work younger associates generally perform is outsourced.¹²³ As a result, there is a decline in the mentoring that takes place in law firms, which will in turn have a negative impact on the quality of the work produced and the reputation of the legal profession.¹²⁴

One possible resource available to lawyers, which comes from

¹¹⁶ See Patel, *supra* note 11, at 94-97 (discussing heightened issue of preservation of confidentiality when firms outsource). One issue with outsourcing is that some cultures may not understand the restrictions of privacy that U.S. attorneys are bound by and the consequences associated with violations of those restrictions. See *id.* at 94-96.

¹¹⁷ See Darya V. Pollak, "I'm Calling My Lawyer... In India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 124 (2006) (detailing privacy concerns associated with legal outsourcing).

¹¹⁸ See *id.* (articulating concerns of U.S. firms).

¹¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983) (explaining supervision requirement of lawyers over non-lawyers); Pollak, *supra* note 117, at 139 (asserting lawyers may not be able to supervise non-lawyers given distance between them).

¹²⁰ See Patel, *supra* note 11, at 85-86 (explaining how most observable effect of outsourcing is American job loss). But see Adam Mordecai, *Anti-Offshoring Legislation: The New Wave of Protectionism The Backlash Against Foreign Outsourcing Of American Service Jobs*, 5 RICH. J. GLOBAL L. & BUS. 85, 92 (2005) (explaining that outsourcing does not create "zero-sum" situation because job creation may balance loss). Another major issue with outsourcing is the possibility of having to adjudicate malpractice actions in the Indian justice system, which is notoriously slow and suffers from prevalent corruption. See *id.* at 87-88.

¹²¹ See Jennifer Spellman & Jeanne Varrichio, Note, *Bad Reputation?: The Potential Negative Impact of Outsourcing on the Legal Profession*, 29 HOFSTRA LAB. & EMP. L.J. 575, 597 (2012) (pointing to number of American jobs outsourced).

¹²² See *id.* at 598 (commenting on impact of American job loss on legal profession).

¹²³ See *id.* at 597-98 (discussing how work generally done by younger associates is being outsourced).

¹²⁴ See *id.* at 598 (remarking that quality of work and reputation of profession are at stake).

within the private sector, is document automation software that could help attorneys meet their financial needs as well as ethical obligations by changing the current inefficient business model of law firms.¹²⁵ Much of what lawyers do resembles a manufacturing process.¹²⁶ Lawyers are essentially working in high skilled document factories generating a large quantity of documents quickly, effectively, and accurately.¹²⁷ In the last decade, lawyers have found that outsourcing work to individuals in places like India was a better solution than doing the work themselves because they could complete the work on a schedule that met their needs and for a fraction of the cost.¹²⁸ Another alternative available for lawyers, includes document automation software, which provides many advantages to the legal profession.¹²⁹

Document automation software is a tool that creates templates of frequently used documents with variable fields coded into the templates.¹³⁰ The document assembly product provides an “answer file” that is filled out by the user.¹³¹ Once the user has entered all the answers, the automation software populates—or plugs-in—the answers into the automated template.¹³² HotDocs, by LexisNexis, is one type of document automation software and is also the most widely known.¹³³ HotDocs works by presenting a series of questions to the user who must answer in an interview.¹³⁴ The user’s answers are then merged into an automated document by the

¹²⁵ See Anne P. Huffman, *The Legal Assistant’s Role in Automated Litigation Support*, in 44 AM. JUR. TRIALS 79, § 75 (2013) (explaining how value billing can be a new effective billing system for firms); Mountain, *supra* note 67, at 176 (explaining how current law firm business model is inefficient).

¹²⁶ See Christy Burke, *More Law Firms See Benefits From Utilizing Document Assembly and Automation Software*, 27 NO. 4 LEGAL MGMT. 36, 36 (2008) (analogizing work of lawyers to manufacturing process).

¹²⁷ See *id.* (comparing lawyer’s job to assembly line process).

¹²⁸ See Kadzik, *supra* note 80, at 733 (explaining why outsourcing is efficient for law firms). Another factor in the decision to outsource legal work to India is the opportunity for increased profits. See *id.*

¹²⁹ See Burke, *supra* note 126, at 36 (discussing how document automation software has recently become full-featured and enhances productivity).

¹³⁰ See Burke, *supra* note 126, at 38 (describing what document automation software does).

¹³¹ See *id.* (discussing task left to user).

¹³² See *id.* (describing what software does once user provides answers).

¹³³ See Burke, *supra* note 126, at 38; see also HOTDOCS, *User Installation Guide and Tutorial*, available at http://www.hotdocs.com/sites/default/files/hotdocs/documents/2010/HotDocs_User_10_Guide.pdf (2011) (describing process of using HotDocs software); THOMSON REUTERS CHECKPOINT, http://support.rg.thomsonreuters.com/assets/checkpoint/demos/decisiontools/base_autosize.html (last visited Feb. 23, 2012) (advertising checkpoint software which allows lawyers to complete legal work with greater efficiency).

¹³⁴ See HOTDOCS, *supra* note 133, at 19 (describing how HotDocs works).

software, and once all of the answers are provided, the user can print the document or save it to a disk.¹³⁵

Document automation software allows lawyers to produce and reproduce a document with ease and little effort.¹³⁶ Lawyers are often outsourcing or using the “find and replace” method of creating documents, but both methods can lead to embarrassing and sometimes costly errors, which are avoidable.¹³⁷ These tools can generate more work product in less time, with less investment of current intellectual effort.¹³⁸ As described by Professor Marc Lauritsen, information technology can be used “to capture intellectual energy before it dissipates; bottle it up” in the form of an automated document, and then that energy can be “redeploy[ed] . . . in later contexts when it can do some good.”¹³⁹ Thus, standardized forms can be created to provide stable and reliable documents of consistent professional quality.¹⁴⁰

¹³⁵ See HOTDOCS, *supra* note 133, at 19 (describing what happens after user’s answers are provided).

¹³⁶ See Burke, *supra* note 126, at 42 (explaining firms that use document automation software have consistency in document production); see also Joyce D. Cutlip, *The Automated Law Firm: A Complete Guide to Software and Systems*, 12 NO. 4 LEGAL MGMT. 54, 54 (1993) (commenting on how automation is a productivity tool); RONALD W. STAUDT, EDUCATING THE DIGITAL LAWYER, § 8.02 (Oliver Goodenough & Marc Lauritsen eds., 2012), available at http://www.law.harvard.edu/programs/plp/pdf/009-03358_03358-ch0008.pdf (explaining how law firms are using technology to be more efficient).

¹³⁷ See Burke, *supra* note 126, at 40-41 (explaining advantage of using document automation software over traditional methods). Lawyers often take an old document and replace it with new information relevant to their current case, but this can lead to embarrassing errors if they left in information from the old document. See *id.* Document automation software, however, fixes this problem because the template will automatically replace the old answers with the new answers. See *id.*; see also Cassandra Burke Robertson, *A Collaborative Model Of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 141 (2011) (criticizing documents prepared by outsourcers because they can contain British terms). Some clients reported that they were dissatisfied with the outsourced work because they spent too much time changing British-English idioms to American-English. See *id.* at 142. For example, deposition summaries would use the word “bonnet” to mean hood of a vehicle. See *id.*

¹³⁸ See MARC LAURITSEN, *THE LAWYERS GUIDE TO WORKING SMARTER WITH KNOWLEDGE TOOLS* 127 (2010) (asserting that document automation software leads to efficiency); see also AMERICAN BAR ASSOCIATION, *Technology—Property*, 23-JUN PROB. & PROP. 58 (2009) (discussing how automation software leads to more efficiency which in turn lowers costs for firms); Daniel B. Evans, *Technology Probate*, 14-AUG PROB. & PROP. 13, 14 (2000) (explaining potential efficiency levels of document automation software).

¹³⁹ See LAURITSEN, *supra* note 138 at 13-14 (explaining advantage of document automation software); see also Evans, *supra* note 138, at 14 (describing how energy is conserved with use of document automation software).

¹⁴⁰ See Burke, *supra* note 126, at 42 (explaining how document automation software standardizes documents); see also 16 Henry J. Lischer, JR., Donald J. Malouf & Alex E. Nakos, WEST’S LEGAL FORMS, ESTATE PLANNING § 3.5 (2013) (highlighting advantages of document automation software); Silvia L.

, *Knowledge is Power: Delivering Consistent Work Product to Firm Clients*, 35 NO. 3 L. PRAC.

Another great advantage to automating documents is that lawyers can charge more reasonable fees through a flat-fee system instead of billing by the hour.¹⁴¹ This new system of billing, called value billing, allows lawyers to charge based on the value of the work rendered to the client rather than by the amount of time that was spent creating the work.¹⁴² This is good for both the client and attorney because it can provide a catalyst to change the current law firm business model and correct some of the inefficiencies in the production of work, which should reduce or eliminate the need for firms to outsource their legal work.¹⁴³

IV. ANALYSIS

Both federal and state governments have tried to regulate legal outsourcing in various ways; however, their attempts have been insufficient because the resulting legislation has not dealt with private contracts.¹⁴⁴ On

51, 51 (2009) (discussing how document automation software provides consistent results, which helps firms' reputations). The co-managing partner at WilmerHale described the importance of automated knowledge as follows:

Our reputation is founded on the quality of the legal work we do and the manner in which we deliver those services. Today, technology plays a critical role in ensuring the consistency of the quality and the efficiency of what we do. For that reason, even in challenging economic times, we continue to invest heavily in knowledge management.

See Coulter, *supra*, at 51.

¹⁴¹ See Coulter, *supra* note 140, at 38 (discussing how document automation software allows lawyers to charge flat fees).

¹⁴² See Alan S. Gutterman, *Incentive and Value Billing*, 1 BUS. TRANSACTIONS SOLUTIONS § 1:47 (2014) (explaining how value billing consists of billing clients value of work rendered to them); David J. Waxse, *Comments and Alternatives to Hourly Billing*, 68-FEB J. KAN. B.A. 2, 13 (1999) (billing by value disregards time to complete work and emphasizes value of work performed).

¹⁴³ See Mountain, *supra* note 67, at 176 (commenting on how software is advantageous for both clients and attorneys); see also David P. Vandagriff, *Faster Than Fast: Letting the Computer Assemble Your Documents Puts You in the Race*, 80-OCT A.B.A. J. 93 (1994) (explaining how document assembly allows for improved client service and greater profits for lawyers). But see LAURITSEN, *supra* note 138, at 45 (discussing disadvantages to document automation software). Many of the issues with document automation software include intellectual property concerns, professional ethics, discoverability of information, and admissibility of information. See LAURITSEN, *supra* note 138, at 45; see also Clayton M. Christensen & Scott D. Anthony, *eLaw-Forum: Transforming Legal Services*, DRYSTONE CAPITAL, 1 (2003), available at http://www.drystonecapital.com/pdf/christensen_case_study.pdf (providing profit margins for American law firms).

¹⁴⁴ See Baker, *supra* note 14, at 830-35 (questioning effectiveness of Thomas-Voinovich Amendment, immigration reform, and TAA Program); Gupta & Sao, *supra* note 39, at 635-36 (discussing how state offshoring legislation could be unconstitutional); Earle, *supra* note 14, at 113-16 (asserting how state tax and subsidy incentive bills may violate Congress's Foreign Commerce Clause powers).

the one hand, federal legislation has focused on public instead of private contracts because it would otherwise likely violate an international treaty to which the U.S. is a party.¹⁴⁵ State legislation, on the other hand, has focused on public contracts because it would otherwise most likely be preempted by federal legislation.¹⁴⁶ Document automation software, however, is a tool from within the private sector that can provide an efficient solution for clients and lawyers.¹⁴⁷

The Thomas-Voinovich Amendment limits the offshoring of government work overseas.¹⁴⁸ The amendment lacks any real value in the context of legal outsourcing because it fails to address private contracts, which means that private firms are still free to contract with other private firms who outsource work.¹⁴⁹ In addition, it appears even future federal legislation could not seriously impede the practice of legal outsourcing.¹⁵⁰ The only way federal legislation could significantly affect legal outsourcing is if legislation prohibited sending private information of clients overseas, which would impact the kind of work that law firms could outsource.¹⁵¹ Second, via the Thomas-Voinovich Amendment, the U.S. violates its trade obligations under Article III of the GPA.¹⁵² Article III of the GPA provides that member countries are prohibited from treating foreign suppliers of goods and services less favorably on the grounds of where the good or service was produced.¹⁵³ Article III further provides that a member country cannot discriminate against domestic suppliers who have foreign ownership, or a corporation whose goods and services were produced in a foreign

¹⁴⁵ See *supra* note 144 and accompanying text (explaining how federal legislation does not cover private contracts).

¹⁴⁶ See *supra* note 144 and accompanying text (explaining how state legislation does not cover private contracts).

¹⁴⁷ See Mountain, *supra* note 67, at 176 (commenting on efficiency of automation software).

¹⁴⁸ See Baker, *supra* note 14, at 834 (discussing how Thomas-Voinovich Amendment limited offshoring of government work); Earle, *supra* note 14, at 101 (expressing limitations of Thomas-Voinovich Amendment).

¹⁴⁹ See Baker, *supra* note 14, at 834-35 (stating how Thomas-Voinovich Amendment fails to address private contracts and violates GPA); Patterson, *supra* note 11, at 202 (stating that private firms face little threat from federal legislation). There is no federal legislation that has been proposed or is currently pending that is directly intended to stop private law firms from outsourcing legal work. See Patterson, *supra* note 11, at 202.

¹⁵⁰ See Patterson, *supra* note 11, at 202 (explaining ineffectiveness of future federal legislation on legal outsourcing).

¹⁵¹ See Patterson, *supra* note 11, at 202 (banning private information from outsourcing may slow practice).

¹⁵² See Klinger & Sykes, *supra* note 23, at 19 (claiming that Thomas-Voinovich Amendment violates GPA).

¹⁵³ See *id.* (claiming that Thomas-Voinovich Amendment violates GPA).

country.¹⁵⁴ The Thomas-Voinovich Amendment violates Article III of the GPA because it forces all contractors to use domestic workers.¹⁵⁵ Foreign corporations who bid for government contracts from the U.S. may already have a significant amount of their labor force located in countries other than the U.S.¹⁵⁶ As a result, under the Thomas-Voinovich Amendment, the foreign corporations would have to relocate all of their labor force to the U.S. to be eligible for government contracts, thus raising foreign corporations' contract costs as compared to domestic bidders who already have their workers in the U.S.¹⁵⁷ The World Trade Organization's dispute settlement body should, therefore, find the Thomas-Voinovich Amendment to be in violation of the non-discrimination and national treatment principles of the GPA because it provides less favorable treatment to foreign rather than domestic firms.¹⁵⁸

The Thomas-Voinovich Amendment also raises a lot of contention from foreign countries, such as India, who have criticized the Amendment as a hypocritical solution to the effects of globalization.¹⁵⁹ All countries are both benefited and adversely affected by free trade in some way, and the United States is no exception.¹⁶⁰ The United States, however, tries to limit the benefits that other countries would receive through the Thomas-Voinovich Amendment, and the intent of the legislation echoes this agenda.¹⁶¹ Arun Shourie, India's Minister on Information Technology, referred to the legislation as the "U.S. double standards on free trade," and went as far as to suggest that the Amendment is a threat to the revival of the Doha round of the world trade talks, designed to open free trade around the world.¹⁶² In other words, not only does the Thomas-Voinovich Amend-

¹⁵⁴ See Klinger & Sykes, *supra* note 23, at 19 (explaining how GPA prohibits member countries from either discrimination of foreign or domestic suppliers).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* (explaining that majority of foreign corporations' workforce is outside of U.S.).

¹⁵⁷ See Klinger & Sykes, *supra* note 23, at 19 (discussing how foreign corporations would have to relocate to U.S. to bid for contracts).

¹⁵⁸ See *id.* at 19 (explaining how Thomas-Voinovich Amendment violates non-discrimination and national treatment principles of GPA); see also Patterson, *supra* note 11, at 201 (explaining how Thomas-Voinovich is less favorable to foreign firms thus violating GPA principles).

¹⁵⁹ See Baker, *supra* note 14, at 835 (arguing America benefits from free trade yet tries to restrict other countries from trade).

¹⁶⁰ See *id.* (pointing out that despite its benefits, free trade may hinder all countries in some way).

¹⁶¹ See *id.* at 834-35 (explaining how Thomas-Voinovich Amendment limits benefits of free trade other countries receive); see also Klinger & Sykes, *supra* note 23, at 19-20 (explaining intent of Thomas-Voinovich Amendment to prohibit movement of federal jobs overseas).

¹⁶² See Baker, *supra* note 14, at 835 (providing Arun Shourie's reaction to Thomas-Voinovich Amendment).

ment fail to address private contracts, which is the essence of legal outsourcing, but it also violates the GPA and draws significant criticism from countries like India.¹⁶³

Congress's 2003 change to the H1-B visa cap is a more indirect approach to regulating outsourcing than the Thomas-Voinovich Amendment, but it too avoids the issues created by legal outsourcing.¹⁶⁴ The loss of American jobs is one of the issues with legal outsourcing.¹⁶⁵ When firms outsource, they send work overseas, but the change in the H1-B visa cap tries to give more jobs to Americans by preventing foreign workers from coming into America.¹⁶⁶ This isolationist strategy, however, does not solve the issue because, when it comes to outsourcing, foreigners are not coming to America to do the work; rather the work is sent to them in their countries, still leaving Americans out of those jobs.¹⁶⁷ Thus, whether the H1-B visa statutory cap is 65,000 or any other number, legal work is still going to be sent overseas because it is cheaper and more efficient to do so.¹⁶⁸ Furthermore, the idea that every job outsourced ends in a "zero-sum" situation is not a complete picture of how American jobs are lost because it fails to take into account the creation of new jobs that may balance out the loss of the outsourced jobs.¹⁶⁹ For example, free trade can lead to more efficient use of resources and capital, and can improve the economic situation for all countries involved.¹⁷⁰ This means that immigration reform, which tries to preserve American jobs, does not take into account the fact that American capital would not be spread as thinly as legislators anticipate due to legal outsourcing.¹⁷¹

The TAA Program is another federal attempt that is insufficient to address legal outsourcing.¹⁷² The TAA Program helps reemploy U.S.

¹⁶³ See Baker, *supra* note 14, at 834-35; see also Klinger & Sykes, *supra* note 23, at 19-20 (discussing how Thomas-Voinovich Amendment violates GPA).

¹⁶⁴ See Baker, *supra* note 14, at 829-30 (claiming immigration reform is ineffective way to address legal outsourcing).

¹⁶⁵ See Spellman & Varrichio, *supra* note 121, at 597 (explaining how legal outsourcing has led to American job loss).

¹⁶⁶ See Baker, *supra* note 14, at 828-29 (stating what immigration reform is designed to do).

¹⁶⁷ See *id.* at 828-30 (arguing immigration reform does not prevent Americans from losing their jobs to legal outsourcing).

¹⁶⁸ See *id.* at 828-30 (discussing change in H1-B visa cap and fallout from that change); D'Angelo, *supra* note 91, at 172-73 (pointing to how much money can be saved by outsourcing legal work).

¹⁶⁹ See Mordecai, *supra* note 120, at 92 (arguing outsourcing does not create "zero-sum" situation).

¹⁷⁰ See *id.* at 92 (highlighting beneficial impact of free trade).

¹⁷¹ See *id.* (explaining immigration reform may not be solving American job loss problem).

¹⁷² See Baker, *supra* note 14, at 831-32 (questioning effectiveness of TAA Program).

workers who have lost, or may lose, their jobs as a result of foreign trade.¹⁷³ The issue is that this program is a retroactive measure, rather than a proactive solution because it helps workers after they have already been, or are about to be, displaced by foreign trade.¹⁷⁴ In addition, it raises more questions than it answers, such as whether society is ready to take on the burden of paying for the education of these workers, and whether workers who are already educated may end up losing their jobs again to another outsourced job.¹⁷⁵

State attempts, such as Arizona's Procurement Services bill and New York's "Act to Amend the Business Corporation Law," were just as ineffective as federal attempts.¹⁷⁶ Arizona's Procurement Services bill was similar to the Thomas-Voinovich Amendment in that it required the state's contract work to be completed within the United States.¹⁷⁷ Arizona's Procurement Services bill was just as ineffective as the Thomas-Voinovich Amendment because it too dealt with only public contracts and failed to address privately outsourced legal work.¹⁷⁸ The bill would have also been found unconstitutional and thus ineffective as federal law would have preempted Arizona's attempt to dictate the U.S.'s foreign affairs.¹⁷⁹ New York's bill appeared to be more effective than Arizona's because it gave individuals the option of whether they wanted to receive state benefits or not, which meant that the bill could potentially have covered private contracts.¹⁸⁰ The issue, however, is that the incentives relied on individuals performing work within the state rather than contracting work overseas.¹⁸¹

¹⁷³ See The DEPARTMENT OF LABOR, *supra* note 31, at 2 (explaining objective of TAA Program).

¹⁷⁴ See *supra* note 36 and accompanying text (discussing TAA Program's process that helps workers after they have lost their jobs).

¹⁷⁵ See Baker, *supra* note 14, at 832-33 (explaining ineffectiveness of TAA Program).

¹⁷⁶ See Gupta & Sao, *supra* note 39, at 636 (pointing to constitutional issues arising from public contract outsourcing legislation); see also Earle, *supra* note 14, at 113-16 (discussing how state tax and subsidy incentive bills may violate Congress's Foreign Commerce Clause powers).

¹⁷⁷ See Ariz. S.B. 1449, 47th Cong. (2005), available at <http://www.nfap.com/researchactivities/globalsourcing/legtext/ArizonaSB1449.pdf> (discussing Arizona's Procurement Services bill); see also Dizard, *supra* note 19 (discussing how Thomas-Voinovich Amendment bars companies from shifting federal work to other countries).

¹⁷⁸ See Ariz. S.B. 1449, 47th Cong. (2005), available at <http://www.nfap.com/researchactivities/globalsourcing/legtext/ArizonaSB1449.pdf> (examining bill proposed by Arizona) (discussing how Arizona's bill only applies to public contracts); *supra* note 14 and accompanying text (explaining how Thomas-Voinovich Amendment is limited to public contracts).

¹⁷⁹ See Gupta & Sao, *supra* note 39, at 636 (explaining how Arizona's bill would be unconstitutional).

¹⁸⁰ See *supra* notes 49-50 and accompanying text (discussing how New York's bill could potentially cover private contracts).

¹⁸¹ See *supra* note 50 and accompanying text (pointing to how incentives are only given if

Thus, New York indirectly regulated foreign commerce, which meant that the bill would have been found unconstitutional as a violation of Congress's Foreign Commerce Clause power.¹⁸²

Document automation software is a tool from within the private sector that can meet lawyers' financial needs, which increasingly has been done through outsourcing.¹⁸³ The only source of revenue for law firms consists of billable hours, and clients have no control over what those rates are and how much they are billed.¹⁸⁴ When dealing with automation software, however, clients have more control over costs because they sometimes provide their own technological resources to the law firm, which helps reduce some costs.¹⁸⁵ Even if clients do not offer their own resources to law firms, automated work can still reduce costs because it creates a new system of billing, known as value billing.¹⁸⁶ Value billing can reduce costs because it is not based on the hourly rate, like traditional law firms, but rather on the value of the work produced.¹⁸⁷ The notion behind value billing is "that a particular piece of legal work has an inherent value that represents its cost to the client, regardless of the number of hours it took to perform that piece of work."¹⁸⁸ For example, if a client asks for a set of articles of incorporation, a law firm using automated software would already have a preexisting template and could create a new set of articles of incorporation, specific to the new client, in far less time than it would take if a whole new set were drafted from the beginning.¹⁸⁹ If that law firm were to charge by the hourly rate to produce that same work, it most likely would not make enough to cover overhead costs, but with the value billing method a standard fee can be negotiated at the beginning, which would include the value of the work the attorney rendered to the client.¹⁹⁰ Automation is thus ad-

work is performed within state).

¹⁸² See Earle, *supra* note 14, at 115-16 (discussing how state tax and subsidy incentive bills may violate Congress's Foreign Commerce Clause power).

¹⁸³ See Gutterman, *supra* note 142 (explaining value billing consists of billing clients the value of work rendered to them); Waxse, *supra* note 142, 13 (reasoning billing by value disregards time to complete work and emphasizes value of work performed).

¹⁸⁴ See Huffman, *supra* note 125, § 75 (discussing traditional and new billing practices).

¹⁸⁵ See *id.* § 74 (providing technological resources to law firms allows clients to reduce costs).

¹⁸⁶ See *id.* § 75 (explaining how automating documents creates new value-billing system).

¹⁸⁷ See *id.* (detailing how value billing can reduce costs).

¹⁸⁸ *Id.*; see also Gutterman, *supra* note 142 (explaining value billing concept); Waxse, *supra* note 142, at 13 (explaining that value billing disregards time to complete work and emphasizes value of work performed).

¹⁸⁹ See Huffman, *supra* note 125, § 75 (giving example of how value billing works for law firms).

¹⁹⁰ See *id.* at § 75 (reasoning that billing by value of work can still help law firms cover their costs).

vantageous for both the clients and the firm; the individual client pays less money, but the firm still makes money in the aggregate because each lawyer can get more work done for more clients.¹⁹¹ The new model of billing would allow law firms that use automation software to undercut their competitors on price, but make up the difference by generating a large volume of documents.¹⁹² The major difference between the new value billing method and the traditional hourly billing method is that the emphasis in value billing is on generating a large amount of documents; whereas, the traditional method emphasizes billing a large number of hours.¹⁹³ The traditional law firm uses the billable hour system to award associates bonuses, promote attorneys to partner, and determine how to compensate partners.¹⁹⁴ The billable hour method of compensation places efficiency secondary to billing as many hours as possible because lawyers and firms do not see the need to get work done faster when the primary mode of income depends on how much time they spend on their work.¹⁹⁵ Firms are reluctant to invest in technology that will allow them to be too efficient, and the lack of client pressure has allowed firms to continue their status quo business model.¹⁹⁶ It is precisely this lack of efficiency within law firms that has lured so many firms to outsource their legal work to make up lost profits due to their inefficiencies.¹⁹⁷ Automating documents gives law firms an alternate method of billing clients that rests on a more efficient mode of production, and greater efficiency should generate more profits for law firms, which legal outsourcing has done for the last few decades.¹⁹⁸

Ethics opinions such as the ones produced by the ABA and the North Carolina state bar are more effective than legislative attempts, but are still too broad in scope and actually help perpetuate the inefficiencies of the current law firm model rather than solve them, which document auto-

¹⁹¹ See Mountain, *supra* note 67, at 176 (noting each client saves money while law firm continues to make money in aggregate).

¹⁹² See *id.* at 177 (detailing benefits of automation for law firms).

¹⁹³ See *id.* (automating documents allows firms to bill by value which can generate large volumes of documents).

¹⁹⁴ See *id.* at 176 (discussing compensation system of traditional law firms).

¹⁹⁵ See *id.* (noting billing less hours seems contrary to productivity goals).

¹⁹⁶ See Mountain, *supra* note 67, at 176 (explaining how lack of client pressure has led firms to continue their business models). This issue of a lack of client pressure on lawyers to use more efficient methods stems from the idea that buyers of legal services are not as well-informed as buyers of other services about ways to increase their service-providers' efficiency. *Id.*

¹⁹⁷ See Kadzik, *supra* note 80, at 732-73 (stating that outsourcing work is more efficient for law firms).

¹⁹⁸ See Evans, *supra* note 138, at 14 (explaining how automation software can complete eighty percent of work with twenty percent effort); Krishnan, *supra* note 91, at 2205-06 (discussing costs saved by outsourcing patent work to India); McFadden, *supra* note 81, at 444 (explaining how costs savings is one major factor in outsourcing legal work).

mation software could do.¹⁹⁹ The ABA and North Carolina bar both require that lawyers provide competent representation and reasonably supervise the work that is completed; the North Carolina bar goes even further by stating that the ethical standards are the same for a lawyer whether the work is done by a domestic non-lawyer assistant or a foreign one.²⁰⁰ The North Carolina ethics opinion and the lack of cases relating to legal outsourcing reported by the North Carolina state bar are an indication of how low the standard on the work produced by non-lawyers is, which also implicitly means that the North Carolina state bar allows lawyers and law firms to remain inefficient.²⁰¹ A low competency requirement allows lawyers to get non-lawyers in places like India to do the work for them easily, which in turn gives lawyers no reason to become more efficient.²⁰² If the standard was higher, it would force lawyers and law firms to reevaluate the way they operate because they would encounter more restrictions when hiring non-lawyer assistants in places like India.²⁰³ However, document automation software allows lawyers to be more efficient even with such a low

¹⁹⁹ See Patel, *supra* note 11, at 91 (highlighting that ethics opinions are merely guidelines and are not binding); see also Mountain, *supra* note 67, at 180 (opining outsourcing only sustains current law firm business model). Ethics opinions allow firms to outsource, which in turn perpetuates the current inefficient business model. See Mountain, *supra* note 67, at 180.

²⁰⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (last visited Apr. 21, 2014), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html (establishing that lawyers have to provide competent legal services); MODEL RULES OF PROF'L CONDUCT R. 5.3 (last visited Apr. 21, 2014), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html (requiring lawyers to provide reasonable supervision); NORTH CAROLINA STATE BAR, 2007 Formal Ethics Opinion 12 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (requiring lawyers to provide competent and reasonable legal services regardless of where work is produced).

²⁰¹ See Patel, *supra* note 11, at 92 (qualifying non-lawyer's work overseas is extremely difficult). Lawyers in the U.S. have difficulty evaluating the experience levels of non-lawyers overseas. See *id.* Consequently, allowing the U.S. lawyer to be able to use that non-lawyer's work with the current competence requirement allows firms the opportunity to outsource legal work as an alternative to addressing their inefficient practices. See *id.*; see also *supra* note 77 and accompanying text (pointing to some disciplinary actions reported by North Carolina state bar).

²⁰² See D'Allaird, *supra* note 80, at 3 (explaining how India is easy destination to outsource legal work); see also Mountain, *supra* note 67, at 176 (stating lawyers who bill by hour are reluctant to become too efficient); Patel, *supra* note 11, at 108 (arguing outsourcing is example of American legal industry's inability to adapt to technological advances).

²⁰³ See Kadzik, *supra* note 80, at 739 (stating amending model rules is necessary to ensure no ethical violations occur). Legal outsourcing is a new practice, and the current model rules need to be amended in the areas of lawyer supervision, client confidentiality, conflicts of interest, and disclosure to clients, to ensure that outsourcing does not compromise the services provided to their clients. See *id.*

standard of competency required by ethics opinions.²⁰⁴ Therefore, not only would lawyers be more effective in their production of work, but there would be no issue of the competency of non-lawyer assistants because the lawyers themselves would be producing the work and would be bound by the same requirements as if they were producing the work without the software.²⁰⁵

Another requirement by the North Carolina state bar and the ABA is for attorneys to charge a reasonable fee; this requirement, as well, is too broad in scope and preserves the inefficient status quo of law firms that otherwise could be changed by document automation software.²⁰⁶ The ABA requires that lawyers charge a reasonable fee to their clients, while the North Carolina state bar provides that the fees not be clearly excessive.²⁰⁷ The issue with the language of these model rules is that they leave such broad discretion to the lawyer to determine what a “reasonable” or “clearly excessive” fee would be, which effectively permits the lawyer to continue to charge an overly high fee while calling it reasonable.²⁰⁸ Law firms can do this because the legal profession is a monopoly run by lawyers who operate in a closed environment and are insulated from price competi-

²⁰⁴ See LAURITSEN, *supra* note 138, at 127 (explaining how document automation software leads to efficiency); see also THOMSON REUTERS, *supra* note 133 (advertising efficiency of new checkpoint software); Evans, *supra* note 138, at 14 (explaining level of efficiency that can be achieved with automation software).

²⁰⁵ See Burke, *supra* note 126, at 42 (discussing how document automation software standardizes documents allowing lawyers to do work themselves); see also LAURITSEN, *supra* note 138, at 127 (stating that lawyers use their own judgment when producing work).

²⁰⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.5, *supra* note 64 (requiring lawyers charge reasonable fees); see also N.C. RULES OF PROF'L CONDUCT R. 1.5 (2013), available at <http://www.ncbar.gov/rules/rules.asp?page=8> (providing for fee requirements in North Carolina); Mountain, *supra* note 67, at 176 (detailing an example of how law firms want to preserve their inefficient status quo). Marc Lauritsen, a leading expert on document automation software, expressed law firms' unwillingness to change by stating, “why spend money to get work done faster when you charge for your time.” See Mountain, *supra* note 67, at 176.

²⁰⁷ Compare MODEL RULES OF PROF'L CONDUCT R. 1.5 (2013) (allowing lawyers to charge only reasonable fees) with N.C. RULES OF PROF'L CONDUCT R. 1.5 (2013), available at <http://www.ncbar.gov/rules/rules.asp?page=8> (providing language for fee requirements in North Carolina).

²⁰⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.5 (last visited Apr. 21, 2014), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html (providing discretion to lawyers to decide what constitutes reasonable fees); see also N.C. RULES OF PROF'L CONDUCT R. 1.5 (1.5 (last visited Apr. 21, 2014), available at <http://www.ncbar.com/rules/rules.asp?page=8> (providing discretion to lawyers in North Carolina to decide what constitutes reasonable fees); Mountain, *supra* note 67, at 184 (explaining how law firms' profit margins are more when compared to other businesses). A typical American Law 100 firm makes an approximate forty percent profit margin. Mountain, *supra* note 67, at 184. That profit margin is roughly twice that of America's largest publicly-traded companies. *Id.*; see also Christensen & Anthony, *supra* note 143, at 2 (describing profit margins for American law firms).

tion.²⁰⁹ Firms have the option to cut their fees with automation software, but instead they bill higher fees, regardless of how inefficient they are, which are then considered “reasonable” because firms are operating in an insulated environment where their only source of price competition comes from other firms who are operating with the same levels of inefficiency thus creating a standard “reasonable fee.”²¹⁰ Second, because the insulated market creates competition that consists of only fellow attorneys, lawyers are reluctant to testify against fellow attorneys when issues of fees arise, allowing fees to be charged subjectively.²¹¹ Lastly, the issue raises the question of whether courts are correctly interpreting the language of “reasonable fee” in light of the technology available because courts seldom administer disciplinary actions against attorneys for overcharging.²¹²

A true reasonable fee, however, would reflect a fee in which lawyers are using the tools and resources that optimized their trade.²¹³ For example, when a contractor works on building a wooden fence for homeowners, the contractor would not use a handsaw, but rather an electric saw.²¹⁴ Similarly a lawyer would be unlikely to continue to draft documents from scratch when he or she could use automated software and potentially address the bulk of a client’s needs at a significantly lower cost and with substantially less effort.²¹⁵ The reasons are twofold: (1) unlike the tools that are available to contractors, many clients are unaware of the “power tools” or office “windmills” that are available to lawyers, which allow them to be

²⁰⁹ See Christensen & Anthony, *supra* note 143, at 1 (explaining why law firms can charge high fees).

²¹⁰ See Mountain, *supra* note 67, at 176 (stating automation software can produce documents in a fraction of time); see also Christensen & Anthony, *supra* note 143, at 1 (discussing how law firms work in an insulated environment).

²¹¹ See Wesley, *supra* note 65, at 120 (commenting attorneys do not want to testify against other attorneys). Attorneys are reluctant to testify against their colleagues on matters dealing with fees because it is a subjective question. See *id.*

²¹² See Romine, *supra* note 65, at 121 (explaining courts’ lack of administering disciplinary actions for excessive fees). But see Romine, *supra* note 65, at 120 (acknowledging difficulty in determining what constitutes a “reasonable fee”). There is great difficulty in assessing what a reasonable fee is and because of this uncertainty, there is a consensus among the legal profession that it would be unjust to penalize a lawyer for excessive fees based on what another claims is fair. See Romine, *supra* note 65, at 120.

²¹³ See Mountain, *supra* note 67, at 176 (analogizing automation software with power tools); see also LAURITSEN, *supra* note 138, at 14 (analogizing automation software with windmills). Automation software is like an office “windmill” that helps maximize the work that a lawyer does by capturing energy and reusing it. See LAURITSEN, *supra*, at 13-14.

²¹⁴ See Mountain, *supra* note 67, at 176 (explaining how other producers of services use most optimal tools in their trade).

²¹⁵ See Evans, *supra* note 138, at 14 (describing potential efficiency levels of automation software); Mountain, *supra* note 67, at 176 (questioning why lawyers do not optimize their work production).

more efficient and charge a truly reasonable fee; and (2) the current business model rewards higher billable hours, which gives less of an incentive to lawyers to get work done faster.²¹⁶ Therefore, the current ethical rules continue to allow lawyers to be inefficient and charge what they believe is a reasonable fee, but in reality is unreasonable when considering how much lower their fees can be if they use a new system of billing using automation software.²¹⁷

V. CONCLUSION

“Document automation software is the windmill of the office that can capture and redeploy intellectual energy before is dissipates”.²¹⁸ If law firms and lawyers adopt and take advantage of this tool they can change the current business model of law firms and reduce much of the existing inefficiencies. In addition, the change will help law firms generate a larger volume of work at a higher level of efficiency, which will, in turn, increase profit margins that many firms today are getting from outsourcing. Firms will not only find that their economic needs are met, but will do so without risking a violation of the duties that they owe to their clients, because lawyers will be performing the work themselves. Meanwhile, legislation, both at the federal and state level, proves that it has not, does not, and most likely will not legislate in the context of private legal outsourcing contracts because of the constitutional and international obstacles. Conversely, ethics opinions seem to perpetuate the current inefficient business model of law firms by drafting model rules that are too broad in scope to be effective. Document automation software can, and should, be adopted. Law firms and lawyers will have to reevaluate how they deliver legal services, and in doing so will hopefully find that the change is for the better.

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²¹⁶ See LAURITSEN, *supra* note 138, at 14 (analogizing automation software to windmills); Mountain, *supra* note 67, at 176 (pointing to absence of client pressure as one factor for lawyers’ inefficiency). The current law firm billing system also creates a disincentive to optimize work efficiency because firms use billable-hour numbers to determine bonuses, promotions, and compensation. See Mountain, *supra* note 67, at 176.

²¹⁷ See Mountain, *supra* note 67, at 180 (noting outsourcing sustains current business model of law firms). Ethics opinions allow for outsourcing and outsourcing sustains the business model. See *id.*; Christensen & Anthony, *supra* note 143, at 1 (explaining how law firms operate in an closed environment with no price competition); see also Huffman, *supra* note 125, § 75 (explaining what value billing is).

²¹⁸ See LAURITSEN, *supra* note 138, at 13-14 (describing document automation software as knowledge storing).