

CORPORATE
BOARD MEMBER

www.boardmember.com

July/August 2004
Volume Seven, Number 3

**SPECIAL
ISSUE**



**AMERICA'S BEST
CORPORATE LAWYERS**

THE TOP 20 FIRMS • THE CHAMPS IN 50 METROPOLITAN AREAS

LESSONS OF THE SCANDAL TRIALS

WHAT DIRECTORS NEED FROM THEIR LAWYERS—AND WHAT THEY DON'T

MOVES TO MAKE IF YOU LOSE YOUR LAWYER

PLUS: THE SEC'S TOP COP IS WATCHING DIRECTORS • TODAY'S TRICKIEST LEGAL CHALLENGES • ELECTION YEAR TRAPS

IN THE EYE OF THE OUTSOURCING STORM

"Hi, this is Patty," the customer-service representative says in perfect American English, the T's sounding more like D's. Thanks to "accent

neutralization" classes, there's sometimes no way of knowing whether the call center you reach for help when your computer crashes, say, is in Omaha or Bangalore. And there is no telltale accent, of course, when your doctor lights up X-rays that were read in Asia or your accountant gives you tax returns prepared there.

For decades, manufacturing jobs have been shipped overseas to cheaper laborers. Wal-Mart is

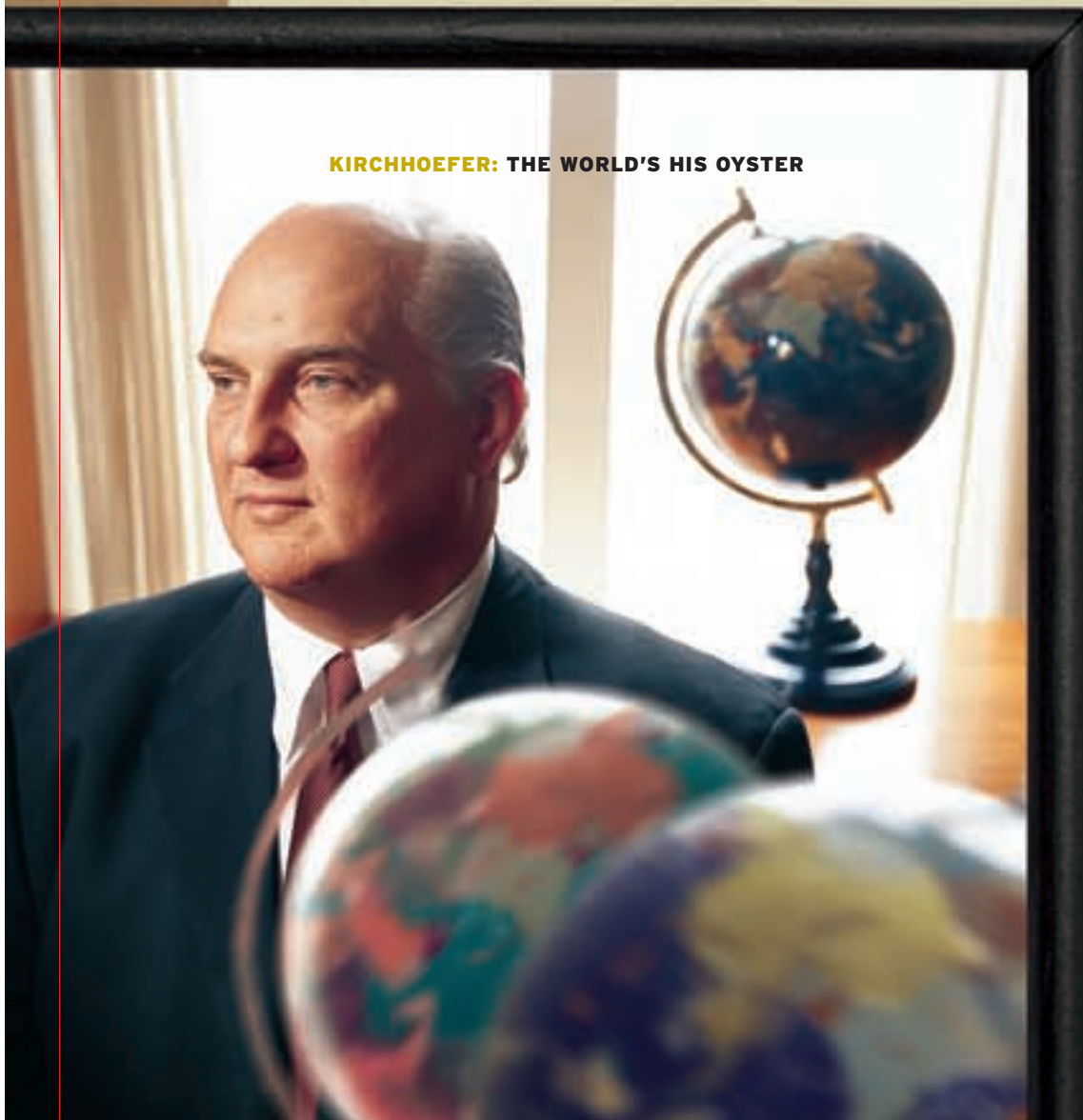
largely based on the simple fact that women all over the world can sew. But educated, high-tech workers are now watching their jobs cross the oceans like so many "send" files. Often they land in India, where well-trained engineers earn about one-fourth the salaries of their American counterparts. According to an estimate by Forrester Research, 3.3 million white-collar jobs will have been sent abroad by 2015. (U.S. white-collar employment currently amounts to nearly 30 million jobs, says the Bureau of Labor Statistics.) The outsourcing of work has become a major issue in the presidential campaign.

But in the belly of the beast, the lawyers' conference rooms where the outsourcing deals are drawn up, there's just a shrug and a sigh. "Work, like water, seeks the lowest level," says Gregg Kirchhoefer, a partner at Kirkland & Ellis in

Chicago, who has been drawing up outsourcing contracts since the early 1980s. Kirchhoefer, 54, doesn't do politics or social engineering. His job is to craft watertight deals that can cross oceans without leaking. "We draft and negotiate the agreement that regulates the relationship between the two companies," he says, referring to the customer and the provider of services.

"When parties contemplate outsourcing, there is a natural desire to get the arrangement under way as soon as possible. The provider wants to make money; the customer wants the savings and the other benefits. But it's like marriage without courtship. What the lawyer does is put a prenuptial agreement in place. How will they live their lives together? And how would they part if they had to? And what happens to the progeny?" he asks, meaning the rights

KIRCHHOEFER: THE WORLD'S HIS OYSTER



to intellectual property.

The negotiating process, says Kirchhoefer, is as important as the contract itself. "The lawyer's role is to help the parties understand each other better, to identify issues that might come up, and to address those issues directly or to develop a process to handle them in the future," he says. As an example, he cites payroll preparation: "What if the tax laws change? Who will be responsible for the costs of adapting the payroll system? If you can't calculate the change or the cost, then you decide on a process, such as a change order or request." In that event, the parties are back at the lawyers' tables.

Outsourcing is a sea change for the company buying the services, Kirchhoefer says. A task once done on the premises, with its own employees and its own equipment, is now being carried out on the other side of the world. "If there is a problem with a division at home," he observes, "the CEO walks down the hall and jawbones the manager. But in offshore work there is time difference, different laws, a different culture. A lot can go wrong, and it often does."

The stakes can be high. "If you blow a phone call, you lose a customer," says Kirchhoefer. "Misread an X-ray and you lose the patient." He points out that the American doctor who ordered the X-ray can be sued but may get no redress from the radiologist, who practices under the laws—and judgment enforcement—of another country. "There can be severe damage from improperly done outsourcing arrangements," Kirchhoefer says.

Even legal work is outsourced today. Not the complex agreements Kirchhoefer draws up, but more fundamental labor. "Clients are saying to law firms that they won't pay \$200 an hour for simple work," Ganesh Natarajan, who runs Mindcrest, a Chicago legal-outsourcing firm, told the *New York Times*. Brad Hildebrandt, a law-firm consultant in New Jersey, told the *Times* that he expects the bulk of the offshore legal business to be initially done at "the paralegal level, because that work is routine, voluminous, and technology-sensitive."

Outsourcing has a history. "We were doing this long before the term was used," says Kirchhoefer.

"We called it 'facilities management' or 'supply agreements' back in the late '80s." Even earlier, Ross Perot built EDS (and his own fortune) by providing data-processing services. One of his biggest clients was the federal government. Kirchhoefer paraphrases the bantam billionaire's pitch: "The government is not in the business of operating data centers. I'm good at that. I have experts, and I do it best." Kirchhoefer helped his client, General Motors, negotiate an outsourcing deal with EDS after the automaker bought the company in 1984.

Do American workers whose jobs are outsourced overseas ever push back in court? "Sure," says Kirchhoefer. But he doesn't litigate those cases; "I have partners who do that."

His work keeps him "eating, breathing, and sleeping" offshore agreements. "I take too many planes to too many places," he says. "My wife says it's too much, but the transactions are incredibly interesting." He recalls a negotiation between U.S. and Asian companies that was so highly secret that the parties had code names for each other in their e-mails and phone calls. They arrived at the hotel for their clandestine deal-closing meeting only to see the names of both companies emblazoned on the WELCOME marquee.

Kirchhoefer grew up in St. Louis and graduated from St. Louis University (with a B.S. in commerce in 1972), then worked as a product manager in the computer business, where he saw that technology was opening up broad new fields of law. "It was transformational," he recalls. "It would explode onto the world, and the law couldn't keep up." He went back to St. Louis University for law school, focused on technology issues, graduated cum laude in 1982, and was admitted to the bar the same year.

He had job offers all over the country. "But Kirkland & Ellis was doing more technology work than anyone else," he says. "And today outsourcing is one of the mainstays of our practice."

It will probably remain so. Offshore lawyers will have to offer more than big discounts to match Kirkland's expertise and steal away its clients.

by Susan Littwin