Legal Services

Legal Process Outsourcing: The Ethical Implications

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June 15, 2017
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Outsourcing and Technology – Evolution or Revolution?

The New York Times
U.S. firms outsource legal services to India
08/2007

The End Of Lawyers?
Richard Susskind
2008

The End Of Lawyers?
Richard Susskind
2008

Call my lawyer.....in India
US companies looking offshore for their legal work.
03/2008

A.I. Is Doing Legal Work.
But It Won’t Replace Lawyers, Yet.
03/2017
Fundamental Change is Necessary Across the Ecosystem

- Baker & McKenzie establishes center in Manila
- Orrick consolidates back-office in Wheeling
- Office Tiger drives outsourced word processing from India
- BLP launches lawyers on demand
- Clifford Chance launches center in New Delhi
- Slater and Gordon becomes first “public” law firm
- Eversheds becomes sole provider to Tyco
- Pfizer consolidates to 19 law firms
- Axiom wins law firm innovation award
- Microsoft and Integreon launch transformative CLM engagement
- Thomson Reuters acquires Pangea3
- Irwin Mitchell converts to ABS
- Allen & Overy opens 300 person center in Belfast
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WHAT DO WE THINK ABOUT WHEN WE HEAR “LPO”?
What Do We Think About When We Hear “LPO”? 

India
What Do We Think About When We Hear “LPO”?

Battery farm of paralegals
What Do We Think About When We Hear “LPO”?  

Low-quality work
# Moving from Theory to Practice

*Aligning LPO Solutions with Practice Areas*

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<td>• Employment Verification Letters</td>
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LPO 2.0 – Legal Department Transformation

Cutting Consumption

- Eliminate Non-Value Added Demand
- Optimize Decision Processes
- Optimize Risk Profile

Improving Efficiency of Legal Operations

- Improve workflows
- Knowledge capture and re-use
- Automate practice where possible
- Apply business intelligence tools
- Optimize staffing mix and resource selection
- Manage outside counsel effectively
Legal Outsourcing is Nothing New

- Outsourcing is delegation
- Lawyers have outsourced for generations
- Difference today is in offshore legal outsourcing
- Ethical obligations differ depending on whether outsourcing “substantive legal support services” or “administrative support”
- Legal Outsourcing raises “real” and “perceived” concerns – both of which must be addressed

“I do have concern about confidence, confidentiality, privacy, conflict of interest, ethical values, and those are issues that are a real concern”.

Jerome Shestack,
Former President American Bar Association 21 Feb. 2006.

“Outsourcing....can allow law firms more opportunities to offer a wider range of service to clients, potentially attracting a broader client base”.

John Wotton,
President Law Society of England and Wales 2011.
Legal Outsourcing Ethics Timeline of Events

2006
- Bar Association Opinions (June 2006 – August 2009)
- Association of India Lawyers Madras High Court Petition – Re UPL in India (March 2010)
- NMH vs. Bush and Acumen (June – August 2008)

2008
- ABA Formal Opinion 08-451 Lawyer’s Obligations When Outsourcing Legal and Non-legal Support Services (August 5, 2008)
- USPTO Notice – Scope of Foreign Filing Licenses (July 16, 2008)
- ABA Summer Issue of International Lawyer – “a lawyer could satisfy her ethical obligations and outsource work offshore.” (June 2009)
- Four key issues:
  1. selection and supervision
  2. avoidance of conflicts
  3. maintaining confidentiality
  4. informed client consent

2009
- Association of India Lawyers Madras High Court Petition – Re UPL in India (March 2010)
- J-M vs. McDermott (June 2011)
- Law Society practice note (October 2011)

2010
- ABA Summer Issue of International Lawyer – “a lawyer could satisfy her ethical obligations and outsource work offshore.” (June 2009)
- ABA Likely to Amend MRPC (1.1 and 5.3) (November 2010)
- Law Society Committee & Consultation (May-Sept 2010)

2011
- SRA Handbook (April 2011)
- Legal Services Board of Victoria (LSB) released Legal Outsourcing Guidelines
- J-M vs. McDermott (June 2011)
- ABA Likely to Amend MRPC (1.1 and 5.3) (November 2010)

2012
- Legal Services Board of Victoria (LSB) released Legal Outsourcing Guidelines
- J-M vs. McDermott (June 2011)
- Law Society Committee & Consultation (May-Sept 2010)

2013
- Office of the Legal Services Commissioner NSW (OLSC) released Practice Guidelines on Outsourcing
- ABA Likely to Amend MRPC (1.1 and 5.3) (November 2010)

2016
- ABA Report on Future of Legal Services
- WAPco Wasted Costs Order (Mar 2012)
- District of Columbia Opinion 21-12 Applicability of Rule 49 to Discovery Services Companies (January 2012)
- Legal Services Board of Victoria (LSB) released Legal Outsourcing Guidelines
- Law Society Committee & Consultation (May-Sept 2010)
- SRA Handbook (April 2011)
ABA Formal Opinion 08-451

Lawyer’s Obligations When Outsourcing Legal and Non-legal Support Services

“The outsourcing trend is a salutary one for our globalized economy.”

Key points:

- May outsource provided U.S. lawyer remains responsible for rendering competent legal services
- Ensure conduct of lawyers or non-lawyers to whom tasks are outsourced is compatible with U.S. lawyer’s professional obligations
- Retain direct supervisory authority
- Appropriate disclosures to clients
- Fees charged must be reasonable
- Avoid unauthorized practice of law
### Key Points to Ensure Obligations Are Met When Outsourcing

1. Avoid unauthorized practice of law
2. Provide competent representation
3. Adhere to duty of disclosure/communication
4. Avoid conflicts of interest
5. Ensure confidentiality and security
6. Bill appropriately
Avoid Aiding and Abetting the Unauthorized Practice of Law

The MRPC at 5.5 (a) states:

“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”

Key points:

- Lay client cannot directly contract with offshore outsource provider
- Review the communications between and among outsource provider, attorney, and client
- Supervision and control by attorney for tasks that constitute or may be deemed to constitute practice of law
- Ensure that outsourcing company assists US attorney in practicing law, NOT the other way round
Supervision by Counsel & Responsibility for Work Delegated

Other Considerations:

  ■ Read the policy
  ■ Consult with carrier
◆ Don’t rubber stamp, take ownership
◆ District of Columbia Committee for the Unauthorized Practice of Law – Appropriate Disclaimers (Jan 2012)
  ■ Broad statements that a company can manage the entire discovery process have a serious potential to mislead
◆ U.S. attorney retains ultimate responsibility for outsourced work and is subject to the relevant State Bar Act and Rules of Professional Conduct relating to violation of professional responsibilities
◆ See for example www.calbar.org and www.nysba.org
West African Gas Pipeline Co Ltd v Willbros Global Holdings Inc.

Where costs were wasted by reason of one party’s failures regarding the disclosure of electronic documents, it was appropriate to award the other party the costs in question.

- Failure to gather relevant documents
- Failure to de-duplicate documents

“A third and significant difficulty arose because of a failure properly to review documents.”

Failure to carry out a proper review of the documents - claimant to pay 50 per cent of the defendant’s costs of dealing with and reviewing the late-disclosed documents.

Key points:

- Court recognizes that disclosure in complex litigation is always difficult
- Outside counsel take primary responsibility for organizing review of documents for disclosure
- Herbert Smith briefed reviewers and monitored quality – what more can be done?
- Stuck between a rock and a hard place? Review in-house means increased costs, outsource leads to “inadequacy of review”?
Competent Representation

The MRPC at 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.”

Key points:

◆ Selection and evaluation of the outsource provider
  ■ Due diligence: Investigate background info about offshore company
  ■ Be aware of qualifications of individuals who will perform the work
  ■ Obtain references of company/individuals assigned to perform the work
  ■ Always interview the company in advance
  ■ Request sample of work product that is comparable to your project
  ■ Communicate with non-lawyer during assignment to ensure that the non-lawyer understands the assignment
  ■ Review ethical standards with individuals who will perform the work and incorporate the standards into the terms of the contract with the company

◆ Knowledge of legal and factual issues sufficient to competently supervise
◆ Supervision of outsource provider’s work
◆ ABA Opinion – “written confidentiality agreements”
Duty of Communication Owed to Client

Confidential Information

The MRPC at 1.6 (a) states:

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

- Significant Developments
  - Use by a California lawyer of services of “non-lawyers” may be deemed a “significant development”
  - “Significant Development” – Based on the facts of each case?
  - “Significant Development” – A function of client’s expectations

- Non-lawyers often provide only basic “legal support services”; BUT communication still owed to client if:
  - Non-lawyers to play a significant role e.g. several hired for a document review
  - Client confidences and secrets are to be shared
  - Client’s expectations are that only law firm personnel to handle matter
  - Billing to be anything other than at cost
Conflicts of Interest

**MRCP 1.7, 1.8**

Florida Opinion:

“[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.”

Key points:

- Ask outsourcing company about conflict checking procedures
- Do they keep a record of existing and former clients and client engagements?
- How does outsourcing company track work performed for other clients?
- Does the law firm need to screen foreign “non-lawyer” directly re previous engagements?
- Will provider turn down work?
Protecting Client Confidentiality and Client Confidences

*Extends above and beyond 1.6(a)*

**Ohio Opinion:**

"Client confidentiality is a hallmark of the attorney client relationship."

**San Diego Opinion:**

"[An additional duty of an outsourcing attorney is to] maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets of his or her client." (CA B&P Code §6068(e)).

**New York State Professional Conduct Rule 1.6: Lawyer’s Duty to Preserve Client Confidences & Secrets**

- Is client’s consent necessary?
- Contract with outsourcing company to deal with client confidentiality
- Non-disclosure agreements – signed between outsourcing company and law firm – and if required with law firm’s client
- Check whether outsourcing company’s employees subject to NDAs and confidentiality agreements prior to employment
- Certification by independent auditing bodies, such as SAS 70, ISO 27001, HIPAA or EU-US Privacy Shield. The EU-US Privacy Shield provides companies on both sides of the Atlantic with a mechanism to comply with European Union (EU) data protection requirements designed to prevent accidental information disclosure or loss
### U.S. and U.K. Lawyers’ Number One Concern – Security and Client Confidentiality

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<th><strong>Physical On-Site Security and Workstation Measures</strong></th>
<th><strong>Data Transfer Security</strong></th>
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<tr>
<td>◆ ID required to enter premises, closed-circuit security cameras</td>
<td>◆ Secured VPN tunnel (3DES encrypted) for server connectivity</td>
</tr>
<tr>
<td>◆ Biometric and key card access requirements</td>
<td>◆ Clients access our secure FTP server with a confidential login</td>
</tr>
<tr>
<td>◆ Personal communications or data recording devices are not permitted</td>
<td>◆ Login information is changed routinely on a monthly basis</td>
</tr>
<tr>
<td>◆ All removable drives are disabled from the domain controller</td>
<td>◆ Disaster recovery &amp; backup arrangements. Backups performed at regular intervals throughout day</td>
</tr>
<tr>
<td>◆ Users only entitled to use their own specific login details</td>
<td>◆ Encrypted backup data stored on secondary servers offsite to protect against hard driver failure</td>
</tr>
<tr>
<td>◆ Hard-to-guess and frequently changed passwords</td>
<td>◆ Continuous backup power is delivered to each server to protect against outages</td>
</tr>
<tr>
<td>◆ Printing is disabled without prior authorization and clearance</td>
<td>◆ Backup facility with full security and systems located within five miles of current facility</td>
</tr>
</tbody>
</table>
| ◆ All incoming and outgoing mails are monitored on exchange server. Attachments are filtered | }
Fee Agreements and Billing

The MRPC at 1.5 (a) states:

“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”

Key points:

- Formal Opinion No. 00-420, ABA concluded that a law firm that engaged a contract lawyer could mark up the cost provided that the total charge represented a reasonable fee for the services provided
- Agreements between the lawyer/law firm and the outsource provider (CRPC 1-320)
- Billing the client for outsource provider’s services
  - Can the cost of outsourcing be included in the attorney’s legal fees?
  - Direct cost, plus a reasonable allocation of overhead, or
  - A reasonable mark-up?
  - How should outsourced work be categorized on bills?
- Contingency – Outsourced provider’s fee cannot be based on percentage of contingency fee award
- ABA Opinion – In absence of prior agreement – cost plus reasonable allocation of associated overhead
Mark Ross

Global Head, Legal Process Outsourcing

Mark joined Integreon in 2009 and, as Global Head of LPO, he is responsible for the firm’s legal process outsourcing delivery worldwide. Mark is a recognized thought leader in the LPO field. He is a former partner at the first UK law firm to offshore legal work, and is the only person to have been invited to address the ABA, the Law Societies of England & Wales and South Africa, The Solicitors Regulation Authority, and the International Bar Association on the topic of LPO. Mark developed the first State Bar minimum continuing legal education (MCLE) and continuing professional development (CPD) accredited courses on the ethical implications of outsourcing legal work.

He has been interviewed by numerous publications, including The New York Times, Wall Street Journal and Time Magazine, and has also been invited to speak as a leading authority on LPO by organizations that include: Financial Times, UC Berkeley School of Law, Northwestern University School of Law, Stanford Center for the Legal Profession and the International Legal Ethics conference.

Mark is the former chair of the International Association of Outsourcing Professionals’ Legal Outsourcing Chapter, on the editorial board of Outsource Magazine and on the Advisory Boards of Suffolk Law School’s Institute on Law Practice Technology and Innovation and Northwestern University Law School’s Center for Practice Engagement and Innovation. In September 2016 Mark was inducted as a Fellow of the College of Law Practice Management.
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