

# Outsourcing issues for legal practice

Maintaining the confidentiality and security of a client's information require extra vigilance when legal processes are contracted to external entities.

By CORALIE KENNY and TAHLIA GORDON

Developments in technology and rising costs have led to an increase in the outsourcing of legal work in Australia and around the world. While legal secretarial tasks and repetitive legal administrative functions were the initial functions to be outsourced, complex legal research, due diligence, contract management and negotiation, and intellectual property services are now also being outsourced, often to offshore locations such as India and other Asian countries, which are now becoming the prime provider locations for these types of legal services globally.

Australia is well entrenched in the legal outsourcing market as both a provider and user of outsourcing.

To help legal practitioners ensure they meet their ethical and professional obligations when using new technologies and service delivery methods, the Law Society of NSW, in conjunction with the Office of the Legal Services Commissioner (OLSC), is developing a series of guidelines on social media, cloud computing, outsourcing and virtual legal practices. The guidelines will be based on the findings of a major research project by the OLSC. By way of introduction and to contextualise the guidelines, a series of short papers is being published in *LSJ* to inform the profession of the relevance of these topics to legal services and to identify the professional conduct issues to be dealt with in the guidelines. The first article, on social media, appeared in *LSJ* April 2012; the final article planned for *LSJ* June will cover cloud computing and the virtual law practice.



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## What is outsourcing?

Outsourcing is a subset of the knowledge process outsourcing (KPO) industry. The term 'outsourcing' refers to having particular functions of a business performed by an external entity where previously those functions were performed internally by the business itself. The American Bar Association (ABA) has defined legal outsourcing as referring generally to "the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider".<sup>1</sup>

Traditionally, outsourcing was used to perform non-core business functions, that is, business functions essential to the delivery of legal services but not typically including end-stage work or products deliverable to the client. This might, for example, include 'back room' services, such as administrative tasks, photocopying and computer services. Evidence indicates that the traditional parameters of outsourcing may be expanding<sup>2</sup> as, today, complex legal research, due diligence, contract management and negotiation, and intellectual property services are also being outsourced.

Three different types of legal outsourcing arrangements exist in the legal marketplace today.<sup>3</sup> The first arrangement is

where legal work is outsourced to subsidiaries; the second is where a law firm will directly hire a foreign law firm to undertake the work; and the third arrangement is where a law firm employs a third-party vendor, known as a legal process outsourcers (LPOs) who may be onshore (within Australia), near shore (for example, New Zealand) or offshore.<sup>4</sup>

There are two primary methods that can be used by law firms wishing to engage in offshore outsourcing. First is what is referred to as a 'captive centre', that is, an offshore subsidiary of a corporation.<sup>5</sup> Second, firms may elect to engage a third-party vendor, such as Pangea,<sup>3</sup> Clutch Group, CPA Global and Integreon,<sup>6</sup> to carry out the LPO services.

## Why outsource?

The motivations for outsourcing largely relate to cost savings through economies of scale and specialisation, as well as offering a legal practice the opportunity to access resources the practice does not have – whether from a skill or capacity perspective.<sup>7</sup>

Commercial pressure may be another reason for law firms outsource work.<sup>8</sup>

The use of India's outsourcing services above those of other nations has been primarily attributed to the significantly lower cost of legal services,<sup>9</sup> as well as to the high quality of workers with advanced

education. In addition, the fact that India is in a different time zone allows outsource firms to provide round-the-clock legal assistance.<sup>10</sup> Government intervention in the form of tax incentives and export exemptions has also made the use of Indian LPO's more attractive to foreign firms.<sup>11</sup>

### The issues

One of the greatest concerns for solicitors who are considering entering into outsourcing arrangements for their legal practices is the potential for breach of confidentiality or security that can take place with regard to client information.

Outsource providers increasingly operate via cloud computing, where the information is hosted by a system outside the law firm by a third party. Locating client information offsite and out of the direct physical control of the legal practitioner makes it potentially vulnerable to unauthorised access or inadvertent disclosure.

Security threats to the integrity of information provided by outsourcing services can be divided into external threats and internal threats. External security threats such as hackers can be mitigated through appropriate software, although the protections are never absolute. Internal security threats in the form of compromised or reckless actions of employees performing the outsourcing service or the recipients of the outsourcing work are also present. The problem is exacerbated by the fact that outsourcing providers tend to have a higher than normal staff attrition rate.<sup>12</sup>

Confidentiality is not just an issue for clients to worry about, but also for legal process outsourcing vendors themselves. The concern for legal practitioners is founded on a simple premise: that the duty of confidentiality they have to their clients can be effectively enforced upon the outsourced vendor. Clients similarly face the same dilemma, whether or not the outsourced vendor is as careful with and protective of confidential information as their lawyer would be.

The ABA has attempted to address this concern by offering its own ethics opinion that laid down a framework that would allow for ethical outsourcing services in the US and around the world. In 2008, the ABA released a formal opinion on a legal practitioner's obligations when outsourcing

legal and non-legal support services. In essence, this opinion requires legal practitioners in the US who outsource any work or service to ensure that the outsourced work or service meet the same ethical and practice standard set for the American firm itself. The UK has developed a similar approach.

The use of outsourcing arrangements by solicitors also raises concerns about the competence and professionalism of the resources undertaking the outsourced services and their supervision.

At present in NSW, supervision by senior practitioners over junior and non-legal staff often presents major difficulties for legal regulators. This is primarily due to the regulatory concept that misconduct is personal to the legal practitioner. The concept of vicarious liability of a legal

practitioner for the work of another, and particularly a non-lawyer, is not well developed and may well be significantly exacerbated where a solicitor outsources legal work.

Conflicts of interest presents

another area of concern in relation to outsourcing. Conflicts of interest are widely considered to be the most difficult and potentially damaging issue for legal practices today. At present, the rules in NSW that address this issue cover acting against previous clients, legal practitioners preferring their own interests to that of their client's and acting for two clients when their interests diverge. These cover a myriad of potential circumstances and are historically extremely difficult for regulators to address.

Most, if not all, firms presently utilise some form of conflict checking mechanism to determine whether they have previously acted in relation to a client or are presently so acting. This is difficult and costly for larger firms, and even more so where those firms do work in multiple jurisdictions.

At present we are unaware of what processes firms outsourcing work use to ensure that they avoid a conflict of interest. Of even greater concern is how outsource providers ensure that they themselves are not creating conflicts. We understand that outsource providers, particularly large organisations in Asia, provide services for many firms around the world, and these firms must ensure that the work that they do for one firm, or one client, is segregated from work the outsource provider might be providing for another firm or client engaged in the same matter.

### What to consider

Solicitors considering entering into outsourcing arrangements for their legal practices should:

- consider the impacts of outsourcing on their clients;
- assess the risks;
- undertake appropriate due diligence on their proposed outsource providers;
- ensure they are comfortable with their ability to maintain client confidentiality, professional competence and adequate supervision;
- not compromise their integrity and independence; and
- meet with their professional obligations.

The guidelines being developed by the Law Society of NSW in conjunction with the OLSC should assist practitioners in ensuring they meet their ethical and professional obligations when entering into outsourcing arrangements for their legal practices.

*“The use of outsourcing arrangements by solicitors raises concerns about the competence and professionalism of the resources undertaking the outsourced services and their supervision.”*

### ENDNOTES

1. See “ABA Commission on Ethics 20/20 Initial Draft Proposal – Outsourcing, 2 May 2011” at 2.

2. C.B. Robertson, “A Collaborative Model of Offshore Legal Outsourcing” (2010) Case Research Paper Series in Legal Studies, Working Paper 2010-35, Case Western Reserve University, at 8, relying on Evaluateserve report “LPO and the Great Recession”.

3. L.A. Patterson III, “Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation” 2008 7 *Richmond Journal of Global Law & Business* 7(2) at 182.

4. See A.R. Harmon, “The Ethics of Legal Process Outsourcing – Is The Practice of Law a ‘Noble Profession’, or is it Just Another Business?” (2007) 13 *Journal of Technology Law & Policy* 41, at 48.

5. C.B. Robertson, “A Collaborative Model of Offshore Legal Outsourcing” (2010) Case Research Paper Series in Legal Studies, Working Paper 2010-35, Case Western Reserve University, at 13.

6. *Ibid.*

7. Legal Futures, “Keeping control – managing the regulatory risks of outsourcing” 17 January 2011.

8. L.A. Patterson III, “Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation” 2008 7 *Richmond Journal of Global Law & Business* 7(2) at 177.

9. *Ibid.*

10. *Ibid.*

11. *Ibid.*

12. J. Ribero, “Wipro reports strong outsourcing growth, but staff attrition rises”, *ComputerworldUK*, 23 April 2010, available at [www.computerworlduk.com/news/outsourcing/19977/wipro-reports-strong-outsourcing-growth-but-staff-attrition-rises](http://www.computerworlduk.com/news/outsourcing/19977/wipro-reports-strong-outsourcing-growth-but-staff-attrition-rises).