

## **OUTSOURCING PRACTICE NOTE**

The term “outsourcing” is the most commonly used to refer to the use of a third party service provider to perform work that you would otherwise do yourself or for which you are responsible. Outsourcing is generally used as a means of reducing cost and allowing a business to concentrate on core competencies. Outsourcing is becoming increasingly popular in the professional services sector including legal services. For the purposes of this practice note, outsourcing is taken to occur when services in the nature of legal services are delegated to a third party.

A number of different types of legal outsourcing arrangements exist in the legal marketplace today. For example, outsourcing arrangements occur where legal work is outsourced to subsidiaries or non-subsidiaries; where a law firm will directly hire a foreign law firm to undertake the work; and where a law firm employs a third-party vendor, known as a legal process outsourcer (LPO), who may be onshore (within Australia), near shore (for example, New Zealand) or offshore. These foreign outsourcing providers may not be law firms but may be forensic accounting firms, legal support providers, IT or E-discovery specialists.

This practice note is designed to assist by setting out guidance for lawyers when undertaking outsourcing activities in legal practice.

This practice note should be considered in light of the legislation, Rules and common law and is intended to be read in conjunction with the relevant practice rules and statements of ethics in the *Legal Profession Uniform Law (NSW)*, the *Legal Profession Regulation (NSW)* and the *Solicitors’ Rules*. As this practice note is not part of the Solicitors Rules, its contents are not binding.

### **Practice Note**

The Solicitors’ Rules apply to lawyers practising as solicitors or as barristers and solicitors, including those who use outsource service providers.

Lawyers cannot contract out of their professional obligations owed to the Court or their client or delegate them to another person.

Rules dealing with Competence and diligence, Confidentiality), File Retention) and Conflict of interests are particularly relevant to outsourcing activities of solicitors that involve client information.

A lawyer’s fiduciary obligations to their client inherently require maintenance of confidentiality of client information unless otherwise authorized.

A lawyer must obtain consent from their client before disclosing the client’s confidential information to a person other than a principal or employee of the legal

practice, or another person to whom disclosure is authorized by law, such as an auditor or professional indemnity insurer.

A lawyer must conduct client conflict checks before commencing a client engagement.

A lawyer is responsible for retaining, securely and confidentially, documents prepared under the retainer for their client or received from third parties.

Lawyers who use outsourcing providers are responsible for supervising the legal services provided to the client and are ultimately liable for the product of the provider.

**Contemplation:** When contemplating using an outsourcing provider in their legal practice a lawyer should:

1. Consider whether the use of outsourcing services will benefit the lawyer's clients;
2. Consider whether the use of outsourcing services will benefit the lawyer's practice;
3. Ensure they are able to comply with their professional/ethical obligations;
4. Appreciate and appropriately manage the risks of outsourcing services that may arise;
5. Ensure that the provider has the competence and capacity to perform the work at the standard required.

**Client consent:** The outsourcing of legal work may involve disclosure of client confidential information.

Prior to outsourcing services in their legal practice, where client confidential information will be disclosed a lawyer should obtain informed consent from any client whose confidential information may be disclosed to an outsource provider.

As client authorization is needed to disclose client information to providers, a lawyer should either obtain such consent specifically from the client or consider including clauses in their standard retainer agreement.

Clients should also be informed prior to consent being sought as to any risk of loss of legal professional privilege as a result of outsourcing.

**Due Diligence:** Prior to outsourcing legal work a lawyer should undertake appropriate due diligence on the proposed outsource provider/s. The extent of the due diligence exercise to be undertaken will necessarily depend on the nature of the work being outsourced, the outsource provider under consideration and other factors specific to the exercise.

The due diligence investigation should be directed to determining that the outsource provider can perform the tasks required and that any risk identified can be managed. This should include reasonable assurance that the person performing the outsourced work is sufficiently competent.

Lawyers should consider the following:

1. What security the outsourcing provider has in place to maintain confidentiality of confidential information of the lawyer's client and reduce risks of unauthorized access, inadvertent disclosure and reckless or intentional compromise by employees;
2. The extent to which the following may impact a lawyer's ability to comply with their professional obligations:
  - a. the supervisory regime (if any) applicable to the cloud provider; and
  - b. the laws applicable in that jurisdiction to privacy and security. Some jurisdictions (eg the USA Patriot Act) enable access to client information that would otherwise remain confidential. Jurisdictions that don't have a comparable privacy regime to Australia may require enhanced contractual obligations to ensure the outsource provider abides by the same obligations as are applicable in Australia.
3. Inquire whether the outsource provider itself would outsource to other outsource providers. If so, this raises the issue of potentially needing to extend due diligence/inquiries to that chain of outsource providers.

In circumstances where a client has directly engaged an outsourcing provider, the lawyer should discuss the outsourcing arrangement with the client to ensure that issues relating to competence and diligence, confidentiality, supervision and conflicts are adequately addressed.

**The outsourcing arrangement:** Outsource providers will generally have standard form 'terms and conditions' that apply to all their customers. When entering into a contract with an outsource provider a lawyer should consider the following issues:

1. A contractual obligation that the outsource provider conduct its services or activities in a manner that does not cause the lawyer to breach their professional obligations;
2. The choice of law to govern the contractual obligations;
3. The identity of the provider performing the work;
4. Direct and meaningful supervisory arrangements of the provider in performing the work;
5. Restrictions on the jurisdiction in which any client confidential information will be held and any constraints that may raise with regard to the ability to impose contractual obligations on the outsource provider;
6. Obligations for the outsource provider to hold and deal with client confidential information sufficiently securely;
7. Provisions regarding transport of paper records and files, and provisions to guard against loss of that material;
8. Obligations for the outsource provider to undertake the work through resources that meet the required standards of competency;
9. Provisions requiring procedures and systems to ensure staff of the outsource provider and other resources (including non-legal staff) are competent and

appropriately supervised to provide the legal services and other activities to be outsourced;

10. A provision to identify and appropriately manage any conflict that the outsource provider may have in providing services to another of its clients where that other client may itself have as a client a person with whom the lawyer may have a conflict. This may require the establishment of an effective information barrier to handle a conflict involving concurrent clients;
11. A statement that client confidential information remains subject to legal professional privilege when held by or disclosed to an outsource provider so any request to the outsource provider by a third party to access such information must be referred to the lawyer for instructions from the client;
12. A statement of the circumstances in which the outsource provider's staff are authorized to access the confidential information of the lawyer's client and if need be which of the outsource provider's staff are authorized to do so;
13. A process where outsource provider's staff who are authorized to access confidential information sign a undertaking of confidentiality that is sent to the lawyer;
14. Provisions for the lawyer to monitor the legal services provided by and the activities of the outsource provider;
15. Provisions for the outsource provider to regularly report to the lawyer on its compliance with its contractual obligations, particularly those that reflect the lawyer's professional obligations, and to immediately report any breach or potential breach of those contractual obligations;
16. Provisions for protection of confidential client information from unauthorized access and inadvertent disclosure;
17. Provisions for the outsource provider to take appropriate physical and technical steps to ensure protective information barriers are in place between the lawyer's practice requirements (including through their outsource providers) and external sources or recipients of client information. Where an outsource provider in an offshore jurisdiction is to be used, regard should be had to whether Australian legal requirements for the handling of such information using effective information barriers, or whether the jurisdiction of outsource provider (where it has different requirements) will apply;
18. Provisions to enable the lawyer to access the client confidential information held by the outsource provider at any time and particularly if the outsource provider becomes financially distressed, defunct, suffers a disaster event or merges with another provider;
19. Prescribed processes and timing for transition back to the lawyer from the outsource provider or their successor of client confidential information on cessation of the outsource arrangement;
20. The security framework in place offered by the outsourcer as well as information about storage and back up security;
21. That the outsourcing arrangement is not used to put documents or evidence beyond the reach of the Courts.

**Practice management:** When using an outsourced service provider it would be prudent for a lawyer to:

1. Put in place a Policy on outsourcing to document appropriate requirements for the outsourcing of legal services or support to the lawyer's practice;
2. Have procedures and systems to ensure staff appropriately supervise and monitor the legal services and other activities outsourced in accordance with the contractual arrangements with that outsource service provider;
3. Ensure encryption of data transferred on-line to external servers between the lawyer and the outsource provider;
4. Ensure communications with clients through cloud computing service providers are clear and communication benefits do not suffer adversely through change of medium;
5. Enquire whether work undertaken by legal outsourcing providers is covered by the professional indemnity insurer or the fidelity fund and address the situation accordingly;
6. Bill clients appropriately for services performed by outsourcing providers;
7. Ensure his/her indemnity insurance cover will answer claims for acts/omissions resulting in issues from negligent or inadequate outsourced professional services.