

LEGAL PROCESS OUTSOURCING (LPO): TRENDS, BENEFITS AND ETHICAL COMPLIANCE



By Mark Ross

Introduction

Driven by the technology revolution that fueled globalization over the last thirty years, outsourcing has emerged as what is arguably the key strategic business process essential for the successful modern day organization. Historically, the legal profession has lagged behind other industries in embracing outsourcing. Change, however, is upon us and legal services have now become the final frontier for outsourcing. Law firms are now actively trying many new and related approaches: technology, restructuring, process improvement, LPO, AFAs, and knowledge management. Economic pressures are forcing firms to reevaluate their business models and implement innovative solutions in order to deliver cost-effective, high-quality legal services to clients. This demand for change—driven by unrelenting cost pressure, globalization, and technology—is creating an evolution in the legal profession.

However, outsourcing within the legal profession is nothing new. Lawyers have *outsourced* for decades, from one lawyer to another lawyer, or paralegal within a firm, as well as externally to experts and

staffing companies. What is different today with the emergence of the LPO industry is that legal services are being outsourced en-masse to third party providers (LPOs) that have invested heavily in people, process, and technology, and operate across global delivery platforms, including facilities both onshore and offshore in countries such as India and the Philippines.

Technology has played a significant role in the emergence of LPO. Technological advances have had a two-fold affect. First, they enable the performance of increasingly more complex tasks at the simple push of a button and in a fraction of the time. With the increased prevalence of hosted document solutions for litigation, investigations, or M&A, it matters little where your associates are located. Secondly, through improved connectivity, a vast pool of common law trained talent from onshore and offshore locations is now available to assist lawyers in the U.S., U.K, and Australia.

What is LPO?

In essence, LPO is an operating model built on best practices, with process efficiency, quality control, and

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technology at its core. LPO enables legal functions to be standardized and unbundled. Routine work can then be delivered by individuals who specialize in these activities, allowing in-house and private practice lawyers to work more efficiently on higher value tasks. LPO offers not just labor arbitrage, but also a managed service that incorporates automation, streamlined processes, metrics, and governance. Examples of services include document review, contract management and review, due diligence, compliance, legal research, and IP outsourcing.

AS THE LEGAL PROFESSION CONTINUES TO EVOLVE, LPO CONTINUES TO GROW. ALMOST SIX YEARS AGO, THE AMERICAN LAWYER REPORTED THAT 6% OF AMLAW 200 FIRMS HAD OFFSHORED WORK.

Tracking Law Firm Adoption of LPO

The clear consensus among independent observers is that LPO is on the rise. However, greater insight beyond this simplistic sound bite is tricky to come by. One of the difficulties in gauging the level of consumption of LPO has been the reluctance, until relatively recently to acknowledge LPO relationships publicly. Despite this, the body of evidence demonstrates a growing industry that is having a transformational impact on the legal profession.

As the legal profession continues to evolve, LPO continues to grow. Almost six years ago, *The American Lawyer* reported that 6% of AmLaw 200 firms had offshored work. While early reports focused on India and offshoring, then seen as synonymous with LPO, over the last three years, LPO has itself globalized. The 2011 **Altman Weil Law Firms in Transition Survey** found that 8% of large U.S. firms used LPO in 2010 and 11% expected to do so in 2011.

The growing number of major firms that have announced LPO initiatives is evidence of the increased uptake of LPO. On review of the dates of these public

pronouncements, it is readily apparent that the pace of these declarations is picking up. Over the course of the last three years, Simmons & Simmons, Allen & Overy, Pillsbury Winthrop Shaw & Pittman, Nixon Peabody, Pinsent Masons, Linklaters, and most recently, Australian heavyweights Mallesons, Corrs Chambers, and Blake Dawson have all publicly acknowledged relationships with LPO providers.

Ethical Considerations

Outsourcing legal work raises specific issues in relation to the outsourcing lawyer's obligations to his/her client. During the formative years (2005-2008) of the LPO industry, there was limited guidance, in the form of opinions, available from the American Bar Association (ABA) and a number of individual state bar associations (the Opinions). Over the course of the last two years, the ABA has begun studying the area intently and in 2010 established the Commission on Ethics 20/20 (the Commission) to examine the ethical and regulatory impact of advancing technology and increasing globalization, including outsourcing, on the legal profession. The Commission will formally file its outsourcing proposal to the ABA's House of Delegates in August 2012.

All the Opinions and guidance available from the ABA conclude that a lawyer can outsource legal work and satisfy his/her ethical obligations. Arguably, the Opinion that carries the most weight is the one released by the ABA in August 2008 (*Opinion 08-451*). One novel point about the ABA Opinion, as opposed to those by the individual Bar Associations, is the noticeably conciliatory tone with regards to outsourcing generally. The Opinion comments that: "The outsourcing trend is a salutary one for our globalized economy."

It is the Digest to the New York Opinion, (*The Association of the Bar of the City of New York Formal Opinion 2006-3 (Aug 2006)*), however, that most succinctly consolidates the major ethical issues:

A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent

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representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.

These issues prevail across all of the Opinions and while it is beyond the scope of this article to delve into each and every issue; the following are some of the most crucial areas of concern.

SHOULD AN ACTIVITY OTHERWISE BE CONSIDERED THE PRACTICE OF LAW, WHAT SAFEGUARDS AND PROCEDURES ARE PUT IN PLACE, IF ANY, TO NEGATE THE POSSIBILITY THAT THE LPO EMPLOYEES ARE ENGAGED IN UPL?

Unauthorized Practice of Law (UPL): MRPC 5.5 (a):

"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."

The defining ethical issue associated with LPO is the problem of UPL by individuals not qualified to practice law in a particular jurisdiction, and the associated aiding and abetting of UPL.

The key determining issue pertains to what is classified as the "practice of law." Should an activity otherwise be considered the practice of law, what safeguards and procedures are put in place, if any, to negate the possibility that the LPO employees are engaged in UPL? The opinions all conclude that outsourcing legal work overseas does not constitute aiding and abetting UPL where the outsourcing lawyer enacts an appropriate degree of supervision. The necessity to supervise is analogous to the duty owed when delegating work to a paralegal. The necessity to supervise remains in place irrespective of the level of experience of the lawyers located offshore or in

another jurisdiction employed by the LPO entity. The New York Opinion describes foreign lawyers as "non-lawyers."

The outsourcing lawyer should establish procedures for the supervision of outsourced legal support. These procedures should be adaptable and compensate for any physical separation, time zone differences, and differences in legal systems, education, and training. There is no all-encompassing checklist of steps to take to avoid aiding and abetting UPL. However, it is recommended that the outsourcing law firm become sufficiently familiar with the professional training of the LPO's employees, participate in the training specifically as it relates to relevant legal and ethical rules, and establish regular communication practices to ensure that the LPO employees have reasonable access to supervising lawyers in the outsourcing law firm.

The outsourcing lawyer should undertake appropriate due diligence to determine the competence of the LPO. Proactive steps that can be taken in terms of supervision include, reviewing communications and instigating a protocol for quality control. Work with your LPO to create a documented, defensible process, which if necessary, can be referenced in court as evidence that an appropriate system of supervision was in place.

The crucial issue is that, at all times, the US attorney retains ultimate responsibility for the work.

Duty of Competent Representation: MRPC 1.1:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The Opinions and available guidance provide an extended checklist that I paraphrase below. Adherence to this helps ensure compliance with the duty to competently represent one's client. The list, however, is neither all-encompassing nor compulsory in each and every situation:

- Conduct reference checks;
- Investigate the background of the LPO's employees;

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- Interview the lawyers involved in your matters and assess their educational background;
- Inquire into the LPO's hiring practices to evaluate the quality and character of individuals likely to have access to client information;
- Investigate the security of the provider's facilities;
- Conduct a site visit;
- Assess the country to which services are being outsourced for its legal training, judicial system, legal landscape, disciplinary system and core ethical principals; and
- Disclose the outsourcing relationship to the client, and obtain consent.

competently. To satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.

It is clear that, to satisfy the duty of competent representation, a US lawyer cannot rely on the LPO to evaluate its own work product and must be able critically and independently to evaluate the work product received.

Protecting Client Confidences and Secrets and the Duty to Disclose: MRPC, Rule 1.6

“(a) 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).”

The outsourcing lawyer in virtually all instances will be under a duty to disclose the relationship to his/her client. If any client confidential information is to be disclosed, then the client must be informed. The implied authorization Rule 1.6(a) relates to the disclosure of client confidential information within a law firm. The ABA Opinion comments that where the relationship between the firm and the individuals performing the services is attenuated, as in an outsourcing relationship, no client confidential information may be revealed without the client's informed consent. It is difficult to envisage a legal outsourcing engagement that does not involve client confidential information, and thus in each and every situation, it is recommended that the client provides informed consent.

The San Diego Opinion comments that an additional duty is to “maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client” (*California Business & Professions Code section 6068(e)*). This additional duty extends beyond the requirements set out in Rule 1.6(a), and compels the outsourcing lawyer to take proactive steps to ensure the preservation of client confidential information. These proactive steps can include requiring providers to demonstrate compliance

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The San Diego Opinion (*San Diego Bar Association Legal Ethics Opinion 2007-1 (2007)*) references a useful hypothetical whereby a small law firm takes on an intellectual property dispute. The firm has limited experience in intellectual property. The firm then contracts with a fictional India-based LPO to undertake legal support work associated with the case. Although Legalworks' particular area of expertise lies in the field of intellectual property, in questioning whether this satisfies the duty to act competently, the Opinion comments:

[n]or does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney's duty to act

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with and/or certification by independent facility and security auditing bodies, such as SAS 70, ISO 27001, HIPAA, or EU Safe Harbor. Ensuring that providers' internal information and facility security procedures meet the stringent standards imposed by the aforementioned organizations, assists in compliance with this additional duty.

Billing for outsourced legal support: MRPC Rule 1.5:

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

The issue of how to bill appropriately for outsourced legal services has not been determined definitively as yet. There is consensus across the ABA and individual State Bar Association Opinions, that a simple pass-through of the cost of services together with appropriate billing for supervision and overhead are permissible. However, the issue of whether a reasonable mark-up of the cost is allowed warrants further debate.

In Formal Opinion No. 00-420, the ABA concluded that a firm engaging a contract lawyer could mark up the cost provided that the total charge represented a reasonable fee for the services provided. In the discussion surrounding the lawyer's duty to disclose, in Formal Opinion 08-451, the ABA states:

“In the absence of an agreement with the client authorizing a greater charge...” no markup is permissible.

This implies that, in the presence of such an agreement, the question reverts back to whether the fee is reasonable pursuant to rule 1.5 MRPC. Rule 1.5 is clear that not only shall lawyers not charge an unreasonable fee, they shall not “make an agreement” for one. There is no definitive answer as to what level of markup agreed to between a client and attorney would be considered unreasonable. However, while the overhead costs involved in an LPO engagement are less than those associated with the law firm's own employees, they are certainly not non-existent.

There are forces at play that justify a markup. The engagement itself will be covered by the law firm's malpractice insurance. In ensuring compliance with ethical obligations, the outsourcing lawyer will have gone through a rigorous due diligence process in

determining their choice of LPO provider. Depending on the nature of the relationship between the law firm and the LPO provider there may be IT, HR, and other ancillary overhead costs associated with the successful maintenance of the relationship. In addition, there is the layer of supervision and project management that the firm will have in place to govern the relationship.

The available advice pertaining to the instruction of contract attorneys in no way implies that the firm cannot profit in any way from such an engagement when undertaken domestically, and the position is not substantially different when going offshore. The only difference is the degree of markup considered reasonable. What is clear, however, is that in the absence of a prior agreement authorizing a mark-up, the lawyer may only bill the actual cost of the services.

Conclusion

As new innovative models for delivering legal services continue to emerge, the legal profession is facing a period of evolutionary change. It is reassuring to those of us working within this morphing global legal ecosystem that the regulatory and professional bodies across the U.S. are giving long overdue attention to these developments. In fact, the concluding remarks of the Ethics 20/20 Commission in their Initial Proposal on legal outsourcing are also a fitting conclusion to this article.

The Commission does not intend for its proposals to be the final word on outsourcing. Rather, the Commission believes that continuing study of outsourcing practices is essential, especially given that those practices continue to evolve and new issues continue to arise.

Mark Ross is an experienced UK litigation solicitor, former partner at UK law firm Underwoods and now Vice President of Legal Process Outsourcing at Integreon. His involvement in legal outsourcing dates back to January 2004 when Underwoods became the first UK law firm to outsource legal work to a lower cost common law jurisdiction. Mark joined Integreon in November 2009. He is a preeminent authority and thought leader in the field of legal outsourcing. He is also a recognized expert on the Ethics of Legal Outsourcing, and has written numerous articles and widely acclaimed White Papers dealing with the subject. He developed the first State Bar MCLE Ethics and CPD accredited courses, provided by a legal outsourcing company, on the ethical implications of outsourcing legal work.