



Ethics of Legal Outsourcing White Paper

by Mark Ross
VP Legal Services, Integreon

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INTRODUCTION

The practical reality for US and UK attorneys engaging in or contemplating Legal Process Outsourcing (LPO) is that the outsourcing of both core legal and support services across the legal profession is nothing new. Think about the following examples:

- a. Whenever a client sends work to his/her lawyer, it is “outsourcing” the work.
- b. Whenever a law firm sends work to local counsel in another jurisdiction, or to a specialist outside the firm, it is “outsourcing” the work.
- c. Lawyers have outsourced legal and law related services for generations (e.g. from one lawyer to another within a single firm, from a law firm to a legal research or document review staffing company, etc.).

What is different today with the emergence of the LPO industry is that both core legal and legal support related services are being outsourced to lawyers, law firms and corporations located offshore in countries such as India, South Africa and The Philippines. The outsourcing of legal work by a law firm or legal department to a legal outsourcing company or an entity located offshore raises specific issues pertaining to the outsourcing lawyer’s ethical obligations to his or her client. The concept of outsourcing elements of the legal process, particularly offshore, is provocative to say the least.

In the UK, the relevant regulatory bodies, the Solicitors Regulation Authority (SRA), and the Law Society, have been virtually silent bystanders as market acceptance of LPO has gathered momentum. In the US the American Bar Association and several Bar Associations have discussed the practice of legal outsourcing, providing more detailed guidance (albeit still limited) than that which is available in the UK. The overriding principles, however, governing both US and UK lawyers’ compliance with their ethical obligations, are remarkably similar in both jurisdictions. This paper will initially examine the position as it stands in the US before turning its attention to the UK. While not professing to be a definitive “how to” guide to ethical compliance, the paper will also provide some practical suggestions aimed at ensuring US and UK lawyers avoid falling foul of their respective ethical obligations.

US

“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 of the American Bar Association^[1]

In the early part of the decade, the formative years of the industry, proponents of LPO were oftentimes met with the question: “Is this ethically permissible or even legal?”

In the US to date, six Bar Association Ethics Committees, the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline and the American Bar Association Standing Committee on Ethics and Professional Responsibility^[2] have released Opinions discussing the outsourcing of legal work. All of the Opinions have concluded that a lawyer in the US can outsource legal work and at the same time satisfy his or her ethical obligations. Arguably the Opinion that carries the most weight is the one released by the American Bar Association in August 2008. One novel point about the ABA Opinion, as opposed to those by the individual Bar Associations, is the noticeably conciliatory tone utilized with regards to outsourcing both generally and specifically within the legal profession.

At page 2, the ABA Opinion comments that:

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

It is the Digest to the New York Opinion, however, that most succinctly consolidates the major ethical issues for consideration:

“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 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.”

While individual States may reference their own particular rules of conduct, there is sufficient overlap among the States that for the purposes of understanding a lawyer’s ethical obligations when outsourcing legal work overseas, reference to the ABA’s Model Rules of Professional Conduct (MRPC)^[3] is often sufficient. It is beyond the scope of this paper to explore in detail each and every Bar Association Opinion, together with each individual State’s rules of conduct. I will, however, attempt to provide a broad level of oversight into some of the most crucial areas of concern while highlighting the relevant rules.

In addition, it is worth noting that a lawyer’s ethical obligations differ depending on whether outsourcing is for “substantive legal support services,” such as research, drafting, contracts, document review, writing legal memoranda, drafting patent applications, or for “administrative support” including transcription, document coding, accounting and clerical support. For the purposes of discussion within this paper I will reference the obligations associated with outsourcing of substantive legal support services. While there is a degree of overlap with the ethical obligations associated with administrative support outsourcing, particularly when client confidences are disclosed, it is further beyond the scope of this paper to disaggregate each and every administrative support function to determine which ethical rule applies and which does not.

AVOIDING AIDING AND ABETTING THE UNAUTHORIZED PRACTICE OF LAW

The defining genuine, as opposed to perceived, ethical issue associated with the LPO industry is the problem of the unauthorized practice of law (UPL) by individuals not qualified to practice law in a particular jurisdiction, and the associated aiding and abetting of UPL.

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.”^[3]

The reasoning behind UPL is that *“limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”^[4]*

The key determining issue pertains to what is classified as the practice of law, and if an activity would otherwise be considered as 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. For the purposes of discussion within this paper as

mentioned earlier, the assumption will be made that the “legal work” being outsourced is of a substantive rather than an administrative nature, hence viewed as the practice of law in the normal course of events.

The Opinions all conclude that outsourcing legal work overseas does not constitute aiding and abetting the unauthorized practice of law 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 degree of seniority and level of experience of the lawyers located offshore or in another jurisdiction employed by the LPO entity. The New York Bar Opinion comments that the New York Code of Professional Responsibility describes both a foreign lawyer not admitted to practice in New York, or in any other US jurisdiction, and a layperson as “*non-lawyers*.”

The outsourcing lawyer should establish practices and procedures for the supervision of offshore legal support that are adaptable and compensate for the physical separation, time zone differences, and any differences in legal systems and legal education and training. There is no all-encompassing check list 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 company’s employees, participate in the training program 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 physical degree of separation inherent in the offshore outsourcing relationship may make this act of supervision somewhat more difficult from a practical perspective. The outsourcing lawyer should undertake appropriate due diligence to determine the competence of the legal outsourcing company in performing the desired services. Proactive steps that can be taken in terms of supervision include the review of communications between and among the outsource provider, attorney and client and the instigation of a defined protocol for quality checking of assignments. Work with your chosen LPO provider to create a documented, defensible process, which if necessary, can be referenced in a court of law, 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 outsourced work and is subject to the particular State Bar Acts and Rules of Professional Conduct relating to violation of professional responsibilities.

“Ensure that the outsourcing company assists a California Attorney in practicing law, NOT the other way around.”^[5]

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.

Taking the Opinions as a whole they are useful in that they provide an extended checklist, paraphrased below for US attorneys contemplating outsourcing legal work overseas. Adherence to the following list helps ensure compliance with the duty competently to represent one’s client.

This list, however, is neither all-encompassing nor compulsory in each and every outsourcing situation.

- Conduct reference checks.
- Investigate the background of the lawyers, non-lawyers and service provider.
- Interview the principal lawyers involved in your matters and assess their educational background.
- Inquire into the LPO's hiring practices to evaluate the quality and character of the employees likely to have access to client information.
- Investigate the security of the provider's premises and computer network.
- 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 principles.
- Disclose the outsourcing relationship to the client and obtain informed consent.

The San Diego Opinion references a useful hypothetical case scenario whereby a small law firm takes on a complex intellectual property dispute in the San Diego Superior Court. The law firm has limited experience in intellectual property litigation. The law firm then contracts with a fictional India based LPO company, Legalworks, to undertake substantive 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 that:

"nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney's duty to act 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 competently representing one's client that a US lawyer engaging an LPO provider cannot rely on the LPO provider to evaluate its own work product and must himself be able critically and independently to evaluate the work product received.

DUTY TO DISCLOSE

a) *If Client Confidences and Secrets are to be Disclosed*

MRPC 1.6 Confidentiality of Information (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 nature of the outsourcing relationship to his or 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 a typical 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.

b) *If Client “reasonably expects” work to be performed in-house*

The San Diego Opinion indicates that the duty to inform the client is determined by the client’s reasonable expectation as to who will perform those services.

If the work to be performed by the outside service is within the client’s “reasonable expectation under the circumstances” that it will be performed by the initially instructed US attorney, the client must be informed when the service is “outsourced.” Conversely, if the work is not such that it is within the client’s reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client of the arrangement.

Unfortunately, this is an overly simplistic and static view of the attorney/client relationship and the ever changing world of legal support services. Clearly, at this current juncture in time, the drafting of complex motions and pleadings on a particular case or the provision of premium legal advice comes within the ambit of a client’s reasonable expectations that the work would be performed by their instructed attorney. However, the Opinion only considers the here and the now. A client’s “reasonable expectations” are not static, immovable or unchanging over time. The legal industry now operates in a global marketplace and clients are ever more sophisticated and accepting of the concept of globalization. A client’s reasonable expectations today will be vastly different tomorrow. Within a very short period of time it is conceivable that this argument will become to an extent, redundant. Soon, a client’s only “reasonable expectation” will be that the quality and confidentiality of the work-product is maintained by whoever completes it, wherever he or she may be. As the legal profession continues along its evolutionary journey towards commoditization, particularly for certain process driven legal tasks, such as document review or the large scale review of documents for an M&A due diligence, we may soon reach the day when a client’s reasonable expectations will be that work-product should be outsourced to the most efficient and cost-effective provider.

c) *If Cost of Engagement is Marked-Up*

The Ohio Opinion discusses the current modus operandi within law firms of engaging with and subsequently marking up the cost of domestic based contract attorneys, and the lack of disclosure of this practice to clients. According to the Supreme Court of Ohio a scenario whereby disclosure, consultation and informed consent is not necessary is when a law firm engages a contract attorney in a situation when, for example, a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. The Opinion states that,

“Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice.”

Although the Ohio Opinion does not reference the common practice of engaging domestic based contract attorneys for large scale document review projects, as I interpret it, that would not fall within the “narrow circumstance” detailed above.

In any event if a US lawyer engages an LPO provider and wishes to charge anything other than the basic cost of the services, then according to the Ohio Opinion:

“if any amount beyond cost is added...The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation”

The ABA Opinion states that when engaging contract lawyers you can mark up:

“In Formal Opinion No. 00-420, we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client...In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract.”

The crucial words are *“in the absence of an agreement authorizing a greater charge.”* Clearly if the outsourcing attorney wishes to mark up the cost of outsourced services then there must be prior consent on the part of the client.

PROTECTING CLIENT CONFIDENCES AND SECRETS

The Ohio Opinion comments that:

“Client confidentiality is a hallmark of the attorney client relationship.”

The San Diego County Bar Association Ethics Opinion 2007-1 states that an additional duty of an attorney who outsources work, whether within the US or abroad, is to *“maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets of his or her client.”* (See California Business & Professions Code section 6068(e).).

The New York State Unified Court System’s Rules of Professional Conduct at rule 1.6 imposes a duty on a lawyer to preserve the “confidential information” of its clients. Under rule 1.6, “confidential information” consists of *“information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”*

This additional duty to protect client confidences and secrets extends beyond the requirements as set out in MRPC Rule 1.6(a), and compels the outsourcing attorney to take proactive steps to ensure the preservation of client confidential information.

The San Diego Opinion comments on one unfortunate example of a breach of confidentiality involving an outsourced project subcontracted to India. There, the subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a middleman.

Attorneys need to carry out their own research into the confidentiality and security safeguards that the legal process outsourcing company with which they are contemplating contracting, has in place. Ensuring that

potential providers' internal information and facility security procedures meet the stringent standards imposed by the aforementioned organizations assists in compliance with this additional duty. Proactive steps can include requiring potential providers to demonstrate compliance with and/or certification by independent facility and security auditing bodies, such as SAS 70, ISO 27001, HIPAA or EU Safe Harbor. The US-EU Safe Harbor, for example, is a streamlined process for US companies to demonstrate compliance with the EU Directive 95/46/EC on the protection of personal data. Intended for organizations within the EU or US that store customer data, the *Safe Harbor Principles* are designed to prevent accidental information disclosure or loss.

The Master Services Agreement with the LPO company should specifically address the issue of client confidential information. One area worth highlighting particularly in reference to an LPO engagement relates to the issue of subcontracting, a practice not uncommon within the LPO world. Taking into account that in virtually all legal outsourcing engagements, client confidential data will be involved, in the Master Services Agreement, subcontracting should be prohibited or subject to stringent approval requirements.

AVOIDING CONFLICTS OF INTEREST

The New York Opinion comments that New York Lawyers' Code of Professional Responsibility at DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements.

Discussing the engagement of an LPO provider and the associated conflict of interest checking requirements, the Florida Opinion confirms agreement with the conclusions reached in the Los Angeles Opinion, which states that a lawyer's duties are that:

"[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."

The outsourcing law firm/legal department should ask the LPO provider about its own conflict checking procedures and about how it monitors work performed for other clients. The outsourcing law firm/legal department should also ask the LPO whether it is performing or has performed services for any parties adverse either to the firm's clients or to the corporation itself. Furthermore, the outsourcing law firm/legal department should seek assurances that the individuals within the LPO performing the legal support service have never previously performed nor are currently performing services for any parties adverse to the lawyer's client or the corporation. To assist in fulfilling this obligation, it is highly recommended that the outsourcing lawyer develops a conflict of interest questionnaire for utilization in situations where he or she wishes to outsource work, either domestically or offshore. The master services agreement between the parties should make as a requirement of any retention of the LPO company, the satisfactory completion of the conflicts of interest check questionnaire.

One as yet unresolved difficulty within the LPO industry is that it is commonplace for employees to sign comprehensive non-disclosure and confidentiality agreements with their LPO employers. This raises an issue with potential lateral movement across the LPO industry to other providers. Subject to their confidentiality agreement with previous employers, candidates may be unwilling to disclose pertinent information pertaining to previous client engagements. One possible solution is for the outsourcing law firm/legal department seeking to engage these resources to identify a "hot list" of potential conflicts, and the concerned employees can indicate in general terms as to whether any of the listed clients raise possible conflict concerns.

BILLING FOR OUTSOURCED LEGAL SUPPORT

MRPC 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 support 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 the services together with appropriate billing for supervision and overhead is permissible. However, the issue of whether a reasonable mark-up of the cost of the outsourced support is allowed warrants further debate.

The Ohio Board comments that:

“The most straightforward approach...may be for a lawyer or law firm to bill the client for the outsourced services as an expense based upon the actual cost of the service to the law firm, with an adjustment if necessary to cover a lawyer or law firm’s costs of supervision of the outsourced services.”

The determination as to whether to bill for outsourced services as an expense (plus cost of supervision) or as part of legal fees, is according to the Ohio Board:

“left to a lawyer’s exercise of professional judgment.”

In Formal Opinion No. 00-420, [6] the 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 to the client.

As dealt with earlier in the discussion surrounding the outsourcing attorney’s duty to disclose,...*“In the absence of an agreement with the client authorizing a greater charge”* (ABA 08-451), no mark up is permissible. This implies that in the presence of such an agreement that the question reverts back to simply whether the fee is reasonable pursuant to rule 1.5 MRPC.

Whether billing as an expense or as part of legal fees, the overarching requirement identified by the ABA is that the fee charged should not be unreasonable and must be in keeping with the general requirements of Rule 1.5 as set out below:

1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
- (3) the fee customarily charged in the locality for similar legal services;*
- (4) the amount involved and the results obtained;*
- (5) the time limitations imposed by the client or by the circumstances;*
- (6) the nature and length of the professional relationship with the client;*

- (7) *the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
- (8) *whether the fee is fixed or contingent.*

Rule 1.5 is clear that not only shall a lawyer not charge or collect an unreasonable fee, but that 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 as unreasonable. However, while the overhead costs involved in an LPO engagement may be minimal, there are other forces at play that justify a degree of markup. The engagement itself will no doubt be covered by the outsourcing law firm’s own malpractice insurance policy and in addition there is the layer of supervision and project management that the firm will wish to have in place in governing the relationship. The available advice pertaining to the instruction of domestic based 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.

A separate yet related point, and one worthy of debate, is whether there is a valid argument that given the requirement set out above not to charge an unreasonable fee, whether a US law firm is under a duty at the very least to inform their clients of the “*offshore*” LPO option for certain routine, commoditized legal tasks, such as first pass document review.

If one works with the premise that offshore first pass document review is significantly more cost-competitive and also comparable in terms of productivity and quality, then if one doesn’t inform a client that conducting first pass document review offshore is an option, how does this sit with one’s ethical obligation set out in the Model Rules of Professional Conduct at Rule 1.5 not to charge or make an agreement for an “*unreasonable fee*?” Is it reasonable to assume that billing anything approaching AmLaw 200 junior associate hourly rates for first pass document review could be deemed to be “*an unreasonable fee*,” given “*the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly*?” This question warrants further debate.

MALPRACTICE INSURANCE AND LPO ERRORS AND OMISSIONS

It is incumbent upon US law firms and lawyers carefully to review the coverage and any associated limitations on their professional liability insurance. If the policy does not cover the instruction by the firm of temporary attorneys or non-lawyers, subject to adequate supervision by the firm’s own lawyers, then in the event of an error or omission on the part of an LPO employee the firm will not be covered.

Many malpractice insurance policies provide coverage to law firms for the acts and omissions of domestically engaged contract attorneys and will not preclude coverage based on a firm’s engagement of foreign lawyers through an LPO. However, this can be easily and quickly clarified by addressing the issue with the insurer directly.

The US lawyer seeking to engage an LPO as part of its own due diligence should determine whether the LPO company itself holds sufficient professional liability insurance. The market leaders routinely carry comprehensive liability insurance, however, if one takes a broad snapshot of the LPO provider market, and the plethora of smaller companies that have sprung into existence over the last 2-3 years, many of these do not.

EXPORT CONTROL REGULATIONS

Meriting a separate discussion are the legislative barriers in place governing the outsourcing of patent support services overseas. In the US the Export Administration Regulations (EAR) govern the international dissemination of certain technologies. These restrictions also apply to technology and are not solely limited to tangible goods. Invention disclosures enabling the drafting of patent applications or the undertaking of certain types of patent searches may meet the definition of technology. For the purposes of this discussion technology is defined in the relevant regulations as *“specific information necessary for development, production or use of a product.”* 15 CFR 772.1.

The Bureau of Industry and Security (BIS) is responsible for enforcing and implementing EAR, and has regulatory control over a vast array of technologies ranging from *“dual-use”* items to purely commercial goods.

On July 23rd 2008 the USPTO released a notice titled *“the Scope of Foreign Filing Licenses.”* The notice reminds US patent attorneys and agents that a foreign filing license does not authorize them to send invention disclosures abroad to draft patent applications for eventual filing in the United States.

The most relevant portion of the Notice states that:

“Applicants who are considering exporting subject matter abroad for the preparation of patent applications to be filed in the United States should contact the Bureau of Industry and Security (BIS...)The BIS has promulgated the Export Administration Regulations (EAR) governing exports of dual-use commodities, software, and technology, including technical data, which are codified at 15 CFR Parts 730–774.”

Adhering to the BIS regulatory framework is absolutely essential for any organization interested in outsourcing patent support work to a foreign country. The regulations are also applicable to the outsourcing of documentation perhaps pertaining to an Intellectual Property litigation matter, when the particular documentation falls within the EAR definition of technology. Failure to comply with federal export regulations can result in severe fines and even imprisonment. Items subject to EAR are enumerated on the Commerce Control List (CCL).

The CCL references a list of technologies (covered items) under the export control jurisdiction of the BIS. The CCL contains 10 categories of controlled items:

Category 0 - Nuclear Materials, Facilities & Equipment (and Miscellaneous Items)

Category 1 - Materials, Chemicals, Microorganisms, and Toxins

Category 2 - Materials Processing

Category 3 - Electronics

Category 4 - Computers

Category 5 (Part 1) - Telecommunications

Category 5 (Part 2) - Information Security

Category 6 - Sensors and Lasers

Category 7 - Navigation and Avionics

Category 8 - Marine

Category 9 - Propulsion Systems, Space Vehicles and Related Equipment

Following review of the above list it appears that numerous technical fields fall under the 10 categories listed in the CCL. US lawyers and patent agents engaging the services of an LPO for support in drafting patent applications must:

- a. conduct an export clearance check/invention classification before sending invention disclosures overseas.
- b. seek the necessary clearance from the BIS if the export clearance check/invention classification reveals that the subject matter is a controlled item.

The regulations governing the export of technology and the practical reality of the type of work most frequently outsourced should prevent US law firms and corporations from becoming overly discouraged with the consequences of potential export violations. Only information that is unpublished (not in the public domain) is restricted by US export controls. 15 C.F.R. 734 (EAR) and 22 C.F.R. 120.11 (ITAR). This means that many patent services and documentation relating to intellectual property litigation can be freely outsourced, even if the technology in question falls within the scope of the EAR. Patent application drafting represents only a tiny percentage of the work currently being outsourced overseas by US law firms and corporations. Invalidity, Freedom to Operate and Landscape searches, together with most novelty searching (subject to appropriate tailoring of the invention disclosure so as not to fall foul of the EAR), can all be freely outsourced, as can issued patent proofreading, file wrapper analysis and competitive research.

UK

Unlike the ABA and the individual Bar Associations, the UK Law Society has not provided any ethical guidelines that deal specifically with outsourcing of legal work offshore. Solicitors are free to outsource a wide variety of legal support work to paralegals, trainee solicitors, temporary solicitors and offshore resources, subject of course to adherence to the Solicitors' Code of Conduct and the relevant obligations set forth therein. The rules impacting on outsourcing are detailed in Rules 1-5^[7] and deal with in particular; acting in clients' best interests, providing a good standard of service, avoiding conflicts of interest, keeping client confidences and supervision.

Rule 4: Confidentiality and Disclosure, 8(f)

If you outsource services such as word processing, telephone call handling or photocopying you must be satisfied that the provider of those services is able to ensure the confidentiality of any information concerning your clients. This would normally require confidentiality undertakings from the provider and checks to ensure that the terms of the arrangements regarding confidentiality are being complied with. Whilst you might have implied consent to confidential information being passed to external service

providers, it would be prudent to inform clients of any such services you propose to use in your terms of business or client care letters.

Elsewhere the Law Society model client care letter and accompanying practice note^[8] at s 4.1.7 indicate that outsourcing should be disclosed and informed client consent obtained, consistent with duty of confidentiality.

4.1.7 Outsourcing of work

Where you outsource work on client files, there is a risk your outsourced provider may breach client confidentiality. Drawing attention to this risk may mitigate any breach of confidentiality which then occurs, but you still risk a finding of misconduct or inadequate professional service. You should ensure that you have a confidentiality agreement with your suppliers. In your terms and conditions you should: advise the client if the practice outsources work and the type of work it outsources; alert the client to the potential risks in relation to preserving client confidentiality; ask the client to tell you if they object to this practice.

The practice note suggests the inclusion in the client care letter of a paragraph seeking the client's informed consent.

For example:

Sometimes we ask other companies or people to do [typing/photocopying/other work] on our files to ensure this is done promptly. We will always seek a confidentiality agreement with these outsourced providers. If you do not want your file to be outsourced, please tell us as soon as possible.

One particularly relevant section of the Code of Conduct is Rule 2.02 dealing with Client Care. On reviewing these rules it is apparent that any legal outsourcing arrangement necessitates careful thinking, and disclosure to and consent from the client.

Client care (2)

You must, both at the outset and, as necessary, during the course of the matter:

(a) agree an appropriate level of service; and (b) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and

In the Guidance notes to Rule 2, it states at 2.02, 19:

The status of the person dealing with your client must be made absolutely clear, for legal and ethical reasons. For example, a person who is not a solicitor must not be described as one, either expressly or by implication. All staff having contact with clients, including reception, switchboard and secretarial staff, should be advised accordingly.

Rule 5 of the Code of Conduct deals specifically with Supervision. There are several references throughout Rule 5 dealing with the requirement to supervise when work is delegated to "unqualified staff."

The accompanying guidance notes to Rule 5 comment,

8. If certain work is to be done by unqualified staff it may only be done at the direction and/or under the supervision of persons who are allowed by law to do that work themselves.

And,

9. Under the rule... practitioners are responsible for the acts and omissions of all staff, admitted and unadmitted alike. The duty to supervise staff covers not only persons engaged under a contract of service, but also those engaged under a contract for services to carry out work on behalf of the firm, e.g. consultants, locums and outdoor clerks.

UK DATA PROTECTION EXPORT ISSUES

There are specific UK data protection law issues that arise as part of legal outsourcing engagements that impact on whether personal data can be exported to India, The Philippines and other offshore destinations. It is beyond the scope of this paper to provide a rigorous examination of the relevant legislation; however it is important to cover the key points.

The relevant piece of UK legislation is the Data Protection Act 1998 (the “Act”) which implements in UK law the 1995 EU Data Protection Directive. The Eighth Principle of the Act states:

Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

As far as the export of personal data is concerned, India and the Philippines are not deemed to have adequate legal protections in place. There are however a number of methods available under the Act by which the requirements of the Eighth Principle can be met and the export of data to India and the Philippines be permitted. Some of these methods are as a matter of law deemed to be compliant with the Act. Other methods, involve making a determination that the approach taken is sufficient. The methods that involve a subjective determination as to their veracity clearly do not provide the same degree of certainty. The most common approach taken in legal process outsourcing engagements that involve the potential export of personal data to India or the Philippines is to incorporate into the Master Services Agreement with the client, what are termed the “Model Clauses.” This approach has been determined to be compliant with the Act. The Model Clauses have been approved by both the EU and the UK’s Information Commissioner as sufficient to meet the requirements of the Eighth Principle.

CONCLUSION

The end result is thus essentially similar to that under the US rules. In both jurisdictions, whether within an individual State’s Rules of Conduct or the ABA’s Model Rules of Professional Conduct or in the UK, the Solicitor’s Code of conduct, ethical rules exist that impact on a legal outsourcing relationship. These rules ensure that only a lawyer, licensed in the appropriate jurisdiction, practices law within that jurisdiction. Furthermore, if a legal outsourcing company is engaged to assist in the performance of a legal task, the outsourcing lawyer must ensure that adequate supervision is in place by a lawyer within the firm competent to perform the particular

legal task and to evaluate the work undertaken by the legal outsourcing company. In addition, in the UK, as discussed above there is specific legislation in the form of the Data Protection Act that governs the transfer of data overseas. To date the guidance from the ABA and in particular the Law Society has been limited to say the least. However, as the number and scale of legal outsourcing engagements continues to grow, and more firms and corporations publicly acknowledge their utilization of the LPO model, it is highly likely that more concrete, detailed guidance will emerge over the coming months.

Disclaimer: This article contains suggestions and thoughts about legal ethics in the field of legal outsourcing. Nothing in this article should be construed as legal advice or be interpreted to advance a policy or impose a duty or obligation. All statements in this article are the opinions of the author.

ABOUT THE AUTHOR

Mark Ross is an experienced UK litigation solicitor, former partner at high profile UK law firm Underwoods Solicitors, and now Vice President of Legal Services at Integreon, the world's leading provider of legal and knowledge outsourcing services to major corporations and law firms.

Mark's involvement in legal outsourcing dates back to Jan 2004 when Underwoods became the first UK law firm to outsource legal work to a lower cost common law jurisdiction. Chambers Guide 07 refers to Underwoods as "a pioneer of legal offshoring." Mark was responsible for the development of the workflow system for outsourcing to the firm's South Africa office. Mark moved to Los Angeles in 2006 and joined LawScribe where he was responsible for Global Sales and Marketing, before moving to Integreon in November 2009.

He is a recognized authority and thought-leader in the field of legal outsourcing. He has been published by, and interviewed for, numerous mainstream and legal publications, including TIME magazine, the UK Law Society Gazette, and the ABA's Law Practice Management. He is the former Chair of the International Association of Outsourcing Professionals' Legal Outsourcing Chapter. He developed the first State Bar approved MCLE Ethics course, provided by a legal outsourcing company, on the ethical implications of outsourcing legal work. He subsequently created two further State Bar accredited courses dealing with patent support outsourcing and offshore document review. He has been invited to speak as a leading authority on legal outsourcing at conferences run by prestigious organizations including: Financial Times, U.C. Berkeley School of Law, American Lawyer, ALA, LexisNexis, the Sourcing Interest Group, Paralegal Superconference, ACI and IQPC.

Mark can be contacted at mark.ross@integreon.com

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² The Association of the Bar of the City of New York Commission on Professional & Judicial Ethics, Formal Opinion 2006-3 (2006); Los Angeles County Bar Association, Opinion 518 (2006); North Carolina State Bar, Formal Ethics Opinion 12 (2007); San Diego County Bar Association Legal Ethics Opinion 2007-1 (2007); Florida Bar Opinion 07-2 (2008); ABA Committee on Ethics and Professional Responsibility Formal Opinion 08-451 (2008). http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2009/op_09-006.doc The Supreme Court of Ohio http://www.abanet.org/cpr/pubs/issue_index.html

³ American Bar Association Model Rules of Professional Conduct http://www.abanet.org/cpr/mrpc/mrpc_toc.html

⁴ Pollak, Darya. "I'm Calling My Lawyer...in India!: Ethical Issues in International Legal Outsourcing." UCLA Journal of International Law and Foreign Affairs 11 UCLA J. Int'l L. & Foreign Aff.99 (2006).

⁵ Offshore Legal Outsourcing: the Ethical Implications. (LawScribe MCLE Course handout) Glendale, CA: LawScribe, Inc, 2007.

⁶ Rules ABA Formal Opinion 00-420 Surcharge to Client for Use of a Contract Lawyer http://www.abanet.org/cpr/pubs/issue_index.html

⁷ Rules 1-4, Solicitors' Code of Conduct 2007. <http://www.sra.org.uk/solicitors/code-of-conduct.page>

⁸ Client care letters practice note (19 May 2009) s 4.1.7 (outsourcing of work), available at <http://www.lawsociety.org.uk/productsandservices/practicenotes/clientcareletters/2810.article> (accessed June 19, 2009)