

Law Society of the Northern Provinces

Outsourcing of legal work

Guidelines to attorneys

1. Members will be aware of an increasing trend for firms of attorneys to outsource certain categories of legal work to individuals and firms who are not practising attorneys. This issue has recently been referred to the Ethics, Guidance and Rules Committee of the Council with the request that we investigate the propriety of these outsourcing arrangements.
2. Legal process outsourcing (LPO) in this country is not new. For many years attorneys have outsourced work to other legal practitioners - for example, attorneys instruct counsel in litigious and non-litigious matters, and they instruct other attorneys, sometimes for legal assistance, but most frequently to act as their correspondents. This an accepted part of legal practice. On a more mundane level, attorneys outsource some of their functions to entities which are not practising lawyers. Examples are outsourcing of copying facilities and of file storage facilities.
3. The committee accepts that outsourcing of part of a practitioner's functions is a fact of legal practice. The most recent manifestation is the referral of work by attorneys to private contractors, who may have legal qualifications but who are not legal practitioners, in circumstances where that work can be done more cheaply by the private contractors or where the private contractors can provide a service which the attorney does not have the ability or capacity to do himself. Typical examples of the kind of work which is outsourced are due diligence investigations, opinion work and discovery in big litigation matters. The committee understands that in overseas jurisdictions LPO is used extensively to reduce the cost of legal services by outsourcing the work to persons who can do it more cheaply, frequently in other jurisdictions - for example, US lawyers using entities in India for aspects of the work. The offshore entities in those cases are often themselves practising lawyers, but are not necessarily so.
4. In the view of the committee there are potentially undesirable aspects to this practice. In an effort to ensure that the public does not suffer loss as a consequence of the practice of LPO the committee publishes the following guidelines which should be

applied by any attorney seeking to outsource part of his legal work to persons who are not, or entities which are not, practising legal practitioners:

4.1 **client's consent**

- The client must consent to any LPO arrangement whereby legal work is outsourced to a third party. (This would not include the kinds of outsourcing referred to in paragraph 2, which are well established traditional arrangements with which clients will be familiar, although attorneys should not brief advocates without the knowledge and approval of their clients).
- The client's consent should be in writing.
- The client's consent must be informed consent; the client must have been alerted to the fact that confidential information will be made available to third parties.
- The attorney must acknowledge that he retains ultimate responsibility for the work done.

4.2 **confidentiality**

- The attorney must ensure that confidential information of the client which is made available to the service provider will be preserved.
- To this end the attorney should satisfy himself that the service provider has adequate safeguards to guard against accidental or deliberate breaching of the confidences.
- This can be achieved by means of a written confidentiality agreement between the attorney and the service provider.

4.3 **conflicts of interest**

The instructing attorney should ensure that the service provider does not or will not provide services to another party where there would be a conflict between the attorneys' client and that other party. This similarly can be achieved by means of a written agreement between the attorney and the service provider.

4.4 **privilege**

The attorney should ensure that the client's privilege in information disclosed to the attorney, and in turn to the service provider, is maintained.

4.5 **Supervision**

The attorney should continue to supervise the process to ensure that the instructions given to the service provider are properly carried out. This does not mean that the attorney must maintain day-to-day supervision of the work done, but the attorney has a duty to exercise an independent judgment on the quality of the work, and will be liable to the client for errors unless there is a separate arrangement between the attorney and the client (which should be recorded in the written agreement between the attorney and the client).

4.6 **professional conduct**

If the service provider is not a practising attorney (although its staff may be legally qualified) it is not subject to rules of ethics and professional conduct. The instructing attorney should take reasonable steps to ensure that the service provider understands and complies with the rules of professional conduct.

4.7 **billing arrangements**

- Amounts paid by the attorney to the service provider should be reflected on the attorney's accounts as a disbursement (see rule 68.7).
- It would be improper for the attorney to add a premium to the amount paid to the service provider; however, the attorney may bill the client for work actually done by him in instructing the service provider and in reviewing the service provider's work.
- If any discounts are given by the service provider they accrue to the client, unless the client agrees otherwise.

4.8 **assistance to non-lawyers**

The outsourcing arrangement should not be used in such a way as to enable persons who are not qualified to conduct a legal practice in reality to practice in contravention of the law. The instructing attorney should take reasonable efforts

to ensure that the service provider is not a haven for lawyers who have been removed from the roll.

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