



LEGAL PROCESS  
OUTSOURCING:  
REGULATION AND THE  
PROFESSIONAL CONDUCT  
RULES

2012 World Masters of Law Firm  
Management: 11 October 2012

## Session Overview

- ❖ **Context**
- ❖ **Risks**
- ❖ **A precautionary lesson from the UK:  
the *West African Gas Pipeline Case***
- ❖ **Suggested Best Practices**
- ❖ **Regulatory Perspectives**

## Context

### Estimated global revenue from legal process outsourcing:

- 2010 - \$ 400 million
- 2011 - \$640 million
- 2012 anticipated - \$ 2.4 Billion
- 2014 anticipated - \$4 billion

### Drivers of growth include:

- ❖ Global economic environment
- ❖ Globalisation
- ❖ Information technology

## Risks

- ❖ Data security and potential breach of client confidentiality
- ❖ Conflicts of Interest
- ❖ Adequate supervision over the performance and quality of the outsourced work

*Remember: A practitioner cannot 'contract out' of his or her ethical obligations.*

## The West African Gas Pipeline Case

- ❖ The claimant, West African Gas Pipeline engaged two external litigation support providers (one based in India), to fulfil its discovery obligations. The process involved discovery of an initial 70,000 documents (approx.); with 72,000 more documents discovered in subsequent months.
- ❖ The problems identified included:
  - problems with the de-duplication procedures, leading to a large number of duplicated documents which had not been properly identified and removed;
  - failure to deal with redactions consistently; and
  - failure to gather together all the documents required to be discovered, and then carry out a proper review process.

## The West African Gas Pipeline Case

- ❖ The High Court found that West African Gas Pipeline (the claimant) had failed to provide proper discovery and was ordered to pay the defendant's wasted costs of £135,000 (approximately A\$205,000)
- ❖ Ramsey J found the defendant was entitled to have the costs wasted because the defendant had to:
  - consider, a number of times, duplicated copies of the same document;
  - analyse inconsistent redactions; and
  - review documents over a prolonged period, increasing costs for the defendant.

## Suggested Best Practices

Before engaging in LPO...

- ❖ evaluate the quality and reliability of the provider; and
- ❖ ensure individuals working on your matter are adequately qualified.

If you decide to go ahead...

- ❖ undertake a sufficient and thorough briefing process to ensure that the team fully understands what's required;
- ❖ establish formal supervision processes; and
- ❖ institute a quality assurance program.

## Regulatory Perspectives

- ❖ United States and the United Kingdom have taken a similar approach

*'A lawyer may outsource legal or non-legal support service provided the lawyer remains ultimately responsible for rendering competent legal services to the client...'*

*American Bar Association, Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Non-Legal Support Services, 5 August 2008*

## Proper Supervision

The duty to exercise proper supervision requires that:

- ❖ supervision be direct and meaningful; and
- ❖ the lawyer perform reasonable due diligence to ensure that a provider is sufficiently competent to perform the outsourced tasks.

## Observations in Australia

- ❖ Legal profession regulators have expressed the view that law firms using legal outsourcing are responsible for the standards of their work in accordance with legal professional legislation and conduct rules
- ❖ Legal profession PII providers in Victoria and NSW have observed that:
  - they would not prejudge whether outsourcing “causes an increased risk”; and
  - no correlation has been found between outsourcing and increased claims activity.

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# Legal PO: Regulation and the Professional Conduct Rules

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## **Speaking notes- Carole Caple**

### **2012 World Masters of Law Firm Management Legal Process Outsourcing – *The Real Story***

**11 October 2012**

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## Is the world getting flatter?

While it is clear that legal process outsourcing industry is booming, it is difficult to say with precision just how pervasive and widespread reliance on LPOs is. One reason for this is that organisations are typically reluctant to disclose the use of legal process outsourcing providers.<sup>1</sup>

Firms are reluctant to disclose their outsourcing practices for a variety of reasons including the ethical implications raised by legal process outsourcing. These ethical issues include competence and supervision of outsourced work, confidentiality and protection of trade secrets, the potential for the unauthorized practice of law, client disclosure, consultation and consent, data protection issues, digital information vulnerability, malpractice insurance and billing issues.

That said-recent surveys conservatively estimate global revenue from legal process outsourcing to be around \$ 400 million in 2010 and \$640 million in 2011, with revenue anticipated to reach \$ 2.4 Billion by 2012<sup>2</sup> and \$4 billion by 2014.<sup>3</sup>

Recent examples of the take-up by Australian businesses include:

- In 2009, Rio Tinto began outsourcing the bulk of its in-house legal work to India *via* an arrangement with CPA Global in a bid to cut its annual legal bill by 20 per cent.<sup>4</sup>
- ‘Over the past three years Simmons & Simmons, Allen & Overy, Pillsbury Winthrop Shaw & Pittman, Pinsent Masons, Linklaters and, most recently, of course, Australian heavyweights

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<sup>1</sup> Sally Kane, Law Firms Reluctant to disclose Their Outsourcing Practices, July 7 2010 available from <http://legalcareers.about.com/b/2010/07/07/law-firms-reluctant-to-disclose-their-outsourcing-practices.htm>

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- 83% of businesses AM Measure 50 refused to say whether they had used LPO;
- By contrast, conservative Fronterion estimated that between 65-75% of AM 50 companies use varying degrees LPO
- Reluctance to disclose LPOS work that could be linked to ethical ambiguity. A study by Fronterion in 2010 found that, although many law firms in the United States are using [legal outsourcing](#) providers for the first time, few are willing to admit in public

<sup>2</sup> Markets and Research Report, *2010 Leading Providers of Legal Process Outsourcing*, available at [http://www.researchandmarkets.com/research/aa7b23/2010\\_leading\\_provi](http://www.researchandmarkets.com/research/aa7b23/2010_leading_provi)

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Mallesons (now King & Wood Mallesons), Corrs Chambers Westgarth and Blake Dawson (now Ashurst) have all publicly acknowledged relationships with LPO providers.<sup>5</sup>

Reasons for the enthusiastic take-up of LPO services is often attributed to:

- financial imperatives in the wake of the global financial crisis and the subsequent impact of slowed global growth - one of the greatest challenges for the global economy in this slow growth environment is to raise productivity;<sup>6</sup> and
- innovation and acceptance of information technology.

Legal departments in government and the private sector are facing mounting pressure to reduce their legal spending and have subsequently demonstrated a greater willingness to consider alternatives. In addition to representing a response to the immediate financial environment, the use of legal outsourcing also represents a means of surviving in an increasingly global and competitive environment, where legal practitioners are being asked to do more, for less.

The utilisation of outsourcing may not only be of benefit to larger firms, but also small and medium firms, by enabling them to provide labour intensive services in circumstances where they would not ordinarily have sufficient ongoing staff levels to engage in such work.

Services are being outsourced to a wide range of countries including Philippines, South Africa and most notably India, who possess the advantages of a large pool of highly skilled individuals (some of whom have acquired legal education in educational institutions in the UK and US), share a common law background and possess a strong command of English.

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<sup>5</sup> Bob Gogel, 'Madras court ruling backs case for legal process outsourcing', *Lawyers Weekly*, 20 April 2012, available online at: <http://www.theaustralian.com.au/business/legal-affairs/madras-court-ruling-backs-case-for-legal-process-outsourcing/story-e6frg97x-1226333665374>

<sup>6</sup> See for example Organization for Economic Cooperation and Development, *Global Economic Outlook; Interim Assessment September 2012* available at <http://www.oecd.org/eco/economicoutlookanalysisandforecasts/Interimassessment6September2012.pdf> ; International Monetary Fund, *World Economic Outlook Report*, available at <http://www.imf.org/external/ns/cs.aspx?id=29> and The Conference Board's, *Global Economic Outlook 2012* available at: <http://www.conference-board.org/data/globaloutlook.cfm>

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There has also been a shift in the nature of services being outsourced, with services extending beyond more routine tasks such as transcription, discovery and document review and contract management; towards more high end work including providing assistance in drafting court documents, analysis of statutory and case law.

The emergence of legal outsourcing may also be attributed to rapidly improving technology and information exchange, the desire to find more cost effective ways to provide legal services and the impact of globalisation.

Thomas Friedman has described globalisation as a 'flattening' of the world through a combination of technology and 'geoeconomics', with technology enabling the proliferation of information and facilitating the division and distribution of tasks to those able to most effectively accomplish them regardless of their location.<sup>7</sup>

The increasing incidence of legal outsourcing may also be regarded as part of the trend towards the unbundling and commoditisation of legal services, as services are broken down into more discrete tasks and components, capable of being undertaken by a number of providers

More broadly, legal outsourcing may be seen as emerging from the more general growth and evolution of business and information technology, including:

- the growth of information technology outsourcing, as organisations sought to protect themselves from the 'millennium bug' or Y2K problem;
- the growth of business process outsourcing, such as payroll processing or employee benefits management; and

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<sup>7</sup> Mary Daly and Carole Silver, 2006-2007, 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services', 38 *Georgetown Journal of International Law* 401, 401

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- knowledge process outsourcing, which involve more complex processes where a degree of judgement needs to be exercised (for example, rather than a vendor performing data entry of insurance claim forms, KPO may require a vendor to evaluate insurance applications based on a set of criteria or business rules).<sup>8</sup>

Relevant factors in considering whether to outsource services include:

- costs (in terms of work being completed at lower rates than they would be if the work was completed by legal staff, as well as potential savings associated with employee salaries and office space rent);
- ability to supervise work; and
- reputation.

In terms of broader implications for the future of the legal profession Legal outsourcing raises a number of questions including:

- redefining what are to be considered legal services – significant in light of the prohibition against a person providing legal services, unless the person is sufficiently qualified and has been admitted to the legal profession, and to safeguard consumer interests;
- what are the implications for the training of junior lawyers, who would ordinarily undertake such work and who arguably gradually develop skills, expertise and judgement through participating in different aspects of a matter. There has also been some concern that outsourcing will lead to a reduction in the number of junior positions available.

## Risks

Legal outsourcing raises a number of ethical concerns for legal practitioners.

A key principle to bear in mind is that a practitioner cannot 'contract out' of his or her ethical obligations. This means that using an outsourcing service provider will not mediate a practitioner's professional responsibilities. Key areas are as follows:

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<sup>8</sup> Cassandra Burke Robertson, 2011, 'A Collaborative Model of Offshore Legal outsourcing', 43 *Arizona State Law Journal* 128, 129-131

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## 1. Data security and potential breach of client confidentiality

- Lawyers have a duty to maintain confidential client information, see: ASCR 9
- Issues with client confidentiality inter-relate with issues of cloud computing, as many outsourcing arrangements will operate through the hosting of information by a system outside the law practice
- Concerns regarding security against hacking, unauthorised access and inadvertent disclosure particularly having regard the vulnerability of digital information
- To the extent that the legal outsourcers will have access to and review confidential data, it is advisable that client consent is obtained

## 2. Conflicts of Interest

- Solicitors have a duty to avoid any conflicts of interest, see: ASCR 10 and 11
- Legal processors may not have the conflict checking systems in place within law firms. For example, may be possible for a legal processing firm to work for one party, whilst another division may be working for the opposing side

## 3. Adequate supervision over the performance and quality of the outsourced work

- Where work is outsourced, in particular if the work is outsourced to workers in a foreign country (possible language difficulties, technology savvy and issues of proximity), supervision of work becomes more difficult than if the work was being completed by a colleague at the firm.
- A solicitor ultimately remains responsible for any work undertaken by an employee and must be willing to take full responsibility for the final product.
- Prudent practice may require that solicitors obtain a sufficient understanding of recruitment, including ensuring that there are adequate background and reference checks, to ensure that any employees working on a matter are adequately qualified

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## A lesson from the UK; the West African Gas Pipeline Case

- In January this year, a decision of the England and Wales High Court in the matter of *West African Gas Pipeline Company Ltd v Willbros Global Holdings*,<sup>9</sup> illustrates the need for proper checks and balances to be in place.
- Involving Orders from applications in September and November 2011, the High Court found that West African Gas Pipeline (the claimant) had failed to provide proper discovery and was ordered to pay the defendant's wasted costs of £135,000 (approximately A\$205,000).
- The claimant had engaged two external litigation support providers, one of which was based in India, to fulfil its discovery obligations, which involved discovery of an initial 70,000 documents (approx.); with 72,000 more documents discovered in subsequent months.
- During the review of the initial 70,000 discovered documents, Willbros Global Holdings (the defendant) noticed an email from a chain of emails that had not been disclosed. This subsequently led to an extensive enquiry that ultimately exposed the inadequacy of the review of the documents performed by the external litigation support providers. The problems identified included:
  - problems with the de-duplication procedures used by the external litigation support providers, leading to a large number of duplicated documents which had not been properly identified and removed;
  - failure to deal with redactions consistently; and
  - failure to gather together all the documents required to be discovered, and then carry out a proper review process.
- The High Court:
  - noted that while there must be "some give and take" between parties in relation to difficulties which arise out of discovery, the court may exercise its discretion to make costs orders where there had been "a mistake or error"

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<sup>9</sup> *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC) is available from <http://www.bailii.org/ew/cases/EWHC/TCC/2012/396.html>

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- which has had significant consequences in terms of time and cost";
- held that the need to make further disclosures had resulted from the Claimant not undertaking a thorough review at the outset - on many occasions, machine-readable documents had not been provided;
  - Given the level of costs claimed by the Defendant and the orders made, it held that it was not appropriate to summarily assess these. Rather the costs were to be subject to a Detailed Assessment, with the claimant being required to make an interim payment of £135,000.
- Ramsey J found the defendant was entitled to have the costs wasted because the defendant had to:
    - consider, a number of times, duplicated copies of the same document;
    - analyse inconsistent redactions; and
    - review documents over a prolonged period which inevitably increased costs for the defendant as the discovery process became disrupted.

### **Suggested Best Practices when Considering LPO Services**

Preparatory steps legal practitioners might consider taking before working with a Legal Process Outsourcing providers include:

- Undertaking a first hand evaluation of the quality and reliability of the company;
- Investigating the company's background and reputation;
- Undertaking reference checks;
- Enquiring about the outsourcing company's policies: educational, hiring and training;
- Asking about and checking the qualifications of the individuals that will be undertaking the work; and
- Meeting with the company's core management staff.

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Jeffrey Teso<sup>10</sup> of CPA Global has commented that it is essential to:

- visit the LPO company where the work will be performed, even where the work is to be outsourced further afield;
- prepare instructions for the review team, participate in the team's training as well in regular meetings and communications, establish formal supervision processes and document questions and answers that are exchanged between the parties;
- undertake a sufficient and thorough briefing process to ensure that the team fully understands the issues and the tasks;
- document any follow up instructions that are provided to the LPO team - this can be helpful in making sure it is clear the lawyer is supervising the guidance;
- institute a quality assurance program to review the quality of the work and ensure the LPO company and any subcontractors (where relevant) are acting in accord with confidentiality, non-use, non-disclosure terms of the engagement agreements;
- provide regular briefings and feedback sessions; and
- assure yourself that the LPO company has the ability to create meaningful and actual separation (Chinese Walls) among matters being delivered for different clients.

## Regulatory perspectives

### United States

In 2008, the ABA released a formal opinion regarding a practitioner's obligations when outsourcing both legal and non-legal work. The opinion essentially provides that:

*'A lawyer may outsource legal or non-legal support service provided the lawyer remains ultimately responsible for rendering competent legal services to the client...'*<sup>11</sup>

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<sup>10</sup> Jeffrey Teso, Best Practices for Using a Legal Process Outsourcing Provider, 23 August 2011 Lexis Nexis Business available at

<http://www.lexisnexis.com/community/legalbusiness/blogs/lbcblog/archive/2011/08/23/best-practices-for-using-a-legal-process-outsourcing-provider.aspx>

<sup>11</sup> American Bar Association, Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services, 5 August 2008, available online at:

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As at November last year, six bar associations, (including the ABA Standing Committee on Ethics and Professional Responsibility) have now issued opinions.<sup>12</sup>

All of them have concluded that 'providing certain conditions are met the lawyer may at the same time outsource **legal** work and comply with his or her ethical obligations.

Collectively, the opinions issued to date suggest that lawyers may ethically engage with an LPO company to outsource **legal** services, provided he/she:

1. Properly supervises the work being performed by the non-lawyer;
2. Ensures the client's confidences/secrets are preserved;
3. Avoids conflicts of interest when outsourcing;
4. Bills the clients appropriately for services performed by non-lawyers;
5. Informs the client of the outsourcing arrangement when applicable.

Of all of these requirements, the duty to exercise proper supervision stands apart as the most important:

- the supervision needs to be direct and meaningful; and
- the lawyer must perform reasonable due diligence to ensure the non-lawyer is sufficiently competent to perform the outsourced tasks.

### United Kingdom

The UK has adopted a similar approach to that adopted in the United States.

In July 2010, the Solicitors Regulation Authority made the following statement:

*Where law firms are outsourcing some of their legal or administrative work to other law firms or non law firms, the SRA's guidance is that this is allowed on the basis that all relevant rules are complied with (Solicitors' Code of Conduct 2007) and that the arrangement is made transparent and is agreed with the client.*

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<sup>12</sup> Jeffrey Teso *Ethical Considerations When Using Legal Process Outsourcing Provider*, 23 August 2011 available at <http://litigationconferences.com/?p=22175>

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*Particular rules which would apply in legal outsourcing are:*

- *Rule 4 Confidentiality*
- *Rule 2 Client Care and Costs Information*

*Reserved activities/legal work must not be carried out by non lawyer organisations.*

*Indemnity insurance provision to cover acts/omissions resulting in issues of negligence or inadequate professional services*

*In accepting work from a client, the firm must always consider whether the work should be outsourced at all as they should have the necessary resources and competency to undertake the task. In summary a firm must act in the best interests of their client and comply with their core duties.*

The Law Society of England and Wales model client care letter and accompanying practice note also indicates that outsourcing should be disclosed and informed client consent obtained, consistent with the duty of confidentiality.<sup>13</sup>

## **Regulatory Views from Australia**

### *Western Australia*

Legal profession regulators have expressed the view that law firms using legal outsourcing are responsible for the standards of their work in accordance with legal professional legislation and conduct rules.<sup>14</sup>

In a recent interview, Ms Anna Liscia, Chair of the Legal Practice Board of Western Australia, stated that:

- Australian law firms would still be answerable to their clients and bound by the relevant Australian legislation and professional conduct rules.
- it would not be possible to regulate the legal services market fully, if the offshore legal outsourcing market offers services

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<sup>13</sup> Mark Ross, 2010, Ethics of Legal Outsourcing White Paper, Integreon, available online at: <http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2010/10/integreon-white-paper-ethics-of-legal-outsourcing-february-2010.pdf>

<sup>14</sup> Ainslie Van Oneselen, *Regulators Endorse More Outsourcing Work Offshore*, The Australian 11 November 2011, available at <http://www.theaustralian.com.au/business/legal-affairs/regulators-endorse-more-outsourcing-work-offshore/story-e6frq97x-1226191900728>

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- directly to the public without an Australian agent to review and take responsibility to the client for the legal work;
  - the challenge for regulators is to balance the protection of the public whilst not stifling the legal services market; and
  - it is important that clients are fully informed and have consented to the practice.

Ms Liscia said "... in WA it is the aim of the board to see what changes are required to the act, regulations and rules to take into account the various means of practice, in particular the offshore legal services market and the virtual legal firms,".

### *Victoria*

Ms Miranda Milne, Chief executive of Victoria's Legal Professional Indemnity insurer, the Legal Practitioners Liability Committee indicated:

- it would not prejudice whether outsourcing "causes an increased risk";
- it is not so much a premium issue as a "a risk-management issue,";
- law practices are urged to undertake due diligence, have care and control arrangements in place and use an appropriate "allocation of risk as between the legal outsourcer and the law firm."

Ms Milne observed that:

- law practices are not required to disclose to their insurer, whether they use offshore legal outsourcing;
- she is aware of the practice but said she understood the work being offshored was low-level legal work most suited to "document-heavy transactions"; and
- she did not believe there was an appetite for outsourcing legal work "that would otherwise require an Australian practising certificate.", drawing an analogy with the work performed by paralegals (who do not hold a practising certificate).

Ms Milne said she is comfortable with the legal outsourcing industry as "the terms and conditions of the insurance policy indicate that the

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insurer will not assume liability for a matter that wouldn't lie with the firm at law".

### *New South Wales*

Mr Stuart Westgarth, President of the NSW Law Society agreed that the obligation to maintain professional standards remained with the practitioner:

- current and proposed solicitors rules have application under old and new technologies; and
- further guidelines are being developed to assist the legal profession regarding the application to new technologies, including legal process outsourcing;.

When asked whether using offshore legal outsourcing would increase legal professional indemnity insurance premiums, Mr Paul McGahen Chief Executive of NSW's LawCover said:

- the specialist PI insurance company had found no correlation between outsourcing and increased claims activity. Accordingly, LawCover does not impose additional premiums on law practices that use outsourcing; and
- as with any emerging trend, LawCover would 'continue to monitor the situation'.

### *Draft practice guidelines*

Working together the Law Society of New South Wales and the NSW Office of Legal Service Commissioner have recently developed non-binding draft guidelines.<sup>15</sup>

The draft guidelines have been released for consultation and are available on the website of both those organisations. The practice guidelines are based on the findings of a major research project by the OLSC.

We understand that in due course the guidelines will be adopted by regulators in Queensland, Victoria and elsewhere.

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<sup>15</sup> NSW Department of the Attorney General and Justice, Office of Legal Service Commission, Outsourcing Practice Guidelines available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/vwFiles/Draft\\_Outsourcing\\_Practice\\_Guidelines.pdf/\\$file/Draft\\_Outsourcing\\_Practice\\_Guidelines.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Draft_Outsourcing_Practice_Guidelines.pdf/$file/Draft_Outsourcing_Practice_Guidelines.pdf)

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Firms are reluctant to disclose their outsourcing practices for a variety of reasons including the ethical implications raised by legal process outsourcing. These ethical issues include competence and supervision of outsourced work, confidentiality and protection of trade secrets, the potential for the unauthorized practice of law, client disclosure, consultation and consent, data protection issues, digital information vulnerability, malpractice insurance and billing issues.

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More broadly, legal outsourcing may be seen as emerging from the more general growth and evolution of business and information technology, including:

- the growth of information technology outsourcing, as organisations sought to protect themselves from the 'millennium bug' or Y2K problem;
- the growth of business process outsourcing, such as payroll processing or employee benefits management; and

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<sup>7</sup> Mary Daly and Carole Silver, 2006-2007, 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services', 38 *Georgetown Journal of International Law* 401, 401

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- knowledge process outsourcing, which involve more complex processes where a degree of judgement needs to be exercised (for example, rather than a vendor performing data entry of insurance claim forms, KPO may require a vendor to evaluate insurance applications based on a set of criteria or business rules).<sup>8</sup>

Relevant factors in considering whether to outsource services include:

- costs (in terms of work being completed at lower rates than they would be if the work was completed by legal staff, as well as potential savings associated with employee salaries and office space rent);
- ability to supervise work; and
- reputation.

In terms of broader implications for the future of the legal profession Legal outsourcing raises a number of questions including:

- redefining what are to be considered legal services – significant in light of the prohibition against a person providing legal services, unless the person is sufficiently qualified and has been admitted to the legal profession, and to safeguard consumer interests;
- what are the implications for the training of junior lawyers, who would ordinarily undertake such work and who arguably gradually develop skills, expertise and judgement through participating in different aspects of a matter. There has also been some concern that outsourcing will lead to a reduction in the number of junior positions available.

## Risks

Legal outsourcing raises a number of ethical concerns for legal practitioners.

A key principle to bear in mind is that a practitioner cannot 'contract out' of his or her ethical obligations. This means that using an outsourcing service provider will not mediate a practitioner's professional responsibilities. Key areas are as follows:

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<sup>8</sup> Cassandra Burke Robertson, 2011, 'A Collaborative Model of Offshore Legal outsourcing', 43 *Arizona State Law Journal* 128, 129-131

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## 1. Data security and potential breach of client confidentiality

- Lawyers have a duty to maintain confidential client information, see: ASCR 9
- Issues with client confidentiality inter-relate with issues of cloud computing, as many outsourcing arrangements will operate through the hosting of information by a system outside the law practice
- Concerns regarding security against hacking, unauthorised access and inadvertent disclosure particularly having regard the vulnerability of digital information
- To the extent that the legal outsourcers will have access to and review confidential data, it is advisable that client consent is obtained

## 2. Conflicts of Interest

- Solicitors have a duty to avoid any conflicts of interest, see: ASCR 10 and 11
- Legal processors may not have the conflict checking systems in place within law firms. For example, may be possible for a legal processing firm to work for one party, whilst another division may be working for the opposing side

## 3. Adequate supervision over the performance and quality of the outsourced work

- Where work is outsourced, in particular if the work is outsourced to workers in a foreign country (possible language difficulties, technology savvy and issues of proximity), supervision of work becomes more difficult than if the work was being completed by a colleague at the firm.
- A solicitor ultimately remains responsible for any work undertaken by an employee and must be willing to take full responsibility for the final product.
- Prudent practice may require that solicitors obtain a sufficient understanding of recruitment, including ensuring that there are adequate background and reference checks, to ensure that any employees working on a matter are adequately qualified

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## A lesson from the UK; the West African Gas Pipeline Case

- In January this year, a decision of the England and Wales High Court in the matter of *West African Gas Pipeline Company Ltd v Willbros Global Holdings*,<sup>9</sup> illustrates the need for proper checks and balances to be in place.
- Involving Orders from applications in September and November 2011, the High Court found that West African Gas Pipeline (the claimant) had failed to provide proper discovery and was ordered to pay the defendant's wasted costs of £135,000 (approximately A\$205,000).
- The claimant had engaged two external litigation support providers, one of which was based in India, to fulfil its discovery obligations, which involved discovery of an initial 70,000 documents (approx.); with 72,000 more documents discovered in subsequent months.
- During the review of the initial 70,000 discovered documents, Willbros Global Holdings (the defendant) noticed an email from a chain of emails that had not been disclosed. This subsequently led to an extensive enquiry that ultimately exposed the inadequacy of the review of the documents performed by the external litigation support providers. The problems identified included:
  - problems with the de-duplication procedures used by the external litigation support providers, leading to a large number of duplicated documents which had not been properly identified and removed;
  - failure to deal with redactions consistently; and
  - failure to gather together all the documents required to be discovered, and then carry out a proper review process.
- The High Court:
  - noted that while there must be "some give and take" between parties in relation to difficulties which arise out of discovery, the court may exercise its discretion to make costs orders where there had been "a mistake or error"

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<sup>9</sup> *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC) is available from <http://www.bailii.org/ew/cases/EWHC/TCC/2012/396.html>

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- which has had significant consequences in terms of time and cost";
- held that the need to make further disclosures had resulted from the Claimant not undertaking a thorough review at the outset - on many occasions, machine-readable documents had not been provided;
  - Given the level of costs claimed by the Defendant and the orders made, it held that it was not appropriate to summarily assess these. Rather the costs were to be subject to a Detailed Assessment, with the claimant being required to make an interim payment of £135,000.
- Ramsey J found the defendant was entitled to have the costs wasted because the defendant had to:
    - consider, a number of times, duplicated copies of the same document;
    - analyse inconsistent redactions; and
    - review documents over a prolonged period which inevitably increased costs for the defendant as the discovery process became disrupted.

### **Suggested Best Practices when Considering LPO Services**

Preparatory steps legal practitioners might consider taking before working with a Legal Process Outsourcing providers include:

- Undertaking a first hand evaluation of the quality and reliability of the company;
- Investigating the company's background and reputation;
- Undertaking reference checks;
- Enquiring about the outsourcing company's policies: educational, hiring and training;
- Asking about and checking the qualifications of the individuals that will be undertaking the work; and
- Meeting with the company's core management staff.

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Jeffrey Teso<sup>10</sup> of CPA Global has commented that it is essential to:

- visit the LPO company where the work will be performed, even where the work is to be outsourced further afield;
- prepare instructions for the review team, participate in the team's training as well in regular meetings and communications, establish formal supervision processes and document questions and answers that are exchanged between the parties;
- undertake a sufficient and thorough briefing process to ensure that the team fully understands the issues and the tasks;
- document any follow up instructions that are provided to the LPO team - this can be helpful in making sure it is clear the lawyer is supervising the guidance;
- institute a quality assurance program to review the quality of the work and ensure the LPO company and any subcontractors (where relevant) are acting in accord with confidentiality, non-use, non-disclosure terms of the engagement agreements;
- provide regular briefings and feedback sessions; and
- assure yourself that the LPO company has the ability to create meaningful and actual separation (Chinese Walls) among matters being delivered for different clients.

## Regulatory perspectives

### United States

In 2008, the ABA released a formal opinion regarding a practitioner's obligations when outsourcing both legal and non-legal work. The opinion essentially provides that:

*'A lawyer may outsource legal or non-legal support service provided the lawyer remains ultimately responsible for rendering competent legal services to the client...'*<sup>11</sup>

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<sup>10</sup> Jeffrey Teso, Best Practices for Using a Legal Process Outsourcing Provider, 23 August 2011 Lexis Nexis Business available at

<http://www.lexisnexis.com/community/legalbusiness/blogs/lbcblog/archive/2011/08/23/best-practices-for-using-a-legal-process-outsourcing-provider.aspx>

<sup>11</sup> American Bar Association, Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services, 5 August 2008, available online at:

<http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf>

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As at November last year, six bar associations, (including the ABA Standing Committee on Ethics and Professional Responsibility) have now issued opinions.<sup>12</sup>

All of them have concluded that 'providing certain conditions are met the lawyer may at the same time outsource **legal** work and comply with his or her ethical obligations.

Collectively, the opinions issued to date suggest that lawyers may ethically engage with an LPO company to outsource **legal** services, provided he/she:

1. Properly supervises the work being performed by the non-lawyer;
2. Ensures the client's confidences/secrets are preserved;
3. Avoids conflicts of interest when outsourcing;
4. Bills the clients appropriately for services performed by non-lawyers;
5. Informs the client of the outsourcing arrangement when applicable.

Of all of these requirements, the duty to exercise proper supervision stands apart as the most important:

- the supervision needs to be direct and meaningful; and
- the lawyer must perform reasonable due diligence to ensure the non-lawyer is sufficiently competent to perform the outsourced tasks.

### United Kingdom

The UK has adopted a similar approach to that adopted in the United States.

In July 2010, the Solicitors Regulation Authority made the following statement:

*Where law firms are outsourcing some of their legal or administrative work to other law firms or non law firms, the SRA's guidance is that this is allowed on the basis that all relevant rules are complied with (Solicitors' Code of Conduct 2007) and that the arrangement is made transparent and is agreed with the client.*

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<sup>12</sup> Jeffrey Teso *Ethical Considerations When Using Legal Process Outsourcing Provider* , 23 August 2011 available at <http://litigationconferences.com/?p=22175>

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*Particular rules which would apply in legal outsourcing are:*

- *Rule 4 Confidentiality*
- *Rule 2 Client Care and Costs Information*

*Reserved activities/legal work must not be carried out by non lawyer organisations.*

*Indemnity insurance provision to cover acts/omissions resulting in issues of negligence or inadequate professional services*

*In accepting work from a client, the firm must always consider whether the work should be outsourced at all as they should have the necessary resources and competency to undertake the task. In summary a firm must act in the best interests of their client and comply with their core duties.*

The Law Society of England and Wales model client care letter and accompanying practice note also indicates that outsourcing should be disclosed and informed client consent obtained, consistent with the duty of confidentiality.<sup>13</sup>

## **Regulatory Views from Australia**

### *Western Australia*

Legal profession regulators have expressed the view that law firms using legal outsourcing are responsible for the standards of their work in accordance with legal professional legislation and conduct rules.<sup>14</sup>

In a recent interview, Ms Anna Liscia, Chair of the Legal Practice Board of Western Australia, stated that:

- Australian law firms would still be answerable to their clients and bound by the relevant Australian legislation and professional conduct rules.
- it would not be possible to regulate the legal services market fully, if the offshore legal outsourcing market offers services

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<sup>13</sup> Mark Ross, 2010, Ethics of Legal Outsourcing White Paper, Integreon, available online at: <http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2010/10/integreon-white-paper-ethics-of-legal-outsourcing-february-2010.pdf>

<sup>14</sup> Ainslie Van Oneselen, *Regulators Endorse More Outsourcing Work Offshore*, The Australian 11 November 2011, available at <http://www.theaustralian.com.au/business/legal-affairs/regulators-endorse-more-outsourcing-work-offshore/story-e6frq97x-1226191900728>

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- directly to the public without an Australian agent to review and take responsibility to the client for the legal work;
  - the challenge for regulators is to balance the protection of the public whilst not stifling the legal services market; and
  - it is important that clients are fully informed and have consented to the practice.

Ms Liscia said "... in WA it is the aim of the board to see what changes are required to the act, regulations and rules to take into account the various means of practice, in particular the offshore legal services market and the virtual legal firms,".

### *Victoria*

Ms Miranda Milne, Chief executive of Victoria's Legal Professional Indemnity insurer, the Legal Practitioners Liability Committee indicated:

- it would not prejudice whether outsourcing "causes an increased risk";
- it is not so much a premium issue as a "a risk-management issue,";
- law practices are urged to undertake due diligence, have care and control arrangements in place and use an appropriate "allocation of risk as between the legal outsourcer and the law firm."

Ms Milne observed that:

- law practices are not required to disclose to their insurer, whether they use offshore legal outsourcing;
- she is aware of the practice but said she understood the work being offshored was low-level legal work most suited to "document-heavy transactions"; and
- she did not believe there was an appetite for outsourcing legal work "that would otherwise require an Australian practising certificate.", drawing an analogy with the work performed by paralegals (who do not hold a practising certificate).

Ms Milne said she is comfortable with the legal outsourcing industry as "the terms and conditions of the insurance policy indicate that the

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insurer will not assume liability for a matter that wouldn't lie with the firm at law".

### *New South Wales*

Mr Stuart Westgarth, President of the NSW Law Society agreed that the obligation to maintain professional standards remained with the practitioner:

- current and proposed solicitors rules have application under old and new technologies; and
- further guidelines are being developed to assist the legal profession regarding the application to new technologies, including legal process outsourcing;

When asked whether using offshore legal outsourcing would increase legal professional indemnity insurance premiums, Mr Paul McGahen Chief Executive of NSW's LawCover said:

- the specialist PI insurance company had found no correlation between outsourcing and increased claims activity. Accordingly, LawCover does not impose additional premiums on law practices that use outsourcing; and
- as with any emerging trend, LawCover would 'continue to monitor the situation'.

### *Draft practice guidelines*

Working together the Law Society of New South Wales and the NSW Office of Legal Service Commissioner have recently developed non-binding draft guidelines.<sup>15</sup>

The draft guidelines have been released for consultation and are available on the website of both those organisations. The practice guidelines are based on the findings of a major research project by the OLSC.

We understand that in due course the guidelines will be adopted by regulators in Queensland, Victoria and elsewhere.

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<sup>15</sup> NSW Department of the Attorney General and Justice, Office of Legal Service Commission, Outsourcing Practice Guidelines available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/vwFiles/Draft\\_Outsourcing\\_Practice\\_Guidelines.pdf/\\$file/Draft\\_Outsourcing\\_Practice\\_Guidelines.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Draft_Outsourcing_Practice_Guidelines.pdf/$file/Draft_Outsourcing_Practice_Guidelines.pdf)

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