

Trouble offshore

The ethics of sending legal work to an outsourcing firm overseas.

By Daniel Casciato

While the practice of offshoring legal work — outsourcing certain legal tasks to common-law-trained lawyers in India and elsewhere — has been underway in the United States for a few years, the concept is only now starting to gain ground in Canada. For law firm or law department lawyers considering the offshore route, one of the first questions that often arises is whether this practice breaches any rules of professional ethics.

No Canadian law society has yet ruled directly on the ethics of offshoring, but existing rules do cover the question of delegating and supervising work to non-members of the bar. “There’s no prohibition against offshoring legal services,” says Allan Hutchinson, distinguished research professor at Osgoode Hall Law

School in Toronto. “However, from an ethical standpoint, whatever occurs, the lawyer remains responsible for the quality of that work.”

Hutchinson, currently writing a book on legal ethics and professional responsibility, worries that clients will not be billed appropriately for offshored work and that law firms will offshore solely to make extra profits, which he finds unethical. For these reasons, he’s opposed to offshoring.

“If you’re getting somebody else to do work so you can pass the savings cost of that work to the client, that’s

not the problem,” he says. “But the problem is whether you charge a premium. That’s a much more dubious practice. It’s reasonable to add some small premium, but you can’t charge at your normal rates, especially if the reason for offshoring is to get a much cheaper deal.”

“The buck stops with the lawyer. So you’d better be sure to hire a qualified outsourcing firm.”

Allan Hutchinson, Osgoode Hall Law School, Toronto



In the U.S., the New York, Los Angeles and San Diego bar associations have weighed in directly on this matter, and have determined that lawyers can ethically offshore work without violating the code of professional responsibility,

provided they follow these ethical considerations:

- take responsibility for the work;
- obtain the client's permission;
- preserve the client's confidentiality;

Ethical Hypothetical *How not to offshore legal work.*

Question: James is a litigation associate in a large national firm. A major pharmaceutical client has retained the firm to defend a class action over a diabetic drug, and James has been tasked with conducting research on key elements of similar actions in the past.

James outsources the work to a Bangalore legal services company, which produces a detailed memo days later. He submits the work as his own, failing to tell the senior partner or the client where it came from. But the memo overlooks a key decision, upon which the claim for certification eventually turns. The client is incensed. How much trouble is James, the supervising partner, and the law firm in?



ANNOUNCEMENT

Donald R. Munroe, Q.C.

Heenan Blaikie is pleased to announce that Donald R. Munroe, Q.C. has joined the firm as counsel.

Don began his legal career as a litigator in civil, criminal and administrative law matters. More recently, he has become widely known as one of Canada's most respected arbitrators and mediators in labour relations matters, as well as in a broad range of commercial, employment, human rights, securities, commodity-pricing and other civil disputes. Over the years, he has also advised governments on a range of public policy issues.

Don served as chair of the BC Labour Relations Board from 1978-81, then as a visiting professor of law at the University of Victoria from 1982-85, teaching constitutional and labour law. He has since acted as arbitrator and mediator in hundreds of cases, including appointments by successive provincial and federal governments to assist in the resolution of complex disputes affecting the public interest. Don was appointed by the BC government in 2004 as the Mediation-Arbitration Commissioner under the *Coastal Forest Industry Dispute Settlement Act*, and by the federal government in 1993 as a Conciliation Commissioner in the violent Giant Mine dispute in Yellowknife.

As counsel to Heenan Blaikie, Don will be assisting both public and private bodies, helping them address legal, policy and industry challenges. Don will also continue to arbitrate and mediate commercial disputes, in addition to advising clients on constitutional, labour, environmental, aboriginal and civil files generally.

With 440+ lawyers across Canada, Heenan Blaikie is one of the country's leading law firms, delivering a full range of legal services and innovative business solutions to clients ranging from start-ups to many of Canada's largest companies, institutions and governing bodies.

Donald R. Munroe • 604 891.1155 • dmunroe@heenan.ca

Heenan Blaikie – Vancouver

1055 West Hastings Street, Suite 2200
Vancouver, B.C. V6E 2E9 • 604 669.0011

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Answer: According to Osgoode Hall Law School professor Allan Hutchinson, James is in a great deal of trouble, and so is his firm.

"Any lawyer who did this without the knowledge of a law firm or his partners is looking to get fired," he says. "If the law firm did know what was going on, they will be open to a malpractice action. The client is entitled to be incensed."

Angelo Paparelli, a California-based lawyer who offshores legal work, says that it's clear that the firm and James violated professional ethics. "The law firm is in huge trouble, especially over its failure to supervise James," he says.

"They have perhaps exposed themselves to communicative malpractice liability. I think that James is probably out of a job and justly so, because he had no authority to do that. He also probably committed wire and mail fraud if he sent it through the Internet to the client as his own work product. So he might be in criminal hot water as well."

But Philadelphia lawyer Sharmil McKee sees it a bit differently. While she emphasizes that it is a law industry standard to review and approve work before submitting it to court, she doesn't see a big claim for malpractice by the client. "Attorneys make mistakes all the time," she says. "Most mistakes can be corrected and they can file an amended pleading or interlocutory appeal."

The lesson to be learned from this hypothetical is that an associate, on his or her own, does not contract with an offshoring enterprise. "These relationships are negotiated and entered into from the top," says Paparelli. "It is only done with the proper infrastructure for the review of the work product."

Had the law firm known, it could have gone back to the LPO and told its directors that their employee didn't do a good job and that its relationship with them is at risk. "There may even be contractual penalties that they have already negotiated," says Paparelli. "It's not for the associate to engage in that secretive outsourcing."

Troubles à l'horizon

L'impartition du travail juridique soulève de nombreuses questions d'ordre déontologique.

Contrairement aux États-Unis, où l'impartition du travail juridique vers les pays à faible coût, comme l'Inde, existe depuis quelques années, le phénomène est relativement nouveau au Canada. Il reste que la pratique mérite une réflexion quant aux questions déontologiques soulevées.

Aucun barreau canadien n'a encore statué sur la question de l'impartition juridique, alors rien ne s'y oppose en principe. Cependant les règles en vigueur s'intéressent aux circonstances dans lesquelles des tâches sont déléguées à des non juristes. L'avocat doit assurer une surveillance et assumer intégralement la responsabilité du travail qui lui a été confié.

Allan Hutchinson, professeur de droit à Osgoode Hall, s'interroge également sur la conduite des bureaux qui pratiquent l'impartition avec l'objectif d'empocher tous les

profits. Les économies réalisées devraient revenir à leurs clients, affirme-t-il.

Dans le pays de l'Oncle Sam, les barreaux de New York, Los Angeles et San Diego ont imposé certaines conditions explicites à l'impartition juridique. Notamment l'avocat doit :

- assumer la responsabilité du travail qui lui a été confié;
- obtenir l'autorisation du client;
- maintenir la confidentialité du client;
- s'assurer de l'absence de conflits d'intérêt;
- produire une facture juste et raisonnable; et
- assurer la surveillance du travail qui fait l'objet de l'impartition.

L'importance d'en informer le client tient du fait que des informations confidentielles sur celui-ci seront partagées avec la firme outre-mer. Le client doit comprendre qu'une tierce

partie sera engagée pour fournir certains services juridiques et être rassuré que le secret de ces renseignements sera respecté. L'avocat sera bien avisé d'obtenir au préalable le consentement du client par écrit.

Faute de tels éclaircissements, le fait pour un cabinet de sous-traiter du travail à une firme étrangère sans en informer son client de l'arrangement pourra mettre en péril les bonnes relations avec celui-ci.

Outre la réduction des coûts, l'impartition juridique présente l'avantage de pouvoir préparer un dossier en moins de temps, soutient Rjon Robins, un consultant en marketing juridique. Il rappelle toutefois l'importance d'être vigilant et de toujours réviser ce qu'on a délégué à un autre. Forcément car c'est à l'avocat qu'il incombe la responsabilité de s'assurer que le travail est bien fait.

—Yves Faguy

- examine any potential conflicts;
- bill appropriately; and
- exercise proper supervision of the work being outsourced.

Angelo Paparelli of Paparelli & Partners, a multi-jurisdictional law firm with offices in California and New York State, offshores legal work to Legal Process Outsourcing (LPO) firms overseas. He stresses that before any lawyer considers offshoring, it is imperative to inform the client.

If a lawyer were to send information given by the client to an LPO it will, by necessity, be sharing solicitor-client-privileged information. So the lawyer needs to disclose the outsourcing relationship to the client and receive approval before sending out the work. "There must be strict data security and client confidentiality privileges that the lawyer, through due diligence, confirms that the LPO provider adheres to," says Paparelli.

"There must be disclosure to the client, and the client must consent to using an LPO," he adds. "As a lawyer, you need to make sure you get it in writing that the client understands you are using a third party to carry out some legal services."

Sharmil McKee of the McKee Law Office in Philadelphia says that it's always a good client relations practice to inform the

client about how legal work is performed. "Otherwise, a firm risks a client feeling lied to or deceived," she says. "While clients understand that a lower-level paralegal will perform some research tasks, they are probably not aware that an outsourced firm can write briefs to be submitted to court."

Florida attorney Rjon Robins, who runs HowTo-MakeItRain.com, a legal marketing consulting firm, is in favour of offshoring because of the cost savings, the ability to prepare for a case quickly without maintaining a large staff, and the ability to make progress 24 hours a day on a case, since many LPOs are in different time zones.

"Lawyers need to realize the benefits available for themselves, their families and their clients by being able to have work done for less money, in less time, and not be intimidated by the prospect of offshoring," he says.

But Robins adds that any lawyer who is thinking about delegating work to an LPO has to supervise the outcome of the work. "The buck stops with the lawyer," he says. "So you'd better be sure to hire a qualified outsourcing firm, train them well for the tasks delegated to them, and actually read what they give you back." ■

Daniel Casciato is a freelance writer based in Pittsburgh, PA.