

ETHICAL IMPERATIVES IN AN LPO

PART I – CONFLICT CHECKING



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Ethical Imperatives in an LPO

Part I-Conflict Checking

Legal Process Outsourcing companies supplement both in-house and firm-based attorneys by performing a variety of legal services – including legal research and writing, deposition summaries, contract and document drafting and reviewing, pre-litigation support, drafting of memorandum, preparation of trial and appellate-level pleadings and briefs, and discovery and patent services.

Bar committees in New York City, Los Angeles County, and San Diego County have all ruled that *“lawyers may contract with foreign lawyers not admitted to practice in any jurisdiction in the United States... to perform legal work for U.S. clients.”*¹

As increasing numbers of in-house counsel and firm-based attorneys evaluate the significant cost savings offered by LPOs, they must also factor into consideration an LPO’s commitment to thoroughly upholding the ethical obligations lawyers implicitly owe their clients. Because, while utilizing an LPO may result in efficiencies and significant cost savings, those benefits are meaningless if the outsourcing results in an ethical breach such as conflicts of interest.

Conflicts of Interest

A conflict of interest can generally be defined as a situation where a person in a position of trust (such as a lawyer) has actual or potential competing interests (professional or personal) that make it difficult for that person to fulfill his/her duties to a client in an impartial manner.

In the legal profession, a law firm is prohibited, by the duty of loyalty owed to a client, from representing any other party with interests that are adverse to those of any current client. The most common example of this is the fact that the same law firm will not represent opposing parties in a case. The actual or even potential existence of a conflict of interest can create an appearance of impropriety, undermining the client’s confidence in the firm.

¹ Steven J. Mintz, *Ethics Opinions Allow Foreign Legal Outsourcing*, ABA Litig. News Online, July 2007, at: http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html

Conflict Checking

In terms of legal process outsourcing, the New York City Bar’s statement opined that “[a]s a threshold matter, the outsourcing ...lawyer should ask the intermediary, which employs or engages an overseas non-lawyer, about its conflict checking procedures and about how it tracks work performed for other clients.”²

When evaluating the value of an intermediary LPO, one of the primary concerns expressed by in-house and firm-based counsel alike is the avoidance of conflicts of interest. Attorneys know that conflict checking can be substantial even within a single firm, so there is legitimate cause for consideration when contemplating employing an LPO that could potentially be providing similar services to a number of firms. This is why it is imperative for an LPO – as both a duty of loyalty and as a professional tenant – to design and implement comprehensive conflict checking systems.

Internal Protocol

Before an LPO even enters into conversations with counsel, the LPO should have an initial foundation in place to ensure ethical conduct. This starts with education and training in conflict avoidance for each employee, onshore and offshore.

Training should include an employee handbook with written protocol emphasizing the ethical requirements for conflict avoidance. And while a thorough overview is the first part of the internal foundation, it is of little value without a proactive policy for conflict disclosure.

The protocol for disclosure should cast a wide net, requiring disclosure on any actual or possible conflict of interest from any employee assigned to a project. This disclosure requirement should include the existence of any actual or potential conflicting interest, whether personal or professional. Any such disclosure must be made at the beginning of the project or as soon as the actual or potential conflict is recognized.

Information Collection

“A legal outsourcing company should have a conflicts checking procedure in place that... includes avoidance of a concurrent conflict of interest with a client already engaged, and avoidance of a significant risk that the representation of one client may be materially limited by responsibilities to another client.”³

² NYCBA, Formal Op. 2006-3

³ American Bar Association Model Rule of Professional Conduct 1.7.

Once the value of distributing work to an LPO has been established, it is vital for both the LPO and the client's counsel to ensure sufficient communication to allow for viable conflict checking. To achieve this level of communication, it is helpful to have a tool in place at the outset to gather high level information and keywords (ranging from the clients' business names and principal names, to client subsidiary or parent companies, to business sectors, to the nature of the legal proceeding). A detailed Work Product Request Form can collect these high level keywords and allow for more thorough conflict checking.

Of course, non-disclosure agreements should be in place with every employee of an LPO to allow the client's counsel to comfortably provide enough searchable data to avoid conflicts.

Electronic Referencing

"A law firm shall keep records of prior engagements... and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements..."⁴

Data from the Work Product Request Forms should then be used to populate and maintain a searchable database with keywords and summaries of each client and case.

As an alternative to custom databases, many time and billing software programs contain conflict of interest functionality. When evaluating a time and billing software program, an LPO should thoroughly QA the conflict checking functionality.

Summary

Legal Process Outsourcing companies are doubly indebted – to the client and to the client's counsel – to uphold ethical standards. Conflict checking should be thoroughly pursued by employing internal measures (training, written protocols, and non-disclosure agreements), detailed work process request forms to capture searchable data, and effective electronic referencing via project databases or time/billing software programs.

⁴ DR 5 – 105(E), New York Lawyers Code of Ethical Responsibility