Outsourcing of Legal Services

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"Get in on the Act" is a regular column from the Law Society's Ethics & Practice Unit which details practitioners' statutory professional obligations and responsibilities.

The aim of this article is to provide assistance to law practices who are considering outsourcing some of their legal work to law practices which operate from international jurisdictions.

The outsourcing may for example involve document drafting/preparation and legal research on particular aspects of a client's matter. It is, however, important that law practices who are considering outsourcing legal work on this basis be aware of their statutory and professional obligations under the *Legal Practitioners Act*, 1981 (the Act) and the Australian Solicitors' Conduct Rules (ASCR).

CONFIDENTIALITY

Practitioners have an obligation to maintain client confidentiality as expressed by Australian Solicitors' Conduct Rule (ASCR) 9. This duty remains after termination of the retainer and even after death of the client.

Practitioners must accordingly not disclose any information that is confidential to a client except as permitted by the exceptions contained in ASCR 9.2.

One exception is where the client provides express or implied authority. It is however recommended that where practitioners intend to provide confidential client information to a third party that they obtain the client's informed written consent and do not merely rely on implied consent.

Practitioners should also be mindful of the fact that when engaging a third party in this manner they may effectively be giving up control of the client's confidential information.

It is therefore recommended that practitioners consider the risks associated with such engagement of a third party especially when it involves a third party in an international jurisdiction.

One of the primary considerations may be how to ensure that no confidential client information is retained by the third party once the work has been completed.

INSURANCE AND JURISDICTION

The provision of confidential client information to a third party in another country could potentially raise both jurisdictional and insurance (PII) issues should things go wrong. In this context geographical exclusions may apply to your insurance cover and practitioners would be well advised to obtain advice on this aspect in advance.

Practitioners should therefore be mindful of the possible remedies they may have at their disposal should there be a breach of confidentiality by the outsourced service provider and whether or not such breach will be covered by their insurance.

The following non-exhaustive list of questions may prove useful for consideration:

- Will the SA law practice lose effective control of the confidential client information once it's been provided to the third party?
- Whether or not the third party is insured?
- What recourse, if any, the SA firm will have against the third party's insurance if confidentiality is breached?

STATUTORY REQUIREMENTS

If the outsourcing is limited to mere legal research and drafting of documents on the instructions of the local law practice there may not necessarily be a breach of the requirements of the *Legal Practitioners Act*, 1981 (the Act).

Where it would get difficult is if the international firm is allowed to have direct contact with and provide advice to the client.

The danger lies in possible breaches of the requirements of sections 21 and 23 of the Act unless the overseas practitioners are admitted in SA and hold current SA practising certificates and (if required) have provided the required statutory notifications for the provision of legal services in SA.

Section 21 of the *Legal Practitioners Act*, 1981 (the Act) makes it an offence to practise the profession of the law in South Australia unless you are a local or interstate legal practitioner. Therefore, if the international service provider steps outside of the boundaries of mere drafting and research they may find themselves on the wrong side of this provision.

The local law practice must also be aware of the prohibitions contained in Sections 23, (2) and 3(a) of the Act. These sections respectively state that if a person (whether or not a legal practitioner) holds out an unqualified person as being entitled to practise the profession of the law, the person is guilty of an offence and, further, that if a legal practitioner permits or aids an unqualified person to practise the profession of the law, or acts in collusion with an unqualified person so as to enable that person to practise the profession of the law, that the practitioner is guilty of an offence.

Lastly, if and when entering into agreements for remuneration of such unqualified third parties in this context, practitioners should be mindful of the provisions in section 23(3)(b) of the Act which makes it an offence to share profits arising from legal practice with unqualified persons. Unqualified persons in this context refers to people who are not entitled to practise the profession of the law in SA.

Practitioners are welcome to contact the Ethics and Practice Unit on **ethicsandpractice@lawsocietysa.asn.au** or 82290229 if they require further information. B