

Outsourcing legal work raises privacy concerns

By Helen Burnett
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Outsourcing certain types of legal work to third parties located offshore may not be common practice in Ontario at the moment, but there are already concerns about how it would affect issues such as privacy if it were to become more prevalent.

"I think it's something that we need to really be on guard against, that certainly will give rise to a lot of problems if it happens on a more widespread basis," Toronto immigration lawyer Sergio Karas recently told Law Times.

At a conference of the American Immigration Lawyers Association in Toronto in August, Karas noted several issues relating to the outsourcing of work involving client information. For one thing, the lawyer is not as close to the work produced, in terms of being able to review it, but remains ultimately responsible for it.

"We have to realize that technology is great, but the question of outsourcing has very serious limitations. And the limitations should be dictated by the limits imposed by privacy legislation and by solicitor and client privileges," Karas said later.

A certain amount of outsourcing has always taken place in the legal profession for specific, often more mechanical tasks delegated to third parties such as court filing agents and legal process servers, Karas said, but those individuals are ultimately not participating in the preparation of the documents.

He added, however, that "now we have a situation in which, I think more so in the United States than in Canada, a lot of law firms, although I don't know what the big firms are doing, are outsourcing certain tasks – for example, research and financial information disclosure or things like that – to individuals who are not even in Canada.

"The concern is that we are dealing with people in another country who are not subject to U.S. or Canadian law, as the case may be, and we have no control over it because they are not our employees," said Karas.

In the field of immigration law, the concept of outsourcing could be problematic because the forms being prepared contain information that may give rise to misrepresentation, he said.

And with information moving back and forth online, Karas added, there are also serious implications for privacy legislation.

"You open yourself to a very serious problem, because if something goes wrong and data is one day disclosed to somebody else, who is responsible? Is the lawyer responsible for it, or is the third party provider who let the breach occur responsible for it?"

"I think that it is a very serious consideration that you have to bear in mind, to be able to say to the client that you have full control of the information and anybody who is working on your file is under your

supervision," said Karas.

Mark Hayes, chair of the privacy law section of the Ontario Bar Association, said offshore outsourcing by large firms is more common in the United States and Britain than in Ontario.

"As long as it is done between licensed lawyers in Ontario, there isn't really a confidentiality issue. They just act as their agents, they are subject to the same confidentiality risks," said Hayes.

"There are concerns when you start to look at sending substantive work outside of the jurisdiction, because the people who will be doing the work won't be subject to the same ethical and confidentiality rules as lawyers are in Ontario, so clearly that raises some privacy concerns. It raises some ethical and professional responsibility concerns.

"What some firms I think will ultimately decide is that the potential problems may overshadow the cost benefits, but that is an analysis that depends on the type of work. It depends on the amount of the cost savings, because it is all really about cost, and the level of risk that the firm and the client are willing to take on," said Hayes.

Legal research is an area where offshore outsourcing has been developing in other jurisdictions, Hayes noted, but so far outsourcing suppliers have focused on training for the larger legal markets such as the U.S and Britain.

"At this point we are not seeing anytime soon on the horizon a lot of work being done to train lawyers in offshore jurisdictions in Canadian law. The market is just not all that big, and so it may be some time before we see a lot of availability of that type of research."

Hayes said one area where outsourcing could develop quickly is in IP, such as patent drafting, because of the similar nature of the standards from country to country.