

Outsourcing In-House

With an increasing array of services, legal process outsourcing is evolving quickly to meet the needs of in-house counsel BY BEV CLINE

AT ONE TIME, much of the focus on legal process outsourcing (LPO) was on e-discovery, but the extent to which these providers have diversified their services suggests in-house counsel might want to re-visit what's being offered these days.

It's not only the explosion in data, it's the corresponding "explosion in the variety of services LPOs provide that's opened up new avenues for in-house counsel," says Kelly Friedman, a partner in the Toronto office of Davis LLP.

"In the legal profession, technology has allowed us to really fragment tasks into smaller and smaller bits," says Friedman, former chair of the Canadian working group of the Sedona Conference, a non-profit think tank that has developed national electronic discovery principles. "LPO really made inroads with e-discovery, but has diversified into corporate compliance, trade-mark management, property lease review, M&A due diligence, intellectual property searching and secretarial services. Once you get the people and processes in place, and in-house counsel feel comfortable dealing with these types of relationships and managing these types of service contracts, then really, the sky's the limit in what you can outsource."

Susan Wortzman, the principal of Wortzmans, a Toronto law firm that focuses exclusively on e-discovery and information governance, says the LPO model has evolved to address and respond to escalating legal costs. "The whole concept of charging clients on an hourly basis became so cost-prohibitive for certain tasks that the LPO model makes sense for law firms and organizations. Whether it is used in the e-discovery, litigation or from a corporate perspective, using LPO services typically ensures the work is completed quickly and at a far more manage-



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able cost," she says.

Melanie Schweizer, Vice President - Legal and former Assistant General Counsel, Advertising and Brand at Bell Canada in Toronto, says the company has used legal process outsourcers in some one-off situations and has arrangements in place with certain of its external law firms for the use of legal process outsourcing. Using LPOs, she says, "ties in very closely with one of our overall corporate strategic imperatives —



KELLY FRIEDMAN
 > DAVIS LLP



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cutting costs within the company so we can deploy capital in network enhancements and other initiatives that help return value to our shareholders."

Litigation and legal costs are increasing at the same time that in-house counsel have more work and are being asked to do more with fewer resources, says Schweizer. As a result, she says, "following traditional models is not going to help us achieve the results we need. Legal process outsourcing is one of those tools that if used right can get us there."

Schweizer sees a cultural shift within large law firms. "A number of years ago,

when you talked to them about using LPOs in areas where they are now commonly used, some firms embraced it and frankly those are the firms that are successful in getting our business, because it does help to keep costs in check." Other firms, she says, "were a bit territorial, but there seems to be this cultural shift now where firms are recognizing that it needs to be a partnership, that they need to think creatively and deliver value to clients. And you know, there's not a lot of value to the firm either in having junior associates do some of this work; it's mundane, it's repetitive and it's not a good teaching opportunity for them. There are lower-cost resources that can do it just as effectively."

There's no doubt that managing data cost-effectively has become a prime concern for in-house counsel. Take securities class actions as an example, says Jay Cassidy, Managing Director, FINPRO, Claims Advocacy Practice, with Marsh Canada. "We are seeing between 40 and 50 per cent of the settlement value being added on to the final bill by way of legal costs and a massive chunk of that is e-discovery or some other documentary review that's being done largely right now by external counsel."

Mark Cooper, Senior Counsel and National Claims Leader with Marsh Canada in Toronto, further explains, "it's no longer the case that you go to your outside counsel and say 'here's three boxes — all the files on this matter.' We've got tens of thousands of emails, text messages and social media, such as Twitter or Facebook, so dealing with this correspondence is a massive undertaking."

The day of the general counsel who just reviews a contract or blindly ships something off to outside counsel are gone, says Cassidy. "GCs now report not only on litigation and M&A matters, for example, but also on the business side itself they have to report to finance too. So they're serving two masters and in order to balance those interests they absolutely have to look for ways that are more cost-effective, time-effective, and better serve the core business of the corporation they represent rather than simply turning to outside counsel and saying, 'we have a problem, here, you go fix it.' And I think the law firms know and respect that view."

Sandra Forbes, a partner at Davies Ward Phillips & Vineberg LLP in Toronto, says

there's "no question that sophisticated clients involved in document-intensive litigation are clear that they are not interested in bearing the cost associated with their law firm doing all aspects of document review."

When she has a large file, she "starts with the assumption that her firm will be retaining and working with a managed review service provider [the term some firms use for a LPO vendor]." In a few situations, there are some clients, especially privately held companies, who have significant privacy concerns and choose to have Davies perform all of the document review work, even on document-intensive files. She says it's rare, but still happens.

WHAT'S HAPPENING IS a change in the talent model, says Matthew Peters, a partner with McCarthy Tétrault LLP in Vancouver. "What I find interesting from our experience, and in looking at law firms around the world, is the growing number who are finding ways to work with clients and LPOs in a three-way partnership to re-engineer how certain things are done. As an example, if a client regularly does small to medium-size acquisitions, the traditional way was that as each acquisition comes along the in-house counsel would call up the law firm and say 'can you do this one for us?'"

But Peters says he's seeing more and more instances where the process is being re-engineered for doing these M&A deals. "Firstly, and we all understand the need for it, the documents are being standardized," he says. "But moreover, we're saying 'let's change the talent model we're going to use for our due diligence. Let's bring in a LPO, let's get them up to speed on what we're looking for,' so when the next 10 acquisitions come around the due diligence goes to the LPO and they're using a precedent that you've collectively put together. What you come out with is a much more efficient process, costs less, and can be faster."

In-house counsel are not only dealing with the explosion of electronic information and information in general, "it's the complexity and diversity of information that can inhibit the ability to respond to legal events," says Karen Brookman, President of Commonwealth Legal in Toronto, whose company specializes in evidence management solutions and e-discovery for

law firms and corporations.

As to the evolution of the LPO, law firm, in-house counsel relationship, “what’s changing is that the management of this information is not a transaction, it’s more of a triage where you are taking the expertise of your outside counsel, the knowledge of your in-house counsel and the knowledge within the corporation, and then you may have third-party subject matter experts or service providers that can be brought in. It’s

more of a collaborative team effort to meet these requirements.”

Brookman suggests in-house counsel consider being more proactive in having an internal plan and process in place that touches the different business units or the different areas within the organization, so that when an event occurs where they need to produce documents they’re able to respond in an organized and orderly fashion with confidence.



IN
HOUSE
INSIGHT

TOP LPO TIPS

If your law department is thinking about using legal process outsourcing, here’s what you need to know

- > Re-explore the LPO market. “One of the takeaways for in-house counsel is that if they have engaged the LPO market, even three or four years ago, they should consider re-engaging as it’s likely easier to access now than a few years ago,” says Matthew Peters, a partner with McCarthy Tétrault. “I’m talking about areas such as due diligence or document review as the market has expanded to many other types of services beyond pure e-discovery,” he says.
- > Ensure the potential cost saving associated with using legal process outsourcers are actually realized. Melanie Schweizer, Vice President - Legal at Bell Canada, says, “Ensure you have the appropriate arrangements with your external counsel to pass the savings along to you. And, consistent with that is ensuring you get quality, because cost savings are really meaningless if you’re not receiving the same quality of product.”
- > Investigate your organization’s internal capabilities, resources and potential gaps to create a high-level response plan. “Being proactive will help you to identify critical documents quickly, manage risks, and make decisions with confidence,” says Karen Brookman, President of Commonwealth Legal. And know your role in the process, she adds. “Ask yourself: ‘Will our company take a leadership role in the collection of data? Will we internally index, cull and process the data before we send it to our outside counsel? Would we consider just hosting the data and having our outside counsel come into our environment to look at it? What’s important to us in terms of security, compliance security privacy, etc.?’”
- > Build playbooks, guidebooks and checklists for each project. “It’s important to build a playbook regardless of the kind of work the LPO is doing for you,” says Kelly Friedman, a partner with Davis LLP. “For example, when you’re doing a patent or trade-mark application ‘these are the steps you go through, these are the forms to use and these are the portals used to create the attachment,’ so in-house counsel don’t have to worry so much about people leaving your team.”

“The proactive component is the piece I think is difficult because very often these situations become more of a reaction to what’s immediately happening,” she says. “Corporations traditionally don’t want to plan ahead or invest in technology proactively for an investigation or lawsuit as it is counterintuitive, but being prepared is like having a good insurance policy in place. Incorporating e-discovery into your information management planning and policies can go a long way to protecting your interests and substantially reducing the financial impact of any major legal event.”

Is the potential for outsourcing way beyond first-line review? Thomas Sutton, a partner in McCarthy Tétrault LLP’s Toronto office, views law firms as providing an integral role in helping in-house counsel “find a service provider who can do that first level review, obviously with input from external counsel and in-house counsel in defining relevance and defining scope. It’s far more collaborative than ever before in determining what we are going to collect, where we are going to get it and then that’s where the LPOs can really provide their value add.”

But the real challenge “is going to be the creative use of lawyers at the next level, determining ways in which it is possible to bring other legal providers in the equation as part of a whole value package to help general counsel manage their spend effectively,” he says. For example, he says, “tapping into the expertise of subject-matter experts and litigation experts, perhaps lawyers 20 or 30 years out who are not part of a firm but are happy to work on a contract basis or through a LPO.”

WHEN USING LPOS, another challenge is to maintain a quality product at often very low fees, says Susan Wortzman. “A diligent quality control is necessary to confirm that work product is of the quality expected,” she says. “In many cases, this may involve lawyers, while we often use technical tools and processes to complete the quality control. When advising in-house counsel on using LPO services, we work as a team to ensure that in the litigation or regulatory context the process is legally defensible and meets their needs.”

Value, collaboration and partnerships are the words most often used in describing the

new dynamic. Then there's oversight and vetting. "External counsel can be of great value to in-house counsel in vetting the work received from LPOs, and guiding the process to ensure that the best overall results possible are achieved," says Shelby Austin, a partner at Deloitte LLP in Toronto, where she leads the Legal Project Solutions (LPS) service line, staffing and managing document review and due diligence projects.

Austin is watching a growing trend



SHELBY AUSTIN
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where companies and law firms are entering into long-term strategic relationships with LPOs once they become comfortable with a certain provider. "Working with an LPO can, of course, lower the cost of repetitive services such as document review and due diligence," she says. "By having a dedicated customized workforce that has performed a given task countless times we also see a certain amount of process improvement occur when LPOs manage the workflow."

As to emerging trends, Austin draws attention to "hybrid models in which LPOs draw on onshore and offshore resources in

conjunction in order to find the best solution in terms of cost and quality for their clients." In addition, "more and more clients are requiring their LPO to offer technology as part of their solution for increasing efficiency around legal tasks. It is no longer solely about human capital, but about integrating leading technological resources," she says.

Still, it's important to clarify the roles when it's a law firm/LPO/in-house counsel partnership, says Schweizer. "You need to make sure you're very clear with your outside counsel on the expectations around the LPO and in particular who is giving them instructions. Sometimes, when you bring in an extra party, the chain of command isn't always clear and that leads to inefficiencies and poor quality of results."

At Bell, a lot of the litigation is done in-house so sometimes it makes sense, she says, to retain the LPO directly. But she cautions, "You can't underestimate the amount of internal resources you need. It's not like you can just call in an LPO and tell them what you need and they'll deliver it back to you in a neat little package with the bow. You have to be prepared to invest the time and oversight necessary to make sure you get a quality product."

Davies' Forbes sees a growing trend among large, often significant companies with law departments, who are hiring an in-house counsel with litigation expertise to effectively co-ordinate with external counsel on e-discovery and other litigation-related matters. "I think it's a very smart move," she says. "These lawyers work on collecting documents from the relevant custodians, develop document retention policies and educate employees about these policies, and sometimes, on small to medium-sized files, conduct the document collection, management and review process in-house."

THE GENERAL CONSENSUS in Canada is that the adoption of LPO lags far behind the US and UK. "The hesitation to use LPOs is an educational issue to some degree," says Marsh's Cassidy. "I don't think it's a surprise to anybody the US has been using LPOs for a number of years now and the Canadian litigation and legal market has tended to lag behind the US market, and now the Canadian marketplace is turning their mind to it. But we're under such

constant cost constraints and cost concerns that I don't think we can continue to use the ostrich isolationism approach when it comes to the use of LPOs.

"Certainly, with the litigation that I'm involved in we spend an awful lot of time talking about cost control," continues Cassidy, "sometimes even more than we actually talk about the substantive portion of the claim because the cost can run quickly amuck in large-scale issues. And I don't think that's any different if you're talking about due diligence on an M&A deal."

Speaking of cost control, making the case for utilizing LPOs can be a challenge, adds Marsh's Cooper. "Contract review, such as nondisclosure/confidentiality agreements, is a typical example of something that could provide an opportunity to say 'this is something I could farm out to somebody else to do cost-effectively and take that piece off of the in-house department and let them focus on more important matters.' If you're doing the work internally, that cost is obviously built in. But if it's outsourced, its increasing costs and you got to justify that when we're all battling with tight budgets."

Friedman, a member of the Ontario e-Discovery Implementation Committee, says a US trend is for in-house counsel to conduct a controlled experiment before they select a LPO. "They say 'okay, let's give these 10,000 documents to a provider in India or the Philippines, to a US LPO and to an external law firm to see who comes up with the key material they can explain to our general counsel in 20 minutes."

Since another trend is for companies to enter into long-term contracts, says Friedman, "it might be worth it for them to do this kind of mini-controlled experiment, for example on a file they already know the results of, to see how it plays out and get a sense of how much they really would be saving, what kind of quality each provides, and by doing so they can pick the best option for their business."

As an option, it's not so much that the jury is out in regard to the utilization of LPOs in situations where it is appropriate. "Everybody wants to dance. It's how to get on the dance floor that's the issue," says Cassidy. "I'm a firm believer that the transition of the legal practice and of legal file management will continue to happen and LPOs will be a part of it." 🗨️