RESEARCH MEMORANDUM

TO: Prospective Clients of LexOutsource

FROM The Chief Executive Officer, LexOutsource

DATE October 17, 2014

SUBJECT Is LexOutsource engaged in the "practice of law"?

I ISSUE

1. Whether LexOutsource, an independent provider of legal research, writing and analysis services, offered exclusively to practicing lawyers, is engaged in the "practice of law" when providing such services?

II BRIEF ANSWER

2. LexOutsource does not engage in the "practice of law". Relevant case-law, legislation and ethics opinions have defined the "practice of law" as the performance of legal services on behalf of, to, and for clients (in other words, members of the public). The provision of legal services to lawyers is excluded from the scope of what is regarded as the "practice of law".

3. Simply put, because LexOutsource only provides legal research, writing and analysis services to practicing lawyers, and not to clients (in other words, members of the public), it is not engaged in the "practice of law".

III FACTUAL BACKGROUND

4. LexOutsource is a service provider to whom Canadian lawyers can outsource legal research, writing and analysis work on a contract basis. The business does not provide services directly to clients (in other words, members of the public).

5. Individual members of the team at LexOutsource may be licensed to practice law in some jurisdiction or other (presently or in the past), but their contract with LexOutsource states explicitly that they are not acting in such capacity when employed by LexOutsource. Instead, they act more as a highly qualified paralegal or legal assistant.

6. LexOutsource presently offers the following types of services to Canadian lawyers: Performance of legal research, preparation of research memoranda, and preparation of pleadings, motions, factums, and the like. Under no circumstances is legal advice or any form of legal assistance provided to members of the public.

7. The contracting lawyer retains ultimate responsibility for verifying the accuracy, competence, and diligence of LexOutsource's work product prior to using the work product in connection with their representation of their clients.

8. In terms of marketing efforts, LexOutsource is careful with the language it uses. LexOutsource markets its services only to practicing lawyers and never engages with or meets their clients. Our Chief Executive Officer uses the title "CEO" or "Chief Executive Officer" to convey his authority over the business. Titles such as "Managing Partner", "Partner", and "Associate" are not used by staff of LexOutsource. Additionally, they do not use the designation "Esq." after their names in business marketing materials. Though LexOutsource may refer to some members of their team as lawyers, this is mentioned solely to convey their credentials and experience to prospective contracting lawyers.

9. In addition, each and every page of the LexOutsource website contains an explicit statement making the above clear to prospective clients and stating "LexOutsource is not a law firm and

does not practice law. While our team includes qualified lawyers, they are not employed in such capacity by LexOutsource. For this reason, only practicing lawyers may use our service. In order to fulfil the requirement of supervision, the contracting lawyer must take sole responsibility for the quality of legal services rendered to their clients and must thus approve of our work product before using it in connection with the representation of their clients."

IV DISCUSSION

A THE PHRASE "PRACTICE OF LAW" DOES NOT INCLUDE THE PROVISION OF LEGAL SERVICES TO PRACTICING LAWYERS

10. The "practice of law" refers to the performance of legal services on behalf of, to, and for clients (members of the public). It does not include the provision of legal services to other lawyers.

11. While various provincial statutes contain restrictions on the "practice of law", it has consistently been found that these restrictions are not engaged in a situation where legal services are offered to practicing lawyers.

12. In this regard, some of the relevant statutes themselves contain a direct exception to the "unauthorized practice of law" provisions for persons "employed by" practicing lawyers, legal counsel or law firms. These sort of exceptions have been held to include independent contractors within their ambit.

13. For example, in British Columbia[1] there is an explicit provision in the applicable legislation stating that a person who is "employed by" a practicing lawyer, a law firm, a law corporation or the government and who acts under their supervision does not contravene the prohibition against the "unauthorized practice of law".

    Reference: Section 15(2) of the Legal Profession Act, SBC 1998, c 9.

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[1] Some other provinces also have a similar explicit exception.

14. This exception has been found to include outsourcing providers employed by a practicing lawyer (and not just employees of the practicing lawyer).

15. Indeed, in respect of a legal outsourcing provider, the Ethics Committee of the Law Society of British Columbia has found that "the real issue is not whether work is to be performed by an employee or an independent contractor, but whether the lawyer can properly supervise the work that is to be performed, including ensuring the confidentiality of information entrusted to the employee or contractor." The Committee concluded that provided supervision and confidentiality were maintained "it is proper for a lawyer to engage such a contractor to do work that is the practice of law", even though the latter are not entitled to practice law for their own account.

    Reference: Ethics Committee of the Law Society of British Columbia, Opinion Dated March 3, 2005.

16. Moreover, in interpreting the word "employed" (as used in another part of same legislation)[2] the Court of Appeal for British Columbia has concluded that it "does not necessarily mean employ as a servant but it may mean "acted" or "engaged" without reference to a master and servant relationship".

    Reference: Fan (Re), 1977 CanLII 383 (BC CA).

17. Therefore, the situation in jurisdictions such as British Columbia (where there is an explicit exemption from the prohibition on the "unauthorized practice of law" where a person is "employed" by a supervising lawyer) is clear: An entity providing legal services to and under the supervision of a practicing lawyer is not engaged in the practice of law, regardless of the nature of the services they render to the supervising lawyer.

[2] The presumption that the same word has the same meaning throughout a single piece of legislation would naturally apply, so that the word "employed", as interpreted in the above case, would carry the same interpretation in relation to the restrictions on the "practice of law".

18. In addition, while some other provinces lack explicit provisions stating that someone working under the supervision of a practicing lawyer does not contravene the prohibition against the "unauthorized practice of law", the legal position remains the same nonetheless.

19. Indeed, the nature of the words "practice of law" and prevailing case-law interpreting this phrase, demonstrates that inherent in the concept of "practicing law" is a requirement that there be direct provision of legal services to clients (in other words, members of the public).

20. In a notable case from the United Kingdom it was stated that "In my opinion, 'practising as a solicitor' connotes a person who is acting as a principal; it connotes a person who has clients; it connotes a person in short who has a practice; and the words are not apt words to describe the position of a person who is acting as the servant of another who is practising as a solicitor."

    Reference: Way v Bishop [1928] Ch 647 at 660.

21. In another case, it was noted that in a situation of delegation to a non-lawyer the reality is that "The work was always being done by an individual solicitor although it might be through a managing clerk working on his behalf."

    Reference: Hudgell Yeates & Co v Watson [1978] 2 All ER 363 (CA).

22. This position has been adopted in relation to outsourced legal services providers as well (in British Columbia, among other jurisdictions).[3]

23. More significantly, a fairly recent decision of the Alberta Court of Queen's Bench accepted the position of the Law Society of Alberta that someone not admitted to practice law in any Canadian jurisdiction was not prohibited from "participating 'behind the scenes,' such that they would assist the Plaintiffs' counsel of record in the conduct of research and preparation of briefs, provided any documents that the Plaintiffs place before the court are under the signature

[3] For a Canadian example, see the Ethics Committee of the Law Society of British Columbia, Opinion Dated March 3, 2005.

of the Plaintiffs' counsel of record." The court further accepted that the person or entity not admitted to practice law in Canada could assist an Alberta lawyer by "providing support to [the Alberta lawyer] through research and drafting, provided [the Alberta lawyer], as counsel of record, assumes ultimate responsibility for the work product." Perhaps most importantly, the case also confirmed that outsourcing such tasks to persons outside of Canada was permissible.

Reference: Lameman v. Alberta, 2011 ABQB 396 (CanLII) at paras 4 and 34.

24. So too, in the United States, the Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, has issued two (2) instructive opinions.

25. In one such opinion, it noted that "Providing legal research and writing services exclusively for lawyers and law firms is not considered engaging in the practice of law. Therefore, such a service can be marketed under a trade name. A person who conducts such a service exclusively for lawyer and law firms is not engaged in the practice of law."

Reference: Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 1988-018 (1988).

26. In the more recent opinion, it again stated the following: "an attorney who performs research and writing on a contract basis to other attorneys, but who is not engaged by, does not meet with, and does not offer advice to clients is not considered to be engaged in the practice of law and is not subject to the professional liability insurance notice requirements of DR 1-104."

Reference: Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 2005-1 (2005).

27. In a case-law example from the United States, it was explained: "As perceived by this court, the entire matter was handled in the identical way that it would have been handled had Franks been a paralegal employed by the J & F law firm. The only difference, which has no substantive impact, is that Franks was an outsourced paralegal who was employed by Prommis Solutions. With this level of supervision by a licensed attorney *** to construe that this procedure is the unauthorized practice of law would place form over substance. The use of paralegal employees,

whether outsourced or "in house," reduces the time that must be devoted by a licensed attorney, and, in turn, reduces the costs to all parties."

Reference: In re Thorne 471 B.R. 496.

28. Further to the above, the American examples have noted that even offshore outsourcing of legal work that is otherwise the "practice of law" is ethical, provided there is adequate supervision. Implicit in these findings is the reasoning that where legal services are provided solely to lawyers, "unauthorized practice of law" concerns do not arise.

29. For example, the following extract from the New York Opinion is instructive:

> "A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing."

Reference: The Association of the Bar of the City of New York Commission on Professional & Judicial Ethics, Formal Opinion 2006-3 (2006).

30. Therefore, case-law, legislation and ethics opinions demonstrate that an outsourced legal services provider providing services solely to practicing lawyers does not engage in the "practice of law".

31. In preparing this memorandum, no examples in statute, case-law or ethics opinions where the contrary opinion was reached could be found (despite a diligent search and review).

32. Further, it should be noted that the statutes prohibiting the “unauthorized practice of law” are penal in nature and must be interpreted restrictively, so that a reasonable interpretation which avoids criminal liability is preferred over a contrary interpretation.

Reference: Regina v. McIntosh, [1995] 1 S.C.R. No. 16; Regina v. Poulin, 1973 CanLII 829 (ON SC); Maxwell on Interpretation of Statutes (12th Ed.) at page 239.

33. Here, the interpretation advocated for in this memorandum is not only reasonable, it is in fact supported by the explicit statements of courts and ethics opinions, as set out earlier.

34. There are also policy considerations behind not casting the net too widely, so as to include legal outsourcing providers within the ambit of what is considered the “practice of law”.

35. In this regard, there has been a general acceptance that there is no need to regulate persons providing legal services under the supervision of a lawyer. For example, in a recent task force report, the Law Society of British Columbia has noted that “non-lawyers who provide legal services under the supervision of a lawyer (or a regulated legal service provider such as a notary public) need not be regulated, as the regulation of the person responsible for supervising the non-lawyer provides adequate protection to the public.”

Reference: The Law Society of British Columbia, Final Report of the Legal Service Providers Task Force, Report Dated December 6, 2013.

36. Further to the above, it was explained “that regulation of individuals (as opposed to a certification recognizing the achievement of, for example, educational criteria) who are acting strictly under supervision of a regulated professional is unnecessary and could add needless expense to the cost of the legal services provided.”

Reference: The Law Society of British Columbia, Final Report of the Legal Service Providers Task Force, Report Dated December 6, 2013.

37. Further, a distinction between paralegals and legal assistants (who are allowed presently to render legal services under the supervision of a practicing lawyer) and outsourcing providers would not serve the legislative objectives (to protect the public from harm from unauthorized legal service providers). Indeed, because there is simply no engagement or interaction between members of the public and a legal outsourcing providers, much like with paralegals and legal assistants, the distinction is absurd and meaningless.

38. Moreover, the public interest would be negatively impacted by prohibiting legal outsourcing providers from providing services solely to practicing lawyers. Indeed, the legislative objective of bringing down the costs of legal services and thus increasing access to justice would be hampered this was the case. This has been discussed earlier as well.

39. Consequently, where legal services are provided to a practicing lawyer, the party or entity providing such services does not engage in the practice of law (on any reasonable interpretation of the various pieces of legislation). The contrary argument can be safely rejected (although it does not appear to have been made by any notable body or court).

B LEXOUTSOURCE DOES NOT ENGAGE IN THE "PRACTICE OF LAW"

40. LexOutsource is a legal research, writing and analysis service exclusively for practicing lawyers (just like the services mentioned in several of the cases and opinions mentioned above). In precisely the same way as those examples, LexOutsource does not provide advice to clients, does not represent clients, is not engaged by clients, and does not meet with clients. Additionally, LexOutsource does not hold itself out as being engaged in the "practice of law", nor does it represent that it is a law firm.

41. For anyone who may think otherwise, the following statement on the LexOutsource website should make clear what LexOutsource's limited role is: "LexOutsource is not a law firm and does not practice law. While our team includes qualified lawyers, they are not employed in such capacity by LexOutsource. For this reason, only practicing lawyers may use our service. In

order to fulfil the requirement of supervision, the contracting lawyer must take sole responsibility for the quality of legal services rendered to their clients and must thus approve of our work product before using it in connection with the representation of their clients."

42. Here, though LexOutsource performs legal services, it does not perform legal services on behalf of, to, or for clients. Again, LexOutsource does not prepare legal documents for clients, does not appear at proceedings on behalf of clients, and does not advise clients. Rather, LexOutsource is one step removed as it only performs legal research, writing and analysis services for practicing lawyers, much like a paralegal. The contracting lawyers are ultimately responsible for deciding how to use LexOutsource's work product in connection with their representation of their clients.

43. Consequently, LexOutsource is not engaged in the practice of law because it does not provide legal services on behalf of, for, or to clients. This is the only reasonable interpretation and application of the legislation in question.

V CONCLUSION

44. LexOutsource is not engaged in the "practice of law" in terms of the position set out in case-law and ethics opinions (as supplemented by the statutory language). The supervising lawyers which employ LexOutsource on the other hand, are engaged in the "practice of law". The latter are ultimately responsible for deciding how to use LexOutsource's work product in connection with their representation of their clients. This provides an adequate level of oversight and supervision to meet the ethical duties of the supervising lawyer.