

THE RECORDER

Ethics of Contract Lawyering



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In the current economic climate, many businesses seek law firms offering reduced rates or alternative fee structures to lower their legal bills. But lawyers are overwhelmed because their pool of associates is smaller due to layoffs and hiring freezes. Rather than hiring additional associates, firms increasingly rely on temporary “freelance” or “contract” attorneys to meet their clients’ needs.

A freelance attorney is a solo practitioner who provides temporary legal services to law firms, rather than representing clients directly. The temporary attorney provides a final written product, which the firm then reviews, revises or approves, and signs. Freelance attorneys provide services to law firms independently, or through companies that handle administrative issues. Firms rely on freelance attorneys to assist during busy periods like trial preparation, to add specific expertise and to lower fees to firm clients. Freelance lawyers are essentially contract lawyers but the term “freelance lawyer” is increasingly used

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to describe experienced lawyers who handle substantive projects rather than appearances or document review.

Temporary attorneys can be an attractive model, but firms must consider the ethical rules. How are conflicts of interest managed? Can a firm add a surcharge to the temporary attorney’s rate? Must a firm disclose the relationship to its clients?

In California, the Code of Professional Conduct does not include rules that specifically address temporary attorneys, so the same rules that apply to lawyers who directly represent clients also apply to freelance lawyers and the law firms that use their services. The California Rules of Professional Responsibility govern, with support from state ethics opinions and the ABA Model Rules of Professional Conduct.

CONFLICTS OF INTEREST

How should a law firm best manage conflicts of interest when outsourcing legal work to a freelance attorney?

For many firms, the most concerning part of hiring a temporary attorney is the potential for conflicts of interest. While law firms and temporary attorneys are required to manage conflicts appropriately, conflicts of interest rules should not be a significant hurdle to getting outside help.

California Rule of Professional Conduct 3-310 governs attorney conflicts, and prohibits an attorney from accepting or continuing to represent a client if there is a conflict or potential conflict affecting the member’s representation. If a freelance attorney works for a firm, that firm’s client is the temporary attorney’s client for conflicts purposes. Because temporary attorneys often work for different firms simultaneously, it is

crucial that both the temporary attorney and the firm routinely monitor conflicts. Freelance attorneys are required to maintain accurate records of their actual conflicts so they can properly clear conflicts for every matter. State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1992-126 states:

“To facilitate identification of conflicts, the contract attorney should maintain a personal record of clients and firms for whom he/she has worked, in addition to a general description of the work performed for the clients. The firm engaging a contract attorney has the most direct obligation to maintain an accurate record of the contract attorney’s work for each of its clients and to monitor for conflicts on a routine basis.”

COPRAC Opinion 1992-126 indicates that there is potential for a conflict if the attorney had a “substantial relationship” and obtained “confidential” information during the course of his representation of that client.

While temporary attorneys do not typically obtain confidential client information to amount to a “substantial relationship,” all attorneys must avoid engagements adverse to a current or former client’s interests, especially if a prior relationship presumes knowledge of that client’s confidential information. A better rule is simply for freelance contract attorneys to maintain accurate records of matters and clients, and to avoid working on any other matter adverse to current and former clients.

Imputed disqualification provisions can be especially confusing when dealing with contract attorneys. The key question is whether the law firm’s conflicts are imputed to the temporary attorney, and vice versa. The answer gen-

erally depends on the closeness of the relationship, and under ABA Formal Opinion No. 88-356, whether the temporary attorney is “deemed associated” with the firm such that knowledge of and access to the firm’s clients’ confidential information is presumed. If the attorney is “deemed associated” with the firm, then the firm’s conflicts are imputed to the temporary attorney and vice versa, but not if the relationship is more distant and the temporary attorney does not have access to confidential client information.

Relationships between temporary attorneys and firms vary widely, from a short discrete project to relationships that involve follow-up work. The temporary attorney’s knowledge and access to the firm’s clients’ information will also vary widely — in the case of a discrete project, the temporary attorney may only have information regarding a general question with no knowledge of or access to the clients’ information. But if the relationship involves multiple projects or includes follow-up work, the temporary freelance attorney may have access to the firm’s document database and client files. Conflicts of interest rules for temporary attorneys therefore depend on the closeness of the relationship between the temporary attorney and the firm, and the temporary attorney’s access to the firm clients’ confidential information. Under ABA Formal Opinion No. 88-356, “If the contract attorney works only on a single matter for the firm and has no access to information concerning other clients, then the contract attorney would not be deemed associated for imputed disqualification purposes.”

Firms and temporary attorneys should also take every precaution to limit the temporary attorney’s access to confidential client information. Firms should avoid granting passwords to document management systems or general access to client files to temporary attorneys unless absolutely necessary. COPRAC Opinion No. 1992-126 suggests, “To minimize the chance of the contract attorney unnecessarily learning confidential information, the firm must make a concerted effort to screen the contract attorney

from confidential information that is unnecessary to the attorney’s assignment at the firm. The firm should limit the contract attorney’s access to office files unrelated to the assignment and the contract attorney should not attend meetings at which unrelated cases are discussed.”

AIDING AND ABETTING IN THE UNLAWFUL PRACTICE OF LAW

Does the use of freelance attorneys who are not members of the State Bar of California violate ethical rules prohibiting aiding and abetting in the unlawful practice of law?

“No person shall practice law in California unless the person is an active member of the State Bar.” Cal. Bus. Prof. Code §6125. Under California Rule of Professional Responsibility 1-120, no member may “assist in, solicit, or induce any violation” of the rules of professional conduct or the State Bar. California Rule of Professional Conduct 1-300(A) states, “A member shall not aid any person or entity in the unauthorized practice of law.” These rules apply when a California law firm contracts with attorneys not admitted in California or uses a Legal Process Outsourcing, or LPO, a company that employs off-shore individuals or out-of-state attorneys. *See Birbower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal.4th 119 (1998).

While the State Bar Act does not define the practice of law, courts have discussed its meaning. In *Birbower*, the court held, “The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations.”

Law firms are permitted to contract for certain legal services by nonadmitted attorneys, as long as the law firm remains ultimately responsible for the final work product. If the temporary attorney makes an appearance, then that attorney must be admitted in California. In most situations, however, the temporary attorney performs tasks that do not require a license, as long as a California attorney retains full control over the client representation and exercises independent judgment. Law firms must consider the duty

of competence, but simply engaging temporary attorney services from a non-California attorney does not amount to aiding and abetting in the unlawful practice of law. San Diego County Bar Association Ethics Opinion 2007-1 (SDCBA Opinion 2007-1) (“The attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law.”)

DUTY OF COMPETENCE

Does a law firm violate ethical rules if it uses an inexperienced contract attorney?

Section 6067 of the California Business & Professions Code recites the attorney’s oath “to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability.” California Rule of Professional Conduct 3-110 requires that an attorney perform legal services “competently,” defined as “diligently to apply the learning and skill necessary to perform the member’s duties arising from employment or representation.” Rule 3-110’s discussion further states, “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney employees or agents.”

The temporary attorney relationship typically involves a supervising attorney who is responsible for the temporary attorney’s work. The supervising lawyer assigns the task, and is ultimately responsible for its content. Attorneys may also seek assistance from outside attorneys if they are unfamiliar with a particular area of law. This is permissible under Rule of Professional Conduct 3-110(C), which states, “If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.” To satisfy the duty of competence, the attorney must determine whether the “outsourced” work has been done competently. The attorney therefore must know enough about the subject to competently judge the work. The at-

torney may not solely rely on a temporary attorney to discharge the duty of competence. SDCBA Opinion 2007-1.

The ABA has commented on the importance of using only skilled contract attorneys in Formal Ethics Opinion 08-451 (August 2008) — “There is nothing unethical about lawyer outsourcing legal ... services, provided the outsourcing lawyer renders legal services to the client with the ‘legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,’ as required by Model Rule 1.1.”

ABA Model Rule 1.1 Comment 1 further states: “In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.”

Best practices dictate hiring skilled contract attorneys with the experience necessary to competently perform the quality of legal work clients deserve, and to exercise competent, independent judgment over the temporary attorney’s work product.

DUTY TO INFORM THE CLIENT

Is a law firm required to disclose to its clients that it is using a contract attorney for a legal project?

Law firms often struggle with balancing workloads. Cases can heat up unpredictably, and can become overwhelming. Despite inevitable rushes, law firms may be reluctant to outsource because of questions regarding client disclosure.

California Rule of Professional Responsibility 3-500 states: “A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.” Similarly, California Business and Pro-

fessions Code §6068(m) states that an attorney has a duty “[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.” According to COPRAC Formal Opinion 2004-165, a lawyer must inform a client that he has hired an outside lawyer if using the outside lawyer is a “significant development” in the representation.

COPRAC Opinion 1994-138 enumerates factors to determine whether a firm must disclose the contract attorney relationship, including whether: (1) responsibility for overseeing the client’s matter is being changed; (2) the new attorney will be performing a significant portion or aspect of the work; or (3) staffing of the matter has been changed from what was specifically represented to or agreed with the client. Further, COPRAC Opinion 2004-165 held that the determination also depends on whether the client had a “reasonable expectation under the circumstances” that a firm would use a contract lawyer.

SDCBA Opinion 2007-1 also opines that disclosure should not be limited to whether the service to be “outsourced” technically involves legal services — “the duty to inform the client is determined by the client’s reasonable expectation as to who will perform those services. Therefore, if the work to be performed by the outside service is within the client’s ‘reasonable expectation under the circumstances’ that it will be performed by the attorney, the client must be informed when the service is “outsourced.”

Because a “significant development” depends on specific facts, ethical rules and opinions suggest that firms inform clients when using outside attorneys beyond basic tasks like research and writing.

FEES CHARGED TO CLIENT

Can a law firm make a profit off its freelance attorney?

When a law firm uses a freelance attorney for a legal project, the firm can elect to bill the client in several different ways: (1) firm absorbs the cost; (2) pass the cost directly to the client; (3) mark up the cost and pass the marked up cost

to the client; or (4) pass a flat fee cost to the client. Each of these fee arrangements are ethical in California, if the total fee is not unconscionable pursuant to California Rule of Professional Responsibility 4-200, and the attorney satisfies the requirements set forth under California Business and Profession Code §§6147-6148 & 6068(m), regarding fee arrangements.

California case law establishes that the amount a law firm pays to a freelance attorney is irrelevant to whether a fee is unconscionable, and nothing in Rule 4-200 suggests that the attorney’s profit margin is relevant to determining unconscionability. *Shaffer v. Superior Court*, 33 Cal.App.4th 993 (1995); *see also* ABA Formal Ethics Opinion 2000-420 (“When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of ABA Model Rule 1.5 that a lawyer’s fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client.”). If the firm chooses to pass a marked up rate to its client, however, it may constitute a “significant development,” and the arrangement should be disclosed.

Some company retainer letters include standard provisions prohibiting a firm from adding a surcharge to a contract attorney’s rate, but law firms and businesses should distinguish between substantive and unskilled tasks when deciding whether a surcharge is appropriate. Most businesses appreciate a law firm’s creative solutions to delivering excellent service at the lowest possible cost. If the contract attorney is not billing on a contingency, law firms need not disclose the details of its relationship with the experienced temporary attorney, the same way law firms need not disclose associate salaries to its clients.

DUTY TO PRESERVE CLIENT CONFIDENCES

Can a law firm disclose its client’s confidential information to a freelance attorney?

Every attorney has a duty to preserve

his clients' secrets. Bus. & Prof. Code §6068(e). When a law firm uses a freelance attorney, disclosure of confidential information may be necessary. The freelance attorney bears the burden of non-disclosure regarding secrets learned in the course of representation, while the law firm has the obligation to screen the freelance attorney from client secrets unnecessary to a particular project. See COPRAC Opinion Nos. 1992-126 and 1993-133; see also, Los Angeles County Bar Association Formal Opinion 518. Specifically, LACBA Opinion 518 states, "Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate."

Law firms should err on the side of caution, and should specifically require in writing that outside lawyers preserve all confidential information.

FEE-SPLITTING AND FINANCIAL ARRANGEMENT

Can a law firm pay a company an hourly rate for the work performed by a freelance attorney associated with the company?

Three primary ethical rules are at issue when a law firm pays a company an hourly rate for the services performed by a freelance attorney: Rule 1-310 (forming a partnership with non-lawyers), Rule 2-200 (fee-splitting with lawyers who are not partners, associates or shareholders with the member) and Rule 1-320 (fee-splitting with a non-lawyer).

Ethics opinions all come to the same conclusion — fee-splitting rules are inapplicable when a law firm contracts with a freelance lawyer company because the fee is not considered a "client fee." LACBA Opinion 518 states: "the work being performed by company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services." Similarly, and even if the company is owned by non-lawyers, there is no "partnership" with the company pursuant to Rule 1-310 since the law firm has "merely purchased services at a specified rate," and Rule 1-320 is similarly inapplicable because the law firm "has contract-

ed for services, at an hourly rate, from company." ABA Opinion No. 88-356 also states that even if the "agency" is paid one amount that is shared with the contract attorney, the agency will not be guilty of fee-splitting because the money is not a "legal fee" paid by the client.

Assuming, however, that the financial arrangement is distinct from that addressed in these opinions — and the fee is in fact considered a "client fee" that is subject to fee-splitting ethical rules — certain conditions must be met to make the arrangement permissible.

COPRAC Opinion 1994-138 articulates a three-part test for determining whether a particular arrangement constitutes a division of fees under Rule 2-200: (1) The amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If the payment meets all three criteria, no regulated division of fees has occurred.

Thus, if the law firm does not make payment to the company contingent upon payment by the ultimate client, and if the law firm makes sure to avoid any type of percentage or contingency relationship, it is ethically permissible. See *Chambers v. Kay*, 29 Cal.4th 142 (2002) (holding if the compensation arrangement between the law office and the outside lawyer involves a direct division of the actual fees the client pays to the law office, i.e., 30 percent of \$1,500 the client pays for a project, Rule 2-200 applies to preclude the fee arrangements).

MALPRACTICE INSURANCE

Do freelance attorneys need to carry their own malpractice insurance?

Regardless of whether a freelance attorney carries malpractice insurance, law firms are ultimately responsible for the work product and must review a freelance attorney's work product before submitting it to the client or to a court. (LACBA Opinion 518) It is not ethically permissible, however, to contract with a

client to limit a law firm's potential malpractice liability by placing all liability on the freelance attorney assisting with a project. (Rule 3-400(C)) Some freelance attorneys do not carry independent malpractice insurance, but many insurance policies allow a law firm to add a freelance attorney to its policy without additional premiums.

Pursuant to Rule 3-410, attorneys who do not carry malpractice insurance must inform their clients in writing if the representation is expected to exceed four hours. If a law firm carries malpractice insurance and hires a freelance attorney who does not carry malpractice insurance, the law firm may not be required to notify its client. If the freelance attorney's work does not constitute a "significant development," such that disclosure to the client is not required, then disclosure of the lack of malpractice insurance may not be required. While no California case has specifically addressed this issue, best practices suggest that a law firm notify the client pursuant to Rule 3-410.

Law firms must be mindful of the California Rules of Professional Conduct when outsourcing legal projects because the firm is ethically obligated to its clients. To increase the likelihood of a successful law firm/contract attorney outsourcing relationship, the law firm and contract attorney should consider ethical duties regarding: conflicts of interest, aiding and abetting the unauthorized practice of law, the duty of competence, the duty to disclose to a client, allowable fees, the duty to maintain client confidences, fee-splitting and malpractice insurance.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.

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