The Ethics of Freelance Lawyering

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Before Contracting with a Freelance Lawyer, Know These Eight Ethical Rules

IN THIS ISSUE

Introduction

Every attorney has a love/hate relationship with time. The billable hour is how most attorneys earn money, yet time is our most finite resource. We simply cannot create more time. Digital age technology, both a blessing and a curse, allows clients unprecedented access to attorneys. Clients increasingly expect attorneys to be constantly available due to unlimited access to email and text communications. What can busy attorneys do to create more time, maintain excellent client service and responsiveness, and also promote attorney well-being? Many law firms increasingly rely on temporary "freelance" or "contract" attorneys to meet their clients' legal needs, to improve customer service, and to expand their practice capabilities, essentially creating more time.

Before a hiring a freelance/contract attorney, firms must consider important ethical issues that may arise from bringing in outside help. In California, the Code of Professional Conduct does not include rules that specifically address legal outsourcing or temporary attorneys. 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 ethics opinions.

This article addresses eight ethical considerations that are relevant to legal outsourcing that law firms and freelance attorneys must understand and follow under California ethics rules: (1) conflicts of interest, (2) aiding and abetting the unauthorized practice of law, (3) the duty of competence, (4) the duty to disclose to a client, (5) allowable fees, (6) the duty to maintain client confidences, (7) fee-splitting, and (8) malpractice insurance.

1. Conflicts of Interest

How can a law firm avoid conflicts of interest when outsourcing to a freelance lawyer?

Take Away: Freelance lawyers working for law firms must manage their conflicts of interest for all individual matters, just as they would if they were representing clients directly instead of working through a law firm. To avoid imputed conflicts of interest, law firms should limit a freelance attorney's access to confidential information that is unnecessary for the specific project at hand, and be cautious of using terms like "of counsel," which can unnecessarily create imputed conflicts of interest.

Many firms seeking contract attorney assistance are concerned about the potential for conflicts of interest, and the numerous ethical rules pertaining to conflicts which may or may not apply to a temporary lawyer/firm relationship. Law firms and temporary attorneys are required to manage conflicts appropriately, but conflicts of interest rules are not a significant hurdle to getting outside help.

California Rule of Professional Conduct 1.7 governs attorney conflicts regardless of whether a lawyer is a partner, associate, or a temporary contract attorney, and prohibits an attorney from accepting or continuing representation of a client if there is a conflict or potential conflict affecting the representation. . If a freelance attorney temporarily works for a firm, that firm's client is the temporary attorney's client for purposes of conflicts of interest. Because temporary attorneys often work for multiple firms simultaneously, it is crucial that both the temporary attorney and the firm routinely monitor conflicts. Every freelance attorney is required to maintain accurate records of their actual conflicts so they can properly clear conflicts for every new matter. State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC"), 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 or her representation of that client. Every attorney has a duty to protect client confidences.

While temporary attorneys typically do not obtain confidential client information to amount to a "substantial relationship," all attorneys must take care to 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 attorneys to maintain accurate records of matters and clients, and to take care to avoid working on any other matter adverse to current and former clients.

Firms and freelance attorneys must take special care to avoid imputed conflicts of interest, which create an obligation to clear all conflicts, including those beyond the freelance attorney's assignments with the firm. The key question is whether the law firm's conflicts are imputed to the temporary attorney, and vice versa. The answer generally 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. If the relationship is more distant such that the temporary freelance attorney does not have access to confidential client information beyond the temporary attorney's specific tasks for the firm, then the temporary attorney will not be deemed associated with the firm for purposes of imputed conflicts of interest.

Relationships between temporary attorneys and firms vary widely, from a short discrete project to ongoing 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 research question with no knowledge of or access to the clients' information. But if the relationship is more ongoing and includes follow-up work, the temporary freelance attorney may have access to the firm's document database and client files, which may create imputed conflicts. 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."

A lawyer who is "of counsel" at a particular law firm must pay special attention to the ethical implications that the "of counsel" designation creates – most especially the conflicts of interest rules. The definition of "of counsel" under California Rule of Professional Conduct 1.0.1 [Comment 2] is a "close, personal, continuous and regular relationship" with a named firm. State Bar Ethics Opinion 1993-129 makes clear it is acceptable under the Rules of Professional Responsibility to hold an "of counsel" designation while maintaining a separate source of work, so long as conflicts and other ethical implications do not arise. Unlike the case-specific conflict analysis for an independent contractor, however, an "of counsel" lawyer in California is deemed part of the law firm for conflict purposes, including imputed conflicts of interest. Under this single de facto firm analysis, current and former clients of every firm lawyer and the "of counsel" attorney become relevant to all the lawyers' respective ethical obligations and potential disqualifications. Opinion 1993-129 states that "if the 'of counsel' is precluded from a representation by reason of rule 3-310 [now 1.7] of the California Rules of Professional Conduct, the principal is presumptively precluded as well, and vice-versa." Therefore, when accepting new projects from other law firms, a lawyer who has an "of counsel" relationship with Firm A must run each new matter through Firm A's conflict system. Before entering into "of counsel" relationships, contract attorneys must ensure they have studied all ethical rules pertaining to the relationship, and must be willing to take extra steps to clear conflicts.

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."

2. Aiding and Abetting the Unauthorized Practice of Law

Does a law firm violate ethical rules prohibiting aiding and abetting the unauthorized practice of law by outsourcing legal work to an attorney licensed in another jurisdiction?

Take Away: Aiding and abetting the unauthorized practice of law is not an issue when outsourcing to attorneys licensed in the same jurisdiction, i.e. when a law firm in California hires a freelance lawyer that is a member of the State Bar of California. Outsourcing to an out-of-state attorney is almost always permissible if the freelance lawyer is ghostwriting documents behind the scenes and not doing anything considered "practicing law," such as signing a pleading, making an appearance, or negotiating the ultimate terms of an agreement.

A person who is not an active member of a jurisdiction's state bar may not practice law in that state. An unlicensed lawyer practicing law in California is engaging in the unauthorized practice of law in violation of Business & Professions Code section 6125. A California lawyer who assists an unlicensed person in the practice of law in California may be in violation of California Rule of Professional Responsibility 5.5, which states that a lawyer shall not "knowingly assist a person in the unauthorized practice of law in that jurisdiction..". This provision applies only when a California law firm outsources legal projects to an attorney who is not licensed in California.

While the State Bar Act does not define the practice of law, Courts have discussed its meaning. In *Birbrower, Montalbano, Condon & Frank, PC v. Superior Court* (1998) 17 Cal.4th 119, 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." *Birbrower*, 17 Cal.4th 119, 129.

California ethical rules permit law firms to contract for certain legal services by attorneys not licensed in California, including drafting legal pleadings, as long as the law firm remains ultimately responsible for the final work product. *Jacoby v. State Bar* (1977) 19 Cal. 3d 359, 363; *People v. Perez* (1979) 24 Cal. 3d 133, 143. See also Orange County Bar Formal Opinion No. 94-002 (1994) (opining that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in the unauthorized practice of law where the attorney supervising the paralegal maintains a "direct relationship" with the client, citing ABA Ethical Consideration 3-6.). If the temporary attorney makes an appearance in court or at a deposition, then that attorney must be admitted in California. In most situations, however, the temporary attorney performs research and writing or other tasks that do not require a license so long as an attorney licensed by the state retains full control over the representation of the client and exercised independent judgment in reviewing the non-licensed attorney's work. Law firms must take care to use temporary attorneys with the requisite experience for the task, and must consider the duty of competence, but simply engaging temporary attorney services from an attorney not admitted in California generally 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.")

Orange County Bar Association Formal Opinion 2014-1. The Opinion concludes that "[t]here is nothing inherently unethical with a client or lawyer hiring another lawyer—often a contract lawyer—to ghostwrite a document to be submitted to court, without identifying the contract lawyer or disclosing his involvement." OCBA Formal Opinion 2014-1 at 8.

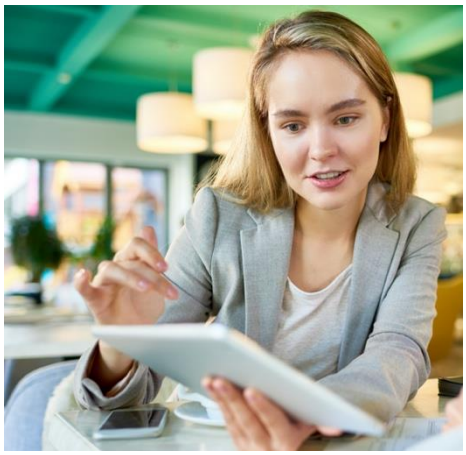
Firms outsourcing to out-of-state attorneys may limit their risk of aiding and abetting the unauthorized practice of law by following some simple steps:

a) Ensure that the contract attorney is only performing tasks that are within their authorized scope of practice in the state where the legal work will be performed. The law firm should provide clear instructions and guidelines to the contract attorney, and it should monitor their work to ensure that it is in compliance with state law.

b) Ensure that the law firm is supervising the work of the contract attorney appropriately.

c) Clearly define the scope of the contract attorney's work. Do not ask the contract attorney to make appearances, sign documents, appear on case captions, counsel clients, or otherwise practice law without a license.

By taking these steps, a law firm can hire a contract attorney licensed in another state without aiding and abetting the unauthorized practice of law.



3. Duty of Competence/Duty to Supervise

Can a hiring lawyer discharge his or her duty of competence by hiring a freelance attorney?

Take Away: No, lawyers are ethically required to competently represent their clients, and an attorney cannot discharge his or her duty of competence under any circumstances. Hiring firms are encouraged to obtain legal help only from competent, experienced freelance attorneys to supplement their legal knowledge, but must always supervise a freelance attorney and review their work product. The hiring firm is ultimately responsible for all work product that leaves the firm.

California Rule of Professional Conduct 1.1 requires that an attorney perform legal services with "competence," which the Rule defines as the application of "the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service." If an attorney is unfamiliar with an area of law, they may also choose to seek assistance from other attorneys to enhance their competence. This is permissible under Rule 1.1, which further states, "If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes to be competent." To satisfy the duty of competence, however, the attorney must be able to independently determine whether the "outsourced" work has been done competently.

The attorney therefore must know enough about the issue or subject to competently judge the work. The attorney may not solely rely on a temporary attorney to discharge the duty of competence. SDCBA Opinion 2007-1.

An attorney's duty of competence is not limited solely to the practicing attorney, but also extends to subordinate attorneys and staff. Rules 5.1 and 5.3 clarify that a hiring attorney has a duty to supervise all subordinates, both lawyers and nonlawyers, including attorneys who are not members of the hiring firm. This means that an attorney's duty of competence includes responsibility for any temporary attorneys working on the firm's matters. 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 provides guidance. The freelance attorney drafts the document(s), which the hiring attorney reviews, revises, and/or ratifies. The hiring firm is ultimately responsible for all content in every document that leaves the firm. Under Rule 5.1(b), "A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act." Rule 5.1(c) further clarifies that the hiring attorney is responsible for another attorney's violation of the duty of competence if the lawyer "orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved" or "the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action."

Simply stated, an attorney cannot discharge the duty of competence, and remains ultimately responsible for the firm's work product.
The ABA has commented on the importance of using only skilled and experienced 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."

Comment 1 to ABA Model Rule 1.1 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 only skilled contract attorneys with the experience necessary to competently perform the quality of legal work all clients deserve, and to exercise competent, independent judgment over the temporary attorney's work product. A hiring firm cannot discharge its duty of competence by hiring a freelance attorney, and must review, revise and/or ratify all work performed by a freelance lawyer because the hiring firm is ultimately responsible for all work product that leaves the firm.

4. Duty to Preserve Client Confidences

Does a hiring lawyer violate his or her duty to preserve client confidences when he or she reveals confidential information to a freelance lawyer assisting on a project?

Take Away: All lawyers, including freelance lawyers, have the same duty to preserve all clients' confidential information. When it is necessary for a law firm to provide confidential information to a freelance lawyer assisting on a matter, the freelance attorney bears the burden of non-disclosure regarding secrets learned during her involvement with the representation. The law firm has the obligation to screen the freelance attorney from client secrets unrelated or unnecessary to a particular project.

Every attorney has a duty to preserve their clients' secrets. California Rule of Professional Conduct 1.6 states, in pertinent part, "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule." The rule has been applied broadly and has been interpreted to cover any information gained in the engagement that the client does not want disclosed, or the disclosure of which is likely to be embarrassing or detrimental to the client.

When a law firm uses a freelance attorney, it may need to disclose a client's confidential information to the freelance attorney for the freelance attorney to adequately assist with the client matter. The freelance attorney bears the burden of non-disclosure regarding secrets learned during her involvement with the representation, while the law firm has the obligation to screen the freelance attorney from

client secrets unrelated or unnecessary to a particular project. See COPRAC Opinion Nos. 1992-126, and 1993-133. See also Los Angeles County Bar Association Formal Opinion 518 ("LACBA 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." See also COPRAC Opinion 2004-165; ABA Model Rule 1.6.

Law firms should err on the side of caution and limit the information it shares with an outside attorney to that which is required to complete the task. Law firms may also consider a freelance attorney agreement that references the duty to maintain client confidences as set forth under the California Rules of Professional Conduct and/or the ABA Model Rules.

5. Duty to Inform the Client
Is a law firm required to notify its client that it is using a freelance lawyer to assist on a matter?

Take Away: A hiring lawyer generally does not have a duty to notify its client when he or she is using a freelance lawyer on a matter unless the representation constitutes a "significant development." Whether the freelance lawyer's assistance constitutes a significant development may depend on a variety of factors, such as the extent of the contract attorney's involvement in the case, the type of work the contract attorney is performing, and the expectations of the client regarding the representation. Clients never like surprises, so notifying a client that an experience freelance lawyer will be working on a particular matter is recommended.

Maintaining a balanced caseload can be a struggle for law firms. Manageable cases can heat up unpredictably and can quickly become overwhelming. Despite inevitable rushes and emergencies, law firms may be reluctant to outsource because of questions regarding client disclosure.

In general, law firms have a duty to keep their clients informed about any material developments in their case and to provide competent and diligent representation. California Rule of Professional Responsibility 1.4 states: "A lawyer shall keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Similarly, Business and Professions Code section 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, these authorities require a lawyer to inform a client that he has hired an outside lawyer or firm if the use of the outside lawyer or firm is a "significant development."

Whether hiring a contract attorney rises to the level of a material development that requires disclosure to the client may depend on a variety of factors, such as the extent of the contract attorney's involvement in the case, the type of work the contract attorney is performing, and the expectations of the client regarding the representation. COPRAC Opinion 2004-165. COPRAC Opinion 1994-138 enumerates examples of relevant factors in determining whether a firm is required to disclose the contract attorney relationship, including: (i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work; or (iii) whether 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 as to whether a development is "significant" is not only a function of the three factors discussed in Formal Opinion 1994-138, but also whether the client had a "reasonable expectation under the circumstances" that a contract lawyer would be used to provide the service.

SDCBA Opinion 2007-1 further analyzes COPRAC Opinion 2004-165, and finds that the question should not be limited to whether the service to be "outsourced" technically involves the practice of law - "to the contrary, 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 which is 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, best practices and the applicable ethical rules and opinions suggest that firms keep clients informed when using outside attorneys on their matters beyond small tasks such as basic research and writing. This may be as simple as including a provision in your client engagement letter.

6. Fees Charged To The Client

Is a law firm allowed to make a profit off a freelance attorney's rate?

Take Away: Yes, just like law firms are allowed to profit off their paralegal and associate rates, law firms can add a surcharge to a freelance lawyer's rate. In terms of fees paid to a freelance lawyer, ethical rules permit firms to (1) absorb the cost paid to the freelance lawyer; (2) pass the cost to the client at the same rate the firm paid the freelance attorney; (3) mark up the cost and pass the marked up cost to the client; or (4) pass a flat fee cost to the client. Most firms choose to add a surcharge to a freelance lawyer's rate, i.e. pay the freelance lawyer $150 and charge their client $375, but they must make sure the total fee is "reasonable."

In addition to easing law firm workload, increasing client service, and improved firm attorney well-being, law firms frequently view contract attorneys as a profit center to the firm.
When a law firm hires a freelance attorney, the firm can elect to bill the client in several different ways: (1) absorb the cost; (2) pass the cost to the client at the same rate the firm paid the freelance attorney; (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 four fee arrangements are ethical in California and the vast majority of states, assuming the fee passed to the client is not otherwise unconscionable pursuant to California Rule of Professional Responsibility 1.5, and assuming the attorney satisfies the standard requirements set forth under California Business and Profession Code sections 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 1.5 suggests that the attorney's profit margin is relevant to the issue of unconscionability. See case law citing prior rule 4-200: *Shaffer v. Superior Court* (1995) 33 Cal. App. 4th 993; *Bushman v. State Bar* (1974) 11 Cal. 3d 558, 564 (a fee which "shocks the conscience" is unconscionable); 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.") Note, however, that if the firm chooses to pass a marked-up rate to its client, according to the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, it likely constitutes a "significant development" of the case and the firm should notify the client that it is working with an outside consulting attorney. Rule 3-500; Bus. and Prof. Code §6068 (m); LACBA Formal Opinion 518.

Similarly, the ABA's Model Rules of Professional Conduct do not explicitly address whether a law firm can add a surcharge to a contract attorney's rate. Model Rule 1.5(a) states that a lawyer's fee must be reasonable and should consider various factors such as the time and labor required, the nature of the services provided, and the fee customarily charged in the locality. The comment to this rule further explains that "the fee may be a reasonable percentage of the amount involved or may be fixed at the outset of the representation, depending on the circumstances."

The District of Columbia Court of Appeals confirmed this in *Matter of Cooperman* (D.C. 2014) 83 A.3d 435, holding that a law firm could add a surcharge to a contract attorney's rate as long as the fee charged was reasonable and the client was informed about the surcharge in advance. The court explained that "surcharge arrangements can be a legitimate and ethical means of compensating contract attorneys" and that the key was ensuring that the fee charged was reasonable.

7. Fee-Splitting/Financial Arrangement

Does hiring freelance lawyers through a platform violate any ethical rules prohibiting fee-splitting?

Take Away: Fee-splitting rules are inapplicable when a freelance attorney platform connects law firms to freelance lawyers and the platform pays the freelance lawyers. This is because ethics opinions are clear that the money the law firm pays to the platform is not considered a "client fee". Rather, the work performed by the platform is viewed as a cost similar to the work performed by a paralegal company or graphic design company, and no actual "client fee" is involved. If, however, the arrangement involves freelance lawyers working directly for clients – as opposed to other lawyers – fee-splitting rules should be reviewed carefully.

The general rule on fee-splitting is that attorneys may not share legal fees with non-lawyers under California Rule 5.4 (Financial and Similar Arrangements with Nonlawyers), which states: "A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law…." If a law firm hires a freelance attorney through a company, is that law firm violating Rule 5.4 by paying the company for the freelance attorney's work?

Ethical opinions all come to the same conclusion that fee-splitting rules are inapplicable when a company contracts freelance lawyers to law firms because the fee paid to the company is not considered a "client fee." Specifically, LACBA Opinion 518 finds that the law firm's payment to the company is simply the purchase of a service: "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 5.4 since the law firm has "merely purchased services at a specified rate," and Rule 5.4 is similarly inapplicable because the law firm has "has contracted for services, at an hourly rate, from Company." See LACBA Opinion518. The same reasoning applies when a company contracts with an in-house department or corporate legal department.

Following LACBA Opinion 518, it is therefore clear that when a company contracts with a law firm for services performed by an independent contractor freelance lawyer, is paid directly by the law firm, and then pays the freelance lawyer, there is no violation of any ethical rules regarding fee-splitting. See also, ABA Opinion No. 88-356, which 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. See also, COPRAC Opinion 1992-126 (finding that an arrangement for a group of attorneys to form an employment agency which contracts out attorneys to law offices on a temporary basis and charges an hourly rate for attorney services to be paid directly to the agency with a service surcharge paid to the agency is ethically permissible, assuming the agency never deals with the law firm's clients directly, and assuming the freelance attorney is an independent contractor, rather than an employee of the company.)

Assuming, however, that the financial arrangement is distinct from that addressed in the previously discussed opinions – and somehow 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.

With respect to Rule 2-200 (now Rule 1.5.1), COPRAC Opinion 1994-138 articulated 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* (2002) 29 Cal.4th 142 (holding that 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% of $1,500 that the client pays for a project, Rule 2-200 (now Rule 1.5.1) applies to preclude the fee arrangements). If a law firm hires a freelance attorney directly, then Rule 1.5.1 (Fee Divisions Among Lawyers) may also apply if payment to a contract attorney is contingent upon the hiring firm collecting fees from the ultimate client.

If the hiring firm's payment to the freelance attorney is conditional, then the firm must comply with the steps set forth in Rule 1.5.1, including a written agreement between the attorneys to divide the fee, and written client consent to the arrangement.

8. Malpractice Insurance

Do freelance lawyers need to obtain their own malpractice insurance?

Take Away: There is no ethical rule requiring any attorney in California to carry malpractice insurance, whether the lawyer directly represents clients or works as a freelance lawyer for other law firms. The only rule that exists states that attorneys who do not carry malpractice insurance must inform their clients in writing if the representation is expected to exceed 4 hours. When a freelance lawyer ghost-writes for a law firm or performs work behind the scenes, the freelance lawyer is working on behalf of the law firm – not on their own behalf. Even though freelance lawyers are not required by any rule to obtain malpractice insurance, freelance lawyers should review all malpractice rules and make their own decisions on malpractice insurance.

Attorneys practicing law in California are not required to carry malpractice insurance, but pursuant to Rule 1.4.2, attorneys who do not carry malpractice insurance must inform their clients in writing if the representation is expected to exceed 4 hours.

A law firm has the ultimate responsibility to their client, and most law firm who serve as counsel of record choose to carry malpractice insurance to protect against risks of a malpractice lawsuit. Insurance policies are all different in terms of their coverage of associates, freelance lawyers and any other individual helping a law firm with a matter. Some insurance companies allow a law firm to add a specific freelance attorney to policies without additional premiums, while other insurance policies frequently automatically cover freelance attorney work.

If a freelance lawyer is ghost-writing for a law firm, and working on behalf of that law firm and not on their own behalf, many freelance lawyers are comfortable working under the law firm's policy and choose not to obtain their own policy. Some freelance lawyers choose to carry their own policy out of an abundance of caution, and each freelance lawyer should weigh the costs and benefits of obtaining a malpractice policy.

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.

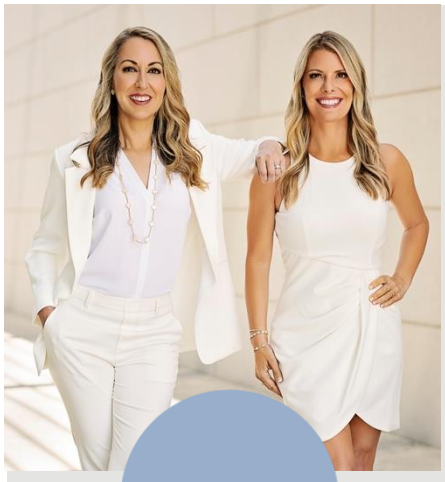
See LACBA Opinion 518 ("…in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.") It is not ethically permissible 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. See Rule 1.8.8 ("A lawyer shall not contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice.").

Pursuant to Rule 1.4.2, if a law firm carries malpractice insurance and hires a freelance attorney who does not carry malpractice insurance, the law firm does not necessarily have to notify their client. If the freelance attorney's work does not constitute a "significant development," and disclosure to the client is not required, then it follows that disclosure of the lack of malpractice insurance is also probably not required.

If a law firm knows their own malpractice policy does not cover its freelance lawyer, and their freelance lawyer's work constitute a "significant development," out of an abundance of caution, the law firm may choose to notify the client that the freelance lawyer does not carry their own policy.

Conclusion

Busy lawyers trusting their critically important client work to freelance attorneys need not be intimidated by logistics and ethical considerations, which are all manageable with the right strategy, planning, and communication. Outsourcing can truly enhance a law firm's ability to provide excellent client service, while helping lawyers maintain a healthy balance between professional and personal pursuits.



Erin Giglia and Laurie Rowen are the co-owners/founders of Montage Legal Group, LLC, a freelance attorney company comprised of former prestigious law firm freelance lawyers who do high-level, substantive legal work for law firms and in-house legal departments on a project/temporary basis.

Prior to founding Montage, Erin and Laurie both practiced litigation at Snell & Wilmer, LLP. Laurie and Erin have been featured in numerous publications including Forbes.com and the ABA Journal, and have received numerous honors in connection with their work with Montage, including receiving OC Metro Magazine's "Top 40 under 40" young professionals, the National Association of Women Business Owners-OC's Entrepreneur to Watch, the Enterprising Women's Magazine's Enterprising Women of the Year Award, and the National Philanthropy Day prize for small businesses. Laurie and Erin frequently speak and write about ethics and contract lawyers including numerous publications for the American Bar Association and the California State Bar. To contact Laurie and Erin with questions, please email info@montagelegal.com.