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The Ethics of Freelance Lawyering, Parts 1-4

The Ethics of Freelance Lawyering, Part 1: Duty to Inform the Client and Fees Charged to the Client/Upcharging

By Erin Giglia and Laurie Rowen
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Before Contracting With a Freelance Lawyer, Know These Eight Ethical Rules

Many attorneys grapple with the paradox of time: The billable hour fuels earnings, yet time remains an irreplaceable asset. The digital age has amplified this challenge, granting clients constant connectivity and heightening expectations for instantaneous responses. To manage these demands while safeguarding attorney well-being, law firms are increasingly turning to freelance or contract attorneys. This approach enhances client service and practice capabilities while affording attorneys more time for personal endeavors.

Before passing projects to freelance lawyers, however, firms must navigate eight ethical considerations that are relevant to legal outsourcing. The California Rules of Professional Responsibility govern, with support from state ethics opinions.

The article is arranged into four parts, and will address these ethical considerations:

Courtesy photos

Laurie Rowen, left, and Erin Giglia, right, of Montage Legal Group.

Part 1: "Duty to Inform the Client and Fees Charged to the Client/Upcharging"

Part 2: "Conflicts of Interest and Duty to Preserve Client Confidences"

Part 3: "Aiding and Abetting the Unauthorized Practice of Law and Duty of Competence/Duty to Supervise"

Part 4: "Fee-Splitting and Malpractice Insurance"

Duty to Inform the Client

Is a law firm required to notify its client that a freelance lawyer is assisting on a matter?

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 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 "significant development" depends on several factors, such as the extent of the contract attorney's involvement, the type of work they are performing, and the client's expectations regarding the representation. COPRAC Opinion 1994-138 enumerates relevant factors in determining whether a firm must 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 depends on 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: "[T]he 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 hiring attorney, the client must be informed when the service is "outsourced."

Because a "significant development" depends on specific facts, best practices and the ethical rules suggest that firms keep clients informed when using outside attorneys on their matters beyond small tasks such as basic research and writing.

Fees Charged to the Client

Is a law firm allowed to profit from a freelance attorney's work?

In addition to easing law firm workload, increasing client service, and improved firm attorney well-being, law firms utilize contract attorneys as a profit center.

When hiring a freelance attorney, the firm has several options: (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. These fee arrangements are ethical in California, 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 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 (1974) (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, and the firm should notify the client that it is working with an outside consulting attorney. Rule 3-500; Bus. and Prof. Code Section 6068 (m); LACBA Formal Opinion 518.

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 ensure the total fee is "reasonable."

We will continue this discussion with Part 2 ("Conflicts of Interest; Duty to Preserve Client Confidences"), Part 3 ("Aiding and Abetting the Unauthorized Practice of Law; Duty of Competence/Duty to Supervise"), and Part 4 ("Fee Splitting; Malpractice Insurance").

Erin Giglia *and* **Laurie Rowen** *are co-owners and founders of Montage Legal Group.*

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The Ethics of Freelance Lawyering, Part 2: Conflicts of Interest and Duty to Preserve Client Confidences

By Erin Giglia and Laurie Rowen
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Busy lawyers everywhere struggle with the same issues. Growing a law firm sounds easy conceptually, but in practice is wrought with challenges. Law is a style- and personality-driven industry. A perfect associate on paper may not be the perfect match for your firm. Working with experienced freelance attorneys can be one solution. Before a law firm decides to hire a contract lawyer, understand the ethical rules for your best chances of success. We discussed the duty to inform the client and fees charged to the client in Part 1. Part 2 will address conflicts of interest and the duty to preserve client confidences.

Conflicts of Interest

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

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 at a firm, or is a temporary contract attorney, and prohibits an attorney from accepting or continuing client representation if there is a conflict or potential conflict affecting the representation. If a freelance attorney temporarily works on a matter, 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. COPRAC 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 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. 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.

A lawyer who is "of counsel" at a law firm must pay special attention to the ethical implications that the "of counsel" designation creates—specifically with respect to imputed conflicts. Unlike the case-specific conflict analysis for an independent contractor, an "of counsel" lawyer in California is deemed part of the law firm for conflict purposes. See *Speedee Oil* (1999) 20 Cal. 4th 1135 (stating that for purposes of conflicts of interest and disqualification, an "of counsel" attorney and the principal firm must be considered "a single, de facto firm" so that if one of them is precluded from a representation because of a conflict of interest, the other is presumptively precluded from the representation). 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. 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 for Firm B through Firm A's conflict system. Many freelance lawyers avoid the "of counsel" designation in order to avoid imputed conflicts.

Relationships between temporary attorneys and firms vary widely, from a short discrete project to ongoing relationships. Firms and temporary attorneys should take precautions to limit the temporary attorney's access to confidential client information. 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." See 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."

Duty to Preserve Client Confidences

Does a hiring lawyer violate the duty to preserve client confidences when revealing confidential information to a freelance lawyer?

Every attorney has a duty to preserve their clients' secrets. California Rule of Professional Conduct 1.6 states, in 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 hires a freelance attorney, it may need to disclose a client's confidential information for the freelance attorney to adequately assist with the 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.

We will continue the discussion with "Aiding and Abetting the Unauthorized Practice of Law; Duty of Competence/Duty to Supervise" in Part 3, and "Fee Splitting and Malpractice Insurance" in Part 4.

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The Ethics of Freelance Lawyering, Part 3: Aiding and Abetting the Unauthorized Practice of Law and Duty of Competence/Duty to Supervise

By Erin Giglia and Laurie Rowen

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We discussed the duty to inform the client, fees charged to the client, conflicts of interest, and the duty to preserve client confidences in Parts 1 and 2. Part 3 will address aiding and abetting the unauthorized practice of law and the duty of competence/duty to supervise.

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?

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 not licensed in California.

Birbrower, Montalbano, Condon & Frank v. Superior Court, (1998) 17 Cal.4th 119, 129, has discussed the meaning of practicing law: "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."

California rules permit law firms to contract for many legal services by attorneys not licensed in California, including drafting legal pleadings, if 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 preparatory work, 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).

In most situations, 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 and exercises independent judgment in reviewing the non-licensed attorney's work. Law firms should 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 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."

In sum, assuming the hiring attorney maintains control over all work product, 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.

Duty of Competence/Duty to Supervise

Can a hiring lawyer discharge the duty of competence by hiring a freelance attorney?

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 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. An attorney's duty of competence includes responsibility for any temporary attorneys working on the firm's matters, and 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."

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."

Simply stated, an attorney cannot discharge the duty of competence, and remains ultimately responsible for the firm's work product. Best practices dictate hiring skilled contract attorneys with the experience necessary to competently perform high quality legal work, and to exercise competent, independent judgment over the temporary attorney's work product.

We will continue the discussion with fee-splitting/financial arrangement and malpractice insurance in Part 4.

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The Ethics of Freelance Lawyering, Part 4: Fee-Splitting and Malpractice Insurance

By Erin Giglia and Laurie Rowen
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We discussed the duty to inform the client, fees charged to the client, conflicts of interest, and the duty to preserve client confidences, aiding and abetting the unauthorized practice of law and the duty of competence/duty to supervise in Parts 1 through 3. We will address fee-splitting and malpractice insurance in Part 4.

Fee-Splitting/Financial Arrangement

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

Attorneys may not share legal fees with non-lawyers under California Rule 5.4, 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." Ethical opinions all come to the same conclusion that fee-splitting rules are inapplicable when a company or freelance platform contracts freelance lawyers to law firms because the fee paid to the company is not considered a "client fee."

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 Opinion 518. The same reasoning applies when a company contracts with an in-house department or corporate legal department.

Following LACBA Opinion 518, 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.)

In sum, fee-splitting rules are inapplicable when a freelance attorney platform connects law firms to freelance lawyers and the platform pays the freelance lawyers because 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.

Malpractice Insurance

Do freelance lawyers need to obtain their own malpractice insurance?

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. 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 four hours.

A law firm has the ultimate responsibility to their client, and most law firms serving as counsel of record carry malpractice insurance to protect against risks of a malpractice lawsuit. Insurance policies all have different coverage options for associates, freelance lawyers and others. Some insurance companies allow a law firm to add a specific freelance attorney to policies without additional premiums, while other policies automatically cover freelance attorney work.

If a freelance lawyer is ghostwriting 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.

Erin Giglia *and* **Laurie Rowen** *are co-owners and founders of Montage Legal Group.*

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 nationwide.

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, 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 or to hire a freelance lawyer for a project, please email info@montagelegal.com.