Contract Lawyering – The Rewards (and Risks)[1]

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1. Scope of Contract Legal Work.

A contract lawyers has been defined as "A lawyer who provides legal services for another lawyer on a temporary, freelance, project, hourly or intermittent basis." D. ARRON, WHAT CAN YOU DO WITH A LAW DEGREE? 347 (3rd ed. 1997). Wikipedia explains that:

> The work of **contract attorneys** often varies. They can be engaged [for] activities such as document review in response to a document subpoenas or request for production of documents. . . .
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> Many contract, or freelance, attorneys perform legal research, draft legal briefs, and provide a full range of other services to law firms of all sizes. These attorneys typically work for themselves, rather than for temporary agencies, and provide their services to other law firms on an as-needed basis.
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> Some people who hold juris doctor degrees, but who are awaiting bar admission, work as temporary professionals in law firms doing the same type of work as contract attorneys. . . .
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> Contract attorneys typically work on a project-by-project basis and are not full-time law firm employees. However, they also develop long-lasting relationships with firms that regularly or semi-regularly send work to the contract attorney. Many small firms find that the use of contract attorneys provides them the flexibility to grow their business without hiring salaried employees.
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> According to the American Bar Association, law firms can add a surcharge to the fees of their contract attorneys so long as the final fee charged to the client is reasonable. Particularly in a slowing economy, the use of contract attorneys gives firms a competitive edge in the marketplace, helping them to control costs while increasing profitability.

Wikipedia, en.wikipedia.org/wiki/Contract_attorney (April 27, 2011) (footnotes omitted).

[1] These materials are derived from WORKING FOR OTHERS WHILE WORKING FOR YOURSELF: HOW TO BUILD A SUCCESSFUL PRACTICE WITH CONTRACT WORK, prepared for and presented at the 2010 Missouri Solo and Small Firm Conference, by Chris A. Wendelbo, The Session Law Firm, Chris Stiegemeyer, The Bar Plan Mutual Insurance Company, and Rick Rollings.

Lawyers provide services to others. This is true whether employed by a government entity, employed as in-house counsel for a corporation, or practicing as a partner or associate in a law firm. Contract lawyers simply have another attorney between themselves and the clients for whom the work is being done. As a result, contract legal work is as varied as the general practice of law. Additionally, providing contract legal work can be a chosen career or a temporary measure. Some attorneys provide contract legal work to supplement their practice or as a way to establish themselves in either a practice area or a new community. In contrast, others are full time contract lawyers with no intention of engaging in any other type of practice.

The use of contract lawyers can provide law firms with efficient and low cost ways of meeting client needs, and provide lawyers an alternative to traditional legal work. However, the relationship between the primary attorney, the contract attorney, and the client can present unique ethical and malpractice issues.

2. Advantages.

Contract legal work can provide flexibility that is often not otherwise available in the practice of law. Providing contract legal work normally allows an attorney to determine the number of hours to be worked as well as when to work. An attorney that accepts a litigation client is generally obligated for whatever time is required until that litigation is completed. In contrast, a contract lawyer is hired for a particular project, such as drafting a motion for summary judgment. When the project is completed, in this example when the summary judgment motion, response, and reply have all been filed, the contract lawyer's obligation ends. The project by project nature of contract legal work allows a contract lawyer to accept or decline work in smaller increments and provides more flexibility in determining the hours the contract lawyer works. Some attorneys have chosen contract legal work simply because of the flexible hours that allow time for family, hobbies, or other activities. Others have chosen contract legal work to avoid the minimum billing requirements of many firms.

Contract lawyers also have more flexibility regarding the location where their work is done. As contract lawyers often have little or no direct contact with the ultimate client, it is not unusual for contract lawyers to work from home or have other, less formal, office arrangements that can reduce overhead expenses. Some contract lawyers consider the minimum contact with clients as an advantage as well.

Collecting fees can also be simpler for contract lawyers, depending on the fee arraignment involved. A contract lawyer is hired by another attorney and, generally, the other attorney is responsible for the contract lawyer's fee regardless of whether the other attorney is paid by the client. Especially when a contract lawyer routinely works for the same attorney or firm, the contract lawyer knows that their fees will be paid as well as how quickly or slowly the fees will be paid.

Contract lawyers also have the option of working through agencies. A good agency should provide a steady flow of projects and reduce the amount of time spent on administrative tasks such as sending statements. An agency can also provide projects for attorneys that do not have

personal contacts or other means of locating contract legal work. Of course, the agency will retain a portion of the fees.

The use of contract lawyers also provides advantages to the attorneys or firms that hire them. A contract lawyer can work on a project that the attorney or firm would not otherwise have time to complete. A contract lawyer can provide legal research and drafting services so that the attorney or firm can concentrate on other activities. Contract legal work also provides an economical alternative compared to hiring an associate. The contract lawyer is only paid for the projects on which that lawyer works, whether by the hour or on a flat fee basis. In contrast, an associate requires a commitment as to salary, benefits, and overhead that is not necessary when using the services of a contract lawyer.

3. Disadvantages.

As with everything, especially the practice of law, there are advantages and disadvantages. The primary disadvantage of contract legal work is financial. Contract lawyers, unless they focus on an area of the law that requires specialist, generally charge less than the average attorney in their area. Whether fees are charged on a flat, hourly, or contingent basis, a contract lawyer's fees need to be less than would be charged by the average attorney in order for it to be advantageous for both the attorneys that hire the contract lawyers and the ultimate clients.

Additionally, the fact that contract lawyers are hired for projects often results in fluctuations in the amount of work available. The fluctuating stream of projects results in fluctuations in both the corresponding stream of fees being earned and the hours the contract lawyer works. A contract lawyer may have only a project that takes a few hours one week but have several projects the next week that require late hours and a long weekend.

Many attorneys will not necessarily enjoy the work they can find as contract lawyers. As Wikipedia recognized, contract legal work now often involves legal research and drafting legal briefs. Some attorneys may find such work less enjoyable than court appearances or other aspects of legal work that are less frequently delegated to contract lawyers. Additionally, contract lawyers are hired to work on projects that the hiring attorneys do not want to do. A contract lawyer may also feel obliged to take less desirable projects from an attorney with whom the contract lawyer often works in order to maintain the relationship with that attorney.

Contract legal work can also be isolating. The general practice of law provides attorneys with opportunities to interact with clients, opposing counsel, other attorneys in the same firm, support staff, as well as court personnel, all on a regular, if not daily, basis. Contract lawyers deal most frequently with the attorneys that hire them and only much less frequently with others involved in the case. As a result, contract lawyers do not have the diversity of professional interactions that other attorneys enjoy.

4. Advertising and Finding Work.

The marketing options available to contract lawyers have improved significantly over the last decade. Facebook, Twitter, LinkedIn, blogs, and websites provide inexpensive ways for contract

lawyers to promote themselves and interact with attorneys that may need their services. The Small Firm Internet Group (SFIG) listserver maintained by the Missouri Bar provides a great method for meeting and working with a large number of solo and small firm attorneys in Missouri. Other states or groups may have similar opportunities. Solo and small firms more frequently need contract legal work due to the relatively large commitment involved in the hiring of an associate by such attorneys.

A contract lawyer's advertising should be focused on attorneys. Local bar association newsletters often include space for classified advertisements or announcements at reasonable rates. Rule 7.3 exempts communications with attorneys from many of the requirements and restrictions involved in that section. Rule 7.3(a) and (c)[2]. Therefore, direct contact, whether in-person, by email, or regular mail, is allowable. Letters to attorneys in a particular geographic area may be worthwhile.

The most important method for obtaining contract legal work may simply be word of mouth. Contact attorneys you know, have worked with, or have had cases against and let them know that you are now providing contract legal work. Even if they are not in need of your services, they can provide your name, and a reference, to any attorneys they know that need assistance.

5. Areas of Practice.

A contract attorney may provide numerous types of legal assistance to the hiring counsel. However, a contract lawyer's specialized experience or expertise may add significantly to the value of the contract relationship. These attributes allow the retaining counsel or firm to better meet the needs of their clients in a cost-effective and timely manner.

Experience or expertise in tax, securities, environmental law, government relations, appellate practice, or employment law can allow a contract lawyer to assist attorneys or firms with legal work outside their normal practice areas. By supplementing the legal skills available to a client with subject matter experts, the retaining firm may effectively compete with larger "full-service" law firms. As a result, the use of a contract attorney may allow small or solo practitioners to provide those same services on an as-needed basis and effectively compete with larger firms. In this situation, the contract lawyer may augment the services provided by the hiring firm, or may be directed to perform a discrete legal task. The result to the retaining firm is the ability to effectively meet the legal needs of a given client without having the cost of full-time staff.

Litigation and appellate experience can also provide a basis for contract attorney's practice. Many smaller firms may need to augment their staff at critical phases of the litigation process. The use of a contract lawyer will allow the retaining firm to augment its staff to perform those tasks that are "man-hour" intensive and provide the firm with a greater level of expertise than may be obtained through the use of paralegals. Contract lawyers with previous litigation experience are especially valuable additions to any litigation team. A contract lawyer with appellate experience can also provide valuable assistance as a part of a litigation team. The

[2] All references to Rules are to the Indiana Rules of Professional Conduct unless otherwise specified.

critical research and writing skills appellate attorneys possess can also be valuable in motion practice. Appellate attorneys can further assist in preserving issues for appeal and preparing post trial strategies and activities.

Experience with transactional practices such as real estate or mergers and acquisitions can likewise for the basis for contract legal work. The due diligence review and analysis requirements associated with these types of transactions often require significant review and analysis of both historical and current data regarding the acquisition target. The use of specialized contract counsel to reliably perform these functions often allows the hiring counsel to meet enhanced or the "one-time" legal needs of clients.

Finally, the use of contract attorneys to provide general research and writing services, as directed by the hiring counsel or firm, is well established. The establishment of a relationship with a reliable contract attorney to perform general research and writing services on an "on-call" or "as-needed" basis allows the solo or small firm practitioner the ability to effectively provide legal services to clients as they arise, while allowing the hiring practitioner to operate with existing staff and facilities.

6. Scope of Practice.

The move to begin performing contract legal services may be motivated by various needs or causes, including unemployment, the need to augment salary, the need to supplement business growth, or the desire for more work/life flexibility or balance. The decision as to the scope of contract legal services will depend upon the needs of the individual.

For many attorneys, contract legal work may be a full time pursuit. These professionals pursue contract legal work from other attorneys, who are, in essence, their clients. This strategy has several advantages, including the fact that the client firms or attorneys can provide a stable flow of legal work for the contract attorney from among their client base. Moreover, the contract attorney may market to attorney clients alone, rather than engaging in a broad-based marketing strategy.

A second strategy involves providing contract legal services to others during periods of unemployment or to supplement an existing legal practice. Contract legal work can provide a stable source of income while searching for other employment or while building a traditional practice.

Finally, many attorneys turn to contract legal work arrangements in an effort to achieve a more favorable work/life balance, or during periods when "part-time" work may be more appropriate under their individual circumstance. These arrangements often arise when an attorney leaves a firm but continues to provide services to that firm.

The working arrangements for contract legal work may take many forms. This lack of a formal structure can be beneficial in meeting personal obligations and needs. This arrangement is especially productive for those assisting with raising children or caring for a loved one and enables that attorney to "stay in the game" to the extent desired or practicable.

7. Fee Arrangements.

As with other aspects of the contract lawyer arrangement, there are numerous ways to compensate the contract lawyer. Compensation of the contract lawyer, however, is subject to the rules of professional conduct and careful attention must be given to matters of billing. The costs associated with legal services of a contract lawyer, whether billed to the client as fees for legal services or as expenses, are subject to the reasonableness requirement of the American Bar Association (ABA) Model Rule 1.5(a) and Indiana Rules of Professional Conduct Rule 1.5(a).

The hiring firm may add a surcharge to the cost of the contract attorney, as long as it is reasonable and the client consents. In Formal Opinion 00-420 (November 29, 2000), the ABA Standing Committee on Ethics and Professional Responsibility examined the circumstances when a surcharge may be assessed to a client. A surcharge, or profit, occurs when the retaining lawyer charges the client more for the services of the contract lawyer than the costs incurred by the retaining lawyer for obtaining those services. In ABA Formal Opinion 08-451, the Committee refined its earlier opinion. That opinion indicates that when legal services of a contract lawyer are billed to the client as an expense or cost without an understanding that a surcharge or profit will be assessed, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services. As a result, if the retaining firm or lawyer will charge the client more than the actual costs associated with retaining the contract lawyer, including any overhead allocation and supervisory costs, the client must consent to such charge. This requirement is relevant to all compensation structures.

One common arrangement for compensation of contract lawyers is the hourly fee. This arrangement is often the easiest for the parties given the project by project nature of the relationship and the many variables involved in such projects.

A second possible arrangement is the payment of a flat fee or project fee. Under this scenario, the parties negotiate a fee for the services contemplated. As a practical matter, the contract attorney must determine whether the contemplated fee is consistent with the business model under an internal hourly rate benchmark or in combination with other projected sources of income for the period of performance. Additionally, a “success fee” or “efficiency fee” may also be included whereby the retaining attorney will provide an additional amount should the contract attorney meet predetermined performance milestones, such as timeliness. The agreement between the retaining firm and the contract attorney should clearly set forth the milestones to be achieved and the compensation structure association with these milestones. Any such agreement is subject to the restrictions regarding application of a surcharge to the cost and other rules of professional conduct.

A third common compensation structure associated with contract attorneys is a contingent fee arrangement. In Indiana, a fee may be contingent on the outcome of the matter for which the service is rendered, subject to the prohibitions against contingent fee arrangements under Rule 1.5(d). Rule 1.5(c). As a result, compensation of the contract attorney on a contingent basis is permissible. However, contingent fee agreements must be in a writing signed by the client stating the method by which the fee is to be determined. Rule 1.5(c). Further, the nature of the

contract attorney relationship generally means that the contract attorney will be paid from a portion of the contingent fee of the primary attorney. Therefore, it is recommended that the contingent fee agreement address the fee arrangement of both the primary and contract lawyers. This arrangement generally means that the contract attorney shares the same risk of success or failure as the retaining attorney, unless the contract agreement specifies a different payment structure. The parties must also be cognizant of the Indiana Rules regarding splitting of fees.

8. Division of Fees.

Indiana rules provide that "A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable." Rule 1.5(e). A contract lawyer, as well as the attorney hiring the contract lawyer, should keep this rule in mind when determining the compensation for the contract lawyer since the contract lawyer, by definition, is not in the same firm as the hiring attorney.

When the contract lawyer is paid on an hourly basis, the requirement that the division be proportional to the services performed should normally be met. Compliance with the rule would simply require the client's written agreement and that the total fee be reasonable. Other compensation arrangements for the contract lawyer may be more complicated depending on the fee arrangement the hiring attorney has with the client, but the steps to ensure compliance with Rule 1.5(e) should not be difficult.

However, a contract lawyer's compensation may also be structured so that the requirements of Rule 1.5(e) are not applicable. First, Rule 1.5 makes a distinction between fees and expenses, stating that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Rule 1.5(a). Second, the comments to the rule explain that "A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm." Rule 1.5, Comment [7]. These provisions allow for compensation arrangements that do not involve a "division of a fee between lawyers who are not in the same firm". Rule 1.5(e).

If the fees or charges paid to the contract attorney are billed to the client as expenses, then there is no division of a fee. In essence, the contract attorney is treated the same as any other expert retained by the hiring attorney to assist with the case. Of course, the agreement between the hiring attorney and the client should clearly explain that the charges for any contract lawyers will be treated as expenses and the client should agree to the use of the contract lawyer. In such a situation, as long as the fees and expenses are reasonable, the requirements of Rule 1.5 should be met.

Another option is for the retaining attorney to simply forward the contract lawyer's statements to the client for payment. In that circumstance, the client is being billed separately for the services of the contract lawyer and the hiring attorney and there is no division of a fee.

Finally, the agreement between the hiring attorney and the contract lawyer can provide that the hiring attorney is responsible for the contract lawyer's fees *regardless* of whether the hiring attorney is paid by the client or otherwise receives any fee from the client. There is no division of a fee, at least arguably, if it is the hiring attorney that is solely responsible to the contract lawyer for payment, rather than the client. This situation is closely analogous to other experts that are paid by the hiring attorney, not the client. The agreement between the client and the hiring attorney is simply the method by which the hiring attorney recovers the expenses associated with the contract lawyer. This situation is not as clearly addressed by the Rules of Profession Conduct.

It may also be possible to make other compensation arrangements that either meet the requirements of Rule 1.5(e) for division of a fee or are structured so that Rule 1.5(e) does not apply. However, regardless of the arrangements that are made between the hiring attorney and the contract lawyer, the client should (1) be informed that the services of a contract lawyer are being used, (2) agree to the use of the particular contract lawyer, and (3) be clearly informed and agree as to how and when the client will be responsible for payment of any charges.

9. Conflicts of Interest.

The contract lawyer's conflicts of interest will be addressed generally by Rules 1.7, Conflicts of Interest: Current Clients, and 1.9, Duties to Former Clients. Rule 1.7 would prohibit the lawyer from working simultaneously on the matters of two conflicting clients represented by different firms.

The prohibitions in Rule 1.9 are divided into two broad categories of lawyers: 1) a lawyer who performed work for the client, and 2) a lawyer who was in a previous association with a firm which performed work for the client. A lawyer in the first category "shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Rule 1.9(a).

A lawyer in the second category "shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1. 6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing." Rule 1.9(b).

Rule 1.10 Imputation of Conflicts of Interest: General Rule may also have to be considered by the lawyers in the arrangement. Whether the rule's prohibitions apply will likely be determined by the access the contract lawyer had to the information regarding other firm clients. Lastly, a contract lawyer should maintain conflict of interest information for all clients the same as any other attorney.

10. Disclosure to the Client.

Whether the client must be informed of the involvement of the contract lawyer is generally considered under Rules 7.5 Firm Names and Letterheads, 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer, and 1.4 Communication. The answer typically turns on the question of the level of supervision and control the primary attorney exerts on the contract lawyer. The ABA has concluded that if the lawyer is essentially working independently of the law firm lawyer, the client must be informed of and consent to the contract lawyer's involvement. See, ABA Formal Opinions 88-356 and 08-451.

11. Protecting the Contract Lawyer.

Contract lawyers can take some simple steps to meet their ethical obligations and protect themselves from malpractice. First, a contract lawyer should know how the Rules of Professional Conduct apply to the "Contract Lawyer" representation and craft the representation to meet them. Second, a contract lawyer, like any practicing attorney, should apply common sense to the relationship. Oftentimes, it is possible that simple adherence to the Rules will miss meeting the "Common Sense" test.

When it comes to avoiding ethics complaints and malpractice claims, "common sense" equals disclosure and client communication. "Common sense" should be measured by the level of information and disclosure that a reasonable client would expect, not what an attorney might believe is reasonable in the circumstances. The contract lawyer works for the client, not the primary, or hiring, attorney, and should treat the representation no differently than any other attorney-client relationship. That the primary attorney reviews all of the work of the contract attorney is not a shield for the contract attorney's malpractice liability. If a contract attorney relies on the primary attorney to provide appropriate disclosure, obtain the necessary consent, and communicate with the client, the contract attorney has placed the responsibility for discharging ethical obligations in the hands of the primary attorney.

To avoid this result, the contract lawyer should use an engagement letter to the client disclosing the lawyer's involvement and obtaining consent to the contract attorney's involvement. The nature and extent of the involvement should be addressed. The areas of the representation for which the contract lawyer IS and IS NOT responsible should be described. See *Keef v. Widuch*, 321 Ill.App.3d 571, 747 N.E.2d 992 (1st Dist. 2001) (Attorneys retained to pursue workers compensation claim had duty to advise clients of possible third-party claims for products liability despite limits in representation agreement). Arrangements should be made for the disposition of the portion of the file developed by the contract lawyer. Lines of communication should be established. Issues unique to the contract lawyer-client relationship should be discussed and resolved. Ideally, any questions regarding the representation that arise later should be addressed directly to the client, not the primary attorney. Of course, it would also generally be wise to copy the primary attorney on such correspondence.

At the end of the contract lawyer's involvement in the matter, correspondence should be sent re-stating the contract lawyer's role, stating that the contract lawyer's work in that role is

concluded, and indicating that the contract lawyer will take no further action on behalf of the client.

12. Recent ABA Action.[3]

The American Bar Association Commission on Ethics 20/20 issued its Discussion Draft Regarding Domestic and International Outsourcing on November 23, 2010. A copy of the Discussion Draft is available at http://www.abanet.org/ethics2020/pdfs/discussion_draft.pdf. The ABA Lawyers' Manual on Professional Conduct includes an article regarding the Discussion Draft (26 Law. Man. Prof. Conduct 729 (Dec. 8, 2010)), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/law_man_12_8_2010.pdf.

The Draft Report makes clear that it is not endorsing or condemning outsourcing of legal work. "The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct recommended herein constitute neither endorsement nor rejection of the practice of outsourcing by lawyers and law firms. Rather, they are an important and direct response to the existence and growth of outsourcing practices, intended to help lawyers engaging in the practice to do so ethically and responsibly." (ABA Commission on Ethics 20/20 Draft Report, October 31, 2010, Introduction).

The Discussion Draft proposes changes to the comments to the ABA Model Rules of Professional Conduct rather than any changes to the Rules themselves. An additional comment is proposed regarding Model Rule 1.1 Competence that allows an attorney to retain a lawyer from outside his or her firm when "the lawyer reasonably concludes that the other lawyers' services will contribute to the competent and ethical representation of the client." (ABA Commission on Ethics 20/20 Discussion Draft, November 23, 2010, Rule 1.1, Comment [7]). That comment also provides that "If information protected by Rule 1.6 will be disclosed to the nonfirm lawyers, informed client consent to such disclosure *may* be required. For example, if the rules, laws or practices of a foreign jurisdiction provide substantially less protection for confidential client information than that provided in this jurisdiction, the lawyer should obtain the client's informed consent to such disclosure." (ABA Commission on Ethics 20/20 Discussion Draft, November 23, 2010, Rule 1.1, Comment [7]) (emphasis added).

The Discussion Draft did not propose any changes regarding Model Rule 1.5 Fees, finding that the extensive materials available dealing with the reasonableness of fees eliminated the need for any additional guidance.

[3] The ABA Commission on Ethics 20/20 issued its Initial Draft Proposal-Outsourcing on May 2, 2011. The Initial Draft Proposal-Outsourcing replaced the Discussion Draft previously issued. (Footnote added June 6, 2011.)