

## **Working for Others While Working for Yourself: How to Build a Successful Practice with Contract Work**

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### **1. What is 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:

In the beginning, the work of contract attorneys often entailed such activities as document review in response to a document subpoena or a request for production of documents. . . . The role of the contract attorney has evolved, and now 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.

Wikipedia, [en.wikipedia.org/wiki/Contract\\_attorney](http://en.wikipedia.org/wiki/Contract_attorney) (April 22, 2010).

Lawyers, 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, provide services to others. 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 alternate 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 of Working for Other Lawyers.**

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 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 of Working for Other Lawyers.**

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 just 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 a 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 does 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) listserv 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. 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.

Remember that your advertising needs to be focused on attorneys. Local bar association newsletters often include space for classified ads or announcements at reasonable rates. Missouri Supreme Court Rule 4-7.3 exempts communications with attorneys from the requirements and restrictions involved in that section. Rule 4-7.3(a) and (b)<sup>1</sup>. Therefore, direct contact, whether in-person, by email, or regular mail, is allowable. Letters to attorneys in a particular area informing of your services 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.

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<sup>1</sup> All references to Rules are to Missouri Supreme Court Rules, unless otherwise specified.

## **5. Areas of practice that work well for the use of contract legal work.**

While a contract attorney may provide numerous types of legal assistance to the hiring counsel, the value that a contract attorney brings to the contract relationship often rests in the contract lawyer's ability to provide supplement services on demand and for a limited period of time, the contract lawyers experience in the particular subject matter or the fact that the contract lawyer has specialized legal subject matter expertise. These attributes allow the retaining counsel or firm to better meet the needs of their clients in a cost-effective and timely manner. The following practice areas often are compatible with a contract lawyer relationship.

The first practice area that works well with contract legal services involves those that require specialized legal knowledge. The attorneys sought in this category include those with practice areas that are tied to very specific and discrete subject matters, such as tax, securities, environmental law, government relations, appellate practice or employment law. 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 that offer specialized legal expertise or services as a part of the firm. The use of a contract attorney allows small or solo practitioners to provide those same services on an as-needed basis, allowing them to compete effectively for the legal work. 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.

A second practice area that is very compatible with contract legal relationships involves providing litigation or appellate services. During litigation, many hiring firms often find the 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. Finally, while counsel that provide appellate services are best categorized as specialized skill contract lawyers, these counsel may provided valuable assistance as a part of a litigation team by providing critical research and writing skills in motions and in anticipating and preparing for any post trial strategies and activities.

A third area where contract attorneys may also provide assistance includes real estate transactions or mergers and acquisitions. 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. Full time verses supplement to a typical legal 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 performance of contract legal services will depend upon the individual and their respective needs.

For many legal professionals, the pursuit of contract opportunities 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. Attorneys who successfully provide full-time contract support to others often includes those who provide specialized legal services that are sought by other practitioners, such as those previously mention.

A second strategy involves providing contract legal services to others during periods of unemployment or to supplement an existing legal practice. Contract attorneys who pursue this strategy often find that providing services to other attorneys provides a stable source of income for their practices while they job search or continue to build their own clientele.

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 from the attorney leaving a firm or practice and providing a reduced scope of services to that previous firm. The actual working arrangements may take any form and many find the lack of a formal structure to 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. Hourly fee verses flat fee verses contingent 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.

One common alternative is to pay the contract attorney an hourly fee. 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 the American Bar Association (ABA) Model Rule 1.5(a) and Missouri Rule of Professional Conduct 4-1.5(a) that a lawyer's fee shall be reasonable. The hiring firm may add a surcharge to the hourly cost to the contract attorney, as long as it is reasonable. 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 and noted, 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. In short, 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.

A second possible payment 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, etc. 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 Missouri, and subject to the prohibitions against contingent fee arrangements under Rule 4-1.5(d), a fee may be contingent on the outcome of the matter for which the service is rendered. Rule 4-1.5(c). Compensation of the contract attorney on a contingent basis is permissible. Because a contingent fee agreement must be in a [writing](#) signed by the client stating the method by which the fee is to be determined, it is recommended that any inclusion of the contract attorney shall be set forth in the contingent fee agreement. Because the agreement will be between the retaining attorney and the contract attorney, the payment of the contract attorney will probably be taken from the overall contingent payment amount. In traditional contingent fee arrangements, the contract attorney, obviously shares the same risk of success as the retaining attorney, unless the contract agreement specifies a different payment structure. The parties must also be cognizant of the Missouri Rules regarding the limited scope of representation and fee-splitting provisions.

## **8. Division of Fees.**

Missouri 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 association and the agreement is confirmed in writing; and (3) the total fee is reasonable.” Rule 4-1.5(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 4-1.5(e) should not be difficult.

However, a contract lawyer's compensation may also be structured so that the requirements of Rule 4-1.5(e) are not applicable. First, Rule 4-1.5 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 4-1.5(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 4-1.5, 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 4-1.5(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 4-1.5 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 4-1.5(e) for division of a fee or are structured so that Rule 4-1.5(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 as to and agree 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 4-1.7, Conflicts of Interest: Current Clients, and 4-1.9, Duties to Former Clients. Rule 4-1.7 would prohibit the lawyer from working simultaneously on the matters of two conflicting clients represented by different firms.

The prohibitions in Rule 4-1.9 are broken 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.

A lawyer in the second category shall not knowingly represent a person in the same or a substantially related matter whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Rule 4-1.10 Imputation of Conflicts of Interest 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 level lawyer had to the information of other firm clients.

The contract lawyer should maintain her own conflicts of interest information for all clients she represented.

## **10. Disclosure to the Client.**

Whether the client must be informed of the involvement of the contract lawyer is generally considered under Rules 4-7.5 Firm Names and Letterheads, 4-1.2 Scope of Representation and 4-1.4 Communication.

The answer typically turns on the question of the level of supervision and control the primary attorney exerts on the lawyer. If the lawyer is essentially working independently of the law firm lawyer, the client must be informed of the lawyer's involvement. See, ABA Formal Opinion 88-356. How much control is necessary to avoid having to tell the client? In its Formal Opinion 08-451, the ABA looked at the disclosure question again and concluded that while the conclusion in its Opinion 88-356 was still correct, it stated the conclusion was based on the temporary lawyer being tantamount to an employee of the firm. In its Opinion 08-451 the ABA concluded that in the normal outsourcing type of arrangement, that the client must be informed of the lawyer's involvement and consent to it.



## **11. Protecting the Contract Lawyer.**

What should contract lawyers do in order to meet their ethical obligations and protect themselves from malpractice? First, know how the Rules of Professional Conduct apply to the “Contract Lawyer” representation and craft the representation to meet them. Second, forget the Rules of Professional Conduct and apply common sense to the relationship. Oftentimes, it is possible that adherence to Rules will miss meeting the “Common Sense” test.

## **12. The Contract Lawyer’s Ethics Complaints & Malpractice Claims Avoidance.**

When it comes to avoiding ethics complaints and malpractice claims, “common sense” equals disclosure and client communication. And “common sense” equals that level of information and disclosure that a client has and expects, not what an attorney thinks 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 the contract attorney relies on the primary attorney to provide appropriate disclosure, obtain the necessary consent, communicate with the client, etc., she has placed in the hands of the primary attorney her responsibility for discharging her ethical obligations.

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 area of the representation the contract lawyer is responsible for, AND the areas the contract lawyer IS NOT responsible for, should be described. (*See, Keef v. Widuch*, 321 Ill.App.3d 571, 747 N.E.2d 992 (1st Dist. 2001)). 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, as questions arise during the representation, while it is beneficial to copy the primary attorney, they should be addressed directly to the client, not through the primary attorney.

At the end of the contract lawyer’s involvement in the matter, she should send a letter re-stating her role, that her work in that role is concluded, and she will take no further action on behalf of the client.