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Balancing Efficiency and Safety: Risk Management Issues Associated with Contract Attorneys

The legal profession is undergoing significant transformation driven by access to justice issues, technological advancements, and the need for cost-efficiency. One of the notable trends in this transformation is the increasing reliance on contract attorneys. While this practice offers numerous benefits, it also presents unique legal ethics and risk management challenges. This article explores these issues and looks at the ethical considerations and risk management strategies essential for lawyers and law firms engaging in hiring contract attorneys.

Contract Attorneys

Contract attorneys, also known as temporary or freelance lawyers, are engaged on a short-term basis to handle specific projects or to manage workload fluctuations. They are often recent law school graduates seeking practical work experience, solo practitioners looking to expand their practice and financial opportunities without a long-term commitment, or seasoned practitioners wanting to taper their current practice or start their “encore” careers in retirement on a part-time basis. They are often employed for tasks such as document review, litigation support, and due diligence.

Ensuring that contract attorneys are competent and adequately supervised is crucial.

Benefits of Hiring Contract Attorneys

- 1. Flexibility:** Contract attorneys provide a flexible workforce that can be scaled according to the firm’s needs.
- 2. Proven Track Record:** During the term of the contract, law firms have the benefit of evaluating and vetting the contract attorney for positive performance and possible future, full-time employment.
- 3. Cost Savings:** Hiring contract attorneys can be more cost-effective in terms of overhead, e.g., salary and benefits, than maintaining a large permanent staff, especially during periods of fluctuating demand, such as a trial.
- 4. Specialized Expertise:** Contract attorneys often bring specialized skills and experience that can be valuable for specific projects.

Ethical Considerations with Contract Attorneys

Conflicts of Interest

Conflicts of interest concerns are always present when hiring contract attorneys. This risk is exacerbated if the contract attorney has previously worked for a competing firm or on a related matter, leading to a potential conflict between their prior obligations and their current role.

Another significant issue is the attorney’s duty of loyalty. Attorneys are expected to act in the best interests of their firm and clients, but contract attorneys may not have the same level of commitment or understanding of a firm’s culture and long-term goals.

This can result in divided loyalties, especially if the attorney is concurrently working for another firm or client with conflicting interests. Such divided loyalties can compromise the quality of representation and decision-making, harming the client's interests and the firm's reputation.

In addition, the screening process for contract attorneys may not be as rigorous as for permanent new or lateral hires, increasing the likelihood of undetected conflicts of interest. Firms often have immediate staffing needs and may expedite the hiring process, sometimes omitting thorough background checks or conflict checks. This can lead to situations where a contract attorney's previous engagements or personal interests are not fully disclosed or considered, resulting in unforeseen conflicts and may prompt opposing counsel to file a motion to disqualify.

Confidentiality

Employing contract attorneys involves sharing sensitive information. Because of the temporary relationship between the hiring law firm and the contract attorney, issues of confidentiality can arise. Though the contract attorney owes the same duty of confidentiality to firm clients, because they may work for other clients while contracting with a particular law practice, issues may be less clear. Further, because of the distinctive nature of their employment, which often involves working on a variety of cases for multiple firms over short periods, one concern is the potential for confidentiality breaches. Contract attorneys, who might have access to sensitive information from various clients, could inadvertently disclose or misuse this information if they are not adequately briefed on confidentiality protocols. In a Missouri disciplinary case, a contract attorney sent an email containing photos of a deceased person from the client file to friends accompanied by derogatory and insensitive comments. Those same friends forwarded the email to their friends and so on and so on until the matter was reported to the disciplinary authority. The Court found the contract attorney to have violated, *inter alia*, Missouri's version of the American Bar Association ["ABA"] Model Rule of Professional Conduct 1.6(a) – Confidentiality of Information – and received a suspension of six months stayed by probation.¹

Competence, Supervision & Unauthorized Practice of Law

Ensuring that contract attorneys are competent and adequately supervised is crucial. Although it may seem obvious, it is necessary to ensure that potential contract attorney hires are fully qualified to perform the tasks required and that they can effectively contribute to the firm's objectives and uphold the quality of legal services. One key aspect of this evaluation is assessing the attorney's relevant licensure status, experience, and expertise. Firms should review candidates' past work, focusing on their familiarity with the specific area of law required for the project. This includes examining their case history, previous client feedback, licensure status, and continuing legal education courses. Conducting thorough reference checks with previous employers or colleagues can provide insights into an attorney's work ethic, problem-solving abilities, and reliability.

Another important factor is assessing contract attorneys' ability to integrate seamlessly into the firm's workflow. This involves evaluating their adaptability, communication skills, and proficiency with the firm's technology and software. Competent contract attorneys should be able to quickly understand and follow the firm's procedures, collaborate effectively with the permanent team, and manage their workload independently.

Supervision of contract attorneys is also imperative and required by ABA Model Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer. For example, under Rule 5.1(b) of the ABA Model Rules of Professional Conduct, attorneys "having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."² This duty to supervise extends over contract attorneys being supervised by a member of the law firm. Clear instructions, ongoing supervision, and feedback mechanisms should be established to ensure the quality of work before it leaves the confines of the law office.

Client Consent

Securing client consent to hire a contract attorney is an ethical requirement that ensures transparency and maintains trust between the attorney and the client. Clients have a right to know who is working on their case and to be informed about the qualifications and role of any additional legal professionals involved. This clarity allows clients to make informed decisions about their representation and ensures they are comfortable with the expanded legal team. Obtaining explicit consent also helps prevent potential misunderstandings or concerns about confidentiality, billing, and the quality of legal services.

¹ In re: Steven R. Belcher, MBE No. 56075 (2007)

² See, Rule 5.1 of the ABA Model Rules of Professional Conduct

It is important that the hiring law firm know its jurisdiction's requirements on this issue. The ABA has stated in Formal Opinion 88-356 that the use of contract attorneys by a law practice is permissible and does not require informed consent by the client as long as the contract lawyer is working under the direct supervision of a firm lawyer.³ However, certain jurisdictions have issued formal opinions that do require informed consent from clients.⁴

Billing

Another wrinkle with respect to disclosure and consent is if the firm includes overhead and profit in what it charges to the client for contract attorney work.⁵ Clarity in billing practices is key to avoiding disputes and maintaining client trust. Clients should be informed not only when contract attorneys are working on their matters but also how their time is billed. Where the cost of a contract attorney is not a purely pass-through cost, the firm should disclose to the client that it may use contract attorneys, how their work will be billed, and receive client consent. One common approach is to bill clients at the contract attorney's hourly rate, adding a reasonable markup to cover administrative costs and supervision. This method clearly delineates the contract attorney's work from that of permanent staff. Firms should communicate this arrangement upfront to clients, specifying the contract attorney's rate and the nature of the tasks they will handle.

Another important aspect is ensuring that the contract attorney's work is accurately documented and billed in a manner consistent with the firm's standard practices. This includes keeping detailed time records and providing itemized billing statements that outline the specific services performed by the contract attorney. Further, law firms retaining contract attorneys must be mindful of ABA Model Rule 1.5(a) which outlines reasonableness standards about fees.⁶ Firms need to avoid double billing or excessive markups that could be perceived as exploitative.

³ See, ABA Formal Ethics Opinion 88-356.

⁴ See, Ill. State Bar Assoc. Adv. Op. 92-07; Assoc. of Bar of City of N.Y. Comm. on Prof'l and Judicial Ethics Formal Op. 1988-3; Calif. State Bar Formal Op. 1994-138; CO Formal Ethics Opinion 105

⁵ See, ABA Formal Ethics Opinion 00-420 (discussing disclosure of charges for contract attorneys as calculated disbursements versus as fees for legal services).

⁶ See, ABA Model Rule of Professional Conduct 1.5(a).

Insurance

Maintaining professional liability insurance is part of any good risk management plan. It is important for the hiring firm to consider the implications a contract attorney may have on its coverage. Depending upon the policy language, including endorsements and definitions, claims brought against either the hiring firm or the contract attorney may or may not be covered under either attorney's policy. Additionally, hiring law firms need to consider the application of general liability, workers' compensation and other types of insurance given the nature of the engagement.

At a minimum, the hiring firm should determine if the contract lawyer carries insurance and whether there is anything in that insurance policy that could restrict coverage if the hiring firm was to be sued by any party over the representation. The hiring firm also should check whether collaborating with another lawyer will affect coverage under its own policy, and if the other contract attorney could claim coverage under the hiring firm's policy if a suit were filed regarding the representation.

Risk Management Strategies

To effectively manage the risks associated with hiring contract attorneys, law firms should adopt comprehensive risk management strategies that encompass due diligence, contractual safeguards, and ongoing monitoring.

Due Diligence

Conducting thorough due diligence on outsourcing providers and contract attorneys is the first step in mitigating risk. This involves verifying their qualifications, experience, and reputation. Once you have determined the nature of the work to be provided, the responsibilities of the contract lawyers, and identified prospective hires, conduct some investigation to determine if they meet your criteria. The skill level and experience of contract lawyers with expertise in complex areas of law that you do not already have in your firm, e.g., ERISA or special needs trusts, will need to be greater than those of contract lawyers who will perform simple but high-volume tasks like a massive document review. All activities should be documented in the client file, as they can provide evidence in defense of any future claim alleging negligent hiring if the contract lawyer does not meet the standard of care during the representation.

Though it may seem obvious, it is necessary to ensure that potential hires are fully qualified to perform the tasks required. When hiring contract lawyers, obtain proof that the lawyer is duly licensed to practice in the relevant jurisdiction(s). Inquire about and require documentation of any professional liability or disciplinary claims made against the lawyer and the outcome of each claim.

Contractual Safeguards

Clear and comprehensive contracts are essential for managing risk. Contracts with outsourcing providers and contract attorneys should include provisions for confidentiality, data security, conflicts of interest, and quality standards. Specific terms regarding supervision, reporting, and dispute resolution should also be outlined. A good place to start is with the contract or engagement letter specifying exactly what the contract attorney has been hired to do, the protocols for performing that work, and confirmation that the contract attorney will abide by the law firm's practices and procedures, in addition to all ethical and professional rules. Beyond the terms of the contract, law firms can also address the practical aspects of the work to be performed by the contract attorney, including how the contract attorney's work will be reviewed to ensure that it meets the appropriate standards. Law firms simply passing along the work of contract attorneys without doing more may be assuming unnecessary risk.

Training and Awareness

Regular training on ethical and risk management issues should be provided to contract attorneys retained by your firm. This includes training on confidentiality, data security, conflict management, and professional conduct. During the initial stage, assign low-risk tasks until the contract attorney has proven that he/she/they can handle more responsibility. Consider the sensitivity of the client information involved in these initial assignments and the potential risks that could arise from the unintentional or deliberate sharing of it. Contract attorneys also should not participate or attend meetings in which non-assigned client matters are discussed.

Supervision and Quality Control

Ongoing supervision is not only required by the Rules of Professional Conduct but is critical to ensure that work performed by contract attorneys meet the required standards. Regular audits, performance reviews, and feedback sessions should be conducted to maintain quality and address any issues promptly.

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Technology and Data Security

It is also important to consider whether the contract attorney will work in the office or remotely. Leveraging technology to enhance data security and streamline workflow can mitigate many risks associated with contract attorneys. Secure communication platforms, encrypted data storage, and robust cybersecurity measures are essential to protect sensitive information. Further, consider limiting a contract attorney's access to firm files, both physically and virtually, to just those matters on which the contract attorney is currently working. If feasible, it might be valuable to consider physically separating the contract attorney in the office space from other client files. Like all other law firm employees, the contract attorney needs to be given guidelines on law firm equipment, including the use of AI, and cybersecurity safeguards.

Billing

Firms should provide detailed billing guidelines and ensure that clients are aware of the involvement of contract attorneys. Accurate timekeeping and billing practices should be enforced.

Conflicts Checks

When hiring contract lawyers, run a conflicts check and investigate whether they have previously provided services to any of the relevant parties/clients or opposing counsel. If they have done so, determine if they have confidential information that could give rise to a conflict in the current matter. If there is the slightest chance that a conflict of interest exists, it often is better to find another person rather than attempt to obtain a conflict waiver given that it is relatively easy to hire another lawyer who does not present even the possibility of a conflict.

Once you have hired the contract attorney, establish written guidelines for the duration of the employment to help avoid conflicts or inappropriate disclosure of confidential information. Consider hiring contract attorneys who will work exclusively on one client matter until the conclusion of the representation. If that is not feasible, require that for the duration of the assignment, the contract attorney decline any additional employment that would conflict with the work he/she/they are performing. Last, take steps to avoid conflicts after the departure of the contract attorney. Record the names of all contract lawyers and information about the matters on which they worked, ensure remote access to firm IT and files has been terminated, and request all client file information be tendered back to the firm.

Conclusion

Contract attorneys offer significant benefits to law firms, including cost savings, flexibility, and access to specialized expertise. However, these practices also present legal ethics and risk management challenges that must be carefully managed.

Maintaining client confidentiality, ensuring competence and supervision, managing conflicts of interest, and preventing the unauthorized practice of law are critical ethical considerations. Effective risk management strategies, including due diligence, contractual safeguards, training, monitoring, and leveraging technology, are essential to mitigate these risks.

By adopting a proactive and comprehensive approach to managing the ethical and risk management issues associated with contract attorneys, law firms can harness the benefits of these practices while upholding the highest standards of professional conduct and client service.

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