



TECHSHOW2018

On Demand Staffing for Solo and Small Firms

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You suddenly get busy with new client work, but it doesn't make financial sense to hire full-time staff to help out. What are your options? With flexible online legal staffing, you can effectively use contract lawyers and para-professionals to tackle extra work without adding overhead. This session will cover the type of work that can be outsourced without compromising service, and how to ethically manage outside resources.

INTRODUCTION: LAWYERS ARE NOT IMMUNE FROM THE NEW CONTRACTING ECONOMY

When you went to law school you probably didn't think that your career was going to be something like that of an Uber or Lyft Driver.... But times change. A very recent NPR/Marist Poll found that 1 in 5 jobs in America is held by a worker under contract, and that within a decade contractors and freelancers will make up one half of the American workforce. (January 23, 2018 NPR Morning Edition) Attorneys are not immune from this trend.

This affects lawyers in two ways. First, as an attorney business person and owner of a solo or small firm, you may find yourself overburdened for any number of reasons, and in need of help. Likewise, as an independent attorney, you may be looking for a way to make additional income while practicing your specialty, or even learning a new one in a less pressured environment. This paper will deal with both of those somewhat complimentary circumstances, and help you prepare for the future, and navigate the uncharted waters of either hiring contract attorneys or contract legal assistants, or deciding that you want to offer your services to this growing segment of the legal marketplace yourself.

THE ETHICAL FRAMEWORK

Formal Opinion 88-356: The increased use of temp lawyers in the 1980's led the ABA to issue Formal Opinion 88-356 (ABA Committee on Ethics and Professional Responsibility Dec. 16, 1988).

That opinion held that a Temporary Lawyer:

- May work on a single matter for the firm or may work generally for the firm for a limited period... to meet temporary staffing needs of the [law] firm and needed for work on a specific matter.
- May work in the firm's office or may visit the office only occasionally when the work requires
- May work exclusively for the firm during a period of temporary employment or may work simultaneously on other matters for other firms
- Nevertheless, the Ethics Opinion held that the contract attorney still needs to adhere standard conflict of interest rules.
- Attorney must maintain client confidentiality
- Hiring attorney needs to disclose the temp contract arrangement to the client



- The arrangement between the law firm and the contract lawyer (including any fee division that is occurring)
- The arrangement with the lawyer placement [staffing] firm

Formal Opinion 00-420 (ABA Committee on Ethics and Professional Responsibility Nov. 29, 2000) Surcharge for Contract Lawyers.

- A law firm that engages a contract lawyer may add a surcharge to the cost paid the billing lawyers – as long as the total charge to the client is reasonable and otherwise complies with Model Rule 1.5.

Formal Opinion 08-451 Outsourcing Legal and Nonlegal support services (ABA Committee on Ethics and Professional Responsibility Aug.5, 2008)

- Discusses the ethical issues of outsourcing
- Model Rule 1.1 Requires the provision of competent legal services to the client, but does not specify that the tasks be done in a certain way.
- Lawyers may outsource, as long as the outsourcing attorney renders legal services competently.
- Model Rule 5.1(b) – a lawyer with direct supervisory control over another lawyer to make reasonable efforts to ensure that the supervised attorney conforms to the Rules of Professional Conduct.
- Important! Client consent should be obtained if a temporary lawyer is to perform independent work without the close supervision of the hiring lawyers firm.
- Explains the rationale for surcharges and approves of them
- Opinion formalizes that it is OK to yield a profit to the law firm
- “...This is not substantially different from the manner in which a conventional law firm bills for the services of its lawyers.”

THE ADVANTAGES OF USING CONTRACT ATTORNEYS

1. EXPAND YOUR HORIZONS: Allows a smaller firm to become a full(er) Service Firm: Customarily, if a small firm is presented with a case or problem in an area outside of its expertise, it had two options, to either decline representation or to refer the work out to another firm. This still may be a prudent course of action in many cases, especially if it is a complicated area (Corporate mergers, stock issuance, IPO, etc) however, if the firm refers out anything other than a PI case, the possibility of remuneration is remote. Now if a client or prospective client approaches a firm with a new problem, your firm can hire an expert contract attorney, keep the client and grow your practice – the trifecta. However, caution should be exercised if this is an area that is truly far out of your expertise, and caution is appropriate to avoid a potential malpractice issue.



2. **EVEN THE PLAYING FIELD:** Contract Attorneys can help to even out the playing field with larger firms. Complex litigation against larger firms is always daunting. The imbalance in resources is something that we are all familiar with, and in case you are not check out John Grisham's **The Litigators** (2012) a classic on the imbalance between large and small firms. In the classic complex case, the contract attorney may be anything from a junior level attorney document reviewer, or a seasoned contract attorney hired to handle motions or depositions. The advantage is that the small firm can shift labor from a fixed to a variable cost that can be regulated and curtailed when the project is concluded.
3. **GET BETTER RESULTS ON THE WORK YOU ALREADY HAVE:** You can utilize contract attorneys to handle routine work (opinion letters, minor motions, memoranda of law, briefs) This will free up your best litigators (and you) to handle the depositions and trials, and to argue the motions, resulting in a markedly better win ratio, and an overall increase to your bottom line.
4. **FREE UP VALUABLE TIME FOR MARKETING AND RAINMAKING:** Small firms and solos must deal not only with practicing law but also with running the business aspects of their firms. This often leaves precious little time for marketing and networking. By hiring a contract attorney to handle routine matters as they are needed, an attorney is freed up for marketing and rainmaking activities.
5. **A DRESS REHEARSAL FOR PERMANENT HIRES:** Small firms often do not have the resources and time to train new staff, both attorney and paralegal. A small firm needs to be sure that the new hire has the right skills and temperament to fit in with the firm. By testing out a contract attorney you may find the right fit. Caveat: Be sure to read the contract with the staffing firm as to any fees that may be due if you decide to staff in this manner. There may be a steep fee to pay if you hire the individual shortly after the contract with the staffing firm begins. Try to negotiate a declining amount if the contract is for a long period of time (say 6 months) and then you decide to hire.
6. **PROVIDE PERSONNEL BREATHING SPACE:** Contract attorneys allow small firms to fully staff during peak busy periods without incurring such added expenses as health insurance, unemployment insurance, 401(k) contributions etc. Can fill in for attorneys on extended leave, and permits permanent staff to direct their energies to more important pending matters. Contract attorneys provide a real safety net and cushion acute staffing problems.
7. **A NEW AND DIFFERENT BILLING MODEL:** if you have read Richard Suskind's **Tomorrows Attorneys** you already know that the hourly billing model is going the way of the Dinosaurs.... Although maybe not just yet. But firms are under pressure to provide results-oriented billing models, and contract attorneys can help achieve that goal, based on value, worth and benefit to the client. Contract Attorneys provide an alternate billing model.



THE EMPLOYMENT STATUS OF CONTRACT ATTORNEYS – WHAT ARE THEY?

Law Firms working with contract attorneys should be aware that law firms, just like other businesses, are not immune from being audited by federal and state agencies to ensure that they correctly classify their contract lawyers as either employees or independent contractors. Although a firm may assume that a contract attorney is an independent contractor without carefully analyzing the factors that separate employees from independent contractors.

Note that if you utilize a staffing agency and pay a staffing agency, you can immunize yourself from a claim that the individual is not the law firm's employee – but it is the employee of the staffing agency.

If you hire or contract for the attorney yourself be careful that you do not fall into a pattern that could be interpreted as creating an employer-employee relationship. Some factors which would create such a relationship and negate an independent contractor relationship are:

- Who sets the work hours of the attorney
- Who decides and controls what tasks and jobs the attorney works on
- Who supervises the attorney, and how rigorously is the attorney scheduled
- How is the attorney paid, by the hour or by the project
- Is the attorney given a dedicated work space, or works at his or her own location
- Who provides the computer, office supplies to the attorney
- Is the attorney given a W-2 or a Form 1099 (for independent contractors)
- Is withholding tax taken from the pay of the contractor attorney, or are any other "employee type benefits" provided to the attorney

As you can see, it doesn't take much for an independently hired contractor attorney to possibly fall into the ambit of an employee rather than an independent contractor.

In the case of **Donald G. Cave a Professional Law Corp. v. Commissioner**, T.C.M. 2011-48, the U.S. Tax Court ruled that the law firm incorrectly classified its attorneys as independent contractors when they were actually employees. The Tax Court awarded the Commissioner damages of \$150,000 for unpaid employment taxes and a \$10,000 penalty against the firm. The Fifth Circuit Court of Appeals affirmed the Tax Court's decision, finding that the law firm failed to meet its burden of proving that the lawyers were true independent contractors.

So if you decide to hire your own contract attorneys without the intermediary of a staffing firm, beware and be sure to have a written agreement that includes at a minimum the following provisions:



- The contract lawyer is responsible for his or her own income tax withholding and Social Security self-employment taxes, professional liability insurance and excess coverage.
- The Firm will issue a Form 1099 for the services performed by the contract lawyer
- An acknowledgment that this is not a joint venture and the parties do not have any shared business interests.
- The Contract Lawyer is currently licensed and in good standing with the state bar where the services are being performed, has current liability coverage, and has no pending malpractice claims or ethics complaints in this or any other jurisdiction.
- The contract lawyer does not have a conflict with any of the parties involved in the assigned project.
- The contract lawyer agrees to at all times fulfill his or her professional duties to protect the client's privileged and confidential information.
- The contract lawyer will at all times comply with his or her ethical and legal responsibilities as a lawyer licensed to practice law in the jurisdiction where the services are to be performed.
- The contract lawyer will return all client documents, including all copies of he documents, when the project is complete.
- The contract lawyer will not receive any employee benefits or workers compensation coverage.
(See, In Brief, July 2012 Issue 113 Oregon State Bar Professional Liability Fund)

THE THREE WAYS TO HIRE A CONTRACT ATTORNEY

INDEPENDENT CONTRACTOR: The pluses for hiring an attorney on your own this way, as long as you follow the caveats listed above, is that you avoid paying taxes and providing any other employee benefits. You pay the individual as an independent contractor and provide them with a Form 1099. The negatives are that you need to spend time vetting and searching for a contractor, not to mention vetting the employee, including checking their credentials and references and insuring that they have the expertise in the specific area and project that you need them for.

AS A PART TIME EMPLOYEE: There are no pluses to this arrangement as far as hiring a contract attorney from the firm's perspective. You still have to provide all employee related benefits, including unemployment insurance and all of the withholding for the employee.

LEGAL STAFFING AGENCY: This provides the most protection for the firm, and certainty for the contract attorney. The contract attorney is vetted by the staffing agency. His or her credentials and resume are verified by the Agency, and the individual is essentially an employee of the staffing agency, paid by the hour, and assured of being paid for the work contracted by the firm.



SO YOU WANT TO BE A CONTRACT ATTORNEY?

The National Association for Legal Placement (NALP) reported that the overall employment rate for 2012 law school graduates was about 64.4 percent, and of that number only 58.3 percent were able to obtain a full-time position that would last at least one year. This seems to be increasing now, but NALP noted that even with the increasing placement of attorneys in large firms and a rise in median earnings for lawyers, the pre-recession partnership track law firm model is definitely evolving and changing.

Added to this is the fact that law school graduates are saddled with unprecedented student debt. According to U.S. News and World Report, in 2012 the average debt load for a law school graduate was \$108,293.00

According to those who take the pulse of the legal market, there continues to be an overabundance of lawyers for a shrinking number of permanent jobs. But the silver lining to this ominous cloud is that law firms are bringing in staffs of contract lawyers instead of permanent hires because as pointed out above it is a lower cost alternative and an effort to keep costs low.

The experts note that reality is that the business model of the legal economy is shifting, and there is a big self-correction going on in the profession, according to James Jones, a senior fellow at the Center for the Study of the Legal Profession at Georgetown University Law Center. Clients don't want to pay as much for services, and so the power balance has shifted, and firms are adjusting to that, according to Mills.

According to an article in the Washington Lawyer, contract attorneys in the Washington DC Metropolitan Area are outraged by pay that often ranges in the \$25-\$40 per hour. (Washington Lawyer, January 2014, Under Contract: Temporary Attorneys Encounter No-Frills Assignments, Workspace.)

According to **Law School Transparency**, a nonprofit legal education policy organization, 27.7 percent of 2012 law school graduates were either in short-term, part-time, or nonprofessional jobs, or were unemployed. This has improved to 20.9 percent for the class of 2016 graduates. See www.lawschooltransparency.com to see how your school is doing and to glean additional information. Yet despite the lowest current lowest overall unemployment rate in 17 years, only 61.8 percent of 2016 accredited law school graduates have found long term, full-time legal employment.

Historically, for several decades Washington Law Firms have relied on a steady stream of temporary attorneys to help with regulatory work, mergers and acquisitions, and document review and processing in preparation for litigation.



Note however that as artificial intelligence programs gain traction, a lot of the document review will be handed off to computer programs that can analyze specific items that document review used to entail.

Washington is replete with stories in earlier decades of some of the more prestigious firms providing perks to temporary workers, including gourmet meals served at their desks and housing them in glamorous accommodations for litigation preparation.

This seems to have changed since the economic recession of 2007.

Moreover, as law firms have constrained admission to partnership, there are more experienced, highly specialized attorneys who are willing to do contract work, which has provided competition in the market.

Additionally, according to Mary Legg Winter, president and general counsel of Firm Advice, Inc. in Washington, D.C. as the number of permanent jobs has shrunk and the number of temporary legal placement agencies has increased, that the former collegiality between placement agencies has declined.

The good news, however is that the stigma of staffing projects with temporary contract attorneys is waning. Clients are more concerned about results rather than pedigree.

TIPS FOR NAVIGATING THE CONTRACT LAWYER MARKET AS AN ATTORNEY

The use of contract attorneys has become a key component of the legal process, and experts have noted that most corporations and larger law firms have embraced the utilization of contract attorneys through third-party vendors (Part Time Legal Placement Agencies) because it is time efficient and cost effective.

Depending on the legal market you find yourself in, you have choices as to how you enter the contract market:

- If you are in a big city urban market you can choose to either market yourself or sign on with a part time legal placement agency.
- If you are in a smaller market you may have to market yourself through bar journal ads or on the internet.

If you sign on with a legal placement agency:

- Make sure that you have a written contract providing a clear understanding of at least the following:



1. The hours that you are guaranteed
2. The actual rate that you will be paid, and what taxes are taken out of your gross pay
3. Any benefits that you will be provided (ie. Meals, lodging, transportation)
4. Where you will be working, and some guarantee of reasonably comfortable working conditions
5. The expected duration of the project
6. What happens if the Firm decides to hire you as a full-time employee, are you liable for any fee payable to the legal placement agency. (Note that non-compete clauses are usually not applicable to attorneys)

WHAT TO WATCH OUT FOR AS A CONTRACT ATTORNEY – AND SOME HORROR STORIES

One of the offshoots of the contract attorney culture is that contract attorneys have taken to the internet to vent their anger as well as telling those who are considering part time contract attorneys as a way of gainful employment.

Some of these are available on sites and blogs that are easily searchable.

If you decide not to use a legal placement agency, then there are resources to help you find work as a contract attorney:

- The Posse List – maintains separate lists by location, specialty and foreign languages. If you subscribe to the lists that are most applicable and they'll send you job listings. The Posse List specializes in legal work, so it requires less searching than a general job website.
- Set up an alert on a general employment web site. On **Simply Hired**, or **Indeed** set up an alert or engage in a simple search for “temporary attorney” or “document review”
- Local Bar Listserves or specialty legal related listserves. For instance the Washington Metropolitan Employment Lawyers Association (MWELA) has a listserve where attorneys are always requesting assistance when complicated employment litigation heats up.

For a cautionary tale, the internet is replete with horror stories.

Check out www.pointoflaw.com “A \$33/hour Robbins Geller contract attorney tells her story” which is a raw expose of what its like to work in an unheated storage room next to a garage doing document review on a large class action case.

The internet is also replete with stories of contract attorneys having to place their smart phones in lockers when they check in to work.



Another factor to consider is whether as a contract attorney you will be eligible for overtime pay under the Fair Labor Standards Act, which provides that non-managerial workers are entitled to overtime pay for all hours worked over 40 hours. An article in the **American Lawyer** in October 22, 2013, “No Overtime for Contract Attorneys, Quinn Emanuel Argues” relates the story of a contract attorney who sued his AmLaw 100 law firm employer when the document review project that he was working on exceeded 40 hours a week. The firm argued that the contract lawyer was functioning as a lawyer, and as a professional employee he was exempted from the law.

CONCLUSION

In conclusion, as the landscape of law firm employment continues to change and evolve in our post 2008 recession world, the fact is that the utilization of contract attorneys will continue to increase as stable, long term legal employment continues to be in flux. This will no doubt provide opportunities for individuals willing to push the envelope and who are open to the new realities of the legal marketplace. Both for those seeking to utilize contract attorneys, and those seeking to be employed as contract attorneys, there are advantages and also pitfalls, which need to be embraced and avoided.

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