



Lawyers as Contractors — How Much Can You Charge for That?

BY KRISTEN BRAUCHLE

Illustration by Gilberto Saucedo

In these difficult economic times, small firms are looking for ways to cut overhead and attorneys are looking for ways to make money. One way that serves both attorneys and their clients is to hire contract attorneys for temporary assignments or long-term projects.

The move to outsourcing through the hiring of contract attorneys has changed law firms so that they no longer consist solely of partners and associates. Attorneys in a law firm can hold a variety of positions. These changes raise the question of how to compensate contract attorneys and whether the compensation provided to the contract attorney needs to be disclosed to and approved by the client. Traditionally, firms have not had to disclose how they compensate their attorneys to their clients. But, depending on the work performed, the rules change when engaging outside, or non-firm, attorneys.

According to the Professional Ethics Committee for the State Bar of Texas,

compensation arrangements between law firms and contract attorneys must be disclosed and passed on to the client without an additional mark-up if the contract attorney is not part of the law firm.¹

Ethics Opinion 577

In March 2007, the Professional Ethics Committee examined the question of whether a law firm may hire an outside lawyer and then charge more to the client for the work than the lawyer was paid.²

The committee looked at Texas Disciplinary Rules of Professional Conduct 1.04 and 7.01,³ and concluded that a law firm may charge a client more for work done by lawyers that belong to the firm than the lawyer is paid, but it may not mark up the work done by non-firm lawyers.⁴

Rule 7.01(d) prohibits lawyers from holding themselves out as members of a firm if they are not members of the same

firm: “[A] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.” Including attorneys on the client’s bill who are not members of the firm is prohibited by this rule unless the bill clearly states that the attorneys are not part of the firm.

Rule 1.04(f) prohibits attorneys from splitting fees with lawyers who are not in the same firm unless the fee splitting is disclosed to and agreed to by the client.⁵ Although originally enacted to deal with referral fees and referring attorneys, the committee applied this rule to contract attorneys and law firms who hire them.⁶

The committee applied Rule 1.04 to contract attorneys by stating that unless a contract attorney is in the firm, the law firm cannot profit from the attorney’s work — the firm must simply pass the cost of the contract attorney through to the client without a mark-up.⁷ To deter-

mine whether a contract attorney is part of a law firm (a term not defined in the Rules), the committee suggested several factors — whether the attorney:

1. Receives firm communications;
2. Is included in firm events;
3. Works at the firm or at another location;
4. Has a history or long association with the firm;
5. Identifies him- or herself as a member of the firm;
6. Is held out by the firm as being in the firm to clients and to the public; and
7. Has access to firm resources, including computer data and applications, client files, and confidential information.⁸

Examples of in-firm attorneys include of counsel,⁹ senior attorneys, contract lawyers,¹⁰ and part-time lawyers.¹¹

After describing which attorneys can be considered in the firm, the committee then turned its attention to billing a client for a non-firm lawyer's time. Rule 1.04(f) requires attorneys who split fees to (1) split fees in proportion to the services performed or joint responsibility for the representation; (2) obtain written consent from the client to the terms of the fee division; and (3) charge a total fee that is not unconscionable.¹² When law firms pay their in-firm attorneys, fee splitting is not an issue.¹³ The financial arrangements within a firm are not disclosed to its clients, and they do not need to be.¹⁴ A firm can therefore charge the client more than the attorney is being paid, and the firm can split the fee with the lawyers in its firm.

But, according to the committee, the requirements of Rule 1.04(f) come into play when the attorney is not in the firm. The committee concluded that marking up the amount charged by a non-firm attorney without obtaining approval from the client is impermissible fee splitting. The committee reasoned that a division of fees exists in this situation because “either the non-firm lawyer is sharing fees for his services with the law firm or the law firm is sharing a portion of its fees with the non-firm lawyer.”¹⁵ Billing the time for a non-firm lawyer without a mark-up, however, is not a division of fees.¹⁶ In that instance, “the law firm is billing, collecting, and paying

over the fees charged by the non-firm lawyer for that lawyer's services.”¹⁷

When hiring contract attorneys who are not members of the firm, law firms need to comply with Rules 1.04 and 7.01. The firm needs to disclose the relationship to the client, be careful not to hold the contractor out as a member of the firm, and pass on the cost of the contractor's labor without marking it up for overhead.

Notes

1. Prof'l Ethics Opinion for the State Bar of Tex., Op. No. 577 (March 2007) (“Opinion 577”). The opinion reached by the Texas Ethics Committee is different than the conclusion reached by the American Bar Association in its 2000 and 2008 opinions and is different than the conclusion reached by 48 other states. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (Nov. 29, 2000); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (Aug. 5, 2008). See also *Effectively Staffing Your Law Firm* (Jennifer J. Rose ed., ABA 2009) at Chapter 6, n. 2 (*Outsourcing Legal Research and Writing Projects* by Lisa Solomon). (Solomon is a legal research and writing attorney who works solely on a contract basis. See www.questionoflaw.net, last visited Sept. 13, 2009.)
2. See generally Opinion 577.
3. See Tex. Disciplinary R. of Prof'l Conduct R. 1.04(f) and 7.01(d).
4. Opinion 577 at ¶13.
5. See Tex. Disciplinary R. of Prof'l Conduct R. 1.04(f).
6. See Corey L. Marrs, *Being a Contract Lawyer and How*

the Bar Does Not Want You to Hire Me, News for the Bar (State Bar Litigation Section, Fall 2007).

7. Opinion 577 at ¶10.
8. Opinion 577 at ¶6.
9. Hiring contract lawyers as “of counsel” seems like a good way to avoid the issues of whether the attorney is “in” the firm. But Opinion 402 states that attorneys may not be of counsel for more than two law firms. Therefore if the contract attorney employed by the law firm works for more than two different firms, the attorney will not be able to be of counsel to all the firms.
10. The Committee included contract attorneys on the list of attorneys that could be considered in the firm. This implies that a contract attorney can be both in and out of the firm depending on the agreement between the firm and the contract attorney.
11. Opinion 577 at ¶6.
12. See Tex. Disciplinary R. of Prof'l Conduct R. 1.04(f).
13. Opinion 577 at ¶7.
14. *Id.*
15. Opinion 577 at ¶10.
16. Opinion 577 at ¶9.
17. Opinion 577 at ¶9.

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