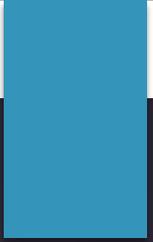




Ethical Issues Related to Contract Work

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Contract Attorneys:

The new *normal*?

Contract Attorneys

Who are they?

Attorneys who work on a contractual basis for a law firm either for a specific case/project or for a defined time period.

Contract Attorneys may be:

- Seasoned attorneys looking to taper their practices;
- Recent graduates seeking practical work experience;
- Sole-practitioner looking to expand their work-load without the long-term commitment.

Benefits for the Contract Attorney

For the contracting attorney, the benefits of a temporary contact arrangement can include:

- ▶ Supplemental income stream for your developing practice
- ▶ Flexibility and control over the workflow and the type of work
- ▶ Gain practical experience, exposure to potential employers and referral sources
- ▶ The ability to explore a variety of practice areas.

Benefits for the Hiring Firm

- ▶ Allows the firm to expand practice areas with little commitment
 - ▶ Increase revenue by keeping work “in-house” that would normally be declined or referred out
 - ▶ may add a surcharge to the cost paid by the billing lawyers – as long as the total charge to the client is reasonable and the client consents (Cal Bar Form. Op. 1992-126)
 - ▶ the firm is not obligated to inform the client how much the firm is paying the contract lawyer (ABA Form. Op. 08-451; But see Cal Bar Form. Op. 2004-165)*
- ▶ Demand driven – retain only when needed, shed when needed.
- ▶ Allows as-needed use of experts in niche areas
 - ▶ May save the client money if there isn't the need to research an issue that is new to the firm but familiar to the contract attorney
- ▶ Lower cost (in terms of overhead, benefits and salary)
- ▶ Allows the firm to evaluate the attorney(s) for possible longer term hiring

COPRAC 2004-165

- ▶ Ethics opinion (Advisory) to both Contract Attorneys and Firms hiring Contract Attorneys:
 - ▶ **Obligations of Hiring Attorneys**: Must disclose the fact of the arrangement to the client if it constitutes a “significant development” in the matter, which is fact driven in each particular situation
 - ▶ If it is anticipated at the outset of the engagement that contract/outside attorneys will be used, best to disclose in the written fee agreement
 - ▶ If the contract lawyer’s charges will be billed to the client, that needs to be disclosed in the fee agreement, along with fact that the client will be billed at contract lawyer’s regular hourly rate, but that hiring lawyer will be paying the contract lawyer less
 - ▶ Must competently supervise contract lawyer
 - ▶ Must comply with other ethical rules of competence, confidentiality, advertising and **conflicts of interest**

COPRAC 2004-165 (cont.)

- ▶ **Obligations of Contract attorney**: Must comply with ethical rules concerning competence, confidentiality, advertising and conflicts of interest that apply to their role in the arrangement.
- ▶ **Note**: Ask hiring lawyer about malpractice insurance coverage for contract attorney's role, make clear that the client is the hiring firm unless the contract attorney will be interacting directly with the hiring lawyer's client, making court appearances on behalf of client, and/or whether or not contract attorney will be denoted on hiring lawyer's bill (See attached sample contract attorney's contract)

Potential Ethical Challenges

- ▶ Duty of Loyalty
- ▶ Conflicts of Interest
- ▶ Duty of Confidentiality
 - ▶ contract attorneys may work for other clients
- ▶ Supervision
- ▶ Client Consent
- ▶ Malpractice Insurance –
 - ▶ whose policy applies (if such policies exist)?
 - ▶ what related disclosures are required?

Duty of Loyalty

Because of the transitory relationship between the hiring law firm and the contract attorney, practical and ethical issues of loyalty can arise.

Practical issues of loyalty:

- ▶ Lack of consistency – the same contract attorney may not be available for the duration of the matter, requiring the hiring and training of the replacement – and a possible inconsistency in work product
- ▶ Potential loss of client: Firm clients may in the future decide to retain the contract attorney instead of the firm.
- ▶ a former contract attorney could be on the opposite side of litigation with knowledge of how a law practice prepares, giving the contract attorney an advantage.

The Ethical Duty of Undivided Loyalty

- ▶ The ethical duty of loyalty is the basis for rules governing conflicts of interest
- ▶ “The relation between attorney and client is a fiduciary relation of the very highest character” – Neel v. Magana, Olney, Levy, Cathcart and Gelfand (1971) 6 Cal. 3d 176, 189; Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal.App.4th 419,430

Conflicts of Interest

It is well established that attorneys are prohibited from representing a client:

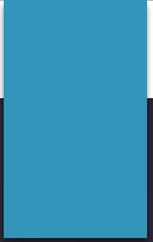
- ▶ that is directly adverse to another client; or,
- ▶ where such representation would be materially limited by that attorney's responsibilities to another client or by the attorney's own interests.

The hiring of contract attorneys also presents some unique considerations regarding potential conflicts.

Conflict Of Interest Defined

“A conflict exists if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person”

- ▶ *Sharp v. Next Entertainment, Inc.*
(2008) 163 Cal.App 4th 410, 426
- ▶ Rest.3d, Law Governing Lawyers, § 121



Contract Lawyers

Duties implicated in Conflict Situations:

The duty of undivided loyalty

The duty to exercise independent judgment

The duty of confidentiality

The duty to provide competent representation; and

The duty to communicate with the client

Why Conflicts Are Of Concern

- ▶ State Bar discipline
 - ▶ Willful violation of the CRPC can result in discipline. Bus. & Prof. C. §§ 6077, 6086.5
 - ▶ Willfulness occurs when an attorney acts or omits to act purposely, meaning she either knew what she was doing or not doing, and intended either to commit the act or to abstain from doing so
 - ▶ *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952



CRPC 1.7: Conflict of Interest: Current Clients

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d) represent a client if the representation is directly adverse to another client in the same or separate matter

CRPC 1.7: Conflict of Interest: Current Clients

- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the responsibilities to or relationships with another client, a former client or a third person*, or by the lawyer's own interests.

CRPC 1.7: Conflict of Interest: Current Clients

- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or other personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

Client Consent

Is necessary to obtain client consent before utilizing a contract attorney for the client's matter??

The American Bar Association has stated in a formal opinion that the use of contract attorneys by a law practice is permissive 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. ABA Ethics Opinion 88-356.

And...

Certain states (e.g., New York and Illinois) have issued formal opinions within their respective bars that do require informed consent from clients.

But...

California – A law firm must inform the client that an outside contract lawyer is involved in the client's representation if the outside lawyer 's involvement is a *significant development*.

CRPC 1.4 (a)(3)

What is “informed written consent”?

- CRPC 1.0.1 Terminology defines all terms designated in the Rules with an asterisk (“*”)
 - (e) “Informed consent” means a person’s* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.
- (g-1) “Person” has the meaning stated in Evidence Code 175.
 - Evidence Code section 175: “Person” includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.”)



What is “informed written consent”?

- CRPC 1.0.1:
- (e-1) “ ‘Informed written consent’ means that the disclosures and the consent required by paragraph (e) must be in writing.*”
- (n) “ ‘Writing’ or ‘written’ has the meaning stated in Evidence Code section 250. A ‘signed’ writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person* with the intent to sign the writing.”
- Evidence Code section 250: “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Confidentiality

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, because they may work for other clients while contracting with a particular law practice, issue may be less clear.

How to control the risk:

- ▶ Include of a detailed confidentiality provision in the Contract Attorney Engagement Agreement
- ▶ Incorporate a thorough conflicts check procedure for each matter on which the Contract Attorney will work

Supervision

Best practices must be used in the process of training and supervising contract attorneys to ensure accuracy, ethical propriety, and efficiency.

- ▶ ABA Model Rule 5.1 (b) requires a lawyer with direct supervisory control over another lawyer to make reasonable efforts to ensure that the latter attorney conforms to the Rules of Professional Conduct.
- ▶ CRPC 1.1: “A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.”
 - ▶ “The duties set forth in rule [CRPC 1.1] include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.” Ca Bar Form. Op. 2004-165

C-RPC 5.1-Responsibilities of Managerial and Supervisory Attorneys

- ▶ (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* **shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act.**
- ▶ (b) A lawyer having **direct supervisory authority** over another lawyer, **whether or not a member or employee of the same law firm,*** shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.
- ▶ (c) A lawyer **shall be responsible for another lawyer's violation of these rules and the State Bar Act if:**
 - ▶ (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; **or**
 - ▶ (2) the lawyer, individually or together with other lawyers, **possesses managerial authority** in the law firm* in which the other lawyer practices, **or has direct supervisory authority** over the other lawyer, whether or not a member or employee of the same law firm,* **and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.**

RPC 5.1 Imposes independent basis for discipline, not “vicarious responsibility”

▶ Comment [8] to this rule states:

“Paragraphs (a), (b), and (c) create **independent bases for discipline**. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these rules.”

Notably, there is NO prior rule that correlates to current rules 5.1, 5.2 or 5.3

C-RCP 5.3 – Responsibilities Regarding Non-lawyer Assistants

- ▶ With respect to a non-lawyer employed or retained by or associated with a lawyer:
- ▶ (a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer;
- ▶ (b) a lawyer having direct supervisory authority over the non-lawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer; **and**
- ▶ (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:
 - ▶ (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; **or**
 - ▶ (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Who is considered to be a “non-lawyer” for purposes of the Rule?

- ▶ Any personnel used by lawyers in their practices, including secretaries, investigators, law student interns, and paraprofessionals. It does not matter whether or not the non-lawyers are employees or independent contractors. If the assistant acts within the lawyer’s direct supervisory authority, a lawyer is charged with providing assistants with appropriate instruction and supervision concerning all ethical aspects of their employment. The measures used in instructing and supervising any such non-lawyers has to take into account the fact that such persons may not have legal training.

Malpractice Insurance

All attorneys can face malpractice claims and should have (or consider) professional liability insurance

How that coverage will be provided for a contract attorney is something that **should be addressed by the hiring firm and contract attorney at the outset of the arrangement and documented in a written agreement.**

Firms hiring contract attorneys should check with its insurance carrier about coverage for specific situations and whether a contract attorney should be added as a named insured under the policy.



AVOIDING MALPRACTICE

- ▶ **CRPC 1.4.2 - Disclosure of Professional Liability Insurance**
- ▶ In a “nutshell” 1.4.2 requires you to inform your client in writing at the time of the engagement that you don’t have malpractice insurance. If you subsequently during the engagement become uninsured, you must tell the client within 30 days.



Resources

- ▶ Access current Rules of Professional Conduct, State Bar Act, and Ethics Opinions by going to the State Bar of California's website : www.calbar.ca.gov
- ▶ COPRAC opinions are not binding authority but provide good guidance on most ethical questions
- ▶ Members of COPRAC committee listed on State Bar website will usually provide ethics guidance as part of their own practices and can be tapped for support
- ▶ Professional Responsibility lawyers from all States are listed on the Association of Professional Responsibility Lawyers website: <https://aprl.net>
- ▶ County Bar and State Bar ethics hotlines free and accessible to members
- ▶ County Bar Ethics opinions also available to members by searching County Bar website
- ▶ San Diego County Bar Association publications "Ethics in Brief", "For the Record", and "Legal Ethics Quarterly" can be accessed on SDCBA website for general legal ethics guidance



Resources

- ▶ Sample Contract Attorney Agreement
- ▶ Sample Contract Attorney clauses for use in hiring firm's fee agreement
- ▶ COPRAC 2004-165 Ethics Opinion