

# Litigation 101: Ethics Related to the Use of Contract Attorneys

By Gregory M. Boyle and J. H. Jennifer Lee

In an economic downturn, the role of the contract attorney, or an attorney without a permanent relationship with law firms, has taken center stage as an effective means for controlling costs in litigation. In addition, law firms may hire contract attorneys due to a conflict of interest in certain cases. Employing contract attorneys typically involves avoiding the expense of using law-firm associates or of counsel, billed out at going firm rates, in favor of contracting with individual, licensed attorneys to perform tasks only for a particular client matter. These tasks may include drafting legal memoranda, performing legal research, or—most commonly—providing document-review-and-production services.

Litigators and their clients frequently hire contract attorneys in circumstances where there is a need to respond quickly and effectively to discovery issues or motions to compel. In light of the time crunches under which the hiring of contract attorneys often arises, it is critical for attorneys to understand in advance the ethical considerations that apply to work performed by contract attorneys.

## Retaining Contract Attorneys and Informed Consent

Using contract attorneys is an area of modern legal practice into which the inexperienced attorney should not venture without thoughtful planning. With respect to the practical issue of finding contract attorneys, it is fortunate that the proliferation of contract attorney agencies presents the litigator with no shortage of options. However, attorneys relying on vendors and agencies may lose sight of counsel's independent obligations. Overlooking ethical obligations related to discovery can have grave consequences for clients' abilities to pay for and prevail in litigation. Where parties are held to have engaged in discovery misconduct, courts have ordered draconian remedies like adverse instructions or substantial monetary sanctions as a means to prevent the abuse of judicial processes. *See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs. LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubalake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). Counsel should be well aware of its obligations before contacting vendors and agencies.

When a client has not demanded that the firm use contract attorneys in the first place, is the firm required to report or

obtain informed consent on the use of contract attorneys? On the one hand, given that the client selected the firm in particular and presumably expects to be represented by attorneys in association with the firm, shouldn't the client be informed of any deviation from that expectation? On the other hand, a law-firm attorney typically has no ethical obligation to get informed consent for every subordinate associate or paralegal who works on the case. As long as the firm attorneys supervise the contract attorneys, from an ethical perspective, shouldn't use of a contract attorney be considered the same as use of any other subordinate within the firm?

The answer differs depending on the jurisdiction in which the attorney practices. Although the ABA Committee on Ethics and Professional Responsibility Formal Opinion 88-356 is permissive, certain states require a client's informed consent. ABA Opinion 88-356 states that a firm is not obligated to inform the client about using contract attorneys on a matter, as long as those attorneys work under the close supervision of firm attorneys or the firm attorneys adopt the contract attorneys' work as their own. The rationale underlying this approach is that there is no risk to the client's expectations.

However, bar organizations in some jurisdictions have issued ethics opinions rejecting this approach. In Illinois and New York City, there are opinions holding that a firm must obtain informed consent from the client whenever contract attorneys are used. 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. In California, there is a different approach. There, a firm must disclose the use of contract attorneys whenever their use constitutes a "significant development" in the legal matter. Calif. State Bar Formal Op. 1994-138. There is no express standard concerning what constitutes a significant development. It depends on the circumstances, such as whether responsibility for overseeing the client's work is changing and whether the new attorney will perform a "significant" amount of work. In light of the lack of a clear standard, it appears that if there is any doubt, disclosure to the client should be made.

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. *See* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 00-420 (discussing disclosure of charges for contract attorneys as calculated disbursements versus as fees for legal services). Where the cost of a contract attorney is not a purely pass-through cost, it is a best practice for the firm to disclose the use of contract attorneys, and the firm's plan to charge for overhead and profit

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and receive client consent.

## Ethical Rules Regarding Supervision of Work

The principal ethics rules governing the supervision of contract attorneys are Model Rules 5.1(b) and 5.3(b). Rule 5.1(b) provides that, “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” In addition, according to Rule 5.3(b), a supervisory lawyer must “make reasonable efforts to ensure that the [contract attorney’s] conduct is compatible with the professional obligations of the lawyer.”

The operative question, then, is what “professional obligations” and “Rules” tend to be relevant to the work that will be performed by contract attorneys in discovery? The two primary rules are Rules 3.3 and 3.4.

Rule 3.3 provides that:

A lawyer shall not knowingly:

make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law . . . or

(3) offer evidence that the lawyer knows to be false . . .

See Rule 3.3(a).

Rule 3.4 provides that:

A lawyer shall not

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . or

(d) make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

See Rule 3.4.

In fast-paced litigation, attorneys must be mindful that accuracy and promptness in responding to a subpoena or document request are critical not only to abide by ethical obligations, but also to avoid sanctions that may be imposed on the lawyer or the client. This may be challenging, however, in view of the fact that litigation is often perceived by clients as a cost center. Nonetheless, it is imperative that any avenue to reducing discovery costs be consistent with the obligation to advance a client’s interests.

Certain best practices can be used in the process of training and supervising contract attorneys to ensure accuracy, ethical propriety, and efficiency. Establishing certain safeguards in the context of document review and production can ensure that a litigator’s retention and supervision of contract attorneys comport with ethical rules. They may include:

1. Assess the contract attorney’s education background and relevant work experience.

2. Execute confidentiality agreements.
3. Conduct conflict checks/implement proper screens.
4. Conduct training on consistent billing practices.
5. Explain the obligations of confidentiality and loyalty to the client.
6. Incorporate sufficient lead-in time for training.
7. Incorporate an initial second-level review by a firm attorney to perform quality control checks early on. After the initial contract attorney team has been assembled, identify a lead training attorney who will teach future contract-attorney hires as additional production sets need to be reviewed; use discretion on whether a contract attorney can fill this role or whether training should be done by a firm attorney.
8. For cases sufficiently complex to merit it, prepare and disseminate a set of written materials explaining the issues in the case and the type of documents being reviewed.
9. Use sample sets of documents to test accuracy in a low-risk environment.
10. If privilege is at issue for the review, provide a refresher tutorial on the attorney-client privilege and attorney-work-product doctrines.
11. Encourage the use of the same foreign-language translator, when appropriate, so that there is familiarity on the team with the same language consultant.

In addition to the best practices listed above, if the document review is being performed at a location outside the law firm, the supervising attorney should consider conducting a site visit to inspect the quality of the resources and the security measures in place at the legal-services agency. Ideally, to minimize costs of repeated screening visits, such a site visit could take place only once, followed by an ongoing relationship with the same agency for future projects.

## Conflicts of Interest

It is by now well established that attorneys are prohibited from representing a client that is directly adverse to another client or may be materially limited by responsibilities to another client or by the lawyer’s own interests. ABA Model Rule of Professional Conduct 1.7. However, the hiring of contract attorneys presents unique considerations regarding potential conflicts. See D.C. Bar Op. 352.

In particular, Rule 1.10 provides that while lawyers are “associated in a firm,” none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7. The question that then arises is whether or not the conflicts of interest faced by the contract attorney are imputed to the firm. Generally, whether the contract attorney is “associated with a firm” depends on the contract attorney’s access to the files regarding other clients of the firm, the contract attorney’s actual knowledge of matters of other firm clients, and screens or other controls put into place to limit such file access.

Given the complexity of the inquiry and dire consequences from any misstep (i.e., disqualification), firms may want to just

assume the contract attorney is “associated,” treat any potential conflict on the matter as it would for any other firm, and limit access to only the file the attorney is hired to work on.

### Post-Script: Outsourcing Legal Services

ABA Ethics Opinion 08-451 is entitled, “Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services.”

According to this opinion, there is nothing “inherently unethical” about outsourcing. However, following the recent proliferation in outsourcing practices, on November 23, 2010, the ABA Commission on Ethics 20/20 released draft amendments to the official comments to Model Rules 1.1 (competence), 5.3 (responsibilities regarding non-lawyer assistants), and 5.5 (unauthorized and multijurisdictional practice of law). The proposed amendments relate to the

lawyer’s obligation to take reasonable steps to ensure the quality of outsourced services and to obtain informed consent for work requiring that confidential client information be disclosed to outside service providers. The draft is being circulated for comments prior to a decision on whether to recommend to the ABA House of Delegates that it adopt the amendments.

Regardless of the outcome of the proposed amendment, lawyers remain ethically bound to ensure that client services are rendered competently pursuant to Model Rule 1.1. The best practices provided above will help litigators leverage the cost savings of contract attorney services and deliver legal services in a manner that comports with the obligation to provide “competent representation” consistent with the “legal knowledge, skill, thoroughness and preparation” required in Rule 1.1.