THE IOWA STATE BAR ASSOCIATION

Committee on
Ethics and Practice Guidelines

August 27, 2013

Mr. Dwight Dinkla
Executing Director
Iowa State Bar Association
625 East Court
Des Moines, IA 50309

RE: IA Ethics Opinion 13-03 The Use of Contracted Lawyers

Dear Mr. Dinkla,

The Committee is asked to give guidance regarding the use of lawyers who are utilized under a contract for temporary employment. Those lawyers are sometimes referred to as contracted lawyers, *locum tenens* lawyers, temporary lawyers or simply "law-temps". The lawyer or law firm that utilizes their services is often referred to as the "retained lawyer." We prefer the use of the terms "contracted lawyer" and "retained lawyer" and will address the issue accordingly.[1] As described in ABA Formal Opinion 88-356:

> The temporary lawyer may work on a single matter for the firm or may work generally for the firm for a limited period, typically to meet temporary staffing needs of the firm or to provide special expertise not available in the firm and needed for work on a specific matter. The temporary lawyer may work in the

[1] *Locum tenens* is the term commonly used in the medical field referring to physicians who take on temporary medical assignments to with a clinic or hospital. Historically, in the legal profession, the activity has been known as devilling. The term "law-temps" is an extraction from the world of business which contracts with a temp-agency to fill a company's staff needs. We believe the term "temporary lawyer" to be misleading with respect to the fact that a lawyer's obligation to a client is continuing in nature and is not viewed as temporary.

> firm's office or may visit the office only occasionally when the work requires. The temporary lawyer may work exclusively for the firm during a period of temporary employment or may work simultaneously on other matters for other firms."

The contracted – retained lawyer relationship is different than a traditional co-counsel relationship. Co-counsel relationships involve lawyers who practice independently from each other and join together for a particular case or matter.

In this opinion we will address five issues relating to the scope and use of contracted lawyers: competency, consent, control, compensation and conflicts.

Competency

A lawyer always has a duty to exercise reasonable care with regard to the building and delivery of legal services to the client. Iowa R. Prof'l Conduct 32:1.1. This duty extends to the need for assistance and selection of a lawyer to provide it. The duty is well understood in the context of the need for specialist co-counsel on a particular matter Rule 32:1.1 Cmt 1. But it can become more complex when a lawyer or law firm needs temporary legal help. The situation usually results from a volume of business that suddenly overwhelms the law firm's legal staff. In such situations the firm is faced with three options: Turn clients away, hire a full time associate or contract with a lawyer to provide support services during the need. The due diligence process regarding the selection of a contracted lawyer is no different than that which the firm uses in selecting an associate. The law firm must identify the matters for which assistance is needed and ensure that the contracted lawyer has the requisite legal expertise, is ethically sound and is compatible with the firm and its practice. See, ABA Formal Opinion 08-451 "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services" Even though the contracted lawyer's involvement may be temporary to the client the contracted lawyer is still a part of the law firm.

Control

Iowa Rule of Professional Conduct 32: 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 Iowa Rules of Professional Conduct." Importantly, in certain situations the rule makes the supervising lawyer liable for rule violations by the subordinate lawyer. Rule 5.1(c) states:

> "(c) A lawyer shall be responsible for another lawyer's violation of the Iowa Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Rule 32:5.1 is framed within the context of intra-firm operations regarding partners and associates. However ABA Formal Opinion 08-451 has interpreted the rule to apply to the retained-contracted lawyer relationship:

> "Although Comment [1] to Rule 5.1 states that paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm (emphasis supplied), we do not believe that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within firms as defined in Rule 1.0(c). A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm. As discussed below, the contrary is true in many respects."

We agree with ABA's interpretation. Accordingly, we are of the opinion that Iowa R.Prof'l Conduct 32:5.1 (b) and (c) apply to relationships where one lawyer has supervisory responsibility over the conduct and work product of another lawyer regardless of whether the two lawyers are members of the same law firm. For clarity, we note that supervisory responsibility usually does not exist in the of-counsel and co-counsel relationship. See, for example IA Ethics Opinions 13-01 and 13-04. Because retained lawyers have the responsibility to adequately supervise and control the services rendered by the contracted lawyer they should be selective in making assignments to contracted lawyers and diligent in supervising their work product.

Consent

Contracted lawyers are considered part of the law firm for the contractual period. Depending upon the need, the contracted lawyer may be assigned to several different matters or cases. Iowa R. Prof'l Conduct 32:1.2(a) and32:1.4 (a)(2) require a lawyer to consult with the client as to the means by which the client's objectives are to be pursued. Client consent is not necessary when a firm hires a full time associate or assigns a matter to a member who is "of-counsel." IA Ethics Opinion 13-01. However, the necessity to obtain client consent when a law firm engages the services of a contracted lawyer is a different matter. In one situation a master servant or employer-employee relationship may exist between the retained and contracted lawyer; in another the contracted lawyer may simply be assigned to the retained lawyer or firm by an intermediary agency. The difference is important. The ABA has focused on the nature of the underlying relationship in assessing the issue. ABA Formal Opinions 88-356 and 08-451 appear to draw a distinction between situations where there is an employer-employee relationship between the retained and contracted lawyer as compared to the situation where the contracted lawyer's services were procured through an intermediary. The ABA opinions reached the conclusion that in the employer-employee situation client consent would be unnecessary whereas it would be needed where an intermediary agency was involved.

Some state ethics committees have elected to follow the ABA rule, WI Ethics Op E-96-4. Others have elected to require consent in all situations where the work performed appears reasonably likely to be material to the representation or to affect the client's reasonable expectations. See, NJ Ethics OP No. 284, Inquiry No. 97-1-15. Some ethics committees opine that disclosure and consent is only necessary where the contracted lawyer is working independently of the retained lawyer. NJ Ethics Op 689.

The essence of the relationship is significantly different between a law firm and an employed associate versus a law firm and a temporary lawyer. The associate has been chosen by the law firm to become part of the professional component of the firm, for all purposes, for the long term. Clients are aware of the identity and reputation of the members of the firm, including the associates, when selecting a law firm. And in the situation where the associate joins the law firm after the client retains the firm's services the client has the assurance that the firm has put its professional reputation behind the employment of the associate. By contrast, contracted lawyers are temporary, provide a limited service, do not constitute the professional component of the firm, have no expectation of a lasting relationship with the firm and simply provide their services on an ad hoc basis as assigned by an intermediary agency. In selecting a law firm, clients will not know the identity of the temporary lawyer who may be providing their legal service. Consequently, we decline to adopt the ABA position. Iowa lawyers who anticipate engaging the services of a contracted lawyer should do so with the consent of their client.

For clarification, we emphasize the fact that lawyers who are employed as part time associates by a law firm or who are in an "of-counsel" relationship with a law firm are not considered contracted lawyers. Client consent to utilize their services is not needed. They are considered part of the law firm and the implied authorization regarding the sharing of confidential information within a firm would extend to them by operation of Rule 32: 1.6(a) and its Comment [5].

Compensation

The nature and amount of compensation to be paid the contracted lawyer and when and how it is to be paid is a matter of contract between the contracted and retained lawyers. Because a contracted lawyer is considered to be part of the firm, albeit for the duration of the contract period, the firm can utilize the services of the contracted lawyer, and bill as it would in the case of an associate. The same calculus used in determining an associate's billing rate or charges should be used to determine the billing rate or charges for the contracted lawyer. However the retained lawyer should be cautious when charging the contracted lawyer's charges as an expense. ABA Formal Opinion 00-420 addresses the issue:

> "When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) [of the Rules of Professional Conduct] that a lawyer's fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services.

* * *

> Subject to the Rule 1.5(a) mandate that 'a lawyers fee shall be reasonable,' a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services. This is true whether the use and role of the contract lawyer are or are not disclosed to the client. The addition of a surcharge above cost does not require disclosure to the client in this circumstance, even when communication about fees is required under Rule 1.5(b). If the costs associated with contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise."
>
> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-420 ("Surcharge to Client for Use of a Contract Lawyer"), at 1, 3 (Nov. 29, 2000).

We adopt the ABA's rationale permitting a surcharge or markup on top of payments made to the contract lawyer: When the retained lawyer bills the contracted lawyer's charges as fees, and not an expense, there is an expectation that the retained lawyer has either supervised the work of the contract lawyer or has adopted that work as his or her own and accordingly stands by it.

Conflicts

Iowa Rule of Professional Conduct 32: 1.7, 1.9 and 1.10, regarding conflicts of interest and imputed conflicts of interest, apply equally to associates, partners or contracted lawyers. Consequently, care must be exercised to identify possible conflicts when choosing the contracted lawyer. Likewise at the conclusion of the contractual period, the contracted lawyer owes a duty to the firm's clients for which work was performed. Rule 32: 1.9.

However a problem arises regarding imputed conflicts under Rule 32: 1.10. For example, under a strict reading of the rule a contracted lawyer is considered "associated with" the law firm for all ethical matters. This creates the situation where a contracted lawyer is assigned to a specific case for a particular client. After leaving the firm the contracted lawyer takes an assignment in another law firm that has other cases against the prior law firm. Under a strict reading of rule 32: 1.10 the subsequent law firm could be subject to disqualification because the temporary lawyer had been "associated with" the prior law firm. In ABA Formal Opinion 88-356, the ABA has taken the position that contracted lawyers should not necessarily be treated as "associated with" the law firm that hires them for purposes of imputed disqualification. In doing so it has formulated a "functional analysis" test focusing on the direct connection between the contracted lawyer and the work that the lawyer performed for the clients, if any, with conflicting interests. The ABA opinion concluded that screening is permissible for contracted lawyers moving from firm to firm:

> "In order to minimize the risk of disqualification, firms should, to the extent practicable, screen each Lawyer Temp from all information relating to clients for which the Lawyer Temp dos not work., All law firms employing Lawyer Temps also should maintain a complete and accurate record of all matters on which each

> Lawyer Temp works. A Lawyer Temp working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the Lawyer Temp is not working. Since a Lawyer Temp has an equal interest in avoiding future imputed disqualification, the Lawyer Temp should also maintain a record of clients and matters worked on."

While we agree with ABA Formal Opinion 88-356 we caution that in some situations screening measures may not be practical or possible and that the efficacy of screening cannot always be guaranteed. Consequently the burden rests with the contracted lawyer to recognize direct conflicts and to avoid placement in law firms that represent clients adverse to the contracted lawyer's current or former clients.

Conclusion

Contract lawyering can provide benefits to both the contracted and retained lawyer and law firm. However both parties – the contracted lawyer and the retained lawyer and law firm – must exercise due care to ensure that the scope and nature of the contracted services are well defined and that the potential for conflicts of interest and imputed conflicts of interest are identified.

For the Committee,

NICK CRITELLI, Chair
Iowa State Bar Association
Ethics and Practice Guidelines Committee

NC:em