



Practice Management Pointers

The Decision to Hire Contract Attorneys Should Never Be Just About the Money

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Firms hire contract attorneys for a variety of reasons, not the least of which is an attempt to control expenses. While reducing expenses is a good thing, the financial savings shouldn't be the only issue in play as unintended consequences could follow if no thought is ever given to a few other concerns. The issues that come to mind most readily for me are conflicts of interest, accountability for work product, disclosure, and insurance coverage were an allegation of negligence ever to arise.

Addressing these issues is problematic however, because the term "contract attorney" means different things to different people. IRS definitions and regulations aside, contract attorneys can run the gamut from fulltime "employees" who are held out as members or associates of a firm to temporary part-time attorneys who never step foot within the walls of the firm. For the purposes of this article, I am going to focus on contract attorneys who will never be held out publicly as being associated with the firm at which they are working.

Let's look at the insurance coverage concern first. Don't assume that coverage for contract attorneys under your existing policy is a given. While some insurance companies make no distinction between "contract attorneys" and "employed" attorneys, others do. This means that some insurance carriers will automatically add contract attorneys to your policy, once notice has been given and the appropriate amount of premium paid, and others will not. Why won't they? One reason is that contract attorneys are often temporary and/or part-time and some firms hire quite a few. Do these part-timers have their own clients, to include other firms that they work for under contract? Is there frequent turnover of contract attorneys at the firm? In short, contract attorneys represent an unknown risk to a malpractice insurance carrier. If your insurance carrier will not extend coverage under your existing policy, the contract attorney may need to purchase his or her own coverage if they feel coverage is necessary. I would suggest that coverage should be mandatory if the contract attorney will be doing things like appearing in court or taking depositions. It may not be necessary if there will never be any client contact and the hiring firm will be reviewing and accepting accountability for the contract attorney's entire work product. Regardless, always confer with your insurance carrier when thinking about hiring a contract

attorney (or attorneys) so that the situation can be fully understood, documented, and appropriately underwritten by the carrier if they are willing.

The decision as to whether to use contract attorneys is not something that should lie exclusively with the firm. Clients may or may not be comfortable with contract attorneys and thus clients should be included in the decision making process. Certainly our ethical rules require disclosure; but ethical rules aside, whose matter is it? It's the clients. I would argue that clients fundamentally deserve to know who will be working on their matters due to confidentiality, competency, and financial concerns at a minimum. Explain to your clients why the use of contract attorneys is necessary. Let them know who they are and what skill set they bring to the table. Then detail what the savings will be and share the steps that will be taken to ensure that confidences will be maintained. In the end, it's all about respecting the attorney/client relationship.

The accountability piece is an interesting issue. Under agency principles, the firm is going to be liable for what the contract attorneys do within the scope of their employment. Sometimes firms will try to do an end run around this concern and treat the contract attorneys as independent contractors. This may be partially effective if the contract attorneys are fully independent (think in accordance with the IRS definition) and the client has not only been made aware of the situation but consented to it in writing. I say partially effective because there will always be the possibility of a negligent hire claim should any of the independent contract attorneys commit malpractice. Given this, appropriate risk management practices are called for whenever utilizing the services of contract attorneys. Adequate supervision and work product review are a given. Have the contract attorneys sign a confidentiality agreement and instruct staff to never discuss unrelated firm matters in front of them. You would also be well advised to inquire into the background, education, and experience of every potential contract attorney hire as well as ask about past claims or disciplinary matters prior to making any hiring decision.

Perhaps the most significant issue with contract attorneys is the imputed conflict problem. Here the specifics of the working relationship will matter. There is going to be a real difference in how the conflict problem plays between contract attorneys who will never step foot inside your firm's physical space, have no access to firm files, and will only work on one project for your firm versus contract attorneys who will work internally, will be employed there for an extended period of time, will be working on multiple projects, and have access to the firm's client files. The issue can be further compounded if any of the contract attorneys will also be working at one or two other firms at the same time. To minimize the risk of unintended conflict problems arising, limit the contract attorneys' access to client files to the greatest degree possible. An isolated or off site work space coupled with no access to the firm's computer network or the area where client files are maintained can be an effective way to manage the problem. In contrast, the greater the degree to which any contract attorney becomes integrated within a firm the greater the likelihood that all the conflicts this attorney carries will be imputed to the firm. Understand that this isn't about how contract attorneys are paid. It's about length of time in your employ, scope of the relationship with the firm, degree of client contact, access to client files, the clients' understanding of the relationship, and the list goes on.

The decision to use contract attorneys can be an appropriate decision that brings real value to your firm and the clients you serve. Just don't rush into this for the expense savings alone because there can be unintended consequences that in the end could prove more costly than if you had never hired the contract attorneys in the first place.



Risk Management Questions?

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