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Legal Ethics and Flexible Lawyer Staffing: Part 2

By Michael Downey

My previous ethics column explained how ethics opinions regulate flexible staff lawyers, including the usual treatment of “of counsel” and temporary attorney relationships. In this column I offer four practical tips about contracting with and employing flexible staff lawyers.

Evaluate what you need. Today law firms can hire attorneys willing to work within numerous forms of flexible arrangements. Some lawyers want limited assignments so they can maintain their own practice and may be willing to receive payment only when the firm receives payment. Other lawyers prefer more regular work and payments, for example, by receiving an hourly wage without regard for whether the firm ultimately receives payment.

Firms can also find lawyers with a wide range of skills and experience willing to work on a flexible basis. Once, while supervising temporary attorneys who were reviewing documents on a large environmental case, I discovered that one of them had previously served as a division general counsel for another global energy company and who was now retired and had decided to work part time and on a flexible basis when convenient. Upon learning this, we were able to use this lawyer’s special knowledge and experience to benefit the client and the representation.

Conduct due diligence. Law firms considering employing flexible staff lawyers

will want to consider conducting three types of due diligence, depending upon the nature of the staffing relationship anticipated.

First, the hiring firm will want to ensure that the temporary attorney has the necessary licensure to perform the job. If the lawyer will operate as a lawyer in state court, for example, the temporary lawyer should be admitted to practice in the state or the hiring firm should be prepared to assist in organizing—and potentially paying for—*pro hac vice* admission for that attorney.

Second, the hiring firm should ensure that the lawyer does not have a conflict of interest that should prevent that lawyer from working on the applicable client files. If the lawyer does have a conflict of interest, this may even impute to the hiring firm and risk the ability of the hiring firm to work on the client matter.

Third, if a flexible staff lawyer will be holding a long-term position or have significant independent responsibility, the hiring firm may want to conduct broader due diligence into the lawyer’s character and credentials. The firm might then request recommendations and contact references to reduce the risks the flexible staff lawyer will cause problems for the firm and its clients.

These due diligence concerns apply regardless of whether the law firm is hiring the flexible staff lawyers directly or through a

staffing agency. ABA Formal Opinion 08-451 advises a law firm using an intermediary to hire flexible staff lawyers to investigate both the intermediary and the attorney who is being hired.

Enter written association agreements.

Firms employing flexible staff lawyers generally benefit from using an employment agreement that specifies the terms of the relationship and the benefits the flexible staff attorney will receive. A typical of counsel relationship addresses at least eight of the following subjects:

- *Title and nature of relationship.* Lawyers are often very concerned with titles, including job titles. Therefore it's often best to specify what title the lawyer and firm will use. Also the firm may want to specify that the lawyer is only an independent contractor, if that is, in fact, how the firm wants to characterize the lawyer's relationship with the firm.
- *Scope.* The flexible staff lawyer's employment agreement should specify the scope of work the lawyer will be handling, including specific language about which aspects of the matter will be (and will not be) the lawyer's responsibility. Clarity at the outset helps avoid conflict later.
- *Compensation and benefits.* Perhaps it seems obvious, but the flexible staff lawyer's employment agreement should specify how much and when the flexible staff lawyer will be paid. Law firms should also seriously consider including limits on compensation in the flexible staff agreement to allow greater flexibility in compensation. In particular, any flexible staffing agreement should expressly address whether or not the lawyer will have a right to share in any

fees recovered in matters the lawyer handles.

- *Exclusivity.* Sometimes a flexible staff lawyer is allowed to keep a separate practice, at least on other types of engagements. Although Rule 5.6 generally prohibits postemployment noncompete agreements, it does not prohibit agreements that limit a lawyer's right to practice outside a firm while associated with that firm.
- *Access to firm resources.* The lawyer-firm agreement should specify the parties' expectations regarding the flexible staff lawyer's access to computers, online research tools, secretarial and paralegal assistance and other firm resources. Also, where the lawyer is allowed to maintain a separate practice, the agreement often addresses whether the lawyer may use firm resources (like computers, offices and stationery) to provide legal services to clients of the lawyer's separate practice and, if so, whether the firm will be reimbursed.
- *Expense reimbursement.* Depending upon his or her role, a flexible staff lawyer may incur expenses on client matters and also while performing nonclient activities that advance the interests of the firm. Often the agreement specifies when the lawyer will be reimbursed, including defining the expense level for which prior authorization should be sought before expenses are incurred.
- *Confidentiality of client files.* The Rules of Professional Conduct impose broad restrictions on the use of client information, but I always like to include a contractual confidentiality provision in a lawyer-firm agreement. Such a provision can be broadened to protect firm

information and also provides the firm with standing if it needs to pursue claims against a lawyer for improper disclosure of client or firm information.

- *Insurance and indemnification.* Flexible lawyer agreements often address the flexible lawyer's insurance. If the lawyer is working exclusively for the firm, often a firm can add the lawyer to the firm's policy at little cost. Where a lawyer is allowed to maintain a separate practice, however, the firm may want to impose minimum professional liability insurance requirements and also require the flexible staff lawyer to indemnify the firm if that lawyer's separate practice results in claims against the firm.

Sometimes firms request that flexible staff lawyers list the firm as an additional insured on their professional liability insurance. Before imposing this requirement, you may want to investigate cost, as adding additional insureds may substantially increase a solo's insurance costs.

- *Duration and termination.* Flexible lawyering agreements normally last a specified duration. The duration may be determined by the status of a particular matter—for the duration of a case or until a deal closes, for example—or they may last a specified period of time. In either case the firm should want to establish a clean termination and ensure that the lawyer does not claim an affiliation with the firm after the relationship ends, thereby reducing potential liability and the like. Similarly, the flexible staff lawyer should prefer a clean break, as this will help him or her to determine current

and former client relationships for conflict-of-interest purposes.

- *Dispute resolution.* Finally, when lawyers get angry, they often turn to litigation to resolve their differences. A good flexible lawyering agreement will provide clear procedures for resolving disputes, often including mandatory arbitration and specifying the forum and governing law. This should help minimize the negative publicity and expenses that result from disputes.

Integrate and supervise flexible staff attorneys. Finally, if your firm decides to use flexible staff lawyers, you should take steps to ensure you have integrated them and are providing effective supervision. Too often I see firms that hire temporary or contract attorneys, ask them to take on a task (a privilege review or due diligence, for example) without explaining the case and then let them go to work without any supervision.

Obviously, even reasonable attorneys are going to have widely different preferences and expectations on how matters should be handled, for example, what risks need additional investigation or what communications are privileged. Thus, if you want flexible staff lawyers to do things the right way, you need to share your expectations with them, supervise them and confirm periodically that legal services are being performed in a manner you find acceptable. Considering that you will likely be responsible for the flexible staff lawyers' actions, both under Rule 5.1 and civil liability standards, your comfort with their legal services is critical.

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