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Legal Ethics and Flexible Lawyer Staffing: Part 1

By Michael Downey

In the past two decades, virtually every sector of the U.S. economy has seen an increase in the use of flexible staffing. And although flexible work models have become more common, the regulations governing the legal profession have undergone comparatively little change.

This column provides guidance on how the ABA Model Rules of Professional Conduct currently regulate lawyers working in flexible staffing positions. My next column will provide suggestions for working or employing lawyers on flexible staffing plans, including provisions to include in of counsel and other lawyer employment agreements.

Flexible staffing relationships. Flexible lawyer staffing comes in many shapes and sizes, often marked with an array of overlapping, confusing labels. Flexible staff lawyers use titles such as "temporary attorney," "contract attorney" and "freelance attorney." They enter "of counsel" relationships with law firms or work as independent contractors.

Sometimes flexible staff employment lasts a short period, perhaps for a specific project or group of projects, such as due diligence on a business transaction or preparation of a legal brief or memorandum. Other times the relationship may be longer. An of counsel relationship, for example, may be a part-time employment relationship that lasts a decade or more.

Sometimes the employment relationship is exclusive, with the lawyer only providing legal services through a single employer to that employer or its clients. Other times the relationship is nonexclusive, with the lawyer continuing a separate practice or with a number of firms in-house side counsel positions.

Legal ethics and alternative arrangements. In contrast to the great variety of flexible roles that lawyers fill, legal ethics authorities essentially divide flexible staff lawyers into two groups. The first category constitutes those lawyers who are so closely associated with a firm (or firms) that they are considered "in" the firm(s) for purposes of the ethics rules. Ethics opinions generally call this role an of counsel relationship.

The second role, typically referred to as a temporary attorney, encompasses lawyers who are so loosely affiliated with a law firm (or firms) that they are effectively "outside" the firm(s), despite having a link to the firm.

In categorizing a lawyer's role, the reality of the relationship is critical. Titles may be helpful but, as noted earlier, lawyer job titles are often confused and misused.

Of counsel relationships. Under ABA Formal Opinion 90-357, the of counsel title should be reserved for lawyers who have "some general and continuing relationship" with a law firm. This designation indicates a

"close, regular, personal relationship" between the law firm and of counsel lawyer, who is neither a partner (or equivalent) nor an associate, which is understood as "a junior non-partner lawyer, regularly employed by the firm."

ABA Opinion 90-357 permits a lawyer to be of counsel with more than one law firm, although, as a practical matter, the number of firms is necessarily limited. "[T]he controlling criterion is 'close and regular' relationships."

Ethics regulations for of counsel lawyers. Where an of counsel relationship does exist, the lawyer is generally treated as a full member of the law firm for purposes of the ethics rules. This includes the rules governing conflicts of interest. ABA Formal Opinion 90-357 explains, "[A]n of counsel lawyer (or firm) is 'associated in' and has an 'association with' the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules and the imputation of disqualifications resulting from former government service under Rules 1.11(a) and 1.12(c)."

ABA Formal Opinion 90-357 also states that an of counsel lawyer is treated as "*in* the firm for purposes of Rule 3.7(b)," the rule that governs when a lawyer may be an advocate and testify in a proceeding.

ABA Opinion 90-357 does not address fee sharing. But the Model Rule 1.5(e) requirements for client notice and consent only apply when lawyers "not in the same firm" are dividing a fee. Because lawyers who are of counsel and in compliance with ABA Opinion 90-357 are generally treated as being "in" the firm with whom they associate as of counsel, consistency would support that an of counsel lawyer may share fees without complying with Rule 1.5(e).

Temporary attorney relationships. ABA Formal Opinion 88-356 provides quite a contrasting definition and ethical treatment for the role of a temporary attorney. A temporary attorney has a less tenuous connection to the law firm and thus is effectively "outside" the firm. Formal Opinion 88-356 states that a temporary attorney:

> 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 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.

Ethics regulation of temporary attorneys. Because the temporary attorney role is effectively "outside" the law firm, a temporary attorney will be treated much more like bringing an outside lawyer to the law firm's client-lawyer relationships.

The law firm may need to notify the client of the temporary lawyer's involvement. The key factors, ABA Formal Opinion 00-420 directs, are the reasonable expectations of the client and the degree of supervision the law firm's own lawyers provide. Under ABA Formal Opinion 88-356, a client should generally receive notice when a temporary lawyer is performing work for the client without close supervision from a firm lawyer, will be billed

to the client as an expense or will be sharing fees as regulated under Model Rule 1.5(e).

ABA Opinion 88-365 permits a law firm to bill for a temporary attorney in two ways. First, the law firm may bill the temporary attorney's time as an expense. If so, the firm should disclose any surcharge imposed. Alternatively, the firm may bill the temporary attorney in the manner in which the firm bills all legal services. Only Model Rule 1.5 acts to limit the markup, as explained in ABA Formal Opinion 00-420.

The imputation of conflicts from a temporary attorney normally involves application of a "functional analysis." Under ABA Opinion 88-356, the primary focus is on the actual relationship between the law firm and the temporary lawyer, and whether the temporary attorney has access to clients and client information other than the matter on which the temporary attorney is working. The more the temporary attorney is segregated from the firm and its information, the less likely imputation of conflicts will occur.

Finally, under Model Rule 7.1 and other candor requirements such as Model Rule 8.4(c), the law firm must take care not to misstate the relationship of the firm and the temporary attorney.

Michael Downey *practices at Downey Law Group LLC, a law firm dedicated to legal ethics, law firm risk management, and the law of lawyering. Michael also teaches legal ethics at Washington University School of Law and St. Louis University School of Law, chaired the ABA Law Practice Division from 2013-14, and served on the Technology Working Group of the ABA Commission on Ethics 20/20. Reach Michael at 314-961-6644 or MDowney@DowneyLawGroup.com.*

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