



Ethical Considerations When Using Freelance Legal Services

BY SARAH COLEMAN

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Both freelance lawyers and hiring lawyers should address ethical issues before and during the course of the representation. This article explores the major ethical issues associated with outsourcing legal work to a freelance lawyer.

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Reflective of the growing “gig economy,” lawyers are increasingly working on a freelance basis. The freelance law model is compatible with the Colorado Rules of Professional Conduct (Colo. RPC or Rules) so long as the lawyers involved in the freelance relationship identify and address ethical issues throughout the course of the relationship. With common sense and diligence, a freelance legal services relationship can provide significant benefits to the freelance lawyer, the hiring lawyer, and the client.

A freelance relationship involves multiple ethical issues, including conflicts of interest, confidentiality, proper handling of compensation arrangements between the freelance lawyer and the hiring lawyer (and between the lawyers and client), and appropriate supervision of the freelance lawyer’s work. This article examines the basics of a freelance relationship and provides guidance for handling these potentially thorny but manageable areas of professional responsibility.

The Basics of Freelance Legal Services

Lawyers form a freelance relationship when a non-employee lawyer is retained to provide legal services by another lawyer or law firm on behalf of their clients.¹ This is often done through an independent contractor agreement between the freelance lawyer and the hiring lawyer or firm. Although the freelance lawyer generally provides legal services directly to the hiring lawyer, the freelance lawyer actually represents the hiring lawyer’s clients.²

The non-employee lawyer may be called a temporary lawyer, contract lawyer, or freelance lawyer. Opinions from the Colorado Bar Association (CBA) Ethics Committee and American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility use these terms interchangeably. Although the terms are largely synonymous, they may carry slightly different connotations. For example, the term “contract lawyer” may imply that the lawyer is working through a placement agency or other third party. In contrast, the term “freelance lawyer” may imply that the lawyer works with many other lawyers as an independent contractor

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without the use of an intermediary, while the term “temporary lawyer” may imply that the relationship between the freelance lawyer and the hiring lawyer is of short duration. This article uses the term “freelance lawyer” to include all of these concepts.

The other half of the freelance legal services equation is the hiring lawyer or law firm that represents a client and hires the freelance lawyer to provide legal services in a non-employment relationship. The hiring lawyer may be called a retaining lawyer, engaging lawyer, outsourcing lawyer, or hiring lawyer. These terms likewise are generally synonymous and the ethics opinions use them interchangeably. The terms also apply when a firm, rather than an individual lawyer, contracts with the freelance lawyer in an independent contractor, temporary, or freelance relationship. This article uses the term “hiring lawyer” to refer to a lawyer or firm that hires the freelance lawyer to work on client matters.

A freelance lawyer and hiring lawyer can work together in a variety of ways to best serve their needs and their client’s needs. For example, a hiring lawyer could use a legal services placement agency to retain a freelance or temporary assignment lawyer, such as when a law firm outsources a document review project for a client. Additionally, a hiring lawyer could directly contract with the freelance lawyer to work as an independent contractor. Further, the hiring lawyer could have an ad hoc arrangement with the freelance lawyer, which would allow the freelance lawyer to cover temporary or short-term assignments when needed.

A freelance relationship also affords flexibility for the conditions under which the legal work will be performed. For example, in a more traditional model, the freelance lawyer could work in the hiring lawyer’s office, sharing the hiring lawyer’s office space, equipment, and support staff. Alternatively, the hiring lawyer could contract with the freelance lawyer to work remotely and never share a physical space, computer resources, or staffing resources with the hiring lawyer.

A freelance relationship may also provide flexibility in terms of the duration and scope of the work. For example, a hiring lawyer may contract with the freelance lawyer to have an ongoing, year-over-year relationship. Or a hiring lawyer may need the freelance lawyer for one or a few specific projects. Additionally, a hiring lawyer may contract with the freelance lawyer to work together on many client matters. Alternatively, the hiring lawyer and freelance lawyer may have just a one-case or one-project relationship.

Generally speaking, and subject to the conflicts analysis addressed below, the freelance lawyer would have the flexibility to work for many different hiring lawyers simultaneously. In certain circumstances, the hiring lawyer might contract to work exclusively with the freelance lawyer during the term of their relationship, such as when the freelance lawyer works full-time on a discovery or document review project for a few weeks or months. The inherent flexibility of the freelance law relationship is often attractive to both parties.

Client-Lawyer Relationship

A critical first step in evaluating whether a freelance relationship complies with the Rules is evaluating whether the freelance relationship between the hiring lawyer and the freelance lawyer creates a client-lawyer relationship. At first blush, it may be tempting for the participants in such a relationship to conclude that there is no client-lawyer relationship. After all, the hiring lawyer is contracting with the freelance lawyer to provide legal services to the hiring lawyer’s clients, not retaining the freelance lawyer as the hiring lawyer’s own counsel for the hiring lawyer’s own legal need.


As tempting as it may be to believe that no client-lawyer relationship exists, all participants in a freelance legal services relationship should reject that idea. CBA Formal Ethics Opinion 105 unambiguously explains that a

client-lawyer relationship exists between a freelance lawyer and the hiring lawyer’s (or firm’s) client notwithstanding the temporary nature of the relationship, the limited scope of the representation, or the intermediary presence of the hiring law firm.³ Thus, a freelance lawyer forms a client-lawyer relationship with the hiring lawyer’s (or firm’s) client even if the freelance lawyer and the client never meet, if the freelance lawyer handles only minor or limited tasks on behalf of the client, or if the hiring lawyer does not disclose the use of the freelance lawyer to the client.

The predicate that the freelance lawyer forms a client-lawyer relationship with the hiring lawyer’s client drives the rest of the analysis under the Rules. The existence of a client-lawyer relationship means that the freelance lawyer owes the hiring lawyer’s client all of the obligations


applicable to a client-lawyer relationship under the Rules applicable to lawyers representing clients.⁴ For example, the freelance lawyer owes the obligation to ensure competence in performing the requested legal work.⁵ Likewise, a freelance lawyer must ensure that she

- diligently handles the client matters,⁶
- ensures reasonable communication between the lawyer and client,⁷
- does not reveal information relating to the representation,⁸ and
- avoids conflicts of interests with current⁹ or former¹⁰ clients, including circumstances where the freelance lawyer’s personal needs or relationships with other hiring lawyers may create a “significant risk that the representation [needed by the hiring lawyer’s client] will be materially limited . . .”¹¹



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Freelance Legal Services Compared to Limited Scope Representation

The growing trend of lawyers providing unbundled legal services, which is also known as limited scope representation, is one example of the growth of the gig economy in the legal profession. Clients and lawyers are increasingly using the limited scope model for on-demand, efficient, and cost-effective representation.

Rule 1.2(c) allows a lawyer and client to agree to limit the scope or objectives of the representation the lawyer provides to the client.¹² The limitation must be reasonable and the client must give informed consent.¹³ Colorado's Rules of Civil Procedure state that a lawyer may provide unbundled legal services to a pro se party by filing a notice of limited appearance for specified proceedings and may file a notice of completion of limited appearance, which terminates the lawyer's appearance without further action by the lawyer or the court.¹⁴ Lawyers may also ghostwrite pleadings or appellate briefs for a self-represented litigant, subject to certain specific limitations.¹⁵

The U.S. District Court for the District of Colorado, however, specifically excludes Rule 1.2(c) from the standards of professional responsibility applicable in its court.¹⁶ In the federal court in Colorado, counsel must move for leave to provide limited scope representation.¹⁷ Specifically, the lawyer must file an Entry of Appearance to Provide Limited Representation.¹⁸ If the court permits the limited scope representation, it will enter an order that defines the scope of the representation and requires further approval of any changes in the scope of the representation.¹⁹

The traditional "full bundle" of legal representation consists of "gathering facts, advising the client, discovering the facts of the opposing party, performing legal research, drafting correspondence and documents, negotiating, and representing the client in court."²⁰ In contrast, unbundled legal services focus on the lawyer (1) providing litigation support to pro se litigants, (2) assisting pro se litigants with preparing pleadings or court documents, (3) providing other non-litigation advice to pro se litigants, and (4) assisting clients with transactional matters.²¹

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services, and both services may be performed simultaneously. Generally, all of the Rules relating to representation of a client apply to lawyers providing unbundled legal services, regardless of the limited scope or temporary duration of the representation.²²

When a lawyer provides unbundled legal services, the client and lawyer will discuss the services that the lawyer may provide and the client may choose only some of the services rather than the full bundle of services involved in a traditional representation.²³ Depending on the terms of the hiring lawyer's and the freelance lawyer's agreement, the delivery of legal services in a freelance model may operate in a similar way—it is à la carte representation. The hiring lawyer may retain the freelance lawyer for very limited legal services, such as drafting one pleading or researching and analyzing one legal issue. Alternatively, the hiring lawyer may retain the freelance lawyer to work more like an associate in the traditional full bundle model. Generally, the principal difference between freelance legal services and unbundled legal

services is that in the freelance model, there is an intermediary between the freelance lawyer and the client—the hiring lawyer.

As with unbundled legal services, the freelance lawyer and hiring lawyer should carefully define the scope of the representation and the services provided.²⁴ A well-drafted agreement between the hiring and freelance lawyers will note the specific tasks that the freelance lawyer will undertake, when they should be undertaken, how they will be communicated to the client, and how the services will be compensated. With both unbundled legal services and freelance legal services, it is crucial that all of the parties (the client, the hiring lawyer, and the freelance lawyer) understand who is responsible for undertaking certain actions, meeting deadlines, ensuring filing, and arranging service. In the freelance context, the freelance lawyer may rely on the hiring lawyer to communicate information to the client. Those expectations should be communicated clearly in writing.

A freelance lawyer, like a lawyer providing unbundled legal services, must provide competent representation²⁵ and should ensure that any agreement with the hiring lawyer does not create limitations that would impair the obligation to provide competent representation to the client. In both the freelance and the unbundled context, lawyers should be wary of limitations placed on their ability to represent clients or personal limitations (such as unreasonable time limitations) that could impair their ability to provide competent advice.²⁶

Disclosure and Informed Consent

The hiring lawyers, who have the direct client-lawyer relationship, have an obligation to communicate to the client information “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁷ Further, under Rule 1.5(b), the lawyer with the direct relationship with the client (i.e., the one who has the fee agreement with the client) must also communicate “the basis or rate of the fee and expenses” charged to the client when the lawyer has not regularly represented the client.

Many lawyers in the role of a hiring lawyer incorrectly assume that they must notify their

client every time they use a freelance lawyer. There is no such bright-line rule. Instead, hiring lawyers must evaluate what they need to disclose to their clients regarding the use of freelance lawyers, such as the identity of the freelance lawyer and how much the services will cost. If disclosure is required or warranted, the hiring lawyer should promptly inform the client and obtain consent.²⁸ The three major considerations in the disclosure analysis are the financial arrangements between the hiring lawyer and freelance lawyer, the level of supervision the hiring lawyer exercises over the freelance lawyer, and the impact that the use of the freelance lawyer has on the representation.

Financial Arrangements

The hiring lawyer and freelance lawyer must evaluate the financial arrangement between them. A client must give informed consent to fee-splitting.²⁹ If lawyers divide fees among themselves but are not practicing in the same firm,³⁰ such a division is permitted only if the lawyers assume joint responsibility or if the division of the fee is proportional to the representation, the client gives informed consent in writing, and the total fee is reasonable.³¹ Because the freelance lawyer and hiring lawyer are usually not in the same firm, many lawyers incorrectly assume that Rule 1.5(d) will always require disclosure for freelance legal services. Although the freelance lawyer and hiring lawyer often will not be in the same firm, it does not necessarily follow that the freelance lawyer's compensation constitutes a "division of fees" that requires informed client consent.

The hiring lawyer and freelance lawyer must determine whether they in fact are dividing legal fees.³² "A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm."³³ Fee-splitting in the freelance law context usually arises when the freelance lawyer's "compensation is directly tied to or dependent on the client's payment of fees,"³⁴ for example, when the gross fee paid by the client is split between the hiring lawyer and the freelance lawyer, the freelance lawyer takes a portion of contingent fees, or the freelance lawyer takes a portion of non-contingent fees paid by the client. If the financial arrangement

constitutes fee-splitting, disclosure to the client is required.

If the hiring lawyer or firm is obligated to pay the freelance lawyer for the freelance legal services regardless of whether the hiring lawyer's client pays, the arrangement is not governed by Rule 1.5(d). Some examples of arrangements that do not constitute fee-splitting include:

- (1) the firm agrees to pay the temporary lawyer an hourly rate for the temporary lawyer's services;
- (2) the firm agrees to pay the temporary lawyer a flat rate per day or week;
- (3) the firm agrees to pay the temporary lawyer a fixed fee for a project.³⁵

If the financial arrangement between the hiring lawyer and the freelance lawyer does not constitute fee-splitting, Rule 1.5(d) does not require disclosure of the freelance relationship to the client.

Hiring Lawyer's Supervision

The hiring lawyer and freelance lawyer must also evaluate the level of supervision, if any, that the hiring lawyer will exercise over the freelance lawyer.³⁶ If the freelance lawyer works independently and without the hiring lawyer's supervision, the hiring lawyer must disclose the use of the freelance lawyer to the client and obtain consent.³⁷ The client cannot be deemed to have consented to having an independent lawyer involved in their case.³⁸

Conversely, if the hiring lawyer supervises the freelance lawyer's activities and work or adopts the freelance lawyer's work as his own, no disclosure is required.³⁹ In this case, [the] client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.⁴⁰

Freelance Lawyer's Impact on the Representation

Finally, the hiring lawyer and freelance lawyer must evaluate whether the use of a freelance lawyer constitutes a significant development in the representation. Lawyers must communicate

with their clients about the status of the legal matter.⁴¹ This includes significant developments that affect the substance of the representation or timing.⁴² This is necessarily a fact-dependent inquiry. For example, if a freelance lawyer moves from performing a specific or limited project to providing substantive and ongoing litigation support, that change is probably a significant development requiring disclosure. On the other hand, it may not be a significant development requiring disclosure when a freelance lawyer provides limited legal research on a straightforward issue.

Although a few bright-line rules require disclosure, there is no rule prohibiting disclosure. Many of the Rules promote open communication and transparency in the client-lawyer relationship. The hiring lawyer must use professional judgment to assess the client's reasonable expectations and the nature of the freelance lawyer's services. If the hiring lawyer reasonably believes that using a freelance lawyer would materially affect the client's expectations, the hiring lawyer must disclose the use of the freelance lawyer.⁴³

Based on the standards addressed above, if there is a duty to disclose the nature of the relationship between the hiring lawyer and the freelance lawyer to the client, the client must give informed consent. Informed consent requires that the hiring lawyer communicate sufficient information and an explanation of both the risks and alternatives to using a freelance lawyer.⁴⁴ If informed consent is required, the hiring lawyer must promptly notify the client.⁴⁵ When communicating about the risks of using a freelance lawyer, the hiring lawyer may wish to discuss with the client conflicts of interest, competency, supervision, and confidentiality issues. When communicating about the alternatives to using a freelance lawyer, the hiring lawyer may wish to discuss workload, availability, fees, and specialization with the client.

Conflicts of Interest

Perhaps the most significant risk faced by both hiring lawyers and freelance lawyers is conflicts of interest. The freelance relationship includes serious conflicts of interest traps for the unwary.

As discussed above, freelance lawyers are governed by all of the Rules applicable to lawyers representing clients, including the conflict of interest rules.⁴⁶ A lawyer may not represent a client if there is a concurrent conflict of interest.⁴⁷ A concurrent conflict exists if the representation of one client is directly adverse to another client, even if the matters are unrelated.⁴⁸ A concurrent conflict also exists if the representation of one client will be materially limited by the lawyer's responsibility to another client, a third party, or the lawyer's personal interests.⁴⁹ These conflicts of interest can be waived by a client who gives informed consent if the elements in Rule 1.7(b) (1) to (4) are satisfied.⁵⁰

Additionally, a lawyer who has represented a client cannot later represent another person in "the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client."⁵¹ Like concurrent conflicts of interest, former-client conflicts can be waived by a client who gives informed consent.⁵²

Before undertaking representation and forming a client-lawyer relationship, the freelance lawyer and hiring lawyer both must identify concurrent and former-client conflicts of interest, and, if necessary, obtain a waiver from the client(s). The hiring lawyer should provide the freelance lawyer with all of the information necessary to evaluate potential conflicts of interest, including the name of the client, opposing parties, related parties, and associated counsel, as well as the substance of the matter.⁵³

Lawyers participating in freelance legal services also should be aware of the potential that conflicts of interest may be imputed between the hiring lawyer and the freelance lawyer if they are deemed to be "associated in a firm." When lawyers are deemed to be in a firm, neither lawyer can represent a client if either one practicing alone would be prohibited from doing so.⁵⁴

Freelance lawyers and hiring lawyers have a mutual interest in avoiding imputed conflicts of interest, which could have significant consequences. If the freelance lawyer is deemed to be associated with multiple hiring law firms, then the current and former clients of each firm might be deemed the current and former

clients of the [freelance] lawyer *and* of all the other firms with which the [freelance] lawyer is associated. In that situation, a firm could face disqualification if one of its clients were adverse to the client of another firm with whom the [freelance] lawyer is associated, even if the [freelance] lawyer did not work on any matter for any client.⁵⁵

Obviously, imputation of a conflict of interest could pose significant costs to the client, the hiring lawyer, and the freelance lawyer.

Lawyers can avoid imputed conflicts of interest by carefully evaluating when a freelance lawyer will be deemed associated with the hiring lawyer's firm. Three factors are generally used

in determining whether a freelance lawyer and hiring lawyer are "associated" in a firm. The first and most important factor is confidentiality, which focuses on whether the freelance lawyer has access to the hiring lawyer's (or firm's) confidential information of other clients whom the freelance lawyer is not representing.⁵⁶

The second factor focuses on how the freelance lawyer is presented to and perceived by those outside the relationship between the hiring lawyer and the freelance lawyer.⁵⁷ What clients, opposing counsel, courts, and third parties think about the freelance lawyer is important. For example, if a court or opposing counsel reasonably believes that the freelance

BEST PRACTICES TO AVOID IMPUTED CONFLICTS OF INTEREST

DO

- screen the freelance lawyer from any confidential information related to the hiring firm's other clients.
- document the steps taken to ensure effective screening.
- password protect files if the freelance lawyer has access to the firm's server (or better yet, do not give the freelance lawyer access to the server).
- keep accurate records of all clients and matters that the freelance lawyer has worked on.
- maintain separate working environments.
- hold the freelance lawyer out as an independent contractor working for the lawyer or law firm on a limited basis.
- issue the freelance lawyer a W-9/1099.

DO NOT

- discuss with the freelance lawyer any client matter that he or she is not working on.
- involve the freelance lawyer in meetings where other clients or matters are discussed.
- allow the freelance lawyer to use the firm's letterhead.
- hold the freelance lawyer out as an employee, associate, or of counsel.
- imply that the freelance lawyer is associated with the firm.
- allow the freelance lawyer access to other clients' files or confidential information.

lawyer is the hiring lawyer's associate (perhaps because court filings say so), then an associated counsel relationship may exist.

The third factor, sometimes called a functional analysis, focuses on the function the hiring and freelance lawyer are serving. This factor examines the specific facts, circumstances, and arrangements between the freelance lawyer and hiring lawyer.⁵⁸ The ABA and CBA ethics committees have adopted this functional analysis approach, which is a fact-driven inquiry.

Confidentiality

Lawyers owe duties of confidentiality. Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."⁵⁹ This confidentiality obligation applies in the freelance context to disclosure to the client based on the level of the hiring lawyer's supervision, the hiring lawyer's obligations, and the freelance lawyer's obligations.

The level of supervision, if any, that the hiring lawyer exercises over the freelance lawyer directly impacts whether the hiring lawyer may share confidential client information with the freelance lawyer without first getting the client's informed consent. In addition to the specific but narrow exceptions contained in Rule 1.6(b), Rule 1.6(a) generally allows a lawyer to disclose information relating to the representation of a client if the client gives informed consent or the disclosure is impliedly authorized. When the hiring lawyer supervises or works closely with the freelance lawyer, the hiring lawyer probably is impliedly authorized to share confidential information with the freelance lawyer as part of the representation because, as discussed above, sharing information necessary to the representation is impliedly authorized. That assumes, however, the relationship between the hiring firm and the freelance lawyer involves "a high degree of supervision and control."⁶⁰

Conversely, when the hiring lawyer does not exercise supervision over the freelance lawyer, the hiring lawyer should get client consent to disclosure of confidential information to the

freelance lawyer. If the relationship between the hiring firm and the freelance lawyer is "attenuated," the hiring lawyer should not share information relating to the representation of the client without the client's consent.⁶¹ "The implied authorization of Rule 1.6(a) . . . to share confidential information within a firm does not extend to outside entities or individuals over whom the firm lacks effective supervision and control."⁶² If informed consent is necessary, the hiring lawyer must provide the client with adequate information about the risks and alternatives.⁶³

Rule 1.6(c) imposes additional obligations on the hiring lawyer, including the duty to take reasonable action to prevent the disclosure of client information.⁶⁴ Rule 1.6(c) has two applications in the freelance law context. First, to avoid imputed conflicts of interest, the hiring lawyer should screen the freelance lawyer from all information relating to the firm's other clients for whom the freelance lawyer is not doing work.⁶⁵ Second, the hiring lawyer should take steps to protect information relating to the representation of a client when outsourcing services, whether legal or nonlegal. When contracting with the freelance lawyer, the hiring lawyer should evaluate processes to ensure compliance with ethical obligations.⁶⁶ To meet this obligation, the hiring lawyer should consider entering into a confidentiality agreement with the freelance lawyer, either as part of a compensation arrangement with the freelance lawyer or in a stand-alone agreement.⁶⁷

Rule 1.6(a) also imposes obligations on the freelance lawyer. If the freelance lawyer is deemed to be associated with the hiring lawyer's firm, the freelance lawyer cannot disclose information related to the representation of the firm's clients, regardless of the source of the information.⁶⁸ The freelance lawyer, however, has more limited obligations when not deemed associated with the hiring firm. In that circumstance, the freelance lawyer is limited to "not revealing (1) information relating to the representation of any client for whom the temporary lawyer is working, and (2) information relating to the representation of other firm clients only to the extent that the temporary lawyer in fact obtains the information as a result of working with the firm."⁶⁹

Billing Clients for Freelance Legal Services

A freelance arrangement affords flexibility in handling compensation to the freelance lawyer and billing the client. A hiring lawyer can either pass on the freelance lawyer's invoice to clients as legal fees or as an expense. Neither the Model Rules of Professional Conduct nor the Colo. RPC addresses this choice, and it "does not seem to be a matter of ethics."⁷⁰

Although this choice is not a matter of ethics, there are important ethical obligations to which both the hiring lawyer and the freelance lawyer should attend. For example, if the hiring lawyer bills clients for freelance legal services as legal fees, Rule 1.5 provides the fees must be reasonable. Notwithstanding this fundamental rule, lawyers can make a profit from their legal services.⁷¹ Under certain circumstances, the hiring lawyer can impose a surcharge on the freelance legal services. A "surcharge" occurs when the hiring lawyer charges the client more for the freelance lawyer's work than the cost incurred by the hiring lawyer for obtaining the work.⁷² To impose a surcharge, the freelance legal services must be billed to the client as legal fees.⁷³

The hiring lawyer can impose a surcharge whether or not the use of the freelance lawyer has been disclosed to the client.⁷⁴ The hiring lawyer does not have a duty to disclose the surcharge if the hiring lawyer either supervises the freelance lawyer or adopts the work of the freelance lawyer.⁷⁵ If the hiring lawyer imposes a surcharge, the client should have a reasonable expectation that the hiring lawyer has supervised the freelance lawyer.⁷⁶ Essentially, if the hiring lawyer has taken the time to supervise the freelance lawyer or taken the risk of adopting the work of the freelance lawyer, the surcharge is compensation for taking that risk.

Many hiring lawyers incorrectly assume that they must disclose the freelance lawyer's compensation to their clients. The CBA and ABA ethics committees, however, have expressly rejected that assumption.⁷⁷ The committees have opined that the financial arrangement between a hiring lawyer and a freelance lawyer is analogous to the one between a firm and an associate. The firm charges the client an hourly

rate for the associate's work. Although part of that hourly rate covers the associate's salary and benefits, another part covers the firm's overhead and a reasonable expectation of profit. The firm typically does not disclose an expectation of profit in its fee breakdown to the client in a traditional client-lawyer relationship. Likewise, in a freelance relationship, the hiring lawyer (or firm) "does not have a duty to disclose to the client the amount paid to the [freelance] lawyer or the profits made from using the [freelance] lawyer as long as the financial arrangement does not constitute fee-splitting under Colo. RPC 1.5(d)" and the total fee is reasonable.⁷⁸ The hiring lawyer can markup the freelance lawyer's work as it would with an associate of the firm. Thus, freelance lawyers may be a profit source for the savvy hiring lawyer.

A hiring lawyer can also choose to pass on the freelance lawyer's invoice to the client as an expense. When billed as an expense, the hiring lawyer cannot impose a surcharge and the bill to the client cannot exceed the cost incurred by the hiring lawyer for obtaining the freelance legal services.⁷⁹ Because freelance lawyers often charge a much lower hourly rate than lawyers in a firm directly representing clients, hiring lawyers can use freelance legal services to provide their modest means clients with cost-effective representation and access to justice.

Supervising a Freelance Lawyer

As briefly explained above, the level of supervision that the hiring lawyer exercises over the freelance lawyer is relevant to several issues, including whether the hiring lawyer (1) must disclose the use of the freelance lawyer to the client, (2) can impose a surcharge for the freelance lawyer's work, and (3) can disclose confidential client information to the freelance lawyer without client consent. But what does supervision of a freelance lawyer entail? The answer to this question is fact-dependent.

"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."⁸⁰ Thus, the hiring lawyer who is supervising the work should take measures to ensure that

the freelance lawyer observes the duties of competency, loyalty, confidentiality, and other ethical obligations.

Further, all lawyers must act competently, regardless of the scope of the representation or the method of service delivery.⁸¹ "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."⁸² Because competency is a core ethical duty, hiring lawyers must ensure that they hire competent lawyers.⁸³

Lawyers must also act with reasonable diligence and promptness.⁸⁴ Failure to exercise the required diligence can have serious negative consequences for both the lawyer and the client. Improved workload management or workflow can be an important benefit of using freelance legal services. Engaging a freelance lawyer allows the hiring lawyer to outsource overflow work to another lawyer and maintain diligence and promptness. Further, when a hiring lawyer selects a competent and experienced freelance lawyer, the supervisory obligations should not be unduly onerous.

Hiring lawyers should use these best practices when hiring a freelance lawyer:

- evaluate the freelance lawyer's educational background;
- verify that the freelance lawyer is licensed and in good standing;
- assess the freelance lawyer's professional experience and expertise;
- conduct reference checks on the freelance lawyer;
- assess the freelance lawyer's character;
- ask about the freelance lawyer's conflicts screening system; and
- ask about the freelance lawyer's measures to ensure confidentiality.

The hiring lawyer should appropriately supervise the freelance lawyer during the relationship. Appropriate supervision includes

- clearly defining the scope of services;
- communicating in writing about each lawyer's responsibilities for meeting deadlines, filing pleadings, arranging service, and other matters;
- periodically checking in with the freelance lawyer regarding the status of the matter;
- evaluating the freelance lawyer's expe-

rience and ability to work more independently;

- proposing remedial actions if necessary; and
- being available for the freelance lawyer to ask questions, brainstorm, and discuss the matter.

Fee Agreements

The Rules generally do not require lawyers to use written fee agreements or engagement letters in all circumstances; these are required only where the client is new or there is a change to the basis or rate of the fee.⁸⁵ It is a safer practice, however, to use written fee agreements. A well-drafted fee agreement defines the parties' expectations and sets forth aspects of law firm management and billing to the client. This is equally true in the freelance law context, and both lawyers should enter into a written compensation agreement. A compensation agreement between the hiring lawyer and freelance lawyer should contain terms identifying the scope of the representation, how billing will be handled, who has supervisory responsibility, conflicts, confidentiality, that the agreement is an independent contractor agreement, and require malpractice insurance. Depending on the particular relationship between the hiring lawyer and the freelance lawyer, other terms (such as provision of temporary office space, mentoring, or computer equipment) may be relevant and should be addressed.

Scope of the Representation

It is crucial that all of the parties are on the same page about the scope of services and which party is responsible for certain actions. The parties to the agreement—the hiring lawyer and freelance lawyer—should be as specific as possible. They should use exclusions. Further, as the scope of the freelance lawyer's representation changes, the lawyers should use an addendum to the fee agreement to document an expanded or modified scope of services. It is important that the agreement between the hiring lawyer and the freelance lawyer define the work product that the freelance lawyer should produce. If the hiring lawyer limits the time the freelance lawyer should spend on a project, the agreement should include this limitation.

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The agreement between the hiring lawyer and the freelance lawyer should clearly identify the nature and terms of the compensation to be paid to the freelance lawyer, such as the hourly, weekly, or per project rate. The agreement should also identify when payment is due and whether payment is subject to any conditions. If the lawyers want to avoid the risk that the freelance relationship is deemed fee-splitting, the agreement between the hiring lawyer and freelance lawyer should state clearly that the hiring lawyer is obligated to pay the freelance lawyer regardless of client payment.

Supervisory Responsibility

The agreement between the hiring lawyer and freelance lawyer should clearly identify the supervisory responsibilities the hiring lawyer will have, if any. The agreement should address how the freelance lawyer’s work product will be adopted by the hiring lawyer. For the reasons explained above, it may be a good idea for the agreement to state that the hiring lawyer is ultimately responsible for the representation of the client and the legal services provided to the client.

Conflicts Screening

In the agreement between the hiring lawyer and freelance lawyer, the hiring lawyer should verify that she has provided the freelance lawyer with information adequate to evaluate conflicts of interest. The freelance lawyer should verify that he performed a conflicts check, and either did not identify any conflicts of interest or that any conflicts have been effectively waived by the client with informed consent provided in writing.

Confidentiality

To avoid imputed conflicts of interest, the agreement between the hiring lawyer and freelance lawyer should state that the hiring lawyer is providing the freelance lawyer with only the information necessary for that particular representation. The agreement should also state that the freelance lawyer does not have access to the hiring lawyer’s (or firm’s) files for other clients.


Independent Contractor Status

To avoid potential issues that would arise from an employment relationship, the agreement between the freelance lawyer and hiring lawyer should state that the freelance lawyer is an independent contractor. In doing so, the agreement should clarify that the freelance lawyer is working for the hiring lawyer on a limited or temporary basis and the working relationship does not constitute an employer–employee relationship. The agreement also should clarify that the freelance lawyer will be compensated on a W-9/1099 basis and that those tax forms will be provided by the hiring lawyer to the freelance lawyer at the appropriate time.

Malpractice Insurance

Although not required, the freelance lawyer and the hiring lawyer should both carry malpractice insurance. If the freelance lawyer and hiring lawyer carry malpractice insurance, the insurance coverage should be stated in the fee agreement. If the freelance lawyer is covered by the hiring lawyer’s malpractice insurance as an independent contractor, that coverage should be verified and identified in the fee agreement.

Conclusion

Freelance arrangements can provide cost-effective and timely representation to clients, while also benefiting the hiring lawyer and freelance lawyer. Freelance legal services can be individually tailored to meet the needs and best interests of lawyers and clients, provided that lawyers carefully address basic ethical issues throughout their relationship. Fee agreements should be used to proactively address ethical issues and define the freelance relationship. 



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NOTES

1. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 00-420, "Surcharge to Client for Use of a Contract Lawyer" at 1 (Nov. 29, 2000).
2. CBA Formal Ethics Opinion 105, "Opinion on Temporary Lawyers" at 4-319 (May 22, 1999).
3. *Id.*
4. *Id.*
5. See Colo. RPC 1.1.
6. See Colo. RPC 1.3.
7. See Colo. RPC 1.4 cmt. [1].
8. See Colo. RPC 1.6(a). Colo. RPC 1.9(b) provides, however, that a lawyer may reveal information relating to the representation of a client in a variety of different settings. Whether such exceptions apply is governed by Colo. RPC 1.6(b) and is beyond the scope of this article.
9. See Colo. RPC 1.7(a)(1).
10. See Colo. RPC 1.9(a).
11. Colo. RPC 1.7(a)(2).
12. See Colo. RPC 1.2(c). See also CBA Formal Ethics Opinion 101, "Unbundling/Limited Scope Representation" (May 21, 2016) (discussing professional responsibility and ethics issues relating to limited scope of representation).
13. See Colo. RPC 1.2(c).
14. CRCP 121 §1-1(5). See also C.A.R. 5(e) (providing for limited scope representation in Colorado's appellate courts).
15. CRCP 11(b) (providing rules for ghostwritten pleadings in district court); CRCP 311(b) (same for county court cases); C.A.R. 5(e) (same for appellate cases).
16. See D.C.COLO.LAttyR 2(b)(1), noting that a lawyer may provide limited scope representation to a pro se prisoner in a civil case. For further information, see www.cod.uscourts.gov/AttorneyInformation/LimitedRepresentation.aspx.
17. *Id.*
18. *Id.*
19. D.C.COLO.LAttyR 5(a)(1) and (2).
20. CBA Formal Ethics Opinion 101 at 2.
21. *Id.* at 3.
22. *Id.* at 9.
23. *Id.* at 6.
24. *Id.* at 4.
25. See Colo. RPC 1.1.
26. *Id.*
27. Colo. RPC 1.4(b).
28. CBA Formal Ethics Opinion 105.
29. Colo. RPC 1.5(d).
30. Colo. RPC 1.0(c) defines a "firm" as "a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation."
31. CBA Formal Ethics Opinion 105 at 4-322 to 4-324.
32. *Id.* at 4-322 to 4-323.
33. *Id.* at 4-323.
34. *Id.*
35. *Id.* at 4-324.
36. See Colo. RPC 5.1(b) ("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.").
37. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 88-356, "Temporary Lawyers" at 5 (Dec. 16, 1988); CBA Formal Ethics Opinion 105 at 4-322.
38. ABA Formal Opinion 88-356 at 5-6; CBA Formal Ethics Opinion 105 at 4-324.
39. ABA Formal Op. 88-356 at 6; CBA Formal Ethics Opinion 105, at 4-324.
40. ABA Formal Opinion 88-356 at 6.
41. Colo. RPC 1.4(a)(3).
42. Colo. RPC 1.4(a)(3) cmt. [3].
43. CBA Formal Ethics Opinion 105 at 4-325; CBA Formal Ethics Opinion 121, "Use of Temporary Lawyers and Other Professionals Not Admitted to Practice in Colorado ('Outsourcing')" at 4-445 (June 16, 2009).
44. Colo. RPC 1.0(e).
45. Colo. RPC 1.4(a)(1).
46. *Id.* at 4-320 to 4-322.
47. Colo. RPC 1.7(a).
48. Colo. RPC 1.7(a)(1). See also ABA Formal Opinion 88-356 at 1 (discussing concurrent conflicts of interest); CBA Formal Ethics Opinion 105 at 4-320 (discussing concurrent conflicts of interest).
49. Colo. RPC 1.7(a)(2).
50. Colo. RPC. 1.7(b).
51. Colo. RPC 1.9(a).
52. *Id.*
53. Colo. RPC 1.6(b)(7) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client.").
54. Colo. RPC 1.10(a).
55. CBA Formal Ethics Opinion 105 at 4-320 (emphasis in original).
56. ABA Formal Opinion 88-356 at 2-3; CBA Formal Ethics Opinion 105 at 4-321.
57. ABA Formal Opinion 88-356 at 2; CBA Formal Ethics Opinion 105 at 4-322.
58. ABA Formal Opinion 88-356; CBA Formal Ethics Opinion 105 at 4-321.
59. Colo. RPC 1.6(a).
60. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 08-451, "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services" at 5 (Aug. 5, 2008).
61. *Id.*
62. *Id.*
63. Colo. RPC 1.0(e).
64. Colo. RPC 1.6(c).
65. ABA Formal Opinion 88-356 at 4; CBA Formal Ethics Opinion 105 at 4-322.
66. ABA Formal Opinion 08-451 at 5.
67. *Id.*
68. ABA Formal Opinion 88-356 at 5.
69. *Id.*
70. ABA Formal Opinion 00-420 at 2.
71. *Id.* at 1.
72. *Id.*
73. *Id.*
74. *Id.* at 6; CBA Formal Ethics Opinion 105 at 4-324.
75. ABA Formal Opinion 00-420 at 5.
76. *Id.*
77. *Id.*; CBA Formal Ethics Opinion 105 at 4-324.
78. CBA Formal Ethics Opinion 105 at 4-324.
79. ABA Formal Opinion 00-420 at 2-3.
80. Colo. RPC 5.1(b).
81. Colo. RPC 1.1.
82. *Id.*
83. ABA Formal Opinion 08-451 at 2; CBA Formal Ethics Opinion 105 at 4-326.
84. Colo. RPC 1.3.
85. See Colo. RPC 1.5(b).