

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-4
(May 2010)

The inquirer advises that he/she normally works as “an associate” but has asked the Committee for guidance regarding “the ethical duties of a contract attorney when they accept assignments from hiring law firms” in certain specific situations. The inquirer does not disclose whether he/she is serving or has served as a “contract attorney” nor does the inquirer explain what arrangement is contemplated by use of the term “contract attorney.” Subject to these limitations, the Committee’s opinion follows.

General Observations

The Pennsylvania Rules of Professional Conduct (“the Rules”) do not use the term “contract attorney” *per se*. American Bar Association Formal Opinion 00-420 does, however, discuss the term “contract lawyer” and notes:

Contract lawyers may be engaged to work on one or more specific matters. They may be employed either by the firm directly or assigned by an independent organization. . Other contract lawyers are retained as specialists or special counsel to perform a specific service in a specific matter. A lawyer may be required to engage a specialist to assure competent representation, or obtain the services of a lawyer in another jurisdiction to provide required opinions or other assistance to the retaining lawyer. **The work of the contract lawyer may be performed on the premises of the retaining lawyer or elsewhere and the degree of supervision will vary, as will the contract lawyer's participation in the general practice activities of the retaining lawyer or law firm.**

Services of a contract lawyer may be billed to the client either as fees for legal services or as costs or expenses incurred by the retaining lawyer. Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics. **When a contract lawyer's services are billed with the retaining lawyer's as fees for legal services, however, the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own.** (emphasis supplied)

It is the Committee's opinion that notwithstanding the absence of an affirmative duty under the Rules, the duties imposed on a lawyer engaged by another attorney or law firm ("the retaining firm") to perform services on behalf of a client can vary significantly with the nature of the relationship so as to require disclosure and consent in some instances.

Disclosure to Clients

The inquirer asks whether it is "correct" that a lawyer who serves as a "contract attorney" and works on document review, document preparation or brief-writing need not communicate with the hiring attorney or law firm's client about his/her participation in the matter. From the limited information available in the Inquiry, the Committee cannot respond definitively to this question.

Certainly, the Rules do not single out a lawyer working on a contract basis as having any express duty to make any direct, independent disclosure to the client about that status or about the manner in which he/she is being compensated (*per diem*, hourly, etc.) ABA Formal Op. No. 88-356 (which uses the term "temporary lawyer") states that "where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client."¹ Under the circumstances where a contract lawyer is working under the direct supervision of an attorney associated with the retaining firm, therefore, the responsibility to disclose and obtain informed consent for the contract lawyer's participation generally lies with the firm utilizing the services of the contract lawyer ("the retaining firm").²

However, the Committee also envisages relationships between lawyers and retaining firms that might be "contractual" in nature but would, in fact, require the contract lawyer to disclose the fact and nature of his/her participation in the matter and even, perhaps, secure the client's informed consent to same. The Committee is aware that retaining firms can and do engage other lawyers from time to time on an *ad hoc* basis for certain specific tasks: oral argument, a discrete deposition, expert witness discovery, brief-writing, etc. Such engagements, by their very nature, often contemplate that the contract lawyer will not be under the direct supervision of a lawyer associated with the retaining firm. If tasks of this stand-alone nature are simply delegated by the retaining firm to a contract lawyer, certain duties of disclosure under the Rules may attach, as for example where:

¹ Obviously, the converse is true; i.e., if the contract lawyer is not working under the close supervision of a lawyer associated with the firm, that fact needs to be disclosed to the client and consent obtained. The disclosure obligation, however, rests with the firm and not the contract lawyer. Formal Op. 88-356.

² The phrase "working under the direct supervision of an attorney associated with the retaining firm" is not a term of art under the Rules. However, as observed in ABA Formal Op. 88-356 regarding "temporary lawyers":

A client who retains a firm expects that legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of personnel and disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm."

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(a) Circumstances are such that the attorney does not “function as a part of the legal services delivery group and reports to a retaining lawyer”; or

(b) Circumstances are such that the client's reasonable expectation [arising from the manner of billing or otherwise] that the retaining lawyer has supervised the work of the attorney or adopted that work as her own is not met; or

(c) The attorney has reason to believe that there is confusion about his/her role in the case vis-à-vis the client.

In this setting, the Committee counsels that a lawyer must address his/her responsibilities under the Rules without assuming that the retaining firm/attorney has disclosed and secured consent for the contract lawyer's participation in the matter. Initially, therefore, a lawyer whose services are contracted for by a retaining firm on some sort of one-off basis would have a duty to confirm with that firm that the client has been informed about and given knowledgeable approval for the lawyer's discrete participation in the matter. In default of such a confirmation, a lawyer would have an affirmative duty to determine the level of awareness and approval directly from the client. If, in the judgment of the lawyer, his/her role is in any way unclear or doubtful from the perspective of the client, the lawyer should either reject the engagement or undertake it with the understanding that at least in the interim, an attorney-client relationship exists and must be consented to by the client.

Rule 1.2(c) lends emphasis to this proposition. That Rule requires that the client give informed consent if the lawyer intends to limit the scope of representation. Thus, if the retaining firm is hiring the lawyer to “cover” a specific deposition in a matter, it may be necessary for the client to give informed consent for that activity. “Informed consent” presupposes “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 1.0 (e).³ This same analysis could implicate as well the balance of a lawyers' duties to a client under the Rules including but not limited to “communication” (Rule 1.4); confidentiality (Rule 1.6) and conflict of interest-free representation. (Rules 1.7 - 1.11.)⁴

The inquirer has also asked what a “contract attorney” is required to advise the client when retained to cover a deposition or a hearing. Again, the Committee lacks sufficient facts about such a situation to give a definitive answer. However, an analysis similar to

³ This could include information as specific as the lawyer's previous deposition experience, what he/she knows or doesn't know about prior discovery or the case as whole, whether the deposition requires some peculiar factual or legal expertise and the lawyer's credentials in that area.

⁴ [The Committee stresses that the creation of an attorney-client relationship between the client and the contract lawyer obligates the contract lawyer to reject any representation involving a concurrent conflict of interest \(Rule 1.6\), the conflicts enumerated in Rule 1.8, the restriction on representing current clients adverse to former clients in the “same or substantially related” matter under Rule 1.9, an imputed conflict-of-interest under Rule 1.10 or that might run afoul of Rule 1.11 having to do with conflicts of interest arising out of former government service or employment.](#)

that in the preceding paragraphs is likely to govern here as well; that is, if the retaining firm has not disclosed the contract lawyer's participation and obtained client consent or the degree of supervision by the retaining firm is less than the client should reasonably expect, duties on the part of the contract lawyer to disclose to and obtain consent directly from the client that do not otherwise exist under the Rules are likely to arise.

Disclosure To The Tribunal

A similar analysis applies to the Inquirer's question about advising a court or other tribunal of the lawyer's contract status in a particular proceeding. For the same reasons as set forth above, the Committee is of the opinion that the Rules of Professional Conduct do not automatically obligate a lawyer to advise a court or other tribunal of his/her contract status. The same considerations addressed above do apply, however, if there are uncertainties surrounding the terms on which the lawyer is appearing.

Rule 3.3 is entitled "Candor Toward the Tribunal" and, *inter alia*, precludes a lawyer from making a "false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal." Rule 3.3 (a) (1). A lawyer who presumes to appear, whether inadvertently or not, before a tribunal on behalf of someone who is not, by reason of lack of disclosure and attendant informed consent, the contract lawyer's client is at risk under this Rule. So, too, is a contract lawyer whose appearance before the tribunal is made under the rubric of the retaining attorney/firm but who does so contrary to the client's reasonable expectations that the contract lawyer is under the direct supervision of an attorney associated with the retaining firm/attorney⁵

Fees and Billing

The Committee also cautions that if a lawyer acting on a contract basis is going to receive compensation that is keyed to and/or in some way dependent on the fees paid by the client, there may be an issue as to whether the law firm is splitting the client's fees with "another lawyer who is not in the same firm" under Rule 1.5 (e). Depending on the nature of the contractual relationship between the lawyer and the retaining firm, Rule 1.5 (e) may require that the client be appraised of and approve the participation of the lawyers involved and that the total fee of the involved lawyer "is not illegal or clearly excessive..." Rule 1.5 (e) (1) and (2).⁶ In addition, ABA Opinion 00-420 holds that if the legal services of a contract attorney are billed to the client as an expense or cost, the client may be charged only the cost directly associated with the services, including

⁵ This includes an ancillary proceeding such as a deposition. RPC 3.3, Comment [1].

⁶ Rule 1.5 provides:

A lawyer shall not divide a fee for leg services with another lawyer who is not in the same firm unless:

- (1) the client is advised of and does not object to the participation of all the lawyers involved; and
- (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services. No surcharge is allowed unless the client agrees otherwise. The Committee also notes that even where the contract lawyer's charges to the client can be billed by the firm as fees for legal services (rather than as costs) it is understood that "the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own." ABA Formal Opinion No. 00-420. The Committee advises, therefore, that notwithstanding the absence of any general duty of disclosure, if the Inquirer has reason to believe that the firm has not disclosed his status as a contract lawyer to the client under the circumstances discussed above - billing, advance approval or some degree of supervision materially less than the client's "reasonable expectations" - he should (a) bring this to the attention of the retaining firm and seek confirmation that the necessary disclosures and approval will be made and obtained or (2) in the absence of confirmation, the contract lawyer should disclose his status and role in the matter.

Malpractice Insurance Disclosure

Finally, the Inquirer asks if the malpractice insurance disclosure requirements of Rule 1.4 (c) apply to a contract attorney. In the Committee's view, this is function of the self-explanatory language of the Rule.

Rule 1.4 (c) requires that:

A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform clients in writing if at any time the lawyer's professional liability insurance drops below either of these amounts or the lawyer's professional liability insurance is terminated...

Accordingly, if a lawyer acting on a contract basis has professional liability insurance and the professional liability insurance of the attorney/firm to which the lawyer is contracted meets or exceeds the minimum requirements of this Rule, the lawyer is under no duty to disclose his/her professional liability insuring arrangements to the client. In the judgment of the Committee, however, a lawyer's duties under this Rule are not dependent one way or the other in the contract attorney's status. Instead, compliance with the Rule obliges the contract lawyer to ascertain whether (a) his services to the client are covered under the retaining firm's professional liability insurance policy and (b) the retaining firm's professional liability insurance conforms to the levels prescribed by the Rule. If it should turn out upon inquiry that the retaining firm's coverage does not extend to the contract lawyer and the lawyer's own coverage, if any, does not meet the minimum thresholds of the Rule, the Committee is of the

opinion that the lawyer is, in fact, under a duty to comply with the disclosures mandated by the Rule.

Cautionary Notes

The inquirer should be mindful that contract attorney status in no way relieves a lawyer of any of the responsibilities otherwise imposed by the Rules of Professional Conduct. See, "Responsibilities of a Subordinate Lawyer", Rule 5.2 (a): "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acts at the direction of another person."

The inquirer should also be mindful, particularly to the extent that the lawyer's services are contemplated to be performed in a jurisdiction other than Pennsylvania or that he is licensed elsewhere, of differences in the law of professional discipline from one jurisdiction to another. In this regard, the Inquirer is reminded of Rule 8.5 relating to "Disciplinary Authority: Choice of Law." This Rule not only makes the Pennsylvania Rules applicable to conduct outside of Pennsylvania but, in some situations, makes the rules for professional discipline of other jurisdictions controlling. Consequently, should the issues raised in this inquiry have been dealt with differently in other jurisdictions, the Inquirer should familiarize himself with these distinctions.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.