

## **Barrister In A Box**

### **Contract Lawyers In Kentucky**

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Delivery of legal service at the *fin de siecle* is in turmoil to say the least. It used to be that you practiced by yourself or with someone else called your partner. As law firms grew in size permanently employed lawyers known as associates and staff attorneys came along. Then, of course, there is the "Of Counsel" which means for purposes of this article a lawyer with a continuing relationship with a firm, but serves in a special capacity. In more modern times the professional services corporation was invented as a business form of practice lawyers could use. In Kentucky our legislature says that lawyers may also practice as limited liability companies or registered limited liability partnerships, but the Supreme Court has so far said no (those of you who jumped the gun hold onto your LLC and RLLP letterhead because time may be on your side).

About the latest entry on the scene is the temporary lawyer now usually called "contract lawyer." The best I can tell the use of contract lawyers in Kentucky is not yet a major factor, but odds are that it will become more of one. This figures because contract lawyering offers flexibility to the profession. It allows a firm to leverage its output in peak times or meet onetime requirements for a lawyer with special expertise without taking on all the overhead. Contract lawyering also provides an alternative career pattern for lawyers. It offers flexibility, autonomy, something to do when in career transition, and the opportunity to practice from home.

What follows is intended to give you an overview of how contract lawyers fit into the system. As always in these articles the focus is on professional responsibility and risk management.

#### **What's A Contract Lawyer?**

A working definition of contract lawyer is a lawyer who provides legal service to a law firm on a non-continuing basis as an independent contractor. The contract lawyer's fees usually are hourly or by project with the work typically performed outside the firm's office. ABA Formal Opinion 88-356, defines and explains the contract lawyer concept as follows:

"The term "temporary" means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. ... The temporary lawyer 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."

One way to define what contract lawyers do is to remember that they don't have any clients of their own. They work for other lawyers who have clients and need some help.

### **What Are The Professional Responsibility Considerations?**

One thing clear is the Rules of Professional Conduct apply in full force and effect to contract lawyers. The problem is that no one was thinking about them when the Rules (or most insurance policies) were written. For this reason applying the Rules to contract lawyers is often an awkward fit. Fortunately for the Kentucky Bar the Supreme Court addressed most of the key contract lawyer professional responsibility issues in *Oliver v. Board of Governors, Kentucky Bar Ass'n*, (Ky. 1989), 779 SW 2d 212. In *Oliver*, an opinion which the Court called advisory, it adopted verbatim substantial portions of ABA Formal Opinion 88-356, Temporary Lawyers. The following analysis of Kentucky contract lawyer professional responsibility is based on these two primary sources.

**Client Confidentiality:** Contract lawyers owe confidentiality to the firm's client on whose matter they are working and to any other clients of the firm they learn about while working for the firm. The scope of a contract lawyer's confidentiality obligation turns on the access the lawyer has to firm information. Contract lawyers working at home pose less of a confidentiality problem than those that work at the firm. The Supreme Court advises "to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does not work."

**Conflicts Of Interest:** The firm and the contract lawyer both have an attorney-client relationship with the client on whose matter the contract lawyer is working. Therefore, the conflict of interest and former client conflict rules apply to the contract lawyer just as in any other representation. The hard issue is when will retaining a contract lawyer who has worked with many other firms trigger the imputed disqualification provisions of Rule 1.10 (the same issue a firm has with a lateral hire of a lawyer from another firm). Imputed disqualification could cause the hiring firm to lose clients or keep a contract lawyer from being hired. The key question is whether the contract lawyer is "associated with a firm" within the meaning of Rule 1.10. The answer to that question is fact dependent and decided on a case by case basis. Both *Oliver* and *ABA Op. 88-356* contain detailed analysis on what to consider in deciding whether a contract lawyer is associated with a firm for purposes of the imputed disqualification rule. Key to avoiding imputed disqualification is careful selection of contract lawyers, limited access to firm business of those hired, and a well drafted contract.

**Fees:** This issue comes up in two ways:

1. What may a contract lawyer referral agency be paid?

2. What division of fees between the contract lawyer and the firm is permissible?

**Referral Agency Fees:** The professional responsibility concern is that the referral agency not exercise any control over the contract lawyer's independent professional judgment by controlling the money. In *Oliver* the Supreme Court advised that a referral agency could be paid a fee as a percentage of or in proportion to the lawyer's compensation provided the hiring firm pays the contract lawyer directly for legal services. If the referral fee is passed on by the firm to the client, the client must be informed by itemizing it on the bill.

**Division of Fees:** ABA Op. 88-356 contains analysis of when paying contract lawyers runs afoul of Rule 1.5(e) covering division of fees between lawyers not in the same firm. The opinion holds that if the contract lawyer's fee is a percentage of the actual fee paid by the client the firm must follow the client disclosure requirements of Rule 1.5(e). If the contract lawyer is paid reasonable compensation which is not expensed to the client, disclosure is not required. Unfortunately, this guidance does not cover the typical situation where the firm pays the contract lawyer an hourly rate and bills the client for those hours at a higher hourly rate. Whether disclosure is required in this situation may be argued either way. For reasons discussed below the conservative approach of making disclosure as required by Rule 1.5(e) is appropriate for Kentucky firms whenever using contract lawyers. Note, however, that Comment (4) to Rule 1.5 provides that in making disclosures it is not necessary to disclose what share of the fee each lawyer is to receive.

**Disclosure Of Use Of Contract Lawyers To Clients:** Stories of irate clients learning after the fact that contract lawyers were used in their matter are frequent. Simply put, they feel cheated. Whether to disclose this information to clients in Kentucky is answered in *Oliver*. The Supreme Court recommended "disclosure to the client of the firm's intention, whether at the commencement or during the course of the representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether on not to consent to such an arrangement." This disclosure should serve to comply with the fee division disclosure requirements of Rule 1.5(e) with the only additional consideration being whether the disclosure should be in writing (see Rule 1.5(e)(1) and (2)).

**Firm Supervisory Lawyer Responsibility:** In *Oliver* the Supreme Court adopted this sentence from ABA Op. 88-356: "Supervising lawyers with the firm also have an obligation to make reasonable efforts to ensure that the temporary lawyer conforms to the rules of professional conduct, including those governing the confidentiality of information relating to representation of a client. Rule 5.1(b) and (c).

### **Contract Lawyers and Risk Management**

Both the firm and the contract lawyer need to carefully think through how the relationship will be risk managed. Key considerations are:

**Malpractice Insurance:** The hiring firm should verify that their malpractice policy covers contract lawyers. In Long and Levit's *Legal Malpractice: The Law Office Guide*

*To Purchasing Legal Malpractice Insurance* the problem of coverage for contract lawyers is explained as follows:

The coverage for an insured usually includes any vicarious liability, that is, liability for another's acts or omissions for whom the insured is legally liable. Thus, if an employee is negligent, you will be entitled to a defense and indemnity for derivative liability. This coverage also includes vicarious liability for non-employed persons, such as agents or, when appropriate, independent contractors. Unless such persons are "insureds," they are not entitled to a defense. This can be a problem for "contract" attorneys who do not meet the definition of "employee".

Firms are advised to consult with their carrier to determine the status of contract lawyers under their policy. Is the firm covered for indemnity and defense for the malpractice of a contract lawyer? Is the contract lawyer covered for indemnity and defense, only indemnity, or neither?

Contract lawyers should maintain their own malpractice insurance coverage as well. The hiring firm and contract lawyer should compare coverages to determine which 4 policy has priority, whether differing limits and deductibles cause gaps in cover which could lead to disadvantageous cross-actions between them, and that both the firm and contract lawyer are entitled to legal defense.

**Conflict Checks:** Both the hiring firm and the contract lawyer must maintain sophisticated conflict check systems. Prior to a firm going into the details of a matter with a contract lawyer, a thorough conflict analysis of the contract lawyer's past and current work must be conducted. A contract lawyer who cannot quickly supply this information should be avoided.

**Screening and Limited Access:** The Rules of Professional Conduct contemplate screening as a technique to avoid conflicts and confidentially questions only in the movement of lawyers between the government and private sector. In *Oliver*, however, the Supreme Court specifically encouraged screening as a device to limit these problems for contract lawyers:

"... to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does not work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters on which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on."

**Firm Supervisory Controls:** Ultimately the firm must control the contract lawyer's work for the client just as in any other matter the firm handles. This includes employing work

and docket control systems, billing, reviewing contract lawyer work product, assuring that that the contract lawyer protects client confidentiality, and confirming that contract lawyers working outside the office have appropriate safeguards for protecting client files and property in their possession. It is especially important that all members of the firm be given specific guidance concerning a contract lawyer's status and access to firm business matters.

**Use Formal Contracts:** Firms should always use a written contract when hiring a contract lawyer. The contract lawyer should insist on one for everybody's protection.

### **Conclusion**

In *Oliver* the Supreme Court proved to be ahead of the power curve in sorting out the difficult issues of a new way to provide the public legal service. By adopting the best parts of a turgid ABA ethics opinion and then filling in the gaps with sound guidance the Court placed Kentucky firms on solid footing in using contract lawyers. Individual lawyers are equally well served because they can opt to offer their skills on a contract lawyer basis with the confidence of knowing their key professional responsibility requirements.