

BALANCE REWARDS WITH RISKS WHEN ACCEPTING TEMPORARY ASSIGNMENTS

By Emily Eichenhorn

Lawyer-for-hire arrangements have different meanings to different people. For young attorneys, being recruited by a firm to help them temporarily can represent a foot in the door to bigger and better things. For experienced lawyers, it can serve as validation of their reputation and expertise in a particular area. For others, working as a lawyer for hire allows for a more flexible lifestyle and the ability to pick and choose assignments without the responsibility of running a firm.

Regardless of where you are in your career, the extra work likely could result in new relationships, broader opportunities, heightened credibility and greater income, making it an attractive proposition. But, such arrangements also come with risks for the hiring firm and the hired lawyers alike.

In my last article, I highlighted many of the risks faced by firms hiring temporary or “contract” attorneys and offered suggestions for mitigating those risks. In this article, I will explore the other side of the partnership, providing tips to help hired lawyers avoid potential pitfalls and protect them from professional liability.

Skills and competence

A key component of risk management is knowing whether you’re capable of performing the duties proposed by the hiring firm. So, before agreeing to take on an engagement, get a complete description of the assignment and make an honest assessment of your ability to perform the services. Ask yourself whether you have the appropriate skills and experience, and if you have the time and resources to take on this assignment.

Make sure you are licensed to practice in the relevant jurisdictions under the circumstances. Because all lawyer-for-hire arrangements are different, determine if you are comfortable with the level of supervision that has been promised.

All lawyers have an ethical obligation to turn down representations they do not feel competent to handle. It is up to the individual attorney to make that determination on a case-by-case basis.

Hiring Firm Competence and Reputation

Lawyers who are being hired by other lawyers should investigate the competence and integrity of the hiring firm to reduce the risk of experiencing a malpractice claim or damage to their reputation. By aligning yourself with another firm, you will be seen in the same light they are – and cast in the same shadow should they behave unethically. Before accepting an engagement as outside counsel or a temporary lawyer, ask yourself these questions:

- Is the firm extending itself beyond its experience, skills, abilities or capacity?
- Does the firm have reasonable internal controls, including conflicts checking systems and docket control or calendaring systems?
- Does the firm appear to treat its clients well and communicate with them regularly?
- Are the firm's premises maintained well and client files protected appropriately?
- Is the firm likely to provide me with the support I will need?
- Will the firm maintain an appropriate level of communication with me?

Conflicts of interest

Both the hiring firm and the hired lawyer have obligations to current and past clients to avoid conflicts of interest and maintain confidentiality of information received during client representations.

If you are positioning yourself in the marketplace as a “contract attorney” available to assist other lawyers, you should maintain your own database of past representations, including all relevant parties, clients and law firms for whom you provided services or from whom you received confidential information. Check for conflicts before accepting any new assignment, including determining whether the hiring firm is opposing counsel in any other matter you have pending.

If you have a placement arrangement with an agency or workforce supplier, inform the agency or the hiring law firm if you expect to work on other representations or projects during the assignment, and decline new assignments that conflict with your current ones.

Even if the hiring firm and not the underlying client engages you directly, consider whether the underlying client’s interests in the matter could conflict against any of your other clients. Will you be taking a position that could undermine the interests of another client? Helping out a business rival of one of your other clients? While you may not have a legal conflict of interest, client relation conflicts can make clients angry and lead to claims.

Confidentiality and communication

To avoid confusion that may result in confidential information being shared with the wrong people, hired lawyers should require written direction from the hiring firm specifying who they should communicate with and in what fashion (letter, telephone, e-mail). They also should request written direction regarding any restrictions on communications with the firm or the client, including any topics or individuals who are “off limits.”

Such ground rules should include an instruction to the staff of the hiring firm that you should not receive information about firm clients or matters that you are not working for or on. Be vigilant while at the firm and stop anyone who begins to share such information. Report breaches to your supervising attorney.

If you are hired as an outside consultant, consider whether or not you wish to communicate only with the hiring firm or directly with the underlying client. On one hand, it may be appealing to have an agreement to communicate only with the hiring firm, which is acting as the client’s agent. This arguably narrows the scope of your responsibility while fulfilling your ethical obligation to communicate with the client. On the other hand, such an agreement may not protect you if the hiring firm fails to communicate important information to the client and you were or should have been aware of the problem. *At the least, get written confirmation from the hiring firm of their obligation to pass along all of your communications to the client.*

It’s also a good idea to require the hiring firm to provide you with notice (and, when possible, copies) of all its communications with the underlying client that are in any way relevant to you or your assignment. Lastly, inquire about the documentation and archiving requirements of the hiring firm (e-mail storage and destruction policies, other filing or copying conventions) to ensure that you feel comfortable with those processes and adapt your own accordingly if necessary.

Engagement agreement

Clarifying the scope of the engagement is an important risk management technique for both the hiring firm and the hired lawyer. Engagement letters that set forth everyone’s expectations and obligations help ethically limit the scope of each lawyer’s liability by defining responsibilities.

Hired lawyers should request as narrow a description of their assignment as possible to avoid the appearance of taking on more responsibility than they were hired to assume. For instance, rather than saying, “environmental law issues associated with the merger of ABC, Inc. and XYZ Corp,” say “environmental law issues associated with the ABC/XYZ merger relating to the following properties, statutes, time frame, etc.”

To the extent possible, specify any parts of the matter for which you are not responsible. For instance, an agreement might spell out that you will “prepare special needs trusts for persons X and Y, but will provide no consultation or assistance to the trustee in carrying out her fiduciary capacity under the trust agreement.”

The agreement also should outline conditions permitting termination of the assignment by either party, including for nonpayment of fees.

Insurance issues

Like lawyers in any other sort of practice, lawyers offering themselves for hire in temporary capacity should maintain professional liability insurance. It is also important for contract lawyers to consider the implications any particular lawyer-for-hire situation may have on their professional liability coverage. Depending upon the policy language, including endorsements and definitions, claims brought against either the hiring firm or the hired attorney may or may not be covered under either attorney’s policy.

It is important to remember that carriers and policies do differ, and the application of general liability, worker's compensation and other types of insurance should be considered, depending on the nature of the engagement. Every policy should be examined carefully with the assistance of a competent insurance agent or broker.

Hired attorneys need to consider the amount and types of insurance carried by the hiring firm, and whether there is anything in their policies that could restrict coverage if the contract lawyer was to be sued by any party over the representation. They also need to know if collaborating with another law firm might affect their own policy coverage and whether the firm could claim coverage under their policy if a suit was filed regarding the representation.

Conclusion

Lawyers hiring other lawyers for targeted temporary assignments is an emerging and evolving practice in the legal profession. As a result, the risks associated with the activity are difficult to pin down and will evolve as the practice changes and case law emerges.

Nevertheless, basic risk management principles can be used to address the risks that already are apparent. These include applying appropriate professional judgment and skill in establishing the parameters of the relationship and selecting the lawyers you hire or work for; communicating well with all parties to the relationship; setting forth clear guidelines regarding each party’s responsibilities; and documenting those efforts well.

Such steps help provide lawyers a measure of comfort to allow them to explore this new phase in client service.

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