

Ethics Opinion No. 96-1

Ethical Considerations when Billing Clients for Contract Attorney Legal Services.(endnote #1)

The opinion of the Committee is that a law firm may charge clients for contract legal services at a rate higher than the law firm's actual cost for the services so long as the total charge to the client is reasonable.

The practice is becoming common for law firms, including sole practitioners, to contract for the services of an attorney on a temporary basis for research, specific projects, or general legal services. Contract legal services can provide certain advantages to both the firm and the contract attorney. The law firm can obtain legal services on a short term without increasing overhead, and the contract attorney maintains independence and control over workload. The Committee has been asked to consider whether the firm may bill the expenses incurred for contract legal services at a higher rate than the rate paid the contract attorney. In other words, can the firm include in the fee billed the client a premium or surcharge for office overhead.

In this opinion the term "contract attorney" refers to an attorney providing services for hire as an independent contractor and includes an attorney referred by a temporary placement agency. The term "law firm" refers to the attorney or attorneys hiring the service and includes law firms, sole practitioners, and corporate legal departments.

The contract attorney is hired for a period of time. During that time the law firm may incur overhead costs in connection with the contract attorney's services, for example, by providing an office, office supplies, telephone, computer, or secretarial support or by incurring errors and omissions liability. We believe that it is appropriate for the law firm to include such general overhead expenses and profit in the rate charged for the contract attorney.

We recently outlined standards for charges to clients for disbursements and other expenses in Ethics Opinion No. 95-4. We concluded that clients may be charged for actual out-of-pocket expenses and a reasonable amount for in-house services provided the charges and the basis for their computation were disclosed. We distinguish services performed by contract attorneys from the disbursements addressed in that opinion. The reason is that the law firm has supervised and is responsible for the work of the contract attorney. The situation is more analogous to the law firm's use of an associate than to making a disbursement on the client's behalf.

ARPC 1.5(a) requires that the charges be reasonable.

It is fair and reasonable to add to the rate charged a client an amount for profit and overhead when the law firm incurs basic overhead expenses when using a contract or temporary attorney. The differences between the contract attorney and the law firm's associates are not great. Using contract attorneys allows a law firm to handle work load variations without increasing its overhead. The requirement that fees be reasonable does not require the law firm to incur a loss, which would result if the law firm were reimbursed for the amounts paid the contract attorney as a cost or disbursement when it provided secretarial and other support. The charge, however, must not be unreasonably high in light of the service and the amount customarily charged in the community for the service. *See* ARPC 1.5(a), which provides:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

ARPC 1.5(b) may require disclosure to the client.

The client generally is entitled to know who is representing its interests. When the contract attorney's relationship to the law firm resembles that of a temporary associate under the close supervision of the law firm, however, the American Bar Association does not require the law firm to disclose the contract attorney to the client under Model Rule 1.5(b). The reason is that, when the client retains the law firm, the client can be reasonably assumed to consent to services performed by various persons under the direct supervision of the firm.

On the other hand, the ABA would require a law firm to disclose to the client and obtain the client's consent in advance for work by a contract attorney who is not directly supervised. The reason is that, when the contract attorney acts independently of the law

firm, the client's consent cannot be inferred from the client's relationship to the law firm. The American Bar Association's Standing Committee on Ethics has stated:

The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, 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. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.

ABA Formal Op. No. 88-356, at 10 (Dec. 16, 1988). In such cases the arrangement must be disclosed and consent obtained in advance.

ARPC 1.5(e) restricts "fee splitting."

A law firm retaining the services of a contract attorney must be aware of the restrictions on "fee splitting." ARPC 1.5(e) provides:

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

The ABA has determined that the fees a law firm pays a contract attorney (the ABA uses the term "temporary lawyer") do not implicate this rule if the attorney is compensated for services performed and the services are not billed to the client as a disbursement. In other words, the contract attorney who is supervised works much like an associate and may be billed similarly. A direct division of the fee or a contingent fee arrangement, however, would require disclosure and consent under this rule. ABA Formal Op. No. 88-356, at 10.

Approved by the Alaska Bar Association Ethics Committee on January 4, 1996.

Adopted by the Board of Governors on January 13, 1996.

Endnote #1:

The contract attorney arrangement raises a number of ethical questions in addition to how such services may be billed. Beyond the scope of this opinion are such questions as the level of supervision required, whether the contract attorney is liable directly to the client,

the risk of conflicts of interest with contract attorneys who contract with a number of law firms, and how to protect client confidences. A discussion of these issues appears in Calif. St. Bar Stdg. Comm. On Prof'l Resp. and Conduct, Formal Op. No. 1992-126, 1992 WL 166234 (1992), and ABA Formal Op. no. 88-356 (Dec. 16, 1988). Also beyond the scope of this opinion is whether the contract attorney is an employee under state and federal law with all of the attendant obligations.