

CONTRACT ATTORNEYS



RISK MANAGEMENT PRACTICE
GUIDE OF LAWYERS MUTUAL

LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

5020 Weston Parkway, Suite 200, Cary, North Carolina 27513

Post Office Box 1929, Cary, North Carolina 27512-1929

919.677.8900 | 800.662.8843 | 919.677.9641 FAX | www.lawyersmutualinc.com

DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is

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NOTE: For forms related to conflicts of interest, please see our “Conflicts of Interest” handout.



INTRODUCTION

Sometimes in your practice, you are presented with a client problem you are not equipped to solve. It could be an unfamiliar subject matter, limited time and resources, or a multitude of other reasons why you and your staff cannot help the client effectively.

What do you do if you don't want to turn away the client? One answer might be to hire a contract attorney. This risk management practice guide will provide information about hiring and working with contract attorneys, including practical and ethical considerations. This handout also provides sample forms and additional resources.

WHO ARE CONTRACT ATTORNEYS?

Contract attorneys are attorneys who work on a temporary, contractual basis either for a specific case/project or for a defined period of time. To put it more simply, contract attorneys are temporary, contract-based workers: they work until the job is done or until the contractual time is up.

Who are these contract attorneys? They could be anyone: recent graduates eager for work; semi-retired attorneys or judges seeking part-time work; government lawyers and in-house counsel looking to use their expertise in different settings; or lawyers-in-transition seeking a flexible position without long-term commitment. The possibilities are endless.

For the contracting attorney, the benefits of a temporary contact arrangement can include: flexibility, control over schedule and nature of work, practical experience, exposure to potential employers, and the ability to explore a variety of practice areas.

THE BENEFITS OF LEGAL OUTSOURCING

The use of contract attorneys has increased in recent years. This can likely be traced to clients and law firms seeking cheaper (yet effective) legal services after the economic downturn of 2008. Even with improving economic conditions, we are experiencing a changing legal marketplace. Contract attorneys are still readily available and could be an asset to your law practice.

SUBJECT MATTER EXPERTS

Contract attorneys are especially beneficial for a law practice that is seeking a subject matter expert. Whether you are a solo practitioner or a member of a large firm, it is always possible to encounter an issue outside of your expertise. Contract attorneys can provide that subject matter knowledge, fulfilling a specific role for a specific case. Instead of billing the client or writing down time to research an unfamiliar area of law, enlisting an attorney who is already well-versed in that subject can better serve the needs of the client and the firm.

Use of a subject matter expert contract attorney can be a tool to expand a law firm's areas of practice. By hiring a contract attorney with special expertise, existing attorneys have the opportunity to learn from the contractor and develop new skills and experience. Even if the firm does not permanently hire the contract attorney, it may still reap a long-lasting benefit from the broadened expertise of its legal staff.

TALENT ACQUISITION

Utilizing contract attorneys can be a great way to acquire legal talent. Many contract attorneys (especially younger, early-in-career, and transitioning attorneys) are actively searching for

employment while working as a contract attorney. If your law practice is looking to add personnel, employing a contract attorney could be a great opportunity to have a "trial run" with the attorney before offering a full-time position.

When outsourcing, the law practice is often in a unique, dominant position because it can set the terms of the contract while bearing little risk, since subsequent employment is not guaranteed. Further, hiring an attorney on contract will give a law practice information about whether that attorney is a good fit for the practice that goes far beyond what could be learned from an interview or résumé. For these reasons, hiring an attorney on a contractual basis before offering him a position in the law practice is generally a "low risk, high reward" method to acquire talent.



What is a Contract Attorney?

Contract attorneys are temporary, contract-based workers. They can be new graduates, or seasoned attorneys.

Why consider a Contract Attorney?

There are numerous reasons you may need to hire one:

- you have too much work, but you may not need another full-time attorney;
- you need a specialist in a subject matter;
- you are looking to add personnel but want to use a contract attorney as a trial run.

TEMPORARY EMPLOYMENT

The temporary nature of the contract attorney arrangement is itself a significant benefit in many instances. Your law practice might encounter an unexpected and overwhelming influx of cases that will determine whether you sink or swim. Hiring contract attorneys could be your “life vest” to ensure that you stay afloat. If work slows down to its prior pace, the “life vest” is contractually released and you continue business as usual. If you find that the uptick continues, you will have the opportunity to make permanent hiring decisions in the future.

Compare this to consumer businesses employing seasonal workers around the holidays. The workers know they are there to fill a temporary role, and the employer is expecting to keep the seasonal workers busy, but only for as long as they are needed.

For the legal workplace, the use of a contract attorney could free up the time of “rainmaking” attorneys to focus on lucrative clients and business development, while a contract attorney assists with overflow work.

COST EFFECTIVENESS

The use of contract attorneys can be very cost effective. A contract attorney arrangement can save the law firm money in two main ways. First, using a contract attorney instead of hiring another attorney outright generates significant savings in overhead costs, long term benefits, and salary. The contract attorney is paid only as agreed pursuant to the contract and does not impose longer term costs on the law practice.



BENEFITS OF CONTRACT ATTORNEYS

1. They are temporary and give you more flexibility
2. They can be cost effective
 - overhead
 - long-term benefits
 - salary
3. Can yield faster results especially when contracting with an attorney already versed in the subject matter

A second source of savings is the quicker results that can be achieved by using a contract attorney. Imagine a client wants to retain you to handle a novel, 3D printing schematic issue. Do you and a new associate want to spend hours researching and trying to figure where to start, or would you rather contract with an intellectual property attorney who has experience in 3D printing? The second option is often preferable for you and the client.

In today’s legal market, clients are seeking sound legal work as quickly and cost effectively as possible. A client may become frustrated after being billed for hours of legal research or training of associates. These clients will appreciate that your law practice is taking measures to reduce billable hours by using a contract attorney, and such client satisfaction will lead to loyalty and continued business.



For the legal workplace, the use of a contract attorney could free up the time of “rainmaking” attorneys to focus on lucrative clients and business development, while a contract attorney assists with overflow work.

ISSUES AND CONSIDERATIONS

The use of contract attorneys comes with certain ethical and financial issues that should be carefully considered. Though the disadvantages are few in number, it is critical to understand and avoid these potential pitfalls.

UNSUITABLE HIRING

When hiring a contract attorney, the expected benefits may not materialize if the attorney is not a good fit for the law practice. For example, consider contracting with an energetic, “fresh-out-of-law-school” attorney who is willing to take on any legal issue you throw at her. This contract attorney could be a great fit to perform tasks like legal research or document review when the contracting firm finds itself overworked and shorthanded. The firm could contract with this young attorney at an economical rate, while not committing to future hiring.

In contrast, this same young attorney becomes virtually useless if hired by a firm that needs a subject matter expert with years of experience. If the firm needs expertise rather than manpower, an inexperienced contract attorney could leave the hiring firm susceptible to a dissatisfied client, and worse yet, a legal malpractice suit.

Next, imagine your law practice is potentially contracting with a retired partner from a 500-attorney law firm in Boston who has retired to the Outer Banks. This contract attorney might be a better fit for a larger law firm, rather than a solo practice. Although the

contract attorney is surely very skilled, the difference in environment could result in headaches as the contract attorney learns to work within the firm’s systems.

The best practice in hiring a contract attorney is to make sure the attorney is a suitable fit for your law practice. Remember contract attorneys can be anyone. Clearly defined expectations for skill level and past work environments and a thorough vetting process will allow your law practice to hire the right contract attorney.

LOYALTY & CONFIDENTIALITY

Because of the fleeting relationship between the law practice and contract attorney, issues of loyalty and confidentiality can arise. Even if the law firm is satisfied with the contract attorney, there is no guarantee that he or she will agree to return for future projects. The firm has to accept the risk of finding a new contract attorney and starting over with the arrangement. Also, in the worst case scenario, a former contract attorney could be on the opposite side of litigation with knowledge of how a law practice prepares, giving the contract attorney an advantage.



POTENTIAL PITFALLS OF CONTRACT ATTORNEYS

1. Not a good hire or fit for the job.
2. Lack of loyalty to firm.
3. Do you know if you need Client Consent?

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Hand-in-hand with the loyalty issue is confidentiality. Since contract attorneys often have less to lose—and less to gain—than full-time staff, they may be more susceptible to confidentiality mistakes. Though they owe the duty of confidentiality, the line can easily become blurred since contract attorneys may work for other clients while contracting with a particular law practice. These issues of loyalty and confidentiality are difficult to avoid, but can be mitigated with the inclusion of a detailed confidentiality agreement in the contract. These contract provisions can give the firm legal remedies if a contract attorney breaches a term of the agreement.

CLIENT CONSENT

An important issue to consider is whether it is necessary to obtain client consent before utilizing a contract attorney for the client’s matter. The North Carolina State Bar has not explicitly addressed this issue. However, in an ethics opinion regarding outsourcing of legal support services, the State Bar concluded:

In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer’s firm, will perform the requested legal services. (2007 Formal Ethics Opinion 12.)

Applying this same rationale, an attorney may have an ethical obligation to disclose the use of a contract

attorney and to obtain the client’s written, informed consent.

Other jurisdictions have reached varying conclusions on this question. The American Bar Association has stated in a formal opinion that the use of contract attorneys by a law practice is permissive and does not require informed consent by the client—as long as the contract lawyer is working under the direct supervision of a firm lawyer. ABA Ethics Opinion 88-356. Certain states (e.g., New York and Illinois) have issued formal opinions within their respective bars that do require informed consent from clients.

Lawyers Mutual recommends that the client be informed that a contract attorney will be assisting with the matter. In addition to aligning expectations, obtaining informed consent gives the law practice an opportunity to share all the benefits of using a contract attorney. Most clients will be glad to hear that, instead of using their case as on-the-job training for a new associate, the law practice hired an expert. Also, informing the client about a contract attorney can yield more transparency when it comes to billing—as well as a cheaper alternative for the client.

The use of contract attorneys can be addressed with clients in the firm’s engagement letter or in a separate document signed by the client. Providing this information in writing and obtaining a signature acknowledgement will prevent future disputes about the disclosure.



All attorneys – full time or temporary, solo practice or large firm – can face malpractice claims and should have professional liability insurance. How that coverage will be provided for a contract attorney is something that should be addressed by the hiring firm and contract attorney at the outset of the arrangement and documented in a written agreement.

MALPRACTICE INSURANCE

All attorneys – full time or temporary, solo practice or large firm – can face malpractice claims and should have professional liability insurance. How that coverage will be provided for a contract attorney is something that should be addressed by the hiring firm and contract attorney at the outset of the arrangement and documented in a written agreement.

Where contract attorneys essentially replace the role of a full-time firm attorney, they may be included within the coverage of the firm’s malpractice insurance policy. One way to determine whether a contract attorney should be covered under the firm’s policy is to ask yourself this question: If the client did not already know a contract attorney has been hired, would he or she be able to tell the contract attorney apart from the firm? If the answer is no, then that attorney likely should be added to and covered under the firm’s insurance policy. An additional consideration is whether the contract attorney will be exercising independent legal judgment in his or her role with the firm, including advising clients, signing documents, or appearing in court. Contract attorneys performing these tasks should generally be added to the firm’s policy.

Firms hiring contract attorneys should check with Lawyers Mutual about coverage for specific situations and whether a contract attorney should be added as a named insured under the policy.

In situations where the contract attorney serves a more limited role and is obviously separate from the firm, that contract attorney will probably need his own liability policy. This would generally include contract attorneys who never meet with clients and do not use law firm resources. Contract attorneys who perform contract work for multiple firms or who have their own practices in addition to their contract work will likely need their own malpractice policies.

In sum, malpractice considerations will vary depending on the nature and details of the contract relationship. Lawyers Mutual’s underwriters and claims attorneys are available to answer specific questions and help you evaluate your coverage needs.

Practice TIPS



CONTRACT ATTORNEYS and MALPRACTICE INSURANCE

1. All attorneys can face malpractice claims and should have professional liability insurance.
2. If a contract attorney essentially replaces the role of a full-time attorney, they may be included within the firm’s malpractice policy.
3. If contract attorney’s role is limited, they may need their own insurance.
4. Check with Lawyers Mutual about coverage first!!!

TIPS FOR A SUCCESSFUL CONTACT ATTORNEY RELATIONSHIP

While each contract attorney arrangement will be unique, based on the particular needs of the firm and the skills and situation of the contract attorney, the following tips will generally promote a good working relationship between the parties:

CLEARLY COMMUNICATE EXPECTATIONS AND DOCUMENT ALL TERMS IN A WRITTEN AGREEMENT.

1. Potential considerations to discuss and address in the agreement include:
 - Location of work
 - Scope of work
 - Access to the client and client files
 - Payment and billing
 - Software compatibility
 - Confidentiality
 - Malpractice insurance for the contract attorney
2. Discuss the maximum amount of time the project should take. Request that the contract attorney consult with the hiring firm before spending additional time. Keep in mind that the project may take longer for an inexperienced attorney.

PROVIDE APPROPRIATE AND MEANINGFUL SUPERVISION.

- For less experienced attorneys, provide progress benchmarks and periodic reviews.
- For more experienced attorneys, provide specific deadlines.
- Provide a firm attorney's contact information for any urgent questions.
- Allow time for a firm lawyer to review work product and perform quality control checks.
- If possible, start with a sample or smaller project so you can assess the contract attorney's skills and working style without the pressure of high stakes or urgent deadlines.

PROTECT CLIENT CONFIDENTIALITY.

- The contract attorney should have access only to files that are necessary for the assignment.
- Check for conflicts of interest before hiring the contract attorney. If the contract attorney is working for multiple firms or has her own clients, establish an ongoing procedure to identify conflicts.

Contract Attorney Engagement Letter

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[Date]

[Name and Address of Hiring
Attorney or Firm]

Re: Engagement Letter

Dear _____:

This will confirm our agreement for me to perform legal services for you ("Firm") at the rate of \$_____ per hour on the following project. [Insert description of project.] I will provide the Firm with [insert description of work product] by close of business [insert date].

I am to spend no more than _____ hours on this project. The Firm and I will discuss any additional time requirements before such time is spent.

It is understood that I am being engaged by the Firm and not its client. I will report to the Firm and my work will be supervised and overseen by the Firm. The Firm is responsible for legal services rendered to its client. The Firm will review and approve any work product contemplated in this letter before it is passed on to the client or others in any form. [Optional: insert indemnification/hold harmless language.]

I will bill the Firm and provide a record of my time within five days after completing the project. I am to receive full payment within 30 days from the billing date. The Firm is responsible for payment whether or not the client pays the Firm. The Firm also agrees to reimburse me for copying costs.

For business purposes, I operate as an independent contractor. Therefore, the Firm should neither withhold nor pay on my behalf income tax, social security, or any other payroll taxes. I understand that payment of taxes is my responsibility and that I am not entitled to employee benefits or statutory mandates like workers' compensation or unemployment insurance.

The Firm and I carry our own professional liability insurance.

The Firm has disclosed to me all parties and potential parties in connection with this matter. I have checked my records and confirm that no conflict of interest prevents me from undertaking this project. The Firm agrees to ensure that I do not have access to files, documents, or other information about firm clients other than what is necessary to complete this project.

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It is understood that I am free to provide legal services to others during those hours when I am not providing services pursuant to this letter.

If this letter is consistent with your understanding of the terms of our agreement, please sign a copy and return it to me. Please let me know immediately if you have a different understanding of any of the terms.

Thank you for calling on me to help with this project. I look forward to working with you.

Sincerely,

[Your Name]
Attorney at Law

Agreed:

[Hiring Attorney]

CONTRACT ATTORNEY AGREEMENT

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This agreement is entered into between [name of hiring law firm] (“Law Firm”) and [name of Contract Attorney], the undersigned Contract Attorney (“Contract Attorney”).

PROJECT. Contract Attorney agrees to complete [name or title of project] on a contract project basis for Law Firm. The scope of the project includes [describe scope of work to be done on project, including name of case and deadline]. Contract Attorney and Law Firm will routinely consult and agree on the logistics and other details of the performance of this Agreement, as needed.

EMPLOYMENT RELATIONSHIP. Contract Attorney shall be engaged by Law Firm as an independent contractor. Contract Attorney is not an employee of Law Firm and is therefore not entitled to any benefits afforded to employees or partners of Law Firm. As an independent contractor, Contract Attorney will determine when, where, and how the above-referenced project will be completed. This Agreement shall not be construed to create any relationship of partnership or joint venture. Contract Attorney operates as a [type of entity and how payment should be recorded via tax ID number or social security number]. Contract Attorney shall be responsible for paying any applicable taxes, including income tax. Contract Attorney shall also be responsible for paying any business expenses in the normal course of project completion; unexpected expenses will be subject to further negotiation between Contract Attorney and Law Firm.

CONFLICTS OF INTEREST. Contract Attorney is a licensed attorney in good standing in [jurisdiction(s)]. Law Firm recognizes that Contract Attorney enters into freelance work agreements with other attorneys, law firms, and legal entities. Contract Attorney agrees to check for conflicts of interest and to honor professional obligations under the applicable Rules of Professional Conduct.

MALPRACTICE INSURANCE. Contract Attorney maintains professional liability insurance coverage through [name of insurer]. By signing this Agreement, Law Firm represents that it has current professional liability insurance to cover the project outlined in this Agreement.

CONFIDENTIALITY. Contract Attorney shall keep all client information confidential, including client documents disclosed by Law Firm. The parties agree that client information provided by Law Firm shall be limited to only that which is necessary to complete the work contemplated by this Agreement.

NO ATTORNEY-CLIENT RELATIONSHIP. This Agreement shall not be construed to create an attorney-client relationship between Contract Attorney and Law Firm’s clients, or between Contract Attorney and Law Firm. At all times, Law Firm will exercise its independent professional judgment and make all final decisions regarding its cases and clients.

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WORK PRODUCT. Law Firm shall own all rights to any work product generated by Contract Attorney while completing the project described in this Agreement. Law Firm may modify any work product prepared by Contract Attorney. Ultimately, Law Firm is responsible for supervising the work of Contract Attorney, and for the content of pleadings or other material submitted on behalf of its clients.

COMPENSATION. [HOURLY RATE OPTION] Contract Attorney shall be paid for legal services rendered under this Agreement at the hourly rate of \$[amount]. [FLAT RATE OPTION] Contract Attorney shall be paid for legal services rendered under this Agreement at the flat rate of \$[amount]. Contract Attorney shall submit an invoice to Law Firm, and payment shall be made within thirty (30) days of the submission of the invoice. Contract Attorney acknowledges and agrees that Law Firm may bill its clients for the amounts due to Contract Attorney at whatever rate or in whatever manner it deems appropriate and consistent with its own billing practices. All payments made by the Law Firm to Contract Attorney will immediately become property of Contract Attorney and will not be placed in an attorney trust account.

SEVERABILITY. All provisions of the Agreement are severable. The determination that any particular provision or term is illegal or unenforceable shall have no effect upon the remaining terms of the Agreement. Assignment. Neither party may assign its duties or rights under the Agreement without prior written approval of the other party.

MODIFICATION TO AGREEMENT. Any modification of this Agreement will be governed effective only if it is in writing and signed by both parties.

TERMINATION. Either party shall have the right to terminate this Agreement with reasonable cause, effective immediately upon giving written notice. In the event of termination, Law Firm shall pay Contract Attorney for work done up to the point of termination.

Contract Attorney

Law Firm

ADDITIONAL RESOURCES

Successfully Partnering Between Inside and Outside Counsel by William L. Deckelman, Jr. and Mary B. Winter. Available on WestLaw.

Litigation 101: Ethics Related to the Use of Contract Attorneys by Gregory M. Boyle and J.H. Jennifer Lee. Published by the Committee on Pretrial Practice & Discovery.
Available at: http://www.jenner.com/system/assets/publications/37/original/litigation_101.pdf?1312383313

Contract Attorneys: How a Small Firm Can Reap Huge Benefits by Cynthia Feathers and Craig S. Brown. Published by the New York State Bar Association.
Available at: <http://www.appealsny.com/staging/articles/CynthiaFeathers-StateBarJournalArticle.pdf>