

LEGAL ETHICS OPINION 1735

ATTORNEY RENDERING PROFESSIONAL
SERVICES FOR CLIENTS OF A LAW FIRM
WHEN ATTORNEY IS AN INDEPENDENT
CONTRACTOR RATHER THAN AN
EMPLOYEE OR PARTNER OF THE LAW FIRM.

You have presented a hypothetical situation focusing on whether an attorney (the "Attorney") may render professional services to or for the benefit of the clients of a law firm (the "Firm") as an independent contractor rather than as an employee or partner of the firm. You have given the following operative facts:

The Firm and the Attorney desire to enter into an exclusive agreement¹ for the Attorney to render professional services to or for the benefit of the clients of the Firm. For professional services rendered, the Firm shall pay to the Attorney a specified hourly rate. The Firm may bill the clients on behalf of whom the Attorney provides professional services at a reasonable rate based upon the rate charged by other law firms for professional services rendered by employee associates with experience and background comparable to that of the Attorney. The rate may be higher than the hourly rate paid to the Attorney by the Firm; however, this need not be disclosed to the clients, and the Attorney shall have no claim against the Firm for the differences in these two rates.

Professional services to be rendered by the Attorney to the Firm shall include review of client files, drafting and review of client legal documents and correspondence, meetings with attorneys or staff employed by the Firm to discuss client files, research requested by attorneys or staff employed by the Firm, strategy and marketing meetings with attorneys or staff employed by the Firm, seminars given by the Attorney on behalf of the Firm and all other matters performed by the Attorney at the request of attorneys or staff employed by the Firm. The professional services rendered by the Attorney to the Firm shall be performed under the direct supervision of an attorney employed by the Firm, and as such shall be considered the work product of the Firm. Only those professional services rendered directly to or for the benefit of clients may be billed to the clients by the Firm; all other professional services rendered shall be considered charges to overhead for the firm.

The Attorney shall have a close and continuing relationship with the Firm, and as such may be considered to be "of counsel" to the Firm. If so, the Attorney shall be entitled to carry business cards designating her as "of counsel" and shall be allowed to sign the Firm's letterhead as "of counsel." If the Attorney is designated as "of counsel," then she may also have both direct and indirect contact with the Firm's clients.

¹ Attorney would not provide services to any other law firm but the Firm would be free to employ other contract lawyers in addition to Attorney.

If the Attorney is not designated as "of counsel," she shall neither carry business cards of the Firm with her name on them nor be entitled to sign the Firm's letterhead. Also, if the Attorney is not designated as "of counsel," she shall not have direct contact with the Firm's clients. Indirect contact refers to professional services performed by the Attorney on the client's file on behalf of the Firm.

When referring a prospective client to the Firm, the Attorney shall provide the prospective client with a business card with the name of an attorney employed by the Firm to call for an appointment. The prospective client shall be interviewed by an attorney or staff person employed by the Firm. If retained, the client shall be a client of the Firm, not the Attorney. The Attorney shall not be entitled to any portion of the fees generated by such referred clients to the Firm. The Attorney shall only be entitled to the specified hourly rate based upon professional services rendered by her to or for the benefit of the client on behalf of the Firm.

The Attorney shall provide her own health, dental, life and disability insurance. The Attorney shall also provide her own professional liability insurance. The Attorney shall maintain and pay all annual fees associated with her license to practice law in the Commonwealth of Virginia. The Attorney shall provide her own computer and office supplies, and shall work primarily out of her home office. The Attorney shall obtain no less than the minimum number of hours of Continuing Legal Education each year.

The Attorney shall be subject to the same confidentiality and conflict of interest rules as if she were an employee associate attorney for the Firm. If the Attorney is designated as "of counsel," the nature of the relationship between the Attorney and the Firm shall be properly and fully disclosed to clients with whom the Attorney has direct contact. Whether the Attorney is designated as "of counsel" or not, the relationship between the Attorney and the Firm need not be disclosed to those clients with whom the Attorney only has indirect contact. As noted above, the rendering of professional services is considered to be indirect contact, shall be provided under the direct supervision of an attorney employed by the Firm, and shall be considered the work product of the Firm.

Under the facts you have presented, you have asked the committee to opine on the following questions which shall be answered in the order they appear:

1. May a firm authorized to practice law in the Commonwealth of Virginia (the "Firm") enter into an exclusive agreement with an attorney licensed to practice law in the Commonwealth of Virginia (the "Attorney") for the Attorney to render professional services to or for the benefit of the Firm's clients on behalf of the Firm?

Yes, it is permissible for Attorney and Firm to have an arrangement in which Attorney provides part-time or full-time services for Firm's clients as an independent contractor, contract attorney or "of counsel." LEOs 442, 1293, 1554 and 1712. However, Attorney and Firm shall be bound by the requirements of confidentiality and the conflicts of interests rules

in the same manner as if Attorney were associated with the Firm. LEO 1712. DRs 4-101 and 5-105.

2. May the Firm bill clients for work performed by the Attorney at a rate which is reasonable based upon the experience and background of the Attorney, even though the rate paid by the Firm to the Attorney per hour for professional services rendered to those clients is less?

In LEO 1712, the committee addressed a similar question in the context of a law firm using the services of a contract or temporary lawyer. In that opinion, the committee reached the conclusion that the Firm has essentially two options. The Firm can charge the Attorney's services as a disbursement or cost advance, in which case the amount charged to the client for the Attorney's services must be the amount actually paid by the Firm to the Attorney for the work performed by the Attorney on that client's case. The client may, of course, agree to a markup on the disbursement, but this would require disclosure of the compensation paid by the Firm to the Attorney. Under this first option the Firm cannot, absent full disclosure and consent, charge the client more than the amount which the Firm actually paid the Attorney. Alternatively, instead of billing the actual amount paid to Attorney as a disbursement, the Firm may simply bill the client for services rendered in an amount reflecting its charge for the Attorney's services, based upon the Attorney's experience and background, in the same manner as it would bill the client for an associate's work on the client's case. The fee charged to the client must be reasonable. DR 2-105. This second option obviates the need to disclose to the client the payment arrangement between the firm and the Attorney.

3. Must the Firm disclose to the clients for whom or for whose benefit the Attorney renders professional services the difference between the rate billed to the clients by the Firm for professional services rendered and the rate actually paid to the Attorney by the Firm for professional services rendered?

The committee refers you to its response to inquiry number two, supra. Disclosure of a markup (the difference between the amount paid by the Firm for the Attorney's services and the amount charged to the client) is required if the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement. Disclosure is not required if the firm bills for Attorney's work in the same manner as it would for any other associate in the Firm and so long as either the attorney works under the direct supervision of the firm or, absent that supervision, the firm adopts the work product as its own.

4. May the Firm designate the Attorney as "of counsel" because of the close and continuing relationship between the Firm and the Attorney, even though the Attorney is not and never has been either an employee associate or a partner of the Firm?

Yes, the firm may designate Attorney as "of counsel" provided the requirements for that relationship are met. Prior opinions issued by the committee would permit a law firm to designate as "of counsel" an attorney, working on a full-time or part-time basis, where the Attorney has a close, continuing relationship with the Firm and direct contact with the firm and its clients. LEOs 1554, 1293 and 442. See also ABA Formal Op. 90-357.

5. If the Attorney is designated as “of counsel” by the Firm, may she have direct contact with the Firm’s clients as long as the nature of the relationship between the Firm and the Attorney is properly and fully disclosed to the clients prior to such contact with the clients?

Yes, but as the committee has stated in a previous opinion, with regard to public communications regarding the Attorney who is “of counsel” the lawyers in the Firm must be scrupulously careful in their representation of the Attorney’s professional status not to hold the Attorney out as being a partner or associate with the Firm. DR 2-101 (A), DR 2-102 (A), (C); EC 2-15; LEO 1293.

6. May the Attorney render professional services to or for the benefit of the clients of the Firm, although she will have no direct contact with the clients, if she is not designated as “of counsel” by the Firm?

Under this scenario, while no direct supervision by the firm of the attorney would occur, the firm would adopt the attorney’s work product as its own. The Attorney need not be “of counsel” to the Firm in order to provide legal services for or on behalf of clients of the Firm. Such services could be provided with or without the Attorney having direct contact with the Firm’s clients. The “of counsel” relationship is but one of several relationships by which the Attorney may provide legal services to the Firm for or on behalf of its clients.

7. If the Attorney is not designated as “of counsel,” must the independent contractor relationship between the Attorney and the Firm be disclosed to the clients to whom or for whose benefit the Attorney renders professional services on behalf of the Firm, even if the Attorney never directly interacts with or corresponds with those clients and if the Attorney never represents the clients in court?

The committee believes that LEO 1712 is also dispositive of this inquiry. Normally, when a law firm associates another attorney outside the firm to work on a client’s matter, the client must be informed and consent to the arrangement. DR 2-105(D). However, to the extent that a temporary or contract attorney works directly under the supervision of an attorney in the Firm, the temporary or contract lawyer is not regarded as a lawyer outside the firm as contemplated by DR 2-105 (D). The client hires the Firm and not simply the lawyer initially consulted and the work is assigned to an attorney “associated with the firm.” If the contract lawyer will work on the client’s matter under the direct supervision of an attorney associated with the Firm, the Firm will ordinarily not have to disclose to the client the fact that a contract attorney is working on that client’s matter. In addition, if Attorney and Firm intend to form an “of counsel” relationship, DR 2-105 (D) does not apply. On the other hand, if the contract attorney will work independently, without close supervision by an attorney associated with the Firm, then the client must be informed of the contract attorney’s participation in the client’s case and the client’s consent must be obtained.

8. May the Attorney, whether or not designated by the Firm as “of counsel,” refer clients to the Firm by arranging for the prospective client to meet with an attorney or staff person employed by the Firm rather than interviewing such prospective clients herself on behalf of the Firm?

Committee Opinion
October 20, 1999

Yes, but the Firm may not compensate Attorney, directly or indirectly, for simply referring a prospective client to the Firm, where Attorney assumes no other responsibility to the client.
DR 2-105 (D).²

9. Must the Firm maintain professional liability insurance for the Attorney if she is providing her own professional liability insurance in amounts deemed appropriate by the Firm?

This is a legal question beyond the purview of the committee.

Committee Opinion
October 20, 1999

² Payment of a forwarding or referral fee will be permissible under the Rules of Professional Conduct (RPC) effective January 1, 2000. See RPC 1.5 (e).