

# When Outsiders Fill In

Work arrangements with nonfirm lawyers can increase liability risks

BY ANNE W. HILL

A byproduct of the changing economics and expertise within the legal profession is the growing use by law firms of "outside" lawyers, such as temporaries and part-timers, for work that full-time associates once were hired to do.

This tactic offers clear advantages, giving smaller firms, for instance, a competitive edge by broadening their expertise or growing into new geographic territories without inflating overhead.

But while work arrangements with outside lawyers may boost a firm's business, they also increase the firm's potential liability exposure when those lawyers are found by courts to be working directly on behalf of the firm rather than as independent contractors.

The fundamental concern about whether the outside lawyer is performing adequately on the work assigned by the hiring firm is compounded by the fact that such lawyers often are doing work for multiple firms, making conflicts control a potential liability nightmare.

Moreover, a firm or attorney using outside lawyers often fails to account for the possibility that the "outsider" may be found to be in essence an employee rather than an independent contractor.

If that possibility is considered in advance, indemnity agreements can be arranged and insurance coverage coordinated so that neither the hiring firm nor the outside lawyer violates malpractice insurance policy requirements. These arrangements should be made with the input and consent of the insurance carriers.

The root of the problem is that, even though "hiring" an outside lawyer generally is not the equivalent of "employing" that lawyer,

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courts stretch to find relationships among networked lawyers, whether in the same firm or not, so they all are liable to a client.

Under the "reasonable client's perception" analysis applied by many courts, if the relationship between the hiring firm or attorney and the outside lawyer could appear to the average client to consti-



tute a partnership or association, then that is the relationship the court will infer, regardless of what the lawyers actually intended.

Once the court finds such a relationship, vicarious liability attaches, and the hiring firm or lawyer may be liable for the outside lawyer's negligence.

That result is especially worrisome since the firm has little or no control over the training and work habits of lawyers who are not partners or associates. Nor do some firms even give much thought to the qualifications and background of outside lawyers, or appreciate that liability for the errors of those lawyers may attach to the firm.

## Clarify the Relationship

Efforts by the hiring firm or attorney to limit liability exposure for the work of an outside lawyer should focus on establishing clearly that the relationship is between independent practitioners rather than the equivalent of partners or associates.

A hiring firm or lawyer can

take a number of steps to establish the independent nature of the relationship with an outside lawyer:

- Conduct a regular conflicts check and a background/qualifications check before hiring an outside lawyer on a temporary or part-time basis. These types of checks are just as important for that purpose as when hiring a regular employee.

- Arrange for the client, rather than the primary firm, to "hire" the outside lawyer directly. The outside lawyer should submit separate bills to the client, have independent communications with the client, and submit conclusions and advice directly to the client.

The client may be more likely to sue only the lawyer who was directly hired to do certain work. Moreover, the arrangement creates a number of possible defenses for the primary lawyer.

- Send a disclaimer/consent letter confirming that the client is hiring the outside lawyer for a particular purpose, that the primary firm is not advising on that issue, and that the client understands and consents.

- State clearly in the disclaimer/consent letter that the primary firm and the outside lawyer are not partners or employees of each other.

- Do not allow the outside lawyer to work on other matters for the firm beyond the one for which he or she was recruited.

Firms that hire outside lawyers to work on specific cases should consider whether they have some responsibility for the quality of work performed by those lawyers, and what role they should play in assuring that quality.

At the same time, no firm or attorney bringing in an outside lawyer on a temporary, part-time or independent contractor basis wants to later be held liable for that lawyer's work.

The best course is to communicate with the outside lawyer and the client regarding the nature of the relationship so that its limits are clear to everyone involved. ■