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DO YOUR HOMEWORK WHEN HIRING TEMPORARY LAWYERS

By Emily Eichenhorn

There are times when a law firm's staff could use a helping hand. A high-intensity project might require temporary lawyers to supplement capacity. A complex case might demand the expertise of a lawyer specializing in a particular area of law. Unusual workloads might necessitate the short-term hiring of extra lawyers to do legal research or write briefs.

Lawyer-for-hire arrangements can make the difference between winning a case and being too overwhelmed to represent a client adequately. But, they also present professional liability risks, for both the hiring firm and the hired lawyers, that arise from the various obligations each lawyer has to the other and to the client. Those obligations vary depending upon the relationships between all the parties in the lawyer-for-hire arrangement.

What does not differ from one engagement to the next is the need to analyze the potential risks and then apply professional judgment to determine how you will address those risks. In this article, I'll explore considerations important to this process from the hiring firm's point of view. A companion article will explore risk management from the hired lawyer's perspective.

Skills and competence

Assigning competent people to specified tasks is an obvious way to manage risk in any situation. Whether you are acting as an agent for the underlying client in hiring an attorney to assist them directly, or you are hiring temporary attorneys to supplement your own staff, you should make a reasonable effort to find qualified people for the job.

Once you have determined the structure of the collaboration, the responsibilities of the hired lawyer, the type of lawyer you need and identified prospective hires, conduct some investigation to determine if they meet your criteria.

The skill level and experience of lawyers with expertise in complex areas of law that you do not already have in your firm (e.g., environmental law or special needs trusts) needs to be greater than those of lawyers who will perform relatively simple but high-volume tasks (like a massive document review or class action claims screenings).

All activities should be documented in the client file, as they can provide evidence in defense of any future claim alleging negligent hiring if the outside lawyer does not meet the standard of care during the representation.

Lawyer qualifications

Though it may seem obvious, it's necessary to ensure that potential hires are fully qualified to perform the tasks required. When hiring temporary lawyers to assist the firm, obtain proof that each lawyer has passed the bar and is licensed to practice in the relevant jurisdictions. Inquire about and require documentation of any professional liability claims or disciplinary claims made against the lawyers and the outcome of each claim. And require the lawyer to sign an affidavit that he or she is under no practice restrictions for disciplinary purposes.

If you're hiring outside experts who will collaborate with you, but will work independently, obtain written confirmation that they have no conflicts of interest and can accept the representation under applicable state ethics rules. Investigate their relevant experience by asking for examples of similar representations and discussing them.

Conflicts of interest

Conflicts of interest can lead to disqualification from the representation, claims alleging breach of fiduciary duty and professional malpractice, and disciplinary action. They must always be considered prior to taking on a new representation or collaborating with another attorney.

When hiring temporary lawyers on behalf of your firm, investigate whether they have previously provided services to any of the relevant parties or attorneys. If they have done so, determine if they have confidential information that could give rise to a conflict in the current matter. *If so, do not hire them – even if you think the conflict can be waived.* It is better to find another competent lawyer than enter the quagmire of waiving conflicts in this circumstance; the complexity and risk are not warranted when you can readily hire another lawyer who does not present even the appearance of a conflict.

Once you have hired temporary lawyers, establish ground rules for the duration of the collaboration to help avoid conflicts or inappropriate disclosure of confidential information. Whenever possible, put them in writing and distribute them to all relevant parties.

If the temporary work will be full time, consider requiring that the lawyers work exclusively on your client matter until the conclusion of the current representation. Barring that, at a minimum, require that for the duration of the assignment the lawyers decline any representations that would conflict with the job they are doing for you and notify you immediately if they perform new work for any other firm or client during the representation.

Finally, take steps to avoid conflicts after the departure of temporary lawyers. In your firm conflicts database, include the names of all temporary lawyers and information about the matters they worked on. In future matters, inquire of opposing counsel whether or not these lawyers work for them, and, if so, check for potential conflicts.

Confidentiality and Communication

Lawyers sometimes fail to take the time at the beginning of a representation to clarify the authorized paths of communication between client and lawyer, or lawyer and lawyer. It is especially important to make these clarifications when lawyers-for-hire are involved because it becomes more difficult to discern the "chain of command." Jokingly referred to as the "who's on first" problem, it is best addressed at the outset of the representation and updated from time to time to ensure confidential information is protected.

It helps to identify one lawyer at the firm through whom all client communications should flow. This does not mean that only one lawyer should have contact with the client, but it does

require that the designated lawyer be made aware of any communication with the client.

Conversely, you should prepare a document for all lawyers participating in the matter (including hired lawyers) that identifies the individuals at the client who are authorized to receive and communicate information on the matter. This group should consist primarily of the “control group” at the client to help maintain the attorney/client privilege. The document should designate a central contact at the client and identify the individual at the client authorized to make decisions on the matter on behalf of the client. Instruct all lawyers to confirm his or her approval before moving forward with anything requiring client consent.

When collaborating with outside firms or attorneys, provide them with written instructions about who they should communicate with at the hiring firm and about contacts with the underlying client. Require that the hired law firm provide notice (and, when possible, copies) of all its communications with the underlying client.

Engagement agreement

In terms of risk management, engagement letters that set forth all parties’ expectations and obligations are valuable in defining responsibilities and limiting the scope of each lawyer’s liability. This holds true in the hired-lawyer context as well.

An engagement agreement with an outside attorney should describe specifically the clients, the matter, and the particular tasks the lawyer is being hired to do. For instance, if the lawyers will be reviewing documents to respond to specific document requests, identify the request in the engagement agreement. Or, if the lawyers are expected to produce certain work product such as memos, briefs or document summaries, describe them in the engagement agreement.

The agreement also should specify the length of the engagement or assignment, including any court-imposed or other deadlines for

completing tasks. It should specify any work hour requirements or other office rules (such as dress code) that lawyers who work on your premises will be expected to follow. And, of course, it should define payment terms.

Insurance issues

Maintaining professional liability insurance is part of any good risk management plan. It is important for hiring firms to consider the implications a lawyer-for-hire situation may have on their 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.

Although there may be apparent similarities from carrier to carrier and policy to policy, it is important to remember that carriers and policies do differ. Additionally, 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.

At a minimum, the hiring firm should determine if the hired lawyer carries insurance and whether there is anything in that insurance policy that could restrict coverage if the hiring firm was to be sued by any party over the representation. The hiring firm also should check whether collaborating with another lawyer or law firm will affect coverage under its own policy, and if the other attorney could claim coverage under the hiring firm’s policy if a suit was filed regarding the representation.

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