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CONTRACT LAWYERING: COMMON ISSUES AND CONSIDERATIONS

The traditional legal employment model of hiring a full-time lawyer to work as an associate attorney or in-house counsel is not always suitable for certain law firms and offices. Temporary projects or legal work that have limited duration don't necessarily call for full-time employment of a lawyer. Some firms and offices may have a long-term need for a full-time lawyer but may not have the budget to hire one at the moment. In those situations, working with a contract lawyer can provide the firm with needed resources and still be within its budget. Lawyers who are in between jobs or prefer something other than a full-time position can benefit from this contractual arrangement with their extra income and gained experience. For those new to the world of contract lawyering, the FAQ below will cover some issues and considerations that often come up in this context.

Do contract lawyers need PLF coverage?

Whether a contract lawyer needs PLF coverage depends on the type of work the contract lawyer will do for the contracting firm. If a contract lawyer is engaged to do only paralegal-type work, that person may not need PLF coverage. A contract lawyer who goes without PLF coverage must work within the PLF **exemption guidelines** (<https://www.osbplf.org/assessment-exemptions/exemptions.html>) (see "Law Clerk/Supervised Attorney (not engaged in the private practice of law)"). Under those guidelines, that person's work must be reviewed and supervised by the contracting firm. That contract lawyer is prohibited from engaging in certain activities typically performed by lawyers, such as making strategic decisions on a case; signing pleadings or briefs; attending depositions or making court appearances as the attorney of record; holding himself or herself out as an attorney to any client; and using the title "attorney," "attorney at law," or "lawyer" on any correspondence or documents. Also, the contracting firm is prohibited from listing that contract lawyer in the firm name or on firm letterhead as an attorney or firm member. Without PLF coverage, the contract lawyer is basically working as a glorified paralegal. Because of these limitations, contract lawyers are better off getting PLF coverage. Having malpractice coverage will allow them to take on more independent work and have a bigger role in the matter. Because they are individually covered, they can negotiate a higher rate with the contracting firm than if they didn't have PLF coverage.

Do the contracting firms or attorneys need to inform their clients?

Lawyers are required under ORPC 1.4 to disclose to clients that a contract lawyer is working on their case if the contract lawyer is independently handling parts of the case, or if the client will be billed for the contract lawyer's work. Even when the contract lawyer's work is supervised and the client is not billed directly for that work, it does not hurt to still get the client's informed consent. The disclosure and client's consent can be accomplished via the engagement letter, fee agreement, or a separate document. That document should describe the contracted work to be performed on the client's matter, explain the risks and alternatives, and otherwise comply with ORPC 1.0(g). (See the **PLF website** (<https://www.osbplf.org/practice-management/forms.html>) for sample engagement letters and fee agreements.).

Are contract lawyers classified as employees or independent contractors?

Contracting firms typically want to classify the contract lawyer as an independent contractor in order to limit their legal liabilities and other obligations owed to employee staff. However, the classification is not determined by the label used by the contracting firm or the contract lawyer, but by various criteria that characterize the working arrangement. The Oregon Employment Department has a helpful **chart** (<https://www.oregon.gov/ic/Documents/State%20Agency%20Criteria%20TABLE.pdf>) summarizing the different criteria and tests that certain state agencies use to determine whether a worker is an independent contractor or employee. You can also find additional resources on the **IRS website** (<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>). This PLF *inBrief* **article** (https://www.osbplf.org/assets/in_briefs_issues/Independent%20Contractors%20or%20Employees%20April%202016%20In%20Brief.pdf) helps clarify the classification issue, as well as this **latest update** (https://www.osbplf.org/assets/in_briefs_issues/Independent%20Contractors%20versus%20Employees.pdf) from the Oregon Supreme Court. It's important for both contracting firms and contract lawyers to understand the lines between employee and independent contract status to avoid misclassification.

Understand that the supervision requirements under the PLF exemption guidelines may conflict with the classification criteria for an independent contractor. If a law firm wishes to engage a contract lawyer without PLF coverage, it should obtain legal advice from an employment lawyer on how supervision will impact the classification of the contract lawyer as an independent contractor.

How should contract lawyers be compensated?

The compensation is completely up to the contracting firm or attorney and the contract lawyer to agree upon. They may structure compensation based on an hourly rate or on a flat rate per project. Some contracting firms and attorneys may want to know whether they can bill clients a "surcharge" or "markup" in excess of the actual cost to the firm of the contract lawyer's services, essentially netting the firm a profit on those services. The Oregon State Bar has not published a formal ethics opinion on this issue, but **ABA Formal Ethics Opinion 00-420** (<https://www.americanbar.org/products/ecd/chapter/219983/>) offers some guidance. This opinion states that a surcharge may be added if: (1) the contract lawyer's work is billed as legal services and not as costs or expenses; and (2) the surcharge is reasonable and disclosed to clients. For hiring firms who want to bill a surcharge or markup of contract lawyer services, think about how such a charge might look like from the client's perspective, and consider the possible downside before adopting such a practice. If you do decide to bill clients for such a charge, after weighing the potential costs and benefits, remember that if a claim of ethical misconduct is brought against you, you will probably not be allowed to rely on an advisory opinion as a defense.

What about conflicts of interest?

A contract lawyer is not a member of the contracting firm for conflict purposes. This means that contracting firms and contract lawyers do not have to incorporate each other's conflict information into their own conflict systems. Instead, conflict lawyers should perform their own conflict search on a matter assigned by the contracting firm, and they can work on the matter if there is no conflict with any of their own former or existing clients.

Should the arrangement be put in writing?

It is good practice to put a contract lawyering arrangement in writing to avoid any misunderstanding or miscommunication. The writing doesn't have to be a formal contract. It can be as simple as a letter of understanding like our sample **Contract Project - Letter of Understanding** (<https://osbplf.org/assets/forms/pdfs/Contract%20Project%20Letter%20of%20Understanding.pdf>). Contracting firms and contract lawyers can modify this sample letter of understanding to suit their individual arrangements. You may consider including additional provisions, such as the extent of the supervision if the contract lawyer is exempt from PLF coverage, clarification that payment is not dependent on the client paying the contracting firm, or any other material terms of the agreement. (See this "**Checklist for Lawyers Working as Independent Contractor**" (<https://osbplf.org/assets/forms/pdfs/Contract%20Lawyers%20Checklist.pdf>)" on the PLF website.)

This blog post was adapted from a prior inPractice blog post on this topic by Lee Wachocki, former PLF Practice Management Attorney.

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Post Author: [Hong Dao \(/blog/staff-authors/hong-dao/\)](/blog/staff-authors/hong-dao/)

Read more about Hong Dao (</about-plf/staff/hong-dao/>)

☎ (tel:503.726.1467) ✉ (mailto:hongd@osbplf.org) 🐦 (<https://twitter.com/OregonPLF>)

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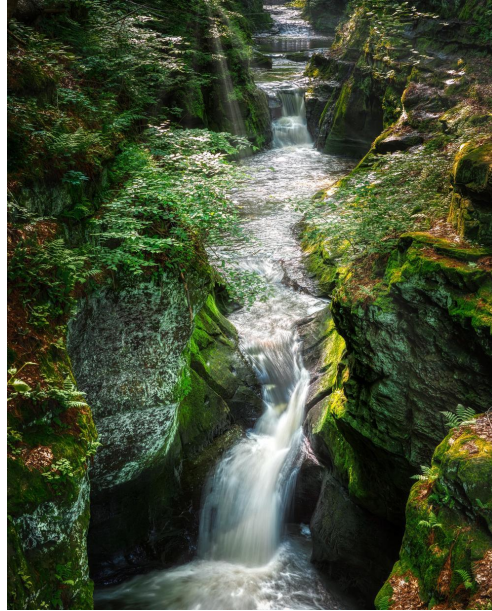
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DRAWING THE LINE FOR NONENGAGEMENT (/BLOG/INPRACTICE/DRAWING- THE-LINE-FOR- NONENGAGEMENT/)

Meeting with a potential client may sometimes feel like walking a tightrope. It can be difficult to end the intake without any misunderstandings or unintended promises. When someone believes an attorney-client relationship has formed but you do not, a real danger exists. As the attorney, it is your role and responsibility to clearly communicate when an attorney-client relationship is established and when it is not, no matter the marketing medium.

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MAKING THE WORK FLOW (/BLOG/INPRACTICE/MAKING-THE- WORK-FLOW/)

To prevent mishaps and errors, you may need to evaluate how cases proceed through your office. Having a smooth process can avoid inaccuracies and save time. You can be more efficient if you have a well-defined and planned workflow for you and your staff.

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16037 SW UPPER BOONES FERRY ROAD, SUITE 300

PO BOX 231600

TIGARD, OR 97281-1600

PHONE: 503.639.6911 (TEL:503-639-6911)

TOLL FREE: 800.452.1639 (TEL:800-452-1639)

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