

Excess Coverage: The Contract Attorney Conundrum

By Melanie Hughes

Consider this: Your firm hires an “independent contractor” (also known as a Form 1099 worker). The lawyer is doing more than just project work or legal research—they are acting in the capacity of a firm attorney (e.g., performing legal duties such as signing pleadings, attending hearings, and otherwise holding themselves out to be a representative of the firm). If a malpractice claim exceeding the coverage limit for PLF Primary Coverage arises from the work the contract attorney performs on behalf of the firm, could the firm be liable?

The answer—which may surprise some—is yes.

As job openings for lawyers continue to surpass the number of qualified professionals available to fill those spots, hiring partners are increasingly turning to contract attorneys to assist with overflow work. Although a seemingly viable solution, it can also generate liability for your firm if they perform tasks that require a law license. This risk is precisely why it is critical to determine who is a firm lawyer through the lens of work performed rather than their tax, compensation, or employment status.

If a contract attorney works under the direct supervision of one or more firm lawyers and refrains from performing legal work, they may claim exemption from PLF coverage. In that scenario, the malpractice risk shifts to the supervising lawyer (as is the case with a law clerk or a paralegal). If the contract attorney engages in legal work, however, they must carry PLF Primary Coverage. It is also

prudent to add them to the firm’s excess coverage as they are a de facto member of the firm. For more information about the “Law Clerk/Supervised Attorney (not engaged in the private practice of law)” exemption, visit the PLF website under Do I Need Coverage? > Exemptions from Coverage.

Omitting a contract attorney from the excess application simply because they are not an employee does not mean they are not a member of the firm for liability purposes. Employment status alone does not relieve the firm of potential liability arising from a contract attorney’s work. Instead, the liability litmus test is based on the scope and type of work the attorney performs for the firm and not their employment relationship or tax status. Failing to add a contract attorney engaged in legal work to a firm’s excess plan could result in malpractice claims that fall outside of the excess coverage, regardless of whether the firm considers them a contract attorney, independent contractor, or “Of Counsel.”

The PLF Excess underwriters can help you determine whether you should list a contract attorney on your firm’s PLF Excess Coverage application. You can reach us at 503.924.4177, or excess@osbplf.org.

Additional information about PLF Excess Coverage is available on the PLF website. ■



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