



ETHICS ADVISORY OPINION

10-08

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Lawyer is considering retaining a contract attorney to provide litigation support, research and writing for the benefit of Lawyer's clients. The contract attorney is not a partner or employee of the firm and only works for Lawyer on a case-by-case basis.

Question Presented:

May Lawyer add a surcharge when billing the client for the cost of the services performed by the contract attorney in light of South Carolina Rules of Professional Conduct 1.1, 1.5, 1.6, 5.1 and 5.2?

Summary:

When services of a contract attorney are billed as fees for legal services, South Carolina Rule 1.5(a) governs the amount that may be charged to the client for those services in that the total fee must be reasonable. The amount of that fee that is paid by the Lawyer to the contract attorney for his services is a matter of contract between the Lawyer and the contract attorney and need not be disclosed to the client, any more than the portion of the fee that would be paid to an employee attorney as salary and benefits would be disclosed. When the legal services of the contract attorney are billed to the client as an expense or cost, the Lawyer may not add a surcharge to the expense or cost absent a retainer agreement with the client that permits such surcharges. In order for the Lawyer to bill the contract attorney's services as fees for legal services, the Lawyer must adopt it as his own and be responsible to the client for it pursuant to South Carolina Rule 1.1 or must supervise the contract attorney pursuant to South Carolina Rule 5.1. If the Lawyer does neither,

the services of the contract attorney must be billed as a cost and the details of the arrangement disclosed and consented to by the client.

Opinion:

Lawyers associate with other attorneys to perform legal work in a variety of ways – as partners, as members of a limited liability company or registered limited liability partnership, as shareholders in a professional corporation, in long term non-equity arrangements as employees or as of-counsel, and, sometimes, on a temporary basis as independent contractors. It is this last arrangement, the independent contract, which we address in this Opinion.

Lawyers associate with contract attorneys for a variety of reasons – to provide expertise the lawyer does not possess, to provide counsel regarding laws in a jurisdiction where the lawyer is not admitted to practice, to enable the lawyer to handle his case load with diligence, or any of a number of other reasons. Sometimes, the lawyer will closely supervise and review the contract attorney's work and as such adopt it as the lawyer's own in fulfilling the lawyer's obligations under South Carolina Rules of Professional Conduct 1.1 or 1.3. In such a case, the contract attorney is associated with the firm for the purposes of the representation in the same way as of counsel, also generally an independent contractor, is considered associated with a firm for all purposes. Sometimes, however, the contract attorney may work largely independently and be directly responsible to the client for his own diligence and competence, and the payment for the contracting attorney's services through the lawyer is for the client's convenience or because the client is relying on the lawyer to review and approve the contract attorney's bill. Whether and how the lawyer bills the client for the contract attorney's services and what surcharges or profit may be added depends on which of these two scenarios is at work.

There is nothing unethical about Lawyer outsourcing legal services provided Lawyer renders legal services to his client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" as provided in South Carolina Rule of Professional Conduct 1.1. In fact, Comment [1] to Rule 1.1 contemplates the use of such support when it states: "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." Thus a lawyer may associate or consult with a contract attorney in order to fulfill the lawyer's obligation of competence under Rule 1.1. By analogy, a lawyer may also associate or consult with a contract attorney to fulfill the lawyer's other obligations, such as the obligation of diligence under Rule 1.3.

Where the lawyer has outsourced work to the contract attorney for any of these purposes, and the lawyer adopts the work product as his own in fulfillment of the lawyer's Article 1 responsibilities, the lawyer may bill the reasonable value of the contract attorney's work to the client as a legal fee. In doing so, the lawyer ratifies the work of the contract attorney and undertakes duties with regard

to the contract lawyer and his work under South Carolina Rule of Professional Conduct 5.1, and the contract lawyer's own conduct is subject to Rule 5.2. Where a lawyer is engaged on a temporary basis to perform services that are ratified and adopted under Rules 1.1 and 5.1, the lawyer is to be considered associated with the firm for the purposes of that representation. As a result, the lawyer is permitted to share confidential information regarding the representation to the contract attorney pursuant to the implied authorization of Rule 1.6(a). The lawyer is cautioned that care must be taken so that the engagement of the contract attorney in these circumstances does not violate the conflict of interest rules.

Where the contract attorney is so associated, the amount of the otherwise reasonable fee paid by the lawyer to the contract attorney need not be disclosed to the client, any more than the portion of the fee paid to an employee lawyer as salary and benefits must be disclosed. However, care must be taken such that the billing does not violate Rules 7.1 or 7.5.

Where the contract attorney's work will not be ratified and supervised by the lawyer, the fees for the services of the contract attorney should not be billed as legal fees by the lawyer, but rather should be billed as costs or expenses. No surcharge on costs or expenses is appropriate except where a reasonable surcharge has been disclosed to and approved by the client. Furthermore, because when a client retains a lawyer he expects that only persons that are closely supervised by the firm will perform his legal work, disclosure of confidential client information to a contract lawyer that will not be so supervised cannot be said to be impliedly authorized under Rule 1.6(a) and the client's informed consent to any such disclosure and representation must be obtained.