

Marking Up Fees

Folks,

When you hire a contract attorney, can the responsible attorney mark up the fees? Let's say you hire an attorney to draft a motion. You pay that attorney \$100 per hour to do the work. The attorney drafts it in 2 hours.

So you pay \$200.

Your hourly rate is \$200 per hour. Do you bill the client \$400 or do you bill the client \$200?

What does your fee agreement say?

Miriam N. Jacobson, Pennsylvania

There are two ABA ethics opinions about marking up the work of a contract lawyer. I do not have the numbers in mind but I will dig them up later this evening. The client has to consent to the involvement of the contract lawyer, and the lawyer must not bill the lawyer's fees as a cost, but the lawyer does not have to tell the client the amount of the markup. The lawyer must, however, supervise the work, if mem'ry serves.

L. Maxwell Taylor, Vermont

I don't see this covered under the new CA Rules of Professional Conduct [esp. rule 1.5 and 1.5.1]. I was under the impression that the lawyer must disclose that he may use lawyers from outside the firm and what the billing

rate(s) will be for such outside lawyers, but I don't see that in writing in the CA RPC. But see the following:

Payments to contract lawyers (nonemployees): Except as noted below (§5:469

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_117001_5%3a469&originationContext=document&transitionType=DocumentItem
&contextData=(sc.Search)#co_pp_sp_117001_5:469>),

CRPC 1.5.1(a) (formerly CRPC 2-200(A)

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applies where a *nonemployee* contract lawyer (i.e., independent

contractor) receives a portion of fees paid by the client to the law firm for legal services. [Cal. State Bar Form.Opn. 1994-138 (decided under former rule)] Whether a particular lawyer who is not a partner or shareholder in the law firm is an “employee” or independent contractor is a legal question. [*Sims v. Charness* (2001) 86 CA4th 884, 890-891, 103 CR2d 619, 622-623

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(disapproved on other grounds in *Chambers v. Kay* (2002) 29 C4th 142, 126 CR2d 536

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see also Cal. State Bar Form.Opn. 1994-138; Los Angeles Bar Ass'n Form.Opn.473 (1993)]

Exception: The fee division rule is not violated where:

- • the amount paid to the outside lawyer is *compensation for work performed* and must be paid whether or not the firm is paid by the client;

- • the amount paid is *not based on fees paid or payable* to the firm by the client; and

- • the amount paid is not based on a percentage of the client's recovery. [Cal. State Bar Form.Opn. 1994-138; *Chambers v. Kay*, supra, 29 C4th at 154-155, 126 CR2d at 546-547

<[https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002693968&pubNum=0003484&originatingDoc=I3c380abf4bf311e584909c6f79ff0614&refType=RP&fi=co_pp_sp_3484_546&originationContext=document&transitionType=DocumentItem&contextData=\(sc.Search\)#co_pp_sp_3484_546](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002693968&pubNum=0003484&originatingDoc=I3c380abf4bf311e584909c6f79ff0614&refType=RP&fi=co_pp_sp_3484_546&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_3484_546)>;

CRPC 1.5.1(a) (eff. 11/1/18)]

2) Application

Attorneys A and B share office space and facilities but have separate law practices.

Attorney B agrees to serve as co-counsel to Attorney A representing Client in Lawsuit. Attorney A orally promises Attorney B a percentage of any recovery obtained in Lawsuit.

Both Attorneys appear as co-counsel and Attorney B performs work under Attorney A's supervision.

Attorney A and Client remove Attorney B from Lawsuit prior to trial.

Attorney A confirms in writing that Attorney B will receive a percentage of recovery from Lawsuit.

Attorney A is successful and obtains a sizable judgment for Client in Lawsuit. Attorney A does not pay Attorney B.

Attorney B cannot enforce the fee-sharing agreement with Attorney A, because Client consent was not obtained as required by former CRPC 2-200(A) (now CRPC 1.5.1(a)). [*Chambers v. Kay*, supra, 29 C4th at 156, 126 CR2d at 547-548

<[https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002693968&pubNum=0003484&originatingDoc=I3c380abf4bf311e584909c6f79ff0614&refType=RP&fi=co_pp_sp_3484_547&originationContext=document&transitionType=DocumentItem&contextData=\(sc.Search\)#co_pp_sp_3484_547](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002693968&pubNum=0003484&originatingDoc=I3c380abf4bf311e584909c6f79ff0614&refType=RP&fi=co_pp_sp_3484_547&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_3484_547)>]

Law Firm retains Contract Lawyer on a temporary basis to assist on specific matters for one or more of Law Firm's clients. Contract Lawyer has no other formal relationship with Law Firm or its clients. Law Firm pays Contract Lawyer directly and includes Contract Lawyer's time in its periodic billings to clients.

Law Firm must comply with the fee division requirements if (i) Law Firm is not obligated to pay for Contract Lawyer's services if the fees for such services are not charged to or paid by Law Firm's clients; (ii) the amount paid to Contract Lawyer is

negotiated or based on fees paid to Law Firm by client; or (iii) Contract Lawyer is entitled to a percentage of the fee paid by the client to Law Firm. [Cal. State Bar Form.Opn. 1994-138; ABA Form.Opn. 88-356 (temporary lawyers); see also ABA Form.Opn. 00-420 (surcharging client for amounts paid to contract attorney),.

Roger Rosen, California

One of the two opinions I had in mind was 00-420:

<http://www.appealsandbriefs.com/app/download/5843496804/ABA+Formal+Opinion+00-420.pdf>

Max Taylor

The best answer is you charge it is a pass-through just like you do for any other vendor related work or costs like recording or expert witness fees.

Whether there is a solid rule on this in your jurisdiction are not, the best way to handle ethical problems is to keep them far, far away. Every single moment you think about an ethical issue is a moment you can't bill a client for real work.

Don't be stupid. When you get the slightest whiff that there might be an ethics concern, or a conflict of interest, or even the appearance thereof, simply lace up your running shoes and get the hell out of there.

Art Macomber, Idaho

If either is in Texas (or perhaps even licensed in Texas), no. Unless you can plausibly argue they are "in the firm." I can get those opinions if you need them.

Tim Ackermann, Texas

Max's recitation conforms with my understanding

Fredric Gruder

OK, same general facts, but what if we replace contract attorney with contract paralegal? I see many remote paralegals advertised. I cannot find anything in the Virginia rules that addresses this. I'm just gauging the general consensus.

Ryan Young, Virginia

My \$0.02: It's all about disclosure.

- 1) You can use a flat fee and do what you want.
- 2) You can disclose the fact that you may hire "XXX attorney" and that "their work will be billed to you at \$____/hour" (or as a flat fee.)
- 3) You can hire the third party attorney as "of counsel" and keep it within your own firm.
- 4) You can raise your own hourly rates and explain that you efficiently rely on others to keep total costs reasonable.
- 5) You can probably disclose a markup (as a percentage, a fixed hourly rate, or a fixed dollar amount) to supervise, hire, etc.

What I think you *cannot* do is to use a standard fee agreement in which the client pays for "expenses," and then include any profit whatsoever as an "expense."

In my view, if you want to rely on a lot of people who are not in your firm, then you should not be using an hourly billing arrangement.

Erik Hammarlund, Massachusetts

As others have indicated, the answer isn't as simple as you posed. If your question is simply "can you do it", you should pose the question to your State counsel for bar discipline; their opinions carry the most weight. If you meant to ask "should you do it", I tend to agree with Art. What I have done under similar circumstances is bill client at rate I was charged/negotiated, but added at my regular billing rate any time I spent with outside provider to direct/confer/edit/review services provided by contract lawyer.

Duke Drouillard, Nebraska

Maybe I was not clear.

In CA, so long as your fee agreement explains to the client that you may use lawyers from outside of your firm, states the hourly rate you will bill for such lawyer's time [or maybe the range of hourly rates you may bill], then you may bill the time spent by the outside lawyers billed to you and you can mark up the charges. That is, if the outside lawyer bills you \$100/hour, to you, you may charge the client \$200/hr. That is, so long as you are obligated to pay the outside lawyer whether or not the client ultimately pays you. It is really just as if the outside lawyer was an associate in your office. Otherwise [that is, if you are not obligated to pay the outside lawyer unless the client pays you] it is a "fee splitting" arrangement which requires a different disclosure and a different client consent.

There are businesses out there which provide such outside lawyers. One such business is called Law Clerk.

Roger Rosen

If I recall directly by treating the contract lawyer as an expense, you are not responsible for the work product (unless you otherwise adopt the work, such as by including it as part of your work). By billing as legal fees, you are responsible full stop.

In many cases the responsible difference is irrelevant— contract lawyer does research you Include in your brief, but in some cases not n[sic]

Fredric Gruder

There are also many freelance attorneys right here on the list (like me :-)) who can answer your question.

For general reference, the other (and more recent) ABA ethics opinion that addresses the use of contract lawyers is Formal Op. 08-451. You can read my analysis of the opinion at <https://questionoflaw.net/2008/08/28/aba-formal-op-08-451-good-news-for-us-based-independent-contract-lawyers/>

.Jon asked how much he can charge if the contract lawyer charged him \$200 for two hours of work and his (Jon's) billing rate is \$200. Jon will have first disclosed the use of a lawyer outside his firm, and told his client how much he would be billing the contract lawyer's time at. If the contract lawyer is extremely skilled, Jon could bill the client at or above his own rate, assuming the client agrees. In my experience, most lawyers charge less for a contract attorney's time than they charge for their own time.

A few years ago, I compiled all of the relevant ethics opinions about contract lawyers from around the country. All states that have addressed the issue allow you to mark up the contract lawyer's rate, as long as you bill the contract lawyer in the "fees" portion of your bill (where you bill your own time) rather than as an expense. I invite anyone who is curious about their state's ethics opinion to contact me offlist at Lisa@QuestionOfLaw.net, and I'll send you the opinion.

Jon's question:

When you hire a contract attorney, can the responsible attorney mark up the fees? Let's say you hire an attorney to draft a motion. You pay that attorney \$100 per hour to do the work. The attorney drafts it in 2 hours So you pay \$200.

Your hourly rate is \$200 per hour. Do you bill the client \$400 or do you bill the client \$200?

My answer: Jon's hourly rate has nothing to do with how much he can bill the client. Let's say Jon has decided not to mark up the contract lawyer's rate. So, he charges the client \$200 for the contract lawyer's work. If Jon spent an hour of his own time reviewing the contract lawyer's work, editing it, etc., he can charge an additional \$200. Because he has a duty to "supervise" the contract lawyer's work, it's likely that he has spent at least some time on the project (just not as much as if he did the entire project himself).

Lisa Solomon, New York

First, in CA, you cannot treat the outside attorney's bill/invoice/cost as an expense. This is prohibited.

Second, if an outside attorney did work for your firm on Client A's matter, and later Client A sued your firm for legal malpractice, and you claimed that your firm could not be liable for the alleged malpractice because the outside attorney's

bill/invoice/cost was treated by you as an expense, you would be laughed at by the judge.

Roger Rosen