



Oregon Women Lawyers

**Contract Attorneys: Managing Expectations and
Getting Paid**

Tuesday, November 19, 2013 | 3:00 p.m. to 5:00 p.m.

Stoel Rives, 900 SW Fifth Avenue, 19th Floor Conference Room, Portland

2 MCLE General or Practical Skills Credits

∞ Featuring ∞

Lisa C. Brown, Bullard Law

Emilee Preble, Professional Liability Fund

Jim Vogeles, Vogeles & Christiansen

Moderator

Andrew Grade, Contract Attorney

We thank Stoel Rives, our generous hosts for today's program

Recording of this program is provided by the Oregon State Bar Professional Liability Fund

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Name:		Bar Number:	
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Title of CLE Activity: Contract Attorneys: Managing Expectations and Getting Paid			
Date: November 19, 2013		Location: Portland, OR	
<input type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i> <input checked="" type="checkbox"/> <u>2</u> General <input type="checkbox"/> Prof Resp-Ethics <input type="checkbox"/> Access to Justice <input type="checkbox"/> Child Abuse Rep. <input type="checkbox"/> Practical Skills <input type="checkbox"/> Pers. Management Assistance	<input type="checkbox"/> Full Credit. <i>I attended the entire program and the total of authorized credits are:</i> <input type="checkbox"/> General <input type="checkbox"/> Prof Resp-Ethics <input type="checkbox"/> Access to Justice <input type="checkbox"/> Child Abuse Rep. <input type="checkbox"/> Practical Skills <input type="checkbox"/> Pers. Management Assistance	<input type="checkbox"/> Partial Credit. <i>I attended _____ hours of the program and am entitled to the following credits*:</i> <input type="checkbox"/> General <input type="checkbox"/> Prof Resp-Ethics <input type="checkbox"/> Access to Justice <input type="checkbox"/> Child Abuse Rep. <input type="checkbox"/> Practical Skills <input type="checkbox"/> Pers. Management Assistance	

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Contract Attorneys: Managing Expectations and Getting Paid

Speaker Profiles

Lisa C. Brown, a partner at Bullard Law, advises and trains on a variety of topics including auditing employment practices, employment policies and procedures, employment agreements, disability discrimination, state and federal family leave laws, hiring, termination, sexual harassment, as well as federal and state discrimination laws. She received her JD at George Washington University.

Emilee Preble is Lead Underwriter and Staff Attorney for the Oregon State Bar Professional Liability Fund. She received her JD from Indiana University School of Law.

Jim Voge, a partner in the firm Voge & Christiansen, is an experienced employment attorney who also has significant experience as a contract attorney. He is a graduate of Harvard Law School. In addition to Oregon, he is admitted to practice in California and Montana.

Contract Attorneys: Managing Expectations and Getting Paid
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Agenda

Establishing a Relationship

- Managing Expectations
- Client Access
- Checking Conflicts
- Deadlines/Timing of Information
- Timing of Payment

Project Rates

- Hourly
- Fixed Rates
- Fixed Costs

Contractual Relationship/Not Employee

- Statutory Factors
- Written Agreement
- Who has PLF Coverage?
- Parties to the Agreement—Contracting Lawyer, Firm, Client?
- IRS Form 1099

What if It All Goes Wrong

- War Stories—You are Not Alone!
- Remedies
 - OSB Fee Arbitration
 - Judicial Remedies
 - Liens
- Other Forms of Remedy
 - Contingency Cases
 - Other Circumstances
- When to Walk Away, When to Stay and Fight

Most of the materials in this packet are available to members of the Oregon State Bar via the Professional Liability Fund website: www.osbarplf.org and are reprinted here merely for convenience. Be sure to check the website for updates.

The chapter on *Setting Your Rates* is reprinted from *The Complete Guide to Contract Lawyering* (3rd Edition) Decision Books (2004) by Deborah Arron and Deborah Guyol. Although some of the material in the book is now out of date, it remains an excellent resource for issues involving the contract lawyer relationship.

Oregon Women Lawyers was instrumental in pioneering the concept of Contract Lawyering in Oregon the early 1990s. Since that time, a separate list of attorneys who are willing to take on contract assignments has been maintained. Any attorney member of Oregon Women Lawyers, whether licensed in Oregon or not, may participate in the Contract Lawyers List for an additional flat fee of \$20 annually. The service is advertised to potential hiring attorneys in the Oregon State Bar *Bulletin* classifieds. We are looking forward to bringing new energy to the Contract Lawyers Service in 2014, and welcome your ideas, input and enthusiasm. For more information, contact diane@oregonwomenlawyers.org.

CHECKLIST FOR CONTRACT LAWYERS

Issues to Discuss with Your Hiring Attorney

1. Potential conflicts of interest.
2. Nature of the project.
3. How long the assignment will take.
4. Applicable deadlines. (Is a short turnaround or rush required?)
5. The project budget.
6. Your fee, including any premium rates that may apply for short turnaround times or purchasing PLF coverage.
7. Payment terms, discounts for early payment, and clarification that your payment is not dependent upon the client paying the hiring attorney.
8. Whether you will work on site and have use of the hiring attorney's equipment and office staff.
9. The form and manner in which your work product will be delivered.
10. What to do if the project's time requirements and scope exceed original terms. (Seek clarification on how the assignment would be restructured or revalued.)
11. How closely supervised you will be.
12. Whether you will sign any documents with your own name, or prepare all documents for the hiring attorney to sign.
13. Your PLF status:

Discuss whether you should purchase your own PLF coverage before taking the assignment, and the higher contract rate you will charge for this added security.

If you do not purchase PLF coverage, you must work within PLF exemption guidelines. As an exempt contract attorney, your work **must** be reviewed and supervised by the hiring attorney. Make sure the hiring attorney understands that you are prohibited from:

- Making strategy or case decisions
- Signing pleadings or briefs
- Attending depositions or making court appearances as attorney of record
- Holding yourself out to any client as an attorney
- Using the title "attorney," "attorney at law" or "lawyer" on any correspondence or documents

For additional resources on contract lawyering, review the PLF seminar, "Practical Contract Lawyering," available at www.osbplf.org. The "Law Clerk/Supervised Attorney" PLF Exemption Guidelines are also available on the PLF Web site. Also see: Heidi O. Strauch, *Choosing a Contract Attorney: Tips for Establishing a Working Relationship*. February/March 2011 *Oregon State Bar Bulletin*.

**CONTRACT PROJECT
LETTER OF UNDERSTANDING**
(Sample Modify as appropriate)

Re: *[Contract Project]*

Dear *[Name]*:

The purpose of this letter is to confirm our conversation of *[date]*. We have agreed that I will work on *[project description]* as a contract lawyer under your direct supervision.

We have agreed that I will handle this matter *[for an hourly contract rate of \$ _____ per hour at a flat project rate of \$ _____]*. We have agreed that the project should be accomplished in approximately _____ hours and will be due by _____. Should either the stated time or deadline prove to be impractical, we each agree to notify the other at once and, if possible, negotiate a new deadline, scope of assignment, and rush premium, as appropriate.

I *[will/will not]* work on site and *[will/will not]* have the use of your equipment and support staff. I will deliver all work product to you as *[specify format]* via *[specify method]*. *[You will provide me with access to the full client file, which I will return to you at the completion of the contract project.]*

I agree to abide by the Oregon Rules of Professional Conduct with respect to the confidentiality of all client information I may learn in the course of this project.

I agree to add *[insert names of all parties]* to my conflict system and to notify you immediately if I become aware of an actual or potential conflict of interest. You agree that it is your responsibility to promptly provide me with the names of any additional parties whose names should be added to my conflict list, so that I may run a conflict check on their names.

[If applicable: It is further understood that I do not carry malpractice coverage from the Professional Liability Fund because I am working as an exempt contract attorney under your direct supervision.]

Thank you for the opportunity to assist you as a contract attorney. If you have any questions, please feel free to call.

Very truly yours,

[Contract Attorney]

Contract Lawyers: Independent Contractors or Employees?

Law firms working with contract lawyers should be aware that law firms, just like any other businesses, may be audited by federal and state agencies to ensure they are correctly classifying their contract lawyers as either employees or independent contractors. A firm may assume a contract lawyer is an independent contractor without carefully analyzing the factors distinguishing independent contractors from employees.

So, why does it matter whether you correctly classify contract lawyers as independent contractors? If the contract lawyer is really an employee and not an independent contractor, the law firm could be exposed to significant damages, including responsibility for federal and state income and employment taxes; pension, health, Medicare, and other benefits; unpaid retirement and disability coverage; workers' compensation benefits; and unemployment insurance benefit payments. Liability could arise from failure to provide protected leave, violation of discrimination or wage and hour laws, failure to comply with I-9 requirements, and a host of other employment-related claims.

In the case of *Donald G. Cave a Professional Law Corp. v. Commissioner*, T.C.M. 2011-48, the U.S. Tax Court ruled that the law firm incorrectly classified its attorneys as independent contractors when they were actually employees. The Tax Court awarded the Commissioner damages of \$150,000 for unpaid employment taxes and a \$10,000 penalty against the law firm. The Fifth Circuit Court of Appeals affirmed the Tax Court's decision, finding that the law firm failed to meet its burden of proving that the lawyers were true independent contractors.

Administrative Agency Review

Several state and federal agencies review whether a worker is correctly classified as an independent contractor or an employee. In Oregon, the state agencies that evaluate whether a worker is correctly classified as an independent contractor include the Department of Revenue, the Employment Department, the Bureau of Labor Wage and Hour Division, and the Workers' Compensation Division. At the federal level, the IRS and the Department of Labor both independently audit employers to ensure that the workers are correctly classified as independent contractors.

The various state and federal agencies that audit these relationships apply different tests. For example, the IRS has a 20-factor test; the Department of Labor and the Bureau of

Labor Wage and Hour Division apply an "economic reality" test; the Oregon Department of Revenue applies the factors listed in ORS 670.600; the Oregon Civil Rights Division and the Workers' Compensation Division apply the "right-to-control" test.

The Contract

One way a law firm can protect itself from potential liability is to have a written agreement in place clarifying that the parties understand and agree that this is an independent contractor relationship and not an employer-employee relationship. The parties should consider including in the contract the following provisions:

- The contract lawyer is responsible for his or her own income tax withholding and Social Security self-employment taxes, professional liability insurance, and excess coverage.
- The firm will issue a Form 1099 for the services performed by the contract lawyer.

- An acknowledgement that this is not a joint venture and the parties do not have any shared business interests.
- The contract lawyer is currently licensed and in good standing with the Oregon State Bar, has current professional liability coverage, and has no pending malpractice claims or ethics complaints.
- The contract lawyer does not have a conflict with any of the parties involved in the assigned project.
- The contract lawyer agrees to at all times fulfill his or her professional duties to protect the client's privileged and confidential information.
- The contract lawyer will at all times comply with his or her ethical and legal responsibilities as a lawyer licensed to practice law in the state of Oregon.
- The contract lawyer will return all client documents, including all copies of the documents, when the project is complete. [Alternatively, the contract lawyer and hiring attorney may agree that the contract lawyer will shred all client documents.]
- The contract lawyer will not receive any employee benefits or workers' compensation coverage.

The Working Relationship

From a practical standpoint, to be an independent contractor, a contract lawyer should have his or her own office, business cards, e-mail account (separate from the firm's e-mail system), online research tools, computer and copying capability, and tax ID number. The contract lawyer should not be integrated into the law firm or expected to regularly work at the firm or attend firm meetings. An independent contract lawyer should determine how much he or she will be paid for a specific project and invoice the firm for the work performed. The firm should allow the contract lawyer to set his or her own work hours. The firm should avoid excessively monitoring the work of the independent contractor or exercising control over how the work is performed. The independent contractor and the firm must agree on the specifics of the assigned project and the due date for that project, but the firm should not ask for regular status reports.

The parties should clarify that the independent contractor works for various law firms and business entities and is not economically dependent on any one firm as a source of business. While the independent contractor may work regularly with one firm, he or she must also work with other firms; the working relationship can be frequent but not constant, allowing some intervals when the contract lawyer is not doing work for the firm. The firm's financial success should not be dependent on the work of the independent contractor; for example, lawyers working in a firm cannot all be independent contractors. The contract lawyer cannot be "fired at will." Instead, the contract lawyer must satisfactorily complete the work he or she contracted to perform according to the contract specifications or be subject to the terms of the contract relating to breach of contract.

Law Firm Internal Controls

Independent contract lawyers should not be former employees who are performing the same job they had as associates in the firm, nor should they be performing the same job as other employees of the firm. If a problem arises with the contract lawyer, the problem should not be resolved as an employee issue through the human resources department, but by enforcing or modifying the terms of the contract. Contract lawyers should not typically be invited to employee functions or instructed on firm policies and procedures. They should not be asked to read or sign the employee handbook. The contract and any other information relating to the independent contractor should be maintained with the firm's vendor files, not with other

employee files. The firm must bill for the work of the contractor as a vendor, not as an employee. Moreover, the contract cannot include a non-compete agreement.

Summary

A law firm wanting to use an independent contractor should consider taking the following steps to establish and maintain the independent contractor relationship:

- **Right to Control** – The firm should provide information necessary for the contract lawyer to perform the work assignment, including the date when the work needs to be completed, but should not micromanage the “means and manner of providing the services.”
- **Scheduling** – The contract lawyer should be allowed to set his or her own work hours.
- **Location** – To the extent possible, the contract lawyer should work outside the firm.
- **Compensation** – Payment should be made on a project basis; the contract lawyer should invoice the firm for the work performed.
- **No Employee-Type Benefits** – The firm should not pay for or provide benefits such as insurance for the contract lawyer.
- **1099 Tax Form** – The firm must issue a Form 1099 at the end of the year and should never use a Form W-2.

For the contract lawyer, the overall goal is to maintain an “independently established business,” which is the test codified in ORS 670.600 and utilized by the Oregon Department of Revenue. While no single factor is conclusive, contract lawyers should consider the following steps to maintain their independent contractor status:

- **Independent Office** – Use his or her own home or business office.
- **Assignments** – Perform work on a project or assignment basis and invoice firms for the work performed.
- **Diversify** – Work for more than one firm, seeking work through appropriate legal and business publications, speaking engagements, and professional networking opportunities.
- **Business Expenses** – Pay for office expenses, staffing and copying assistance, online research tools, business cards, stationery, and other office supplies.
- **Bar and Licensing Requirements** – Pay for bar memberships and fees, CLE requirements, and business licenses.
- **Insurance** – Maintain legal malpractice insurance as required by the PLF.
- **Taxes** – Pay for income tax withholding and Social Security self-employment taxes and agree that a Form 1099 will be issued by the firm for work performed.

While there is not a bright-line test for determining whether a lawyer is an independent contractor or an employee, carefully defining the terms of the relationship between the firm and the contract lawyer will be helpful in avoiding an obvious misclassification and limiting the potential risks associated with this type of business relationship. Although this article describes the basic issues to consider, you should consult qualified employment counsel with respect to specific situations.

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ATTORNEY AT LAW

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CONTRACT PROJECT INTAKE SHEET

TODAY'S DATE _____

HIRING ATTORNEY

Hiring Attorney's Full Name _____

Firm Name _____

Street Address _____

City/State _____ Zip _____ E-mail Address _____

Telephone _____ Fax _____

Referred by _____

CONFLICT CONTROL

Names of all Parties and Potential Parties:

Name _____ Relationship _____

Name _____ Relationship _____

Name _____ Relationship _____

Name _____ Relationship _____

PROJECT INFORMATION AND DEADLINES

Nature of Contract Project _____

Work Product Format/Delivery _____

Deadlines _____

BILLING, TERMS OF PAYMENT, AND PLF COVERAGE

Hourly Rate _____ or Flat Project Rate _____

Billing/Payment Terms _____

Retainer _____ Retainer Received _____

PLF Coverage Required _____ PLF Coverage Obtained _____

Copy of File/Pertinent Documents Received _____ Letter of Understanding Needed _____

Other _____

File opened by _____ Conflicts checked by _____ Deadlines docketed by _____
Letter of Understanding sent by _____ Date: _____

SETTING YOUR RATES

What billing rates are fair and reasonable? How much can you get? This chapter tells you what lawyers across the country charge, how they set their rates, and how you can determine what rate to charge for your services.

"How much should I charge?" is the first question most contract lawyers ask. And with good reason. Setting the rate too low suggests desperation, and could turn off hiring lawyers who equate price with quality. Setting it too high might suggest arrogance and scare them away. Finding the right balance for plenty of business and a comfortable income can be an art. Here's what some of the contract lawyers we talked to charge for their services.

- *Bill Lies, a San Francisco Bay Area contract lawyer and 1982 law school graduate, earns \$60 per hour for work through an agency. But under California law he receives time-and-a-half for hours worked in excess of eight per day or 40 per week.*
- *Elizabeth Bottman has been doing contract work in Seattle since 1987. She charges \$70 per hour.*
- *Mary Jensen works out of Oxford, Mississippi. She was a law librarian and taught legal research and writing for 15 years before starting contract work in 2000. She charges \$85 per hour and stays booked at least a month in advance.*
- *Ellen Singer practiced law for 13 years in California before moving to Eugene, Oregon, in 1992. She charges \$50 per hour and up for her services.*
- *Carol Fritz, a 1996 graduate who limits her practice to document review in complex and class-action litigation, charges \$50 to \$55 per hour. She is based in Philadelphia, but takes on assignments around the country.*
- *Phil Griffin, a Portland, Oregon, contract lawyer with a background in*

**From *The Complete Guide to Contract Lawyering*
(3d Edition) Decision Books, (2004)
Deborah Arron & Deborah Guyol
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complex business litigation, charges \$75 to \$95 per hour for work he gets on his own. He is paid \$55 to \$60 per hour for work he does through agencies.

- *Eric Sarver, a 1998 graduate, charges \$75 to \$100 per hour (the latter rate for rush projects) for his work in Queens, New York.*
- *Lee Archer, an appellate lawyer based in Lake Charles, Louisiana, and on her own since 1992, charges \$100 per hour.*

We learn from this overview that the rates for contract lawyers across the country vary much less than do the rates charged by lawyers to clients.

Some contract lawyers resolve the pricing dilemma by starting low and raising their rates after they've gained confidence. This strategy can backfire, though, if your customers become convinced they can't afford to pay you a penny more than they are already paying. In addition, the tendency of many contract lawyers to ask for too little has led many hiring lawyers to expect unrealistically low rates.

When Deborah Guyol was coordinating the Oregon Women Lawyers Contract Lawyer Referral Service, a law firm asked for names of experienced contract lawyers to handle three months of full-time work on several employment cases. She referred three lawyers with appropriate backgrounds to the firm; they all turned down the assignment because the firm offered only \$35 per hour. Guyol then referred a less experienced lawyer who was willing to work for \$25 per hour. The firm turned her down as unqualified. Sometimes you just can't win!

Setting your rates too low suggests desperation; charging too much suggests arrogance.

DETERMINE YOUR LOWEST RATE

Your first step is to decide on the lowest rate you are willing to accept. This "what-you-can-live-with-rate" will not necessarily be your rate, but it's helpful to begin negotiations with a firm sense of the point beyond which a rate becomes unacceptably low so you'll be able to say "no" without hesitating.

PROJECTED ANNUAL EXPENDITURES

First, project your estimated annual costs of being self-employed, maintaining your license to practice law, and the amount you need to cover reasonable living expenses. Add 25 percent to the last figure to cover Social Security and federal

income taxes, and an additional percentage for any state income tax. You'll find forms to calculate these expenses in this chapter.

PROJECTED BILLABLE HOURS

Next, determine the number of hours you hope to bill annually. For a reasonably accurate estimate, follow these steps and complete the form in this chapter:

- *Determine the number of hours you want to devote to work each week. Note that there are 168 hours in a week. Subtract the time you spend eating, sleeping and running errands, then subtract 10 more hours for good measure, and you'll have a sense of how much time is left for work and play. Most important, decide how many hours a week you really want to spend working.*
- *Estimate the time you'll spend weekly on office administration, transition time between projects, billing, telephone interruptions and legal research dead ends, and deduct those hours from your weekly total. As former San Francisco contract lawyer Hindi Greenberg says, there's "spinning wheels" time, "getting-familiar-with-it" time and "transportation-between-things" time. Bear in mind that if you work for several hiring lawyers, you are practicing law part-time no matter what your intention; the rest of your time is spent running a business. You are your own secretary, receptionist, accountant, computer technician and gofer, as well as a lawyer. You will find it impossible to bill the number of hours a typical law firm associate is expected to bill even if you work full time, evenings and weekends. In fact, lawyers who work on discrete projects rather than long-term on-site assignments typically report that a full-time practice yields 20 to 30 billable hours per week.*
- *Add up the number of days off you expect to take for sick and mental health leave, holidays and vacations, as well as days you will be unable to bill any hours because of lack of business, attendance at CLE programs or attention to marketing efforts. Keep in mind that July, August and December tend to be slow for contract lawyers. For every five days you anticipate not working, subtract one week from the 52 weeks in the year.*
- *Multiply the net hours per week you calculated in Step 2 by the number of weeks you calculated in Step 3. This is the number of hours you expect to*

bill in a year. Subtract another 10 percent for collection and other unforeseen problems.

MINIMUM HOURLY RATE

Divide the net annual billable hour figure into your annual expenses. This is your minimum hourly rate. For example, if you project your total annual expenditures at \$60,000, and estimate that you can bill 1,000 hours in a year, your minimum hourly rate is \$60.

Another way to determine your hourly minimum is to select a tentative rate and divide it into your annual expense figure. Then decide whether the resulting number of billable hours is reasonable.

RATE-SETTING FORMULAS

Once you know how little you can charge and still cover your expenses, it's time to figure out how much you can charge and still attract business. Rate setting is a subjective process, so we can't tell you exactly what your rates should be. We can, however, give you formulas that others use, as well as this advice: Be flexible. Be prepared to charge different rates in different situations. And be brave. Don't be afraid to ask for what you're really worth.

WHAT DO OTHER CONTRACT LAWYERS CHARGE?

Most lawyers we talked to charge between \$50 and \$85 per hour, but we've heard of rates as low as \$15 per hour and as high as \$150. We don't recommend rates below \$30, even for inexperienced lawyers. Asking for less than this suggests more desperation than talent. Experienced lawyers might test their clientele by starting in the \$50 to \$60 per hour range, with an understanding that this introductory rate will be raised after the first assignment. Highly experienced specialists, selected because of their expertise, may be able to command rates of close to \$100 per hour to start.

The upper range of contract lawyer rates is still being explored. Do some research in your area to learn what contract lawyers at your experience level charge. Then experiment. You'll know you've moved too high when new customers flinch or don't call back. And, you'll know you're charging too little when you have plenty of business but aren't netting enough to support yourself. As Elizabeth Bottman says, "I figure if everybody is happy but me, my rate is too low."

Most contract lawyers are paid between \$30 and \$100 per hour.

WHAT DO YOUR POTENTIAL CUSTOMERS CHARGE CLIENTS FOR THEIR LEGAL SERVICES?

Many contract lawyers, as well as hiring lawyers, feel that a fair rule is to make the contract lawyer's hourly rate a percentage of the rate billed to the client. Law firm rates accommodate law office overhead (space, support staff, equipment and supplies), employee benefits (health insurance, sick leave, vacations, membership in such voluntary legal organizations as the ABA) and professional necessities such as malpractice insurance, bar membership fees and tuition for CLEs. There are also dollars allocated to administration, pro bono work, business development and, at least in theory, profit. The law firm using a contract lawyer who works out of her own office doesn't have these expenses loaded into the hourly rate; anything it charges above what it pays for contract services is profit (unless the lawyer supervising the work is not charging the client for oversight). The lawyer or firm can either keep the profit or pass along a discount to the client. Bear this in mind when negotiating your rates.

In the early 1990s, we suggested that contract lawyers who worked from their own offices could ask for half of the rate at which the hiring lawyer can bill the client for their time. This rate provides recompense for home office expenses and a fair reward for expertise. Contract lawyers who work on-site or are paid as employees (see Chapter 18), we suggested, should receive about one-third of the firm's billable rate. For example, the contract lawyer whose time can be billed to the client at \$180 per hour should receive \$90 per hour if she works from her own office, or \$60 per hour if she works on site and uses the hiring lawyer's equipment and support staff.

Since the early 1990s, the hourly rates lawyers bill their clients have risen dramatically, while the rates paid to contract lawyers have gone up only slightly. Thus the formula suggested above remains good in theory, but may be hard to put into practice.

In 2002, law firm billing rates ranged from \$125 per hour for first-year associates in low-end markets, to \$385 per hour for eighth-year associates in Boston. Based on these figures, junior-associate-level contract lawyers should receive at least \$60 per hour no matter where they practice. Experienced contract lawyers should command upwards of \$150 per hour. At press time, however, \$60 per hour is what agencies pay to highly experienced lawyers, and few contract lawyers anywhere charge as much as \$150 per hour.

Contract lawyers who work with former co-workers or employers tend to earn more per hour than those who work with strangers.

Despite these disparities, the rate the hiring lawyer can charge clients for your services is always a good starting point for negotiations. If you contract work from a firm in which you used to be an associate or partner, or if you work on the firm's premises, you'll know your billable rate. Other firms may have different rate structures, however, so you'll need to do research. If you're just out of law school or new in town, make questions about rates part of your initial market research.

WHAT ARE FIRMS PAYING LAWYERS WHO HANDLE THE SAME KIND OF WORK?

If you are a former employee or otherwise have access to salary information, you can ask for an hourly rate comparable to the salary plus benefits divided by average billable hours of an associate or partner in the firm with the necessary level of expertise to handle the job. You might have to settle for a rate that does not take the benefit package into account.

A partner at a large firm, accustomed to delegating the work she considers "routine" to junior associates, may want to vary the hourly rate according to the complexity of the assignment. Many contract lawyers are over-experienced for the work they are assigned. The law firm need not pay "of counsel" or partnership-level compensation to an experienced contract lawyer if the work could be handled by a junior associate. This theory doesn't apply to solo and small firm practitioners accustomed to doing everything themselves. They bill the client at the same hourly rate no matter what the task and are unlikely to think they should pay a higher rate for sophisticated or complex work — or a lower rate for routine assignments.

WHAT DO PLACEMENT AGENCIES CHARGE FOR SOMEONE AT YOUR LEVEL OF EXPERIENCE?

Ask a local placement agency what it would charge for a lawyer with the necessary background and experience to handle your job. Offer to handle the work for \$15 less per hour, assuming you have the same level of experience and credentials as the lawyers the agency is placing.

CALCULATE A REASONABLE PROFIT LEVEL FOR THE HIRING LAWYER

Ask for an hourly rate that allows the firm to retain as profit from 15 to 33 percent of the fee charged to the client, after taking into account the cost of law firm office space and support services you will be using. The higher percentage is based on the outdated notion that rates charged clients generally go one-third to associate salary, one-third to overhead and one-third to profit. The lower percentage reflects today's actual profit margins of more like 10 to 15 percent.

VARIATIONS FROM THE FORMULAS

There are no strict rules about contract lawyer compensation. No matter what formula you use and no matter what the standard rates are for services in your area, you can make arguments to increase that rate — or to consider reducing it — if any of the following variables apply.

THE AMOUNT OF RELEVANT EXPERIENCE YOU POSSESS

Experience is reflected in the rates law firms charge their clients, and it should be in yours too. The more experience you have in a particular specialty, the more efficiently and competently you will work, and the more the hiring lawyer can charge his clients for your time. If you seek assignments like reviewing documents, drafting interrogatories or responding to requests for production, however, you may not be able to command a high hourly rate, no matter how extensive your experience.

As an experienced lawyer, you can charge more for your work, although if you start off with high rates you may have to do some persuading. If you feel threatened by less experienced lawyers charging lower rates, you may be tempted to lower your rates to compete. On the other hand, lawyers who do exceptional work can pretty much set their rates as they choose. Richard Kaplan tells of a San Francisco contract lawyer, much in demand, whose rates are among the highest: "This man recognizes his competence and very high skill, and for his services I pay more than I have for others. To me it's worth it."

Earl Carulli, a St. Louis contract lawyer, handled a rush project for \$75 per hour, his usual rate. The partner who hired him was so happy with his work that he wanted to assign him additional projects — but at a reduced rate of \$65 per hour. Carulli was in a quandary; was he willing to risk losing a customer in order to get his price? Uncertain how to proceed, he showed his résumé to the hiring lawyer. When the lawyer saw that Carulli had over 10 years' experience, including five with a well-known Wall Street firm, he agreed to the higher rate.

YOUR SPECIAL EXPERTISE

Do you have significant experience in a substantive area of the law? You may not be able to limit your practice to this kind of work in a small legal market, but you could charge a higher rate for work in your area of expertise than for general assignments. For example, if you've spent the last 10 years immersed in the tax code, you can charge more to work on a tax issue than for research on a real estate transaction.

Be wary of accepting a lower hourly rate in your area of expertise when you have sole responsibility for the matter. Even if the assignment appears routine, its nature can change in mid-course. Former San Francisco contract lawyer Steve Weinstein once agreed to work for \$55 per hour rather than his usual (at the time) \$78 per hour, because the two-week assignment was represented as a routine business closing for a partner who was going on vacation. In short order, the work became radically more complex and intense than he had expected. Since it was a short assignment, Weinstein didn't feel comfortable trying to renegotiate his fee; instead, he developed a raging case of resentment for underselling his services.

You may also be able to charge more if your time is passed directly through to the client without write-off. On the other hand, if the firm frequently trims your hours, they'll probably want to keep you at the low end of the scale.

THE REQUIREMENTS OF THE PROJECT

Many contract lawyers charge higher rates for rush projects — typically those requiring a 24-hour turnaround. (If it's a big project, a week could be considered a "rush.") Some contract lawyers charge higher rates for courtroom or deposition appearances than for research and writing. Some charge more for appellate work than for work at the trial court level. With experience, you can decide which projects command premium rates. You may be willing to charge less per hour if you are guaranteed payment for a minimum number of hours weekly whether or not the firm has work for you, or if the assignment is for 35 hours or more weekly for several months. (Before you accept this type of assignment, however, consider whether handling a lengthy project for one hiring lawyer will hurt your relationships with others.) The hourly rate may be lower, but your total compensation will likely be higher than usual because you will lose little or no time to marketing, transitions from home to office and back, and other inefficiencies of small, home-based projects.

MALPRACTICE INSURANCE COVERAGE

Whether this is a factor depends on what is generally accepted where you practice. Being insured is less of an issue in California (where as many as 40 percent of the profession practices without liability insurance) than in Oregon (where malpractice insurance is mandatory except for lawyers whose work is supervised by other attorneys and who never represent clients directly). If your hiring lawyers require you to purchase your own coverage, or if they rely on you as a consulting expert, you should charge more for the added security.

THE WORK SITE

If you work on-site for a lawyer, firm or in-house counsel, there will be overhead attributable to you and your rate should be lower. On the other hand, if you work from your own office, the lawyer you work for has no overhead associated with you; you can either charge for the time you spend on administrative tasks or raise your rates to reflect the inefficiencies of this type of practice. Katherine Foldes admits that she charges for "transaction" time — the hours it takes to pick up, deliver and discuss assignments — but she attributes time spent talking about her clients' children to marketing. Deborah Guyol does not charge for "transaction" time. She figures that her high hourly rate should include some services and she often receives more work when she delivers a completed assignment in person.

YOUR PRIOR RELATIONSHIP WITH THE HIRING LAWYER

Contract lawyers who work with former co-workers or employers tend to earn more per hour than those who work for strangers. Beth Besner, who resigned from a well-respected Miami law firm to devote more time to political campaigns, was invited to return to the firm on a contract basis two years later. The partner-in-charge offered to pay her \$35 per hour. She knew that, as a fifth-year associate, \$50 was more appropriate — especially since the firm would be charging her out at \$175. When she responded with a simple, "I'm leaving," the firm met her price.

Be careful also of reducing your hourly rate for a struggling colleague. Catherine Bitterman, a West Coast contract lawyer with 12 years of general practice experience, typically charges between \$50 and \$80 per hour for her time. She agreed to bill only \$35 per hour to a solo practitioner friend who needed help but claimed to be in poor financial health. Three years later, he's the only hiring lawyer who calls her late at night to plead for help or to talk about case strategy. And her hourly rate has stayed the same; it's hard to raise rates on a financially-strapped friend who seems to be working so hard.

PAYMENT TERMS

Your rate may also vary depending upon when payment is made. One way to deal with slow-paying hiring lawyers is either to offer a lower rate for quick payment, or to charge more for delayed payment. For example, you could charge \$60 per hour if you are paid within 10 days of invoice; \$65 per hour for payment more than 10 but within 30 days of invoice, and \$75 per hour for later payment. A different approach would be to set your rate somewhat higher (especially for a hiring lawyer with a history of slow payment) and offer a discount for payment within 10 days. You could quote \$75 per hour, but offer a 10 percent discount if payment is made

within 10 days and five percent if within 30 days. Be certain to make any such agreement when you are hired, so your bill reflects the appropriate rates.

ALTERNATIVE BILLING ARRANGEMENTS

The foregoing discussions assume you are being paid per hour. There are other compensation arrangements. Commentators have been predicting (and advocating) the end of the billable hour system for years, and in some legal markets the process is well under way. To keep up with the times, consider the following alternative billing systems.

FLAT FEES

Many California lawyers contract for appearance work at flat fees of \$50 to \$100 per appearance. Flat fees can be an attractive option for hiring lawyers because they offer the advantage of predictability. Any flat fee you offer is based on your sense of how long the project will take. If you offer a flat fee, you are in essence betting that you will be able to complete the project in fewer hours than the total fee divided by your usual hourly rate. Offer flat fees only when you've had enough experience with a certain kind of project to predict accurately the time it will take, or when you're trying to attract repeat business.

Flat fees can be offered in hybrid form as well. For example, you could quote a fee based on an estimate that the project will take 25 to 35 hours. If in fact the project takes fewer than 20 hours, you charge your usual hourly rate rather than the flat fee; if it requires more than 35 hours, you charge the flat fee plus a charge for hours in excess of 35 at a lower than usual hourly rate.

CONTINGENT FEES

Good contingent fee assignments are hard to find. In our research, we discovered only one contract lawyer working on a contingent fee basis on a case that promised to be lucrative. Most hiring lawyers who do both contingent fee and hourly work manage their caseloads by handling the contingent fee cases themselves, and assigning work on hourly matters to contract lawyers. This way, the contract lawyer generates a profit for the practitioner and all the work gets done. And personal

Offer flat fees when you have a good idea how long the work will take or if you're trying to attract repeat business.

injury lawyers with thriving practices are usually willing to pay hourly rates to contract lawyers as costs advanced — like expert witness and deposition fees.

Therefore the lawyer who asks you to work on a straight contingent fee basis may have a marginal practice — or may want to hand off a case that does not look promising. Some contract lawyers who run regular advertisements report calls from personal injury lawyers who ask them to take over a particular case on a totally contingent basis. These hiring lawyers work on volume and figure they'll increase their odds of turning a profit if someone else handles the small cases and long shots. Be cautious about accepting such cases.

If you decide to try contingent fee work, follow the example of Sylvia Linscott, who handles most of her contract assignments for a contingent fee. She does not accept the assignment unless she believes there is a 99 percent chance of recovery. "I don't do it unless I've sat down with the attorney, assessed the relative merits of the case and confirmed a settlement plan, or a reasonable range of verdicts. I don't just go in cold." Her approach makes sense for contract lawyers without much hourly work. If you're willing to invest another five to 10 hours a week in a case that may not pay, you'll gain experience and exposure, develop leads and expand your market.

A straight contingent fee arrangement might provide that if the client prevails, you will receive 25 percent of the fee the hiring lawyer receives. (The percentage will

ESTIMATED COSTS OF DOING BUSINESS

	PER MONTH	PER YEAR
office rent, if applicable	_____	_____
telephone lines (business, fax, modem)	_____	_____
malpractice insurance	_____	_____
disability or income replacement insurance	_____	_____
bar association and other licensing fees	_____	_____
elective bar association dues	_____	_____
other elective membership fees	_____	_____
advertising	_____	_____
office supplies	_____	_____
office equipment upkeep and repair	_____	_____
books and subscriptions	_____	_____
on-line services	_____	_____
CLE and other programs	_____	_____
parking	_____	_____
TOTAL	_____	_____

depend on how much work you perform. It should be decided in advance. The Rules of Professional Conduct require disclosure and client consent for division of fees. See Division of Fees, Chapter 17.) One way to reduce the risk is to agree on a hybrid fee structure. You could charge an hourly rate much lower than your usual rate, payable immediately, and receive more only if the client prevails. For example, if your usual rate is \$70 per hour, you might agree to do the work for guaranteed immediate payment of \$35 per hour. If your client lost, you would receive nothing more. If he prevailed, you would receive an additional \$70 for each hour you had billed on the case, so that you ultimately received a total of \$105 per hour.

If you agree to any payment that is contingent on receipt of a settlement or verdict, file the papers necessary to associate yourself on the matter and assure that your name is included on any settlement check. Elizabeth Bottman took this precaution when she assisted at a medical malpractice trial, representing the husband in a claim for loss of consortium. "I drew up a contract in which I was to receive a low hourly rate for my time and if the husband was awarded anything for loss of consortium, I would also get a percentage fee for that," she says. "We didn't win the loss of consortium but I did end up billing about \$2,000 for my time." Unfortunately, the hiring lawyer regretted the agreement when it came time to cut the check. Elizabeth had to co-sign the settlement checks, so she agreed to meet him at the bank and exchange her signature on the settlement check for a \$2,000 check in her name. The hiring lawyer was outraged but acceded to her demand. "Afterwards, I felt kind of rotten," she admits. "But if I hadn't been paid I would really have stewed."

MINIMUMS

Some contract lawyers establish per project or per week minimums. You may want to do this if you find you are handling so many small projects that, taking transaction time into account, your effective hourly compensation is far below your stated rate. To solve the problem, charge a higher hourly rate for projects under, say, five hours, or tell your customers that you have a project minimum of three or four hours. In the alternative, imitate lawyers who charge minimum fees for depositions and court appearances — say, a floor of \$100, or a minimum of two hours at their usual rate. If the appearance takes more than two hours, they charge the time at their standard rate, but they're paid for two hours of work no matter what. Bundling several matters into one trip to the courthouse can produce a generous rate of return for the hours invested.

The issue may also arise if a law firm has asked you to keep yourself available to help them but has little or no work for weeks at a time. For such a firm, request a guarantee of, say, 10 hours per week at a discounted rate. Hours over that minimum

ESTIMATED LIVING EXPENSES

	PER MONTH	PER YEAR
mortgage payment or rent	_____	_____
real estate taxes and insurance (if not included in above figure)	_____	_____
utilities	_____	_____
household upkeep and repair	_____	_____
medical insurance	_____	_____
dental insurance	_____	_____
uninsured medical/dental expense (including deductible)	_____	_____
life insurance	_____	_____
automobile expense:		
payment	_____	_____
insurance	_____	_____
gasoline	_____	_____
upkeep and repair	_____	_____
registration/tax	_____	_____
other transportation expense	_____	_____
student loans	_____	_____
credit card or other revolving debt payment	_____	_____
IRA/pension contribution	_____	_____
food	_____	_____
daycare/tuition	_____	_____
personal expenses (haircuts, manicures, cosmetics, etc.)	_____	_____
clothing	_____	_____
gifts and donations	_____	_____
entertainment & athletic expense	_____	_____
travel	_____	_____
other _____	_____	_____
other _____	_____	_____
other _____	_____	_____
SUBTOTAL	_____	_____
federal taxes (multiply subtotal by 25%)	_____	_____
state taxes (multiply subtotal by applicable percentage)	_____	_____
TOTAL	_____	_____
add estimated costs of doing business	_____	_____
TOTAL EXPENDITURES	_____	_____

PROJECTED ANNUAL BILLABLE HOURS

1. Hours I want to devote to work each week _____
2. Hours I expect to spend weekly on:
- office administration, billing _____
 - transition time between projects _____
 - telephone interruptions _____
 - written-off time _____
 - marketing calls or meetings _____
 - bar association activities _____

total nonbillable hours _____

3. Subtract the total of #2 from the figure in #1 _____

4. Weeks I expect to take annually for:
- sick and mental health leave _____
 - holidays _____
 - vacations _____
 - lack of business _____
 - attendance at educational programs _____
 - concentrated marketing efforts _____
 - total number of weeks _____

subtracted from 52 = _____

5. Multiply the net hours per day from #3 by the net number of weeks from #4 to equal your total estimated annual billable hours:

$$\underline{\hspace{2cm}} \times \underline{\hspace{2cm}} = \underline{\hspace{2cm}}$$

6. Multiply the annual billable hour estimate by 10% and deduct this figure to reach your estimated collectible hours:

$$\underline{\hspace{2cm}} \times 10\% = \underline{\hspace{2cm}}$$

annual billable hours uncollectible hours

$$\underline{\hspace{2cm}} - \underline{\hspace{2cm}} = \underline{\hspace{2cm}}$$

annual billable hours uncollectible hours net annual billable hours

7. Divide the figure from #6 into your total annual expenditures to get your minimum hourly rate:

$$\underline{\hspace{2cm}} \div \underline{\hspace{2cm}} = \underline{\hspace{2cm}}$$

annual expenditures net billable hours minimum hourly rate

in any one week would be billed at your higher regular hourly rate. If one hiring lawyer comes to rely on your services to handle a number of very small research projects each month or quarter without ever assigning you more complex matters, you could ask for a monthly retainer based on a range of hours rather than charging per project. Some contract lawyers shy away from project minimums, on the theory that a small assignment well done may lead to larger projects or regular work from that hiring lawyer. Other contract lawyers consider those small projects a service that keeps their regular customers coming back.

RETAINERS

Contract lawyers have also discovered that retainers, especially when dealing with new hiring lawyers or for small projects, greatly help with cash flow. One contract lawyer asks for a retainer equal to the expected fee plus expenses and deposits it into a trust account. Another asks for a substantial retainer on long projects, applies half to the initial billing and states that the other half will apply to the final bill. Then, she submits weekly statements. This way, she learns whether she has a slow-pay or no-pay customer before she invests too much uncompensated time in the case.

CONCLUSION

The more work you do as a contract lawyer, the less troublesome you are likely to find questions of rates. You will gain confidence in your abilities and a sense of how valuable you are to hiring lawyers. You'll feel more comfortable negotiating and you may develop new arrangements. Please let us know if you do.