

Outsourcing Legal Research and Writing Projects

by Lisa Solomon

Why Outsource Your Legal Research and Writing Projects

Lawyers outsource legal research and writing projects for a variety of reasons. One primary reason is time: unfortunately, lawyers are not always in control of their own schedules. Deadlines—whether set by statute, court rule or judicial fiat—are ever-present.

While a large firm might simply pull an associate from one matter to work on another, more pressing, case, small firms and solo practitioners usually don't have that luxury. This makes small firms and solos particularly vulnerable to periodic "workload overload."

Some tasks—such as trials, client meetings and rainmaking—demand your personal attention; others, such as legal research and writing, do not. Outsourcing enables you to weather particularly busy periods without having to hire an employee or face time pressures that lead to lawyer stress and burnout.

Another benefit of outsourcing legal research and writing on an as-needed basis is cost. Hiring an associate requires a

As published in *Effectively Staffing Your Law Firm*
(Jennifer J. Rose, ed.; American Bar Association 2009).

significant investment in both time and money. When you outsource legal research and writing projects, you pay only for the time it takes to complete the project, but when you hire an employee, you immediately add to your fixed expenses. Searching for and training a new associate (particularly a junior-level associate) is time-consuming. Your practice may be busy enough to benefit from project-based outsourcing, but not busy enough to not support another employee. Outsourcing is a wise use of your firm's resources that can increase profitability.

Hiring an associate has other downsides that can be avoided by retaining an independent contractor to assist you with your research and writing needs. An employee adds to your administrative burdens, especially if you are a sole practitioner. Your malpractice rates will rise, and you will be subject to all the financial and legal responsibilities that accompany "employer" status. Retaining an independent contractor is much less complicated, both initially and on an ongoing basis.

In fact, outsourcing legal research and writing projects can help your firm's bottom line. With two exceptions, all of the bar associations that have addressed the issue—including, most notably, the ABA¹—have determined that a lawyer may charge the client a premium or reasonable measure of profit in excess of the research and writing provider's cost to the lawyer, as long as the total charges to the client are reasonable.² Regardless of whether or not you choose to charge your client more than you pay for legal research and writing services, outsourcing is still cost-effective for your client, since even a rate that

¹ See ABA Formal Op. 08-451 (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services); ABA Formal Op. 00-420 (Surcharge to Client for Use of a Contract Lawyer); ABA Formal Op. 88-356 (Temporary Lawyers).

² The exceptions are the Maryland Bar Association and the Professional Ethics Committee for the State Bar of Texas. However, the Maryland Bar Association did not give any reason or cite any rule in support of the position it expressed in Md. Bar Assoc. Ethics Comm. Op. 92-19 (1992), and the reasoning of the Professional Ethics Committee for the State Bar of Texas in Opinion 577 (March 2007) is questionable. See Corey L. Marrs, *Being a Contract Lawyer and How the Bar Does not Want You to Hire Me*, News for the Bar (Litigation Section of the State Bar of Texas, Fall 2007)

includes a reasonable profit to you will generally be lower than your own hourly rate.

Moreover, a lawyer who concentrates in legal research and writing can often accomplish those jobs more efficiently than a busy practitioner who may not be as familiar with the available resources or as experienced in searching large databases for sometimes elusive answers. You may already outsource other tasks to independent professionals, such as private investigators, in order to benefit from their expertise. Outsourcing frees you to use your valuable time in a way that is most efficient for you and your clients.

Finally, some lawyers simply like doing "outside" work—such as trials, depositions and client meetings—more than "inside" work, such as legal research and writing. Outsourcing frees you to do those tasks that you find most personally and professionally rewarding.

What Types of Legal Research and Writing Projects Can be Outsourced?

It is not always necessary to outsource an entire legal research and writing project. On one end of the spectrum, you may have already researched the issues and drafted a brief, but need someone to edit your work. Or you may need help with research, but want to write a brief or opinion letter yourself. Or you may prefer to delegate primary responsibility for an entire large project—including the preparation of a record on appeal, legal research and brief writing—to your provider (working under your ultimate supervision, of course). Look for a provider who will accommodate your preferred work style.

Outsourcing legal research and writing is not just for litigators. Although there are more opportunities for litigators to outsource legal research and writing work on an ongoing basis, transactional lawyers can also benefit from working with independent providers. For example, a lawyer who is drafting a contract that will be used by a business client with outlets in many states may want to know how courts in those jurisdictions will construe a particular contract provision. Or a real estate practitioner may agree to handle a litigation matter arising from a failed deal (as an accommodation to the client), but may be rusty when it comes to legal research and brief writing.

Even if you are handling a case on a contingency basis and will be absorbing the provider's fees yourself, it may still make sense to work with an independent legal research and writing services provider. Hiring a provider to work on a low-value case frees you up to devote more time to higher-value cases; conversely, an experienced provider can offer critical legal research and writing assistance in a high-value case. A legal research and writing provider can even help you decide whether or not to accept a contingency case by examining issues you have identified at the outset (such as whether a statute of limitations was tolled based on the facts of the case) or by performing a jury verdict search.

Small firms and sole practitioners in particular can benefit from the fresh perspective and critical eye that an outside researcher/writer can bring to a case. For example, sometimes it is difficult to dispassionately evaluate legal issues in a case to which you have already committed significant resources; other times an issue arises that is outside your expertise. Although chatting informally with a colleague about your case may help point you in the right direction, a legal research and writing services provider who is familiar with all of the relevant facts and has read the applicable cases and statutes will be able to analyze the issues more closely.

How to Find a Legal Research and Writing Services Provider

The process of finding the right legal research and writing services provider is no different from finding the right carpenter to build a backyard deck or IT professional to oversee your office's computer network: the best place to start is with personal recommendations. Since outsourcing legal research and writing projects has become more common over the past few years, it's likely that a colleague can recommend someone.

If the referral avenue leads to a dead end, your next step should be a web search. Since it is not necessary for the provider you hire to be licensed in the jurisdiction in which you are admitted or where the matter is venued, the pool of available providers will be fairly broad.

Just as law firms range from one lawyer to thousands, some legal research and writing services providers are solos, while others are

larger companies. If you are considering retaining a larger firm, note whether the company's website identifies the company's principals (even if it doesn't identify all the researchers).

Whether you find a provider through a personal referral or a web search, you should review some writing samples (including a sample of the type of document—such as a summary judgment brief or internal memo—that you expect the provider to draft) to ensure that the provider's writing ability meets your standards.

You should also closely examine the provider's website. Is it well-written and free of grammatical and typographical errors? Look for testimonials on the provider's website from named clients; if there are no testimonials, make sure to obtain and follow up on references.

What to Look for in a Legal Research and Writing Services Provider

Generally, a legal research and writing services provider will not become counsel of record for your client; rather, the provider will be working under your general supervision as a subcontractor to you. Therefore, it is not necessary for the provider to be licensed in your state.

A dedicated research and writing services provider should have his or her own legal research subscription plan (or access to a well-stocked law library) that includes all of the materials that you would want access to if you were doing the research yourself. Except in extraordinary circumstances or as otherwise agreed in advance, your provider should not bill you for the cost of accessing any databases or materials that are relevant to the legal issues involved.

For risk management purposes, make sure your provider carries malpractice or errors and omissions insurance. Although your malpractice policy will most likely cover you for work performed by an independent legal research and writing provider, you (or your insurance company) may wish to seek indemnification from the provider.

Best Practices for Working with a Legal Research and Writing Services Provider

As with any other type of contract, it is wise to have a written agreement with your provider. At a minimum, the agreement should include provisions: (1) requiring the provider to maintain the confidentiality of any and all client information the provider learns while working on matters for you, to the same extent as if the provider had an attorney/client relationship with your clients; (2) establishing the basis for and amount of payment to the provider (e.g., \$150 per hour or \$3,000 to research and draft a particular motion); and (3) addressing how disbursements will be handled (for example, will the provider advance expenses for appellate printing, or will you pay those expenses directly?); and (4) setting forth the choice of law and forum in the event that a dispute arises.

If the provider is billing on an hourly basis, you may want to receive regular progress reports (for example, you may ask that the provider discuss the project's status with you at the 10-hour mark). You can also instruct the provider not to spend more than a certain amount of time on a project. Although such an approach will make the provider's total fees more predictable, the project may not be completed within the allotted time. (To ameliorate this risk, you may wish to negotiate a flat fee for the entire project.) Once you have established a relationship with a provider who has demonstrated the ability to complete projects to your standards in a timely and efficient manner, you may find it unnecessary to use these monitoring techniques.

You may enter into a broad agreement designed to set the ground rules for work on an unlimited number of current and future matters, or a more limited agreement that applies only to one matter. If you enter into a broad agreement, make sure that you specify the scope of each particular project in writing at the outset of the project.

A critical part of establishing a project's scope is to clearly define the research issues. It is also important, however, to be open your provider's input, since initial research may sometimes enable the provider to identify other issues that impact your case. Your provider should bring these issues to your attention and obtain express authorization to go beyond the initial project scope before proceeding.

The give-and-take extends to the writing process. It's wise to discuss major substantive changes to a document your provider has drafted, since drafting decisions are premised on the provider's analysis of the issues. Any divergence between your analysis and/or conclusions and the provider's may indicate a weakness in the case that merits further exploration. Additionally, if you're working with an experienced writer, you will benefit from being open to his or her feedback on your writing style.

Although some legal research and writing services providers insist that the hiring attorney not reveal the identity of the ultimate client, it is much more efficient for solos and small firm lawyers to be able to freely share all information when working on an outsourced project than to have to redact documents. Assuming that you will be sharing all relevant information about each case with the services provider, you and the provider should treat conflicts issues as if the provider were an employee of your firm.

While you certainly can ask a provider to perform work at your office, the vast majority of providers do not work on-site. Free or cost-effective technologies such as Basecamp (a turnkey intranet service) and YouSendIt.com (which allows you to send large files over the internet) allow you to easily collaborate on document-intensive projects (such as a summary judgment motion in a hotly contested case). Even if you end up sending hard copies of documents to your provider, the shipping cost will be far outweighed by the financial benefits both you and your clients can obtain by outsourcing legal research and writing projects.

The provider should be willing and able to deliver exactly the type of work product you need. On one project, you may only need the provider to e-mail you the relevant cases he or she has located; in another matter, you may ask the provider to draft a summary judgment motion. The provider should also be able to deliver results to you in your preferred word processing format.

Other Ethical Issues in the Outsourcing Relationship

In addition to the issues of billing, conflicts and confidentiality that are briefly discussed above, other ethical considerations are relevant to the

outsourcing relationship. One important issue is the hiring attorney's duty to adequately supervise and oversee the provider's work. Although this chapter presumes that your provider is admitted in at least one U.S. jurisdiction, any provider who is not licensed in your jurisdiction will be considered a "non-lawyer" under your state's ethical rules. And, of course, even if you are working with a provider who is admitted in your jurisdiction, you retain the obligation to adequately supervise the provider—just as you would bear the responsibility to oversee and supervise an associate. (If you prefer not to maintain this responsibility, you may want to consider a referral or co-counsel relationship instead of an outsourcing relationship.)

Another question is whether you must disclose to the client your use of a legal research and writing services provider. Although, under ABA Op. 88-356, a hiring lawyer is not required to disclose the use of a contract lawyer or obtain the client's consent to such an arrangement where the contract lawyer is working under the direct supervision of a lawyer associated with the firm, disclosure is required if the contract lawyer is performing independent work for a client without the close supervision of a lawyer associated with the firm. Furthermore, many state and local bar associations have issued ethics opinions requiring disclosure under some circumstances, and others mandate disclosure under all circumstances. Thus, the safest route (particularly if you practice in a state that has not issued a governing ethics opinion) is to disclose, and obtain the client's consent to, your use of a research and writing specialist. If you will be billing an experienced provider's services to your client at a rate lower than your own, this process can actually be an opportunity to demonstrate your commitment to achieving the best possible result for the client at the lowest cost.

As long as the provider is not working on a contingent basis, you are not required to disclose the billing arrangements between you and the provider; in other words, you do not need to reveal the amount of profit you are making (assuming that you mark up the provider's bill). This position makes sense: after all, if an associate (*i.e.* your employee) was working on a client's matter, you would not be obliged to reveal the associate's salary to your client.