



WHEN ALTERNATIVE STAFFING MAKES SENSE

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I am frequently asked by solo and small firm lawyers when they “know” it is time to hire another lawyer or paralegal. I have come to realize there are two schools of thought at each end of a continuum. First are those who find they have too much work on their plate, and will make a “leap of faith” to hire even though they may only have sufficient excess work to partially fill the plate of a lawyer or paralegal. These are people who are willing to take risks. They have confidence in their ability to continue to grow their practice; particularly if they are relieved of some of their workload so they have additional time to market. They also realize that hiring is not an overnight process; it requires time and attention to detail to do it right.

At the other end of the spectrum are those who are afraid to commit to the overhead of a new hire until they are certain they have sufficient work in the pipeline to keep the new person fully utilized. These attorneys will wait until they are at or past the point of risking malpractice before committing to hire. Unfortunately, at the point the decision to hire is made, the need is urgent, and the available time to do it right is no longer available. Without a great deal of luck, hiring decisions made under such circumstances rarely work out.

As one can imagine, either end of the spectrum is risky. If I had to pick a preference for one end of the extreme, it would be the former and not the latter. The former poses greater financial risk to the firm, as well as embarrassment if work falls off or fails to materialize, in which case a new hire may have to be let go. This could be interpreted in the community – and often is – as a sign that the lawyer’s practice is at risk of failure or is not doing well. However, having the pressure of a plate to fill is frequently a necessary incentive for some attorneys to actively market their practice.

At the other extreme, there is the risk of a sharp decline in client service, and a significant increase in malpractice exposure. Either can and will have an ongoing negative impact on incoming work volume and success of marketing efforts. One must also question whether the trade-off in quality of life, and heightened stress level is worth it.

The same questions regarding cost effectiveness and need arise when it comes to adding staff. Can I afford a secretary? Can I afford a bookkeeper? Will a paralegal be an investment or expense? How skilled a person can I afford, compared to what I need?

Fortunately, I am frequently able to counsel attorneys on a viable alternative. Whereas alternative staffing arrangements used to be the exception to the rule, they are now a mainstay – and growing – method of staffing.

The multiple technology solutions available to seamlessly incorporate telecommuters and virtual workers, along with a wealth of talented professionals and staff who desire non-traditional work arrangements, such as independent contractors, now makes it possible to hire someone of higher skill and experience than one might otherwise afford, and to employ them only for the time actually needed to meet client demands, and run the office smoothly.

Large firms have been trimming overhead and improving profit margin by embracing this new employment model. By utilizing independent contractors, telecommuters and virtual office workers, they significantly reduce space requirements – often one of the highest overhead factors. Similarly lowered are benefit costs, and wages for hours not utilized. Firms are able to maintain greater flexibility to ramp up for increased workflow or scale back due to diminished demand, without the associated hiring costs, or resorting to layoffs and any negative publicity which might raise eyebrows or encourage speculation in the marketplace.

Kenneth A. Roos, Esquire, administrative partner at Wisler Pearlstine, LLP in Blue Bell, Montgomery County, says “We used an independent contractor when we were ramping up an existing practice area. The individual was a highly skilled writer and incredibly knowledgeable. We fully disclosed the nature of our relationship to our clients. It enabled us to quickly access skills and knowledge and deliver a superior product to our clients in a cost effective manner.”

In order to utilize alternative staffing to fill your needs, there are some concepts you need to understand, and some preconceptions you need to modify or let go.

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Probably the most challenging obstacle right now is the perception by the remaining baby boomer generation which assumes there is only work being done when there is “meat in the seat.” In fact, this attitude is still so strong, that many attorneys who would otherwise opt for an alternative work arrangement are afraid that “out of sight is out of mind” where promotions are concerned. One article I read on the topic said something to the effect that “the promotions go to the person with the great personality who entertains everyone in the break room, rather than the extraordinarily productive virtual worker than no one really knows.” While making partner is never that simplistic at a law firm, some firms make it clear that one must be onsite full time to have a chance at the brass ring.

The reality is that those working from home are often more productive than their in-office counterparts. It’s not difficult to make a strong case that an off-site attorney can be more productive, and therefore more profitable, than one on-site. And that’s consistently confirmed by studies. Why?

- Lack of commute provides more time to work. Some who commute by train or bus get work done while in transit, but productivity isn’t the same. Confidentiality issues alone make it difficult to be as productive in a public setting.
- Saved time not having to get properly attired each day adds up. Of course some people are faster than others. Surprisingly, gender doesn’t necessarily determine how much time. Regardless, if the time is invested in work, that’s another significant boost in productivity.
- Fewer distractions outside the office can provide greater ability to concentrate and complete complex assignments. The assumption is that virtual office workers or telecommuters are sufficiently disciplined to avoid a different set of potential distractions. However, in the office environment there is little control over people popping their heads in to chat about a case or personal matter. It is difficult not to engage in hallway conversations and impromptu celebrations without becoming known as the office curmudgeon. Noises in the hallway or next door office are unavoidable. All of these are part and parcel of being in an office environment.
- Flexible work hours enables people to concentrate work hours during the time(s) of day when they are most effective. Elimination of an artificial work schedule means the employer benefits from paying for intensely productive hours rather than relatively unproductive hours.



- Work tools are available 24x7, whereas the office worker may only have necessary tools available while at the office.

Alternative staffing arrangements have additional benefits. For example, a small firm struggling with space allocation issues may continue to support an expanding client roster without a corresponding expansion in office space. Another example is a strong staff member whose spouse gets transferred to another geographic location, but can remain a loyal and productive staff member. In fact, this scenario was one of the first hot line challenges I resolved when I joined PBA.

Management is another issue which bears consideration. It may be relatively easy to feel comfortable with a professional working remotely. Yes, there are some considerations which I will briefly discuss further in the article. But because one can easily measure productivity in billable hours, and calculate the profitability of the arrangement just as easily, trust builds quickly. For support staff, however, it can be far more difficult to assess productivity as compared to wages. Only clearly defined expectations helps management monitor and build the necessary trust. There is a tendency for managers to micro-manage remote workers, especially when expectations are vague.

Thus far discussion has focused on work which would and could be done by virtual office workers, telecommuters, and independent contractors. I will return shortly to differentiating each and focusing a bit on special considerations related to each. But before doing so, let's also think about outsourced and virtual services. Law firms have embraced many of these for years. The more functionality that can be outsourced, the more focused the law firm can be on its core function of providing skilled legal service to clients in a timely manner. Outsourced service may include any of the following: (provided onsite or offsite)

- Bookkeeping / billing / receivable management
- Receptionist / transcriptionist
- Copy & mail services
- Courthouse filings
- Research databases
- Discovery services / litigation support
- Client intake screening and scheduling
- Office management / HR management
- Payroll and tax filings
- Paralegal services
- Benefits management / retirement plan management
- Computer infrastructure / computer maintenance

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- Marketing services
- Records management and destruction
- and more

Utilization of outsourced services makes sense when the firm would otherwise need to employ someone to perform the same function, particularly if a high degree of expertise were needed, or if the cost would be higher in-house, or if turnover were likely to occur regularly, and/or oversight by lawyers would be regularly required for in-house but not when outsourced. It also makes sense when the service need is either infrequent or disproportionately high.

Nina Cunningham, Ph.D. is an affiliate with Altman Weil consulting and President and CEO of Quidlibet Research. In an article entitled “Is Outsourcing an Opportunity for Law Firms?” she states, “There are specialized firms today that provide temporary lawyers, expert witnesses, legal research and brief writing, and e-discovery among other things. It is well known that people who do one thing extremely often and extremely well can perform a service better and faster than a cheaper in-house staffer who is only occasionally faced with certain problems to solve.”

Small firms often have difficulty retaining people in-house when their compensation and/or benefit package is modest. Outsourcing can provide a better quality of service without the related employment issues. Although the expense may seem higher than hiring someone in-house, when you take taxes, benefits, turnover, and management time for compliance, training and oversight into account, it’s often less expensive to outsource and pay only for what you need.

What differentiates virtual office workers, telecommuters, and independent contractors? Opinions and definitions can vary.

Telecommuters are the easiest to define. They are employees of the firm who work some portion of their allotted hours from a home-based office. They do *not* work for other employers, because if they did they would be independent contractors. They may be full or part-time in total hours. They will be required to attend functions, like meetings at the office, and to abide by office policies and procedures.

Typically telecommuters in law firms are owners or associates. Less frequently they are managers or support staff. As mentioned previously, repeated studies



show that telecommuters are highly productive, and usually more loyal to employers. Law firms which permit telecommuting should have written policies covering such things as

- Working hours – defining and reporting
- Work space safety and confidentiality of work product within the work space
- Eligibility and any maximum length of telecommuting arrangement
- Equipment, furniture, internet and telephone access: what the firm supplies, what the firm reimburses for, and what the firm remotely supports
- Employee privacy and the firm's right to inspect the home work space for compliance with safety and confidentiality requirements
- Insurance for workers compensation, liability, property, and any other such considerations

Remember that a telecommuting policy can't discriminate within the same category of employee. You can make it available only to associates, for example, but you can't make it available only to female associates. Wage and hour rules apply the same as for onsite workers. Non-exempt workers still qualify for overtime, and hours must be recorded regularly. Consistent use of a time-reporting system is highly recommended. Generally, when an employee works from home, the laws of the state in which the home is located are those that apply.

For many firms, allowing telecommuting will be more the exception than the rule. Such is the case with Wisler Pearlstine's accounting person, Kevin Roos explains. "She works half her hours from home. Her considerable talents make us willing to allow her to do so."

Telecommuting arrangements are not without challenges. Managers must allow greater flexibility in scheduling meetings. Better communication is required to make meetings productive. Telecommuters may struggle to maintain separation of work and personal life at home. Technical problems are more challenging and frustrating for telecommuters if remote support is not readily available. Successful telecommuting requires significant organizational skills to ensure that any essential materials are at the right location at the right time.

Independent contractors, by definition, are *not* employees of the firm. They may perform some, all, or none of their work onsite. Frequently they work for more than one firm. Typically they come self-equipped with whatever equipment they will need to accomplish their assignment. They are expected to have all the requisite



knowledge and skills necessary to provide the required services. Although they are relied upon to meet assignment deadlines, they will determine their own work schedule and priorities. Attorneys who are independent contractors are usually referred to as “contract attorneys.” Whether attorney or staff, independent contractors do not qualify for any employee benefits, nor are they subject to payroll taxes. They must be issued a 1099 if they are paid \$600 or more in a calendar year.

Law firms and businesses tend to frequently err by misclassifying employees as independent contractors. Duane Morris attorneys Steven M. Packer and Brian K. Adams present the risks and considerations in their article entitled “Law Firms Employing ‘Independent Contractors’: Beware” which appeared in the October 10, 2011 issue of The Legal Intelligencer. They wrote, “This is an area the Internal Revenue Service closely monitors. Rest assured, the IRS will aggressively pursue collection activities against firms that inappropriately classify employees as independent contractors, and consequently fail to remit payroll taxes as required by law. . . . While no uniform definition of ‘employee’ exists, a worker generally is considered an employee for federal tax purposes if the employer has the right to control and direct the worker regarding the job assigned and related performance. . . . When a worker provides his or her own tools to perform job functions, it generally indicates that the worker is an independent contractor.”

If you are not sure if someone is actually going to pass muster as an independent contractor from the IRS’ perspective, consult with a tax professional. You can feel relatively confident about the classification with a combination of some of the following factors:

- A written contractor agreement
- A contractor who independently works for firms other than just your firm
- A contractor who controls his/her sources of revenue, pays his/her own business expenses, and earns profit independent of what you pay
- A contractor who provides his/her own tools to get the job done
- No requirement that the work be completed primarily at your office using your equipment and personnel
- Is self-insured for personal and professional liability

Last and most difficult to define are virtual workers. Lawyers’ definitions vary among those who consider themselves virtual workers. Opinions as to what defines a virtual lawyer or law office (“VLO”) are varied and strongly held among members of the ABA Law Practice Division eLawyering Task Force. Broadly, the definition on the website (<http://apps.americanbar.org/dch/committee.cfm?com=EP024500>) states “eLawyering is doing legal work - not just marketing - over the Web.

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Practitioners have found new ways to communicate and collaborate with clients and other lawyers, produce documents, settle disputes, interact with courts, and manage legal knowledge. ELawyering encompasses all the ways in which lawyers can do their work using the Web and associated technologies.”

Beyond this broad brushstroke there is disagreement. Some feel that all legal services must be delivered virtually to meet the definition. Some feel that secure client portals must be employed. Some cite a requirement to provide unbundled legal services. Yet others contend that a virtual lawyer is merely one who has no brick and mortar office.

For the purposes of this article, which is written to identify alternative methods to cost-effectively obtain lawyer and staff services in support of client needs, we need only view a virtual worker as someone who works without traditional borders. It may be either a virtual employee, or virtual independent contractor. The key consideration from your perspective is that geography need not limit their availability to fill your needs.

One example is what is commonly referred to as a snow-bird, otherwise known as the attorney who is fortunate enough to move to warmer climates for the winter, or even permanently. If he or she is licensed to practice in PA, and has the expertise you need, there is no reason they cannot assist you on client assignments. The client need only be informed. Another example is the staff member who must relocate due to a spouse’s employment situation. He or she can still remain your employee while working on a virtual basis. Think of it as a telecommuter who never shows up at the office.

In both instances, technology makes seamless and secure delivery of services possible. For the virtual employee, you will provide and manage most if not all of the technology. For the virtual independent contractor, you will utilize technology on your end to ensure seamless and secure delivery. For both, you will need to take into consideration what your requirements will be for the virtual worker’s environment, much the same as with a telecommuter.

Let’s acknowledge that alternative staffing may well be outside your current comfort zone. However, when you have a need for additional professional or support help at your firm, your need may not fit a “traditional” hire. Perhaps the work ebbs and flows. It may require a small number of hours over a long period, intermittent hours, a short-term of intense assistance, or specialized expertise you don’t want to



pass off to another firm. You may need a level of competence which is unaffordable on anything but an hourly basis. Or perhaps not available in your geographic location. In fact I frequently hear lawyers lament, “No one with the education and expertise we need wants to practice in our geographic location.” That doesn’t mean that an independent lawyer located elsewhere in PA can’t provide the assistance you need, for as many or as few hours as you need, on a virtual basis.

PA has a large number of attorneys who have varying skill levels and areas of practice concentration who are out on their own – voluntarily or involuntarily – and looking for work. Many only want to, or are only able to work limited hours. Many want to work from home or anywhere they travel. Some have big firm experience. Most are priced reasonably so that you can make a decent profit on their work.

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