flexlegal

HOW TO GUIDE:

BILLING OUT & MARKING-UP

FLEX FREELANCE LAWYERS' FEES TO CLIENTS*

By

Flex Legal Network Inc.

2019

*This Guide is for informational purposes and guidance only and does not purport to be legal advice.

TABLE OF CONTENTS

*This Guide is for informational purposes and guidance only and does not purport to be legal advice.

INTRODUCTION

The practice of law is changing, and with the emergence of the "gig economy" freelance lawyering arrangements are quite common and are welcomed by most cost-conscious lawyers and clients.

With the improvement of technology, outsourcing overflow legal work to freelance lawyers has become accessible to many solo, small, and mid-size firm lawyers who lack the resources to hire an on-site lawyer. There are several benefits for hiring lawyers and for freelance lawyers looking for a non-traditional way to practice law.

However, with this innovative and non-traditional practice of law, many questions arise with respect to professionalism and legal ethics. We have written blog posts on the ethics of freelancing including on the Duty of Confidentially and Conflicts of Interest. This guide focuses on the ethics of marking-up or adding a surcharge to the cost of a freelance lawyer when billing to the client.

THE SHORT ANSWER

Lawyers and law firms who hire Flex's freelance lawyers, often ask: "How do I bill out the freelance lawyer's time or cost to my client?" The short answer is that there are several options for the hiring lawyer to choose from:

1) pass the direct cost of the freelance lawyer to the client as a **disbursement** (although our courts discourage categorizing a freelance lawyer's cost as a *disbursement* when seeking a costs award, or on a costs assessment, noting that they should be characterized as *legal fees*, discussed below);

2) pass the cost of the freelance lawyer on to the client as **legal fees at the same rate** the hiring firm or hiring lawyer paid the freelance lawyer;

3) pass the cost of the freelance lawyer on to the client as **legal fees and mark-up the rate paid by the hiring firm or hiring lawyer** (note: you cannot mark-up a disbursement); or

4) the hiring lawyer absorbs the cost themselves.

The most common question we receive is with respect to #3: is it ethical for the hiring lawyer to mark-up the freelance lawyer's legal fees before passing them on to the client?

After reviewing the analysis and research below, we've concluded that nothing in the *Rules of Professional Conduct*, legislation, or case law prohibits a mark-up of a freelance lawyer's fees as long as the marked-up amount is passed on as legal fees, and not a disbursement. The overarching principle and governing rule being that the ultimate legal fees charged to the client must be "fair and reasonable".[1]

This makes sense, as there is no denying that *employee* associates are a law firm's main profit centre. It would be unfair to prohibit lawyers or law firms who cannot afford (or who do not need) full-time *employee* associates from using *independent contractor* associates (i.e. freelance lawyers) as profit centres. In both scenarios, the *employee* associate and the *independent contractor* associate (freelance lawyer) are working under the supervision of a lawyer or law firm that is taking responsibility for the work completed by the associate. Admittedly *employees* have corresponding overhead costs that independent contractors do not, however, law firms mark-up employee associates' rates *above and beyond* those costs. Bottom line: the employment relationship between the associate and the hiring lawyer or law firm should have no bearing on the ultimate fee that the client pays for that associate's time.

[1] See Rule 3.6-1 of the *Rules of Professional Conduct:* "A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion."

It is less clear whether a hiring lawyer must obtain *consent* from the client before marking-up a freelance lawyer's fees.

Once again, nothing in the *Rules* or in case law advises that clients must consent to any fee mark-up. This is understandable as law firms with *employee* associates are not required to seek consent from their clients to bill out their associate's time at $350/hr when that associate is taking home only $90/hr.

However, there is a 20-year-old comment in a letter (discussed below) from the Professional Conduct Committee of the Law Society of Upper Canada (now the Law Society of Ontario) advising that the mark-up must be *revealed* to the client and the client *must consent*. Respectfully, we disagree with this position. The compensation paid by the hiring firm to their associates (either full-time or freelance) is "irrelevant"[2] and the overall concern should be whether the fee charged to the client is "fair and reasonable". Requiring lawyers and firms who use independent contractor lawyers (often solo and small firm lawyers) to meet the additional burden of revealing the mark-up and seeking out their client's consent (something large firms are not required to do) is unfair and discriminatory.

However, despite disagreeing with the position, in order to be in full compliance with the only commentary from the Law Society on this issue, we recommend obtaining the consent of the client before marking-up the fees. Hiring lawyers already need consent from the client to engage the freelance lawyer and to provide the client's confidential information to the freelance lawyer. When obtaining this preliminary consent (most often in a clause in the initial retainer) the hiring lawyer can add a reference to the mark-up (a sample is provided below).

[2] See *Willowrun Investment Corp. v. Greenway Homes Ltd.* (1987), 21 CPC (2d) 129 (Ont HC), [1987] OJ No 803, appeal dismissed [1987] OJ No 1020 (CA) (discussed in detail below).

THE LONG ANSWER (ANALYSIS AND RESEARCH)

Below is a summary of our research and findings:

Guidance from Law Societies / Bar Associations

There is a dearth of commentary in Canada on this topic. However, in the United States several state bar associations and the American Bar Association (the "ABA") have issued opinions on this issue. These opinions can be helpful to lawyers in Canada as our *Rules of Professional Conduct* and the ABA's *Model Rules of Professional Conduct* are very similar.[3] Both Canadian and American sources are outlined below:

Canada

To date, the Law Society of Ontario (LSO) has not released a formal opinion or practice guideline on this issue. Nevertheless, a letter written by the LSO in 1997 with respect to this issue is available online (but not on the LSO's website). The letter is from a Senior Counsel of the "Professional Conduct Committee" and it states that:

> The Professional Conduct Committee has in the past commented on such a practice. The Committee said [grossing up a freelance lawyer's fees] was in order as long as **it was revealed to the client and the client consented**. **The justification for the gross-up is the fact that the lawyer or law firm is taking responsibility for the work** done by that contract lawyer or law student. [emphasis added].[4]

On September 5, 1996, the Ethics Committee of the Law Society of British Columbia released a comment on: a) whether a freelance lawyer's services should be billed to the

[3] See the ABA's *Model Rules of Professional Conduct*, online: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ and the Federation of Law Societies of Canada *Model Code of Professional Conduct*, online: https://flsc.ca/interactivecode/

[4] See the letter online: http://www.virtualassociates.ca/links/PDF/Law%20Society%20of%20Upper%20Canada.pdf Accessed on June 6, 2019. The letter also confirms that the freelance lawyer arrangement does not offend Rule 3.6-5 regarding the "Division of Fees".

client as *fees* or a *disbursement,* and b) whether the hiring lawyer can *mark up* or add a *surcharge* to the account.[5]

The Ethics Committee concluded that there is no "straightforward answer" to the question of whether the charges of a freelance lawyer[6] should be re-billed as a ***fee or a disbursement***. The important question was whether the charge was disclosed to the client pursuant to Chapter 9, Rule 7 of British Columbia's then in-force *Professional Conduct Handbook*. The then-in-force Rule 7 dealt with "Hidden Fees" and stated: "A lawyer must fully disclose, to the client or to any other person who is paying part or all of the lawyer's fee, any fee that is being charged or accepted."

The Ethics Committee also opined that it was not necessarily improper for the hiring firm to ***mark up or surcharge*** the account of the freelance lawyer:

> Surcharges are proper in circumstances where the lawyer or law firm incurred expenses in contracting for the work of the contract lawyer, **added some value to the work of the contract lawyer or where the client has agreed in advance to the payment of the charges**.[emphasis added][7]

A second comment on grossing up or marking up freelance lawyers' bills was made by the Law Society of British Columbia's Ethics Committee on February 2, 2006.[8] In this commentary the Ethics Committee opined that when costs associated with legal services of a freelance lawyer are billed to the client as *fees* for legal services, the amount that may be charged for those services is governed by the requirement of

---

[5] Law Society of British Columbia, Ethics Committee Minutes, September 5, 1996 re "CHAPTER 9: TREATMENT OF CONTRACTOR'S LEGAL FEES WHEN BILLING THE CLIENT", online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/ec/96-09(3).pdf

[6] The comment was related specifically to a freelance research lawyer.

[7] Law Society of British Columbia, Ethics Committee Minutes, September 5, 1996 re "CHAPTER 9: TREATMENT OF CONTRACTOR'S LEGAL FEES WHEN BILLING THE CLIENT", online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/ec/96-09(3).pdf

[8] Law Society of British Columbia, Ethcis Committee Minutes, February 2, 2006 re "CHAPTER 9: GROSSING UP RESEARCH CHARGES" online https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/ec/06-02(5).pdf

Chapter 9, Rule 1 of the British Columbia's (then in force) *Professional Conduct Handbook* that a lawyer's fee "shall not be excessive".

The Committee went on to note that where the hiring lawyer incurred expenses in contracting for the work of the freelance lawyer, reviewed the freelance lawyer's work or otherwise added some value to the work of the freelance lawyer it is proper for the recipient lawyer to bill the client for those expenses or that work, provided the charges are reasonable. The Committee also confirmed that any such charges though "must be clearly disclosed to the client and where the charge is for value added to the work of the contract lawyer by the recipient lawyer, the recipient's lawyer's work should properly be billed to the client as a fee, not a disbursement."[9]

It should be noted that BC's *Handbook* (upon which these comments were based) was replaced by the *Code of Professional Conduct for British Columbia* in 2013 which effectively adopted the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (also adopted by Ontario). No new commentary has been provided from the Law Society of British Columbia since the new *Code* came into force.

Further, no other law society or legal regulator in Canada has made public any opinion on the topic of marking-up freelance lawyer's fees.

The United States

A few years after the LSO's letter, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 00-420 "*Surcharge to Client for Use of a Contract Lawyer"* on November 29, 2000.[10]

---

[9] Minutes, Ethics Committee, Law Society of British Columbia, February 2, 2006 re "CHAPTER 9: GROSSING UP RESEARCH CHARGES" online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/ec/06-02(5).pdf

[10] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 00-420 "*Surcharge to Client for Use of a Contract Lawyer"*, November 29, 2000 http://www.qplegal.com/ABA_Opinion_00-420.pdf ("Formal Opinion 00-420").

The conclusion of the opinion was that when costs associated with legal services of a freelance lawyer are billed to the client as *fees* for legal services, "a surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client",[11] referring to Model Rule 1.5(a) that a lawyer's fee shall be reasonable:

> Subject to the Rule 1.5(a) mandate that a "lawyers fee shall be reasonable", **a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services**. This is true whether the use and role of the contract lawyer are or are not disclosed to the client. **The addition of a surcharge above cost does not require disclosure to the client in the circumstance,** even when communication about fees is required under Rule 1.5(b).[12] [emphasis added]

In 2008 ABA reaffirmed Formal Opinion 00-420 in Formal Opinion 08-451[13] which required lawyers to disclose to clients the use of freelance lawyers though *not the amount of the surcharge*. Formal Opinion 08-451 explained:

> In Formal Opinion No. 00-420, we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. **This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers.** The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, **and also earns a profit from his services**; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. **Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable.** [emphasis added][14]

---

[11] Formal Opinion 00-420 at p 1.
[12] Formal Opinion 00-420 at p 6.
[13] American Bar Association, Standing Committee on Ethics and Professional responsibility, Formal Opinion 08-451, "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services", August 5, 2008 https://www.americanbar.org/content/dam/aba/migrated/ethics2020/pdfs/ethicsopinion08451.authcheckdam.pdf ("Formal Opinion 08-451").
[14] Formal Opinion 08-451 at p 5-6.

When a freelance lawyer's services are billed with the hiring lawyer's services as fees for legal services, the client's reasonable expectation is that the hiring lawyer has supervised the work of the freelance lawyer or adopted the work as his or her own.[15] Thus justifying the up-charging of the legal fees as long as the overall fee billed to the client is "reasonable".

Paragraph (a) of Model Rule 1.5 (Fees) provides the overarching requirement that a lawyer's fees shall be "reasonable" and sets forth a list of factors to be considered (similar to the factors set out in the Federation of Law Societies of Canada's *Model Code*). The Formal Opinion notes that:

> Certainly, the absence of a specific reference to a lawyer's profit in Rule 1.5 cannot reasonably be read to prohibit a lawyer from including a profit factor in her fees. It is implicit in Formal Opinion 93-379 **that profit from providing legal services is expected and appropriate**, as long as the total fee is reasonable.[16]

However, the ABA also concluded that if the hiring firm passes the cost of the freelance lawyer through to the client as a *disbursement*, no markup is permitted. Where billed as a disbursement, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the freelance lawyer's services.[17] In the absence of disclosure, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to the third persons made by the lawyer on the client's behalf, unless the lawyer herself incurs additional expenses (also if a lawyer receives a discount that discount must be passed onto the client).

[15] Formal Opinion 00-420 at p 2.
[16] Formal Opinion 00-420 at p 3.
[17] Formal Opinion 00-420 at p 1.

The ABA Formal Opinion also noted that whether the cost of the freelance lawyer is billed as a *disbursement* or included in the legal services *fees* is not addressed by the Model Rules and "does not seem to be a matter of ethics".[18]

Noting however that when a freelance lawyer's services "are billed with the retaining lawyer's as **fees for legal services**, however, the client's reasonable expectation is that **the retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own**."[emphasis added][19]

The ABA and several state bar associations[20] have concluded that it is ethical and allowable for lawyers to mark-up the cost of freelance lawyers so long as the overall fee to the client is "reasonable" and characterized as legal fees and not a disbursement. Further, there is no obligation on the lawyer to tell the client that they are making a profit by marking-up the freelance lawyer's fees.

Guidance from the Courts

Below is a summary of case law where our courts have commented on the use of freelance lawyers or independent contractor lawyers in Canada. While these cases do not discuss how the hiring lawyer should bill out the freelance lawyer's time to the client, they discuss the recoverability of the freelance lawyer's fees from the opposing party when the client is successful in litigation. Accordingly, the cases below are costs endorsements or cost assessment cases.

[18] Formal Opinion 00-420 at p 2.
[19] Formal Opinion 00-420 at p 2.
[20] *See* Va. Legal Ethics Op. 1712 (July 22, 1998); Va. Legal Ethics Op. 1735 (Oct. 20,1999); Va. Legal Ethics Op. 1850 (Dec. 28, 2010); 2007 N.C. Formal Ethics Op. 12 (Apr. 25,2008); Fla. Ethics Op. 07-2 (Jan. 18, 2008); Fla. Consol. Ethics Ops. 76-33, 76-38 (Mar. 15,1977); Ala. Ethics Op. RO-2007-03 (May 18, 2007); Alaska Ethics Op. 96-1 (Jan. 13,1996);Cal. Formal Ethics Op. 1994-138; Colo. Formal Ethics Op. 105 (May 22, 1999); D.C.Ethics Op. 284 (Sept. 15, 1990); Ga. Formal Advisory Op. 05-9 (Ga. Sup. Ct. Apr. 13, 2006);Ill. Advisory Op. on Prof'l Conduct 92-07 (Jan. 22, 1993); N.H. Formal Op. 1995-96/3 (Nov.8, 1995); N.Y. City Formal Op. 1989-2 (May 10, 1989); N.Y. State Ethics Op. 721 (Sept. 27,1999); Ohio Advisory Op. 2009-6 (Aug. 14, 2009); Pa. Informal Op. 97-20 (Sept. 19, 1997); Phila. Ethics Op. 2010-4 (May 2010); S.C. Ethics Advisory Op. 91-09 (July 1991); S.C. Ethics Advisory Op. 96-13 (1996).

Upcharging

The case of ***Willowrun Investment Corp. v. Greenway Homes Ltd.*** **(1987), 21 CPC (2d) 129 (Ont. HC), [1987] OJ No 803, appeal dismissed [1987] OJ No 1020 (CA)** was an appeal of a Master's decision with respect to a costs assessment.

Willowrun's law firm hired a freelance lawyer as an independent contractor to assist with legal research. The freelance lawyer worked 56 hours on the project and the law firm billed the freelance lawyer's work out to its client, Willowrun, at an hourly rate. However, counsel for the opposing party, Greenway Homes, "through inadvertence" on the part of WIllowrun's law firm, discovered that the law firm had paid the freelance lawyer a lower hourly rate for the work completed, than what was charged to their client, Willowrun. In other words, they had marked-up the freelance lawyer's rate before passing it on to their client.

The Master concluded that "the actual amount paid by [the law firm] to [the freelance lawyers] **was irrelevant**, could not have been ordered to be disclosed and came to [counsel's] attention only through inadvertence." The Master assessed the claim on the basis that "the work was actually done and that [the marked-up rate] was to him the appropriate rate for the services".

On appeal, Greenway Homes argued that the Master erred in awarding the marked-up amount as "the solicitor had no overhead expenses in respect of [the freelance lawyer] and that it is wrong to allow a 'profit' on such a payment".

Justice Sutherland disagreed, noting that the amount paid by the law firm to the freelance lawyer does not necessarily determine Willowrun's costs for the services of the freelance lawyer and concluded that the Master made no error with respect to the fees for the freelance lawyer and dismissed the appeal. Greenway's further appeal to the Ontario Court of Appeal was also dismissed.

The case of ***Sabloff c. MacDowell* 2007 QCCQ 11287 (CanLII)** provides guidance on what *not to do* when hiring and billing out the services of a freelance lawyer at a marked-up rate.

A sole practitioner who had not been to court in 15 years hired his former law firm partner to appear in court for him as an "avocat pigiste" or freelance lawyer. The freelance lawyer charged the sole practitioner $100/hr but the sole practitioner marked-up that rate to $225/hr before passing it on to his client. The freelance lawyer then ran the file and completed 95% of the work.

The first mistake made by the hiring lawyer was that the retainer signed by the client agreeing to the $225/hr fee, stated that the legal services could be performed by other lawyers in the "firm", but the freelance lawyer was no longer a member of the firm. Therefore, Justice Pinsonnault found that the client did not consent to the use of the freelance lawyer at $225/hr.

Justice Pinsonnault also noted that the lawyer should have disclosed to his client that he had not been in court for some 15 years and that, as he did not have any partner or associate able to perform such services, he would have to retain the services of a another lawyer if need be.[21] He went on to conclude that:

> . . such information was crucial especially when the prospective client has to agree in writing to paying to that professional an hourly rate of $225.
>
> [The client] was not looking for a lawyer (at a cost of $225.00 per hour) to manage her legal affairs and supervise another lawyer acting for her. She was looking for a lawyer to represent her actively.[22]

Justice Pinsonnault found that the hiring lawyer failed to comply, *inter alia*, with the provisions of article 3.08.04 of the *Civil Code of Quebec* in not providing to the client all

[21] *Sabloff c MacDowell* 2007 QCCQ 11287 at para 45.
[22] *Sabloff c MacDowell* 2007 QCCQ 11287 at para 46-47.

useful information regarding the nature and financial terms of the services to be rendered.

Making matters worse, the hiring lawyer adjusted the freelance lawyer's time from .10 to .20 (his own minimum charge). This did not help to dispel, in the Court's mind, the manifest appearance of "profit-seeking or commercial character"[23] stemming from the lawyer's conduct, contrary to article 3.08.3 of the *Civil Code*.

The hiring lawyer argued that he did not have any legal obligation to disclose to his client his own financial arrangement with the freelance lawyer. Justice Pinsonnault found that "in general, [this] position would be acceptable" however, not in this instance as the client never consented in the retainer to the hiring of the freelance lawyer, or any lawyer outside of the "firm".

The Court reduced the amount owing by the client to an amount that was "fair and reasonable".

This case confirms that the client must consent to the use of a freelance lawyer, and while a lawyer may make a profit when retaining a freelance lawyer, this should not be excessive. The ultimate fee to the client must be fair and reasonable. The justification of the mark-up is that the hiring lawyer is supervising the freelance lawyer and taking responsibility for their work, which did not happen in this case. Instead the hiring lawyer simply handed the file off to the freelance lawyer to run.

Legal Fees (Not Disbursements) for Costs Awards/Assessments

As discussed above, a hiring lawyer may simply pass on the direct cost of the freelance lawyer as a disbursement (without mark up) to the client.

[23] *Sabloff c MacDowell* 2007 QCCQ 11287 at para 62

However, for the purposes of a cost award or on a costs assessment, based on the case law below, a court will likely characterize the freelance lawyer's cost as legal *fees* (recoverable on a partial or substantial indemnity scale) and not a disbursement.

In the case of *Polish National Union of Canada Inc. v Palais Royale Ltd*. 1998 CanLII 7132 (ONCA) the Court of Appeal for Ontario commented in *obiter* on "agency" fees, where a lawyer hires another lawyer to act as his or her agent on a matter (similar to when a freelance lawyer attends court for another lawyer). The Court of Appeal confirmed that such fees should be part of the lawyer's *fees* section of the bill and not *disbursements*:

> One other basic matter that appears to have been overlooked is that the sum of $1,402 in the bill of costs under Disbursements – Item 33 . . . . is for agency fees. If this was a sum paid for solicitor services, then the services should have been described in the solicitor's fees part of the bill and been open to examination from this point of view.[24]

In the case of *Laudon v Roberts*, 2008 CanLII 65772 (ON SC) (overturned on other grounds 2009 ONCA 383, application for leave to appeal dismissed 2009 CanLII 61390 (SCC)), a party added under "Miscellaneous Expense" in the schedule of assessable disbursements an account for a freelance lawyer. Justice Di Tomaso found:

> This is not a disbursement. Rather, this is an account from another law firm providing the services of an associate lawyer. . .I find the [freelance lawyer] account not an assessable disbursement.[25]

Freelance lawyers' fees were also considered legal fees in the British Columbia case of *Semenoff Estate v Bridgeman* 2014 BCSC 1845:

> Counsel for the defendant, due to the amount of time this case was consuming, brought in a [freelance] lawyer. . . to assist with the case. It was a matter of needing assistance, as defence counsel had to invest more of her time in the within action. The disbursement represents the cost of a lawyer doing research under defence counsel's direction. Defence counsel advised that normally this

[24] *Polish National Union of Canada Inc. v Palais Royal Ltd* 1998 CanLII 7132 (ONCA) at para 16.
[25] *Laudon v Roberts*, 2008 CanLII 65772 (ON SC) at para 76-77.

> sort of expense would not be incurred; however, being a small firm and finding herself in court regularly on short notice, there was a need for another lawyer to assist with the various aspects of trial preparation. **Essentially, this disbursement boils down to a cost for legal fees**.[26]

This assertion that freelance lawyer's fees are "legal fees" was also cited with approval in the British Columbia Court of Appeal case of ***Hokhold v. Gerbrandt*, 2016 BCCA 5**:

> . . .the respondent's bills include charges for the services of [freelance lawyers]. In his testimony, Mr. Kahn indicated that he uses this service to outsource legal research at least in part because their lawyers bill out at a lower hourly rate, as they have little to no overhead.
>
> A review of the bill shows the work done was far more than simply legal research. Entries for [the freelance] lawyers included review of correspondence, preparation of the appeal book, revision of the factum, conferences and emails, as well as the preparation of affidavit material. Though such activities often complement research done, they are services that might otherwise be provided by an associate lawyer.
>
> . . . I agree with Registrar Nielsen that [the freelance lawyers'] costs "boil down" to a cost for legal fees: *Semenoff v. Bridgeman*, 2014 BCSC 1845 at para. 83.
>
> In Mr. Kahn's case, the arrangement is no different than a law firm billing for an associate lawyer on a contract basis for the exercise of their professional legal skill. Recovery of outside counsel's charges as fees rather than disbursements is not without precedent: see, e.g., *D'Elia Estate v. D'Elia*, (2009) 174 A.C.W.S. (3d) 974 (Ont. S.C.J.).[27]

In the cost decision of *D'Elia Estate v D'Elia* 2009 CanLII 3977(ONSC), Hoy J. (as she then was) treated "agency" fees paid to a freelance lawyer "as legal fees, as opposed to a disbursement, and calculated them on a partial indemnity scale".[28]

Further, most recently in *Khan v Queen's University* 2019 ONSC 1864, Justice Mew confirmed that a freelance lawyer's fees for legal research should be recovered as legal

---

[26] *Semenoff v Bridgeman* 2014 BCSC 1845 at para 83.
[27] *Hokhold v Gerbrandt*, 2016 BCCA 5 at para 43-44 and 47-48.
[28] *D'Elia Estate v D'Elia* 2009 CanLII 3977 (ONSC) at para 11.

fees not disbursements and they were recoverable on a partial indemnity basis like the hiring lawyer's fees, rather than on a 100% basis as a disbursement.[29]

It should be noted that there is one case (which we respectfully submit is incorrect) that classifies the cost of outsourced legal research by a lawyer as a disbursement rather than legal fees. Justice G.A. Campbell commented in *Beneteau v Young*, 2010 ONSC 33:

> I am unfamiliar with the apparent new process of litigation lawyers delegating or "farming-out" the research facet of their preparation for trial. My ignorance of that practice is not to suggest, however, that it is inappropriate or wrong in any respect. Indeed, Tariff item 35 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 suggests that an expense for matters that are "reasonably necessary for the conduct of the proceeding" may be recoverable.
>
> I would follow the direction of the higher court [in *Moon v Sher*, 2004 CanLII 39005 (ONCA)] and **expand their allowance for Quicklaw services to include contracted-out research by another lawyer, since both disbursements seems analogous to me**. If Ms. Madsen [the freelance lawyer] had not done the research, then Ms. Barr would have had to have done it herself. [emphasis added][30]

We respectfully disagree that Quicklaw subscription fees and a freelance research lawyer's time are "analogous". The subscription is a product purchased by the firm. The work provided by the research lawyer is a legal service provided by a lawyer.

Cannot Be Duplicative

In keeping the fees charged to the client as "fair and reasonable", the hiring lawyer should be careful that those fees are not duplicative. For example, in the case of ***Giuliani v Region of Halton* 2011 ONSC 5119**, Justice Murray refused to approve payment of a freelance lawyer's legal research as it was duplicative of the hiring lawyer's work:

---

[29] *Khan v Queen's University*, 2019 ONSC 1864 at para 19.
[30] *Beneteau v Young*, 2010 ONSC 33 at para 23.

> Given the extraordinary docketing activity of Ms. Chittley-Young, Mr. Kenney and their law clerks, it is difficult to understand what added value could possibly be provided by [the freelance lawyer] with respect to legal research in preparation of a factum. In my view, it is reasonable to assume this work is duplicative of work done by lawyers or their clerks and therefore excessive.[31]

In ***Beneteau v Young***, discussed above, Justice Campbell was also critical of duplicative work completed by both the freelance lawyer and the hiring lawyer:

> However, Mr. Burns' objection is reasonable to that part of the costs claim that includes Ms. Barr spending **significant time "reviewing the research."** That time seems to me to be a doubling of an expense for which [the opposing party] should not be held responsible. That "review" is similar to the expense charged (and sought) by counsel (**which I would disallow) to regularly "review the file**" and to hold intraoffice meetings with her law clerk to organize the file and to give direction for next steps.[emphasis added][32]

While the hiring lawyer must review the work completed by the freelance lawyer as they are taking responsibility for the freelance lawyer's work, it is likely that in the context of a costs award or costs assessment, a court will not allow full recovery of such time spent if it is "significant" or "excessive".

OBTAINING CONSENT

As mentioned above, a client must consent to the engagement of a freelance lawyer. Often the easiest way to obtain consent is to include a clause in your retainer at the outset of the solicitor and client relationship.

An example:

> We [the clients] authorize you [the lawyer or law firm] to retain other counsel, agents or experts and to incur related disbursements as may become necessary. In particular, we authorize you to use the services of a freelance lawyer, who provides legal services on a project or contract basis and consent to the disclosure of any necessary documents or information from our file to the

[31] *Giuliani v Region of Halton* 2011 ONSC 5119 at para 61.
[32] *Beneteau v Young*, 2010 ONSC 33 at para 26.

> freelance lawyer. We acknowledge that we will pay for the freelance lawyer's services at an hourly rate of [$...].
>
> [Or if you wish to reveal the mark-up] We acknowledge that you pay for the freelance lawyer's services at an hourly rate that is below fair market value and consent to you marking-up these hourly rates to us at fair market value of [$...].[33]

Or, if a retainer has already been entered into with the client, a letter or email outlining your reasons for retaining a freelance lawyer and seeking consent is an option. See a sample letter attached as an Appendix.

CONCLUSION

In summary: A hiring lawyer can pass on the cost of a freelance lawyer as a disbursement (without mark-up) to the client (but be prepared for it to be classified as legal fees on a costs award or assessment); pass the cost on to the client as legal fees (without mark-up); pass the cost on to the client as legal fees with a mark-up; or absorb the cost themselves.

Further, it is not unethical to mark-up a freelance lawyer's fees when billing them out to a client, keeping in mind the overall rule that the ultimate fee paid by the client must be "fair and reasonable". Profit from providing legal services is both appropriate and expected. However, until the Law Society of Ontario (or other legal regulator in Canada) releases a formal comment or opinion on this practice, or we receive some guidance from our courts, we recommend revealing the mark-up to the client and obtaining their consent. Nevertheless, it is our position that this should not be mandatory (and we urge the Law Society to formally confirm this) as it puts lawyers and law firms with minimal resources, who cannot afford employee associates, at a disadvantage. It is unfair to require them to reveal additional information to their client and obtain additional consent, which larger firms are not obligated to obtain.

[33] This is for guidance only; Flex provides no warranty or representation as to the sufficiency of this clause.

APPENDIX – SAMPLE LETTER TO CLIENT

If your client has already signed a retainer agreement without the clause consenting to the use of a freelance lawyer, this is a sample letter setting out the arrangement that can be sent to your client:

Dear Client,

To best serve you, I will be hiring a freelance lawyer not associated with my firm to assist with your matter. Some examples of the work that will be outsourced to this freelance lawyer include: [drafting court documents, legal research, court appearances…].

The freelance lawyer is [insert name], and is a lawyer licensed to practice law in [Province] and will abide by the *Rules of Professional Conduct*, including keeping your information confidential. [She/he] has experience in [insert information, perhaps year of call, etc.] Hiring [freelance lawyer] will help me to more effectively focus my time on other aspects of your case and assist in keeping costs down. The [freelance lawyer's] work will be billed to you at a rate of [$]. [OR – to reveal a mark-up to the client "While the [freelance lawyer's] rate to me is below fair market value, it will be billed to you at the fair market value of [$] which is still lower than my hourly rate.]

You will continue to communicate directly with me. I will remain fully responsible for your matter and I will review and approve all work completed by [freelance lawyer]. I believe that this arrangement will allow me to most effectively and efficiently handle your case. Please advise me immediately if you have any concerns about this arrangement, and, if not, please sign and return the enclosed acknowledgement of your consent.

Sincerely,

Your Lawyer