

Practicing Law in the “Gig Economy”

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The “Gig Economy” is here for legal Jobs, like it or not

LAW STUDENTS

Less than half of recent law grads had 'good jobs' waiting after graduation, report says

BY STEPHANIE FRANCIS WARD

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ABA Journal, January 16, 2018

What Is the Gig Economy?

In a gig economy, temporary, flexible jobs are commonplace and companies tend toward hiring [independent contractors](#) and [freelancers](#) instead of full-time employees. A gig economy undermines the traditional economy of full-time workers who rarely change positions and instead focus on a lifetime career.

Investopedia

What legal professionals are affected?

- Contract Attorneys employed by large firms
- Smaller firms or firms in smaller communities looking for “depth”
- Solo lawyers, retired lawyers
- Support Staff
- “On Demand” legal services providers

For a longer analysis see Law Crossing’s article

The Gig Economy for Lawyers and Legal Staff: How the Gig Economy Effects Lawyers and Legal Staff

<https://www.lawcrossing.com/employers/article/900048996/The-Gig-Economy-What-It-Is-and-How-Can-It-Affect-the-Legal-Industry/>

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Advocacy & Advice

A Typical Scenario

- New attorney or attorney in solo practice
 - Perhaps has some client base but looking to grow
 - Has time and expertise/talent to offer
 - Or, no full-time job available
- Smaller firm or firm in smaller community needs help
 - Specialized expertise
 - Bench depth
 - Part-time work
- Can the attorney maintain his/her own firm and also work for the other firm?

So can a lawyer work for more than one firm?

- Previously, the answer was “NO”
- Now, the answer is “Yes – but be careful!”

Advisory Opinion 2013-01: Simultaneous Practice in Multiple Firms

- A lawyer may practice in more than one firm at the same time if the practice otherwise complies with the Rules of Professional Conduct.
- A lawyer who engages in simultaneous practice in multiple firms must recognize the potential ethical issues connected with such practice. The lawyer diligent in avoiding conflicts of interest, and imputation of conflicts will apply across all associated firms.
- The lawyer is also required to scrupulously maintain client confidentiality and professional independence.

Advisory Opinion 2013-01: Simultaneous Practice in Multiple Firms, cont.

- As part of the lawyer's duty to refrain from false, misleading, or nonverifiable communications about the lawyer or the lawyer's services, the lawyer must inform his or her clients of all multiple firm associations.
- A lawyer should decline any additional firm associations if the lawyer's obligations to any one of the firms would interfere with professional independence and judgment.

Advisory Opinion 2013-01: Simultaneous Practice in Multiple Firms, cont.

- This is a substantial departure from prior position
 - “[I]n this instance, the Board finds substantial justification for a new perspective on practice in multiple firms.”
 - Widespread acceptance in US, especially for “of counsel”

Six reasons for the change

1. 1995 repeal of Gov.Bar. 3 III(3)(D) language prohibiting involvement with multiple legal associations
2. 2007 rules of Professional Conduct – do not prohibit practice in multiple firms
3. Advisory Opinion 2008-1: “So long as a lawyer maintains the requisite “continuing close, regular, and personal relationship with each firm” and “avoids conflicts of interest,” the lawyer “may serve as “of counsel” to more than one firm.”

Six reasons for the change

4. Prevailing view in other jurisdictions is practice in multiple firms is permissible if it otherwise complies with ethical rules.
5. Otherwise, lawyer in a firm could not work with legal services organizations, legal aid, or as a public defender.
6. “[T]he financial reality of the current practice of law, especially in small communities, is that lawyers may have to create full-time employment through part-time positions in different practice environments.”

What is “association”

- Firm is defined by Prof.Cond.R. 1.0(c)
 - “Firm” or “law firm” denotes a lawyer or lawyers **in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law**; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization.

What's the difference between "association" and "of counsel"

- Association:
 - "Firm" or "law firm" denotes a lawyer or lawyers **in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law**; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization. (Prof.Cond.R. 1.0(c))
- Of Counsel:
 - Many definitions: retired partner, part-time employee- full-time employee, co-counsel to the firm for a particular matter.

Key test for association:

- Close, regular, and continuous relationship
- What about contract attorney?
 - Is it a single matter contact?
 - Or is there a “close, regular and continuous” relationship?

Key ethical issues to consider

- Conflicts of Interest
 - Conflicts checks must span all firms
 - Conflicts of a lawyer who practices in multiple firms will be imputed across all firms.
 - If prohibited from representing a client in one firm, can't use another firm to represent that client.
 - Ethical screen is probably NOT sufficient to avoid imputation of conflict.
 - Prof.Cond. Rs. 1.7, 1.8, 1.9, 1.10.

Key ethical issues to consider

- Confidentiality
 - Must maintain client confidentiality across all associated firms. (Prof.Cond. R. 1.6)
- Communication
 - Lawyer must inform clients of all multiple practice associations. (Prof.Cond. Rs. 1.4, 7.1)
- Decline additional firm associations if obligations to any one of the firms would interfere with professional independence and judgment. (Prof.Cond. Rs. 2.1, 5.4)
- Fiduciary issues might also arise.

Practical steps for the attorney with multiple relationships

- Advise all firms of associations with other firms
 - Written is best
- Advise all clients of associations
 - Initial meeting/discussion
 - Engagement Agreement

Practical steps for the attorney with multiple relationships, cont.

- Ensure all conflict-check forms are complete and accurate
 - Ethical issue: how do you present clients and adversaries from matters with firm A to firm B for conflicts purposes?
 - Obtain client or potential client's consent to circulate enough information to other firms to perform the required check
- Advise all clients of associations
 - Initial meeting/discussion
 - Engagement Agreement
 - Website/advertising: open question of how much disclosure is necessary on website. But cannot be misleading.
 - At least a disclaimer

Practical steps for the firm hiring attorneys with multiple relationships

- Attorney must disclose all other firm relationships
- Develop conflict-check forms are complete and accurate
- Develop protocol for attorney to clear potential conflicts with other firm(s)

Practical steps for the firm hiring attorneys with multiple relationships

- Put Compensation Arrangements in Writing
 - Fee may be divided in proportion to services performed, or if joint responsibility is assumed by each lawyer
 - Clients must agree to the arrangement
 - Fee splitting rules do not apply to “of counsel” (Advisory Opinion 2008-1)
- Develop conflict-check forms are complete and accurate
 - Develop protocol for attorney to clear potential conflicts with other firm(s)

Practical steps for the firm hiring attorneys with multiple relationships

- Advise clients for whom attorney will work that attorney has multiple associations and advise regarding fee arrangements. For example:

As a client of our Firm, you may receive legal services from attorneys who also have associations with other firms in addition to Our Firm. This multiple association is permitted by under Ohio's ethical rules and allows Our Firm to provide services to our clients that might not otherwise be possible. Our Firm and the attorney(s) have taken extensive steps to ensure that no conflicts of interest have arise in connection with representing you, and to ensure that all information related to our representation remains confidential. Lawyers associated with, but not employed by, Our Firm receive compensation proportionate to the services performed during the representation.

Many more issues exist than we can address here

- Court information – often not equipped to handle multiple representations. Which login information is used? Where are notices received?
- Subscriptions to research providers and other service providers
- Email addresses – separate addresses for each firm – keep the relationship separate
- Remote access to Firm's contents – how to ensure confidential information is not stored in other Firm's records
- Website and social media content – no definitive guidelines
- Supervisory responsibility
- REPORT TO YOUR INSURANCE CARRIER

About the Presenter



I advocate for and advise parents, their children, and their business and employment issues, through trust and estate planning, education law, and litigation.

While I primarily provide legal services and representation through my own law firm, I am proud to be Of Counsel for The Lefton Group, assisting on litigation matters, and to provide legal services in Tuscarawas County in association with the McCleery Law Firm.

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