

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month



Contract Attorneys and Overtime Rules in Document Review

Scenario

A general counsel is managing a large-scale document review for a significant class action litigation. The general counsel instructs outside counsel to retain a third-party vendor to supply contract attorneys to perform the review as quickly and inexpensively as possible. The general counsel inquires about the obligation to pay the contract attorneys overtime pay for any hours worked over 40 hours per week. The law firm inquires about the local practice of law rules regarding whether contract attorneys must be a member of the bar within that jurisdiction so that it can assess its own risk and exposure.

Contract Attorneys Are Not Engaged in the Practice of Law

In *Lola v. Skadden*, the US Court of Appeals for the Second Circuit recently overturned a district court's ruling on a motion to dismiss and held that a contract attorney working in North Carolina was not engaged in the practice of law while working on a document review project on behalf of a client of Skadden, Arps, Slate, Meagher & Flom LLP, a global New York-based law firm. The contract attorney sued Skadden and Tower Legal Staffing (the vendor hired by Skadden to provide contract attorneys) alleging that they violated overtime provisions of the Fair Labor Standards Act (FLSA) because the contract attorney was not paid overtime for any hours worked above 40 per week.

Defendants argued that they did not have to pay overtime rates because the plaintiff was a licensed attorney engaged in the practice of law and fell within the professional exemption to the FLSA. Plaintiff alleged, however, that he exercised no legal judgment while conducting the review and that his work amounted to nothing more than sorting documents into different categories using criteria developed by others.

The Second Circuit analyzed the practice of law rules for North Carolina (where the document review took place), and held that those rules provide that a document review falls within the ambit of practicing law only when "independent legal judgment in making decision on behalf of a client" is exercised. Simply put, "inherent in the definition of practice of law in North Carolina is the exercise of at least a modicum of independent legal judgment." Because the plaintiff alleged that he exercised no legal judgment while conducting his work, it was inappropriate for the district court to grant defendants' motion to dismiss.

Document Review and UPL Rules

The Second Circuit's opinion makes clear that the question of whether contract attorneys

conducting document review falls within one of the FLSA exemptions is correlated to whether the contract attorneys are engaged in the practice of law. Many states have rules similar to that of North Carolina—that is, that the practice of law necessarily involves the exercise of independent judgment on behalf of a client.

However, if a contract attorney is engaged in the practice of law while conducting a document review, another issue is raised: whether that attorney must be a member of the bar in the jurisdiction in which the review is taking place. While the Second Circuit did not address this issue (which was not before the court), in Washington DC, an ethics opinion makes clear that a contract attorney engaged in the practice of law must be licensed to practice in Washington DC to avoid violating unauthorized practice of law (UPL) rules. Moreover, the ethics opinion also makes clear that contract attorneys must be members of the DC Bar if the contract attorney “is being held out, and billed out, as a lawyer.”

Strategies and Best Practices

The Second Circuit’s opinion raises several concerns regarding document review by contract lawyers of which companies and law firms should be aware:

First, there is a question of whether a document review comprises “legal work” in the sense that practice of law rules are implicated.

Second, if the document review is legal work, then must the reviewer be a member of the bar in the jurisdiction in which the review is taking place; and

Third, if the document review is legal work, then does the contract attorney fall within one of the FLSA exemptions.

Several considerations to help mitigate potential risk and exposure include:

- Law firms and their clients should assess the UPL rules in the state in which the review is taking place to understand the applicable definition of “legal services.”
- If the review is taking place in a state in which the provision of “legal services” requires independent legal judgment by the contract attorney, the instructions given to the contract attorney review team should be carefully drafted. Thus, the firm managing the review should consider implementing one or more of these features in any document review to ensure that the contract attorneys are exercising legal judgment. For example:
 - Provide an instruction to code documents according to certain issues, not just code documents that contain certain key words (e.g., “tag documents that suggest the company was insolvent” versus “only tag documents including the words ‘bankrupt,’ ‘broke’ and ‘debt’”).
 - Consider encouraging contract attorneys to include attorney notes when coding documents that might reflect coding decisions.
 - Provide instructions for a privilege review that allow for an independent assessment of whether a document is privileged instead of requiring coding for privilege based on whether the document contains certain “privileged” terms (such as attorney names or the phrase “privileged & confidential”)
- Additionally, if the review could be considered legal services, the firm should consider whether the state’s ethics rules require that the contract attorneys be members of the bar in that jurisdiction.

- If the document review is being conducted in a manner in which it likely would be considered legal services and the contract lawyers likely fall within one of the FLSA exemptions, the contract attorney may not be entitled to receive overtime for hours worked above 40 in a week. However, there may be other reasons to provide overtime pay. Particularly where providing overtime to contract lawyers is a common practice, failing to do so may make staffing the review difficult.

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