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Jam Session for Seasoned Freelances

In keeping with the theme of this issue, our Freelance Forum contributors—**Cathryn D. Evans**, **Gail Flores**, **Melissa Bogen**, and **Ruwaida Vakil**—have provided their own unique insights into topics raised during the open session moderated by Brian Bass, MWC—“Jam Session for Seasoned Freelances.”

Clients Demanding Freelances NOT be Freelance

There is a disturbing trend some seasoned freelances reported encountering lately in which clients insist their freelances take a W-2, which means they are legally not freelancing for that client but are actually part of the client's staff. Forcing a freelance to work not as a freelance has a number of concerning implications. It affects freedom and flexibility, estimating and invoicing, and relationships with and availability to other clients. Perhaps most important of all, it has the potential to adversely affect the freelance's finances with respect to both income and taxes.

CDE: Yes, I agree that this is disturbing. In fact, 15 years ago my accountant told me to try NOT to accept W-2 wages as it might affect my status as a self-employed businessperson. He did compromise and said, “OK, as long as it is a small percentage of your income.” If you are doing most of your work under W-4/W-2 status, recognize that you are NOT self-employed or in business: you are a temporary/transient employee. That said, today our profession has changed so dramatically—perhaps especially pharma/biotech—that some of us now must make a choice between “flexibility” and “focus.”

For example, a new, inexperienced medical writer who wants to break into the pharma/biotech industry needs to say “yes” to whatever comes, and W-2 contracts might have to be accepted initially to gain experience, samples, and references. An established freelance with solid clients and a great income can say “no” to W-2 work with impunity and focus on building his/her business and not agreeing to temporary employee status. And, regardless of your status, there are times when a W-2 project just seems necessary or is simply quite appealing. In summary, if you can afford it, be flexible; just make sure you watch your tax situation.

MB: As a freelance, I am loath to agree to W-2 status with any client, but in fact I have done so for 2 clients in 20 years. I live and work primarily in New York. One client was a contract research organization (CRO) in New Jersey; the other was a medical communications company in Connecticut that is part of the New York-based Greyhealth group. Both clients told me they had to pay me this way and pitched it as an advantage to me because they would take taxes out for me.

To address Brian's concerns about effects on freedom and flexibility, estimating and invoicing, relationships with and availability to other clients, and income and taxes, here are certain issues to consider:

- Because I work for 6 to 12 clients per year, I knew I would have no trouble confirming my nonemployee status should the need arise.
- I worked onsite only for 1 client and only sporadically; most of my work was from home at hours of my choosing.
- I set my rates with these clients, so estimates were still enough under my control. Invoicing for 1 client was a pain because they wanted me to log hours into their online system, but other (1099) clients have required me to use their time sheets as well. This aspect to invoicing using their time sheets was the most onerous; when I complained enough, they had their human resources person log my time into their system for me on a weekly basis.
- I made it clear from the outset that I had several clients and they were not retaining me, so I did not lose other jobs or clients as a result.
- My accountant handles my taxes, though I provide him with the 1099s and W-2s and clear instructions about which income came from which client so he can keep track of the tax implications.

In some instances, it may be possible to work for such a client without taking a W-2, but that may require carrying a serious amount of professional (errors and omissions) and commercial (business) liability insurance.

A number of the session attendees said they carry such insurance policies and discussed the circumstances under which they came to carry insurance, which was diverse. Other types of insurance policies that were discussed included worker's compensation insurance, which is required by some states for certain types of businesses (eg, New Jersey requires worker's compensation insurance for S-corporations), and long-term disability insurance.

CDE: Yes, this is another problem: some CROs and other companies/agencies want you to accept liability and carry expensive insurance. I do not do this. It is too expensive, yes, but the primary reason I will not buy such insurance or sign a contract agreeing to accept liability is that the majority of my medical writing work is for pharma/biotech and they are 100% legally responsible for the content of all and everything! They dictate direction, focus, content, and structure; they provide all the data and background material (which means the writer cannot be certain s/he has received "everything"); and finally, they absolutely make all decisions about the final outcome. I will not agree to be held liable in such circumstances; my contract wording, which was approved by my attorney, makes this quite clear (wording was published in a prior version of the *AMWA Journal* in case anyone wants to see it.)

MB: As an editor and a sole proprietor, I do not carry errors and omission insurance or any other insurance specifically for my work. I strike out insurance requirements in contracts, as they do not apply to the kind of work I do because I am not responsible for what happens to the work after it leaves my hands. I realize the situation is different with medical writers.

Lawyers, Guns, and Money

No discussion of insurance is complete without someone mentioning lawyers. The conversation quickly broadened to include contracts, master service agreements (MSAs), nondisclosure agreements (NDAs), confidentiality agreements (CAs), and conflict of interest (COI) clauses. The seasoned freelancers in attendance were familiar with these documents and agreed that freelancers should never consider contract language unchangeable. They discussed how to request changes in contract wording, the benefits and drawbacks of providing your own contracts instead of using the client's contracts, contract enforcement, and investing in hiring an attorney to help review and enforce contracts.

The group got into a deep discussion of restrictive covenants, which often oppressively restrict the freelance's ability to work. Some clients—particularly medical communications companies—often have boilerplate language in their contracts that can effectively preclude a freelance from working with anyone else, and often for a period of years. Of course, no successful and busy freelance would ever tolerate, let alone agree to, such restriction, and attendees discussed their approaches for striking or at least revising such covenants.

As several seasoned freelancers noted, restrictive covenants can be fairly easy to revise or delete because clients usually don't even realize that language is in their contracts, let alone appreciate how restrictive they are. The bottom line is that medical communications companies don't want freelancers taking their business, helping others take their business, or otherwise messing with their business. As long as you make clear that such activity would be unethical (to say nothing of it being bad for business), clients are usually fine with revising the wording of their restrictive covenants.

CDE: It is reasonable for a self-employed small businessperson to revise a contract. After all, a contract is an agreement between 2 (or more) parties—it should not be one-sided, always in favor of the client! All of us need to read the NDAs, CAs, and COI statements carefully and delete unnecessary restrictions. Be brave! You likely will not lose a client over this, especially if you speak about it honestly on the phone or in person and NOT in an email.

MB: I agree with Brian that clients usually don't realize what details are in their contracts. I often strike out clauses in contracts that don't pertain to my work as an editor. In addition, I require the "hold harmless" clause goes both ways.

Most importantly, I require that every contract specify what my rate is and when I will be paid. If the term is longer than net 30, I ask if the client's legal department can change the terms to net 30 and I have had success in getting the time shortened in the contract.

The one time I used a lawyer was to review my first contract. True confession: the lawyer was my father; he was a labor lawyer who represented employees of unions, so was familiar with how to word contracts. I never got work from that client because we tore their contract to shreds. After that, I opted not to show my father my contracts and I haven't had a problem since then—either in getting work or in negotiating contract changes on my own behalf.

RV: I completely agree. It is essential to carefully read through all the contracts that you sign. I have been pleasantly surprised that there is rarely a push back when I strike out a clause in the

contract. I always make sure I strike out any phrase that makes me indemnify the client, or holds me entirely responsible for the final work. In my 11 years of freelancing, I only had one client push back on the indemnity clause, and we agreed that I would indemnify them up to the amount that they had paid me for that year.

Bridges and Boundaries

Well-written contracts build bridges to new clients and new opportunities. They also help freelancers set boundaries, which seasoned freelancers agree every client needs. A contract that describes who does what and when, what the deliverable will look like, and every other detail down to the number of revisions, provides a safety net for both the freelance and the client.

During the session several seasoned freelancers shared horror stories about clients who went off the rails, which even the best-written contract cannot prevent.

CDE: Indeed. A caveat here: I think all of us should remember to incorporate into our contracts what is NOT included in the contract fee (ie, what you will NOT do for them under the contract). This can save many headaches along the way.

RV: Unfortunately, this can happen even with the best of clients. Although I price my work on a per-project basis, my contracts always include a line about scope change and the number of revisions, including how they will be priced. I add a statement like, “This estimate includes one round of in-scope revisions. If additional revisions are needed, they will be billed at the hourly rate of X or can be renegotiated with a new fee.”

This led to a discussion about clients who went too far and got themselves fired. Firing clients is an art in itself. Seasoned freelancers shared their approaches, which ranged from confrontation to ghosting. Innovative approaches to setting boundaries were discussed. Perhaps the best, and certainly the most widely applied, were rush fees and PITA (pain in the a**) fees.

CDE: I certainly agree that PITA fees are sometimes appropriate.

Although a formal vote wasn't taken, it seemed that every seasoned freelance in attendance implements some sort of “special” fee structure for clients who are difficult to work with but have not yet elevated themselves to the stature of being fired. They're on the cusp. As one attendee explained, it's amazing what you can put up with when you're being paid excessively well for it. Of course, difficult clients don't know they're being charged a PITA fee. They simply receive the proj-

ect fee that includes the special PITA fee and either agree to the fee or not. If they don't agree, that's one of the more subtle approaches to firing a client that doesn't involve confrontation but keeps them around in case you ever need them.

CDE: It is quite simple to “be too busy with another project” when a client you dislike calls; then you need not fire him/her—they just go away quietly.

GF: As Brian mentioned, firing clients is indeed an art in itself. In my 18 years of freelance medical writing, I have had to let a handful of clients go. I've done it a few different ways, but ultimately, I think that having an honest conversation with the client about why you don't want to continue to work with them leads to the best outcomes. While this may be difficult, in most cases the client deserves it, and it's likely a good exercise for the both of you. Telling them you're too busy to work for them again could backfire if your perceived lack of availability gets passed to their colleagues at other companies, and “ghosting”—not returning their calls or emails—could make you look unprofessional. In contrast, a frank conversation about why you feel the relationship should end can help them better understand the unique needs of freelancers and may benefit future freelancers they hire. Such a conversation could even resolve your issues and make you reconsider working with them.

MB: I agree that some clients are a pain. Fortunately, none of my current clients are. One client had complicated time sheets that had to be completed online every week. Because I was charging them an hourly rate not a project fee, hiding a PITA fee was tricky and I was unable to add time to my invoice for all the online logging. My solution was to become “too busy” to take on more jobs from them. Eventually they stopped contacting me for work. That was a long time ago. Now I would be more upfront and explain that their system was not user-friendly and see if we could negotiate a way to offload some of the nonbillable time-logging tasks onto the client or if I could bill for my time spent updating their online time sheets.

As the session came to an end, it was apparent that attendees had much more they wanted to discuss. Those topics and more will surely take the Jam Session into new uncharted territory at the 2018 Medical Writing & Communication Conference in Washington, DC.