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**E-96-4 Use of temporary attorneys in Wisconsin**

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**Question**

Under what circumstances may a law firm use temporary or contract attorneys in Wisconsin?

**Opinion**

The Professional Ethics committee adopts American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 88-356.

**Caveat**

ABA Formal Opinion 88-356 contains references to the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct, which may differ in some respects with the current Rules of Professional Conduct for Attorneys in Wisconsin. The Professional Ethics committee agrees with the reasoning and the conclusions of ABA Formal Opinion 88-356, and adopts it for the purpose of providing guidance to attorneys in Wisconsin.

**ABA Formal Opinion 88-356: Temporary Lawyers (Dec. 16, 1988)**

*In order to satisfy the requirements of the Model Rules and predecessor Model Code when a lawyer is engaged temporarily to work for clients of a law firm (including a corporate legal department), the lawyer and the firm must exercise care, in accordance with the guidelines in this opinion, to avoid conflicts of interest, to maintain confidentiality of information relating to the representation of clients, to disclose to clients the arrangement between the lawyer and the firm in some circumstances, and to comply with other applicable provisions of the Rules and Code. The use of a lawyer placement agency to obtain temporary lawyer services where the agency's fee is a proportion of the lawyer's compensation does not violate the Model Rules or predecessor Model Code as long as the professional independence of the lawyer is maintained without interference by the agency, the total fee paid by each client to the law*

*firm is reasonable, and the arrangement otherwise is in accord with the guidelines in this opinion.*

The committee has received a number of inquiries relating to the increasing use by law firms of temporary lawyers.<sup>1</sup> The temporary lawyer may work on a single matter for the firm or may work generally for the firm for a limited period, typically to meet temporary staffing needs of the firm or to provide special expertise not available in the firm and needed for work on a specific matter. The temporary lawyer may work in the firm's office or may visit the office only occasionally when the work requires. The temporary lawyer may work exclusively for the firm during the period of temporary employment or may work simultaneously on other matters for other firms.

In this opinion, the committee addresses ethical issues affecting the firm and the temporary lawyer involving the application to temporary lawyer practice of rules relating to conflicts of interest; confidentiality of client information; disclosure to the client of arrangements between the firm and the lawyer (including fee division); and arrangements with lawyer placement agencies. These issues are addressed under the Model Rules and the predecessor Model Code.

### **Conflicts of Interest**

In the Model Rules, the general conflict of interest provision is Rule 1.7, which standing alone applies only to an individual lawyer and a client about to be represented or currently represented by that lawyer. Rule 1.7 prohibits a lawyer from representing a client if the representation of that client will be directly adverse to another client or may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless the lawyer reasonably believes that there will be no adverse effect (as described in the Rule), and the client consents after consultation.

Rule 1.9 relates to conflicts of interest involving former clients of a lawyer. It provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated “represents” that client for purposes of Rules 1.7 and 1.9. Thus, a temporary lawyer could not, under Rule 1.7, work simultaneously on matters for clients of different firms if the representation of each were directly adverse to the other (in the absence of client consent and subject to the other conditions set forth in the Rule). Similarly, under Rule 1.9, a temporary lawyer who worked on a matter for a client of one firm could not thereafter work for a client of another firm on the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the client of the first firm (in the absence of consent of the former client and subject to the other conditions stated in the Rule).<sup>2</sup>

DR 5-105(A) and DR 5-105(B) of the Model Code require a lawyer to decline employment if it will or is likely adversely to affect the lawyer’s independent judgment in behalf of an existing client or would involve the representation of differing interests, except with the informed consent of both clients and then only where it is obvious that the lawyer can represent adequately the interests of each. DR 5-105(C). Thus, a temporary lawyer could not, under DR 5-105, work simultaneously for clients of different firms with differing interests except as permitted by DR 5-105(C).<sup>3</sup>

The most difficult conflict of interest questions involving temporary lawyers arise under the imputed disqualification provisions of Rule 1.10, which provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.<sup>4</sup>

The basic question is under what circumstances a temporary lawyer should be treated as “associated in a firm” or “associated with a firm.”<sup>5</sup> The question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule. The Comment to Rule 1.10, although not addressing specifically the temporary lawyer situation, provides helpful guidance. It provides in relevant part:

“For purposes of the Rules of Professional Conduct, the term ‘firm’ includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.”

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When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

After discussion of the two traditional rubrics under which these competing principles have in the past been explained, the Comment notes that a rule based on functional analysis is more appropriate for determining imputed disqualification. Noting that two functions are involved, preserving confidentiality and avoiding positions adverse to a client, the Comment continues:

“Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

“Application of paragraphs (b) and (c) [of Rule 1.10] depends on a situation’s particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

“Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.”

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The second aspect of loyalty to client is the lawyer’s obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

Ultimately, whether a temporary lawyer is treated as being “associated with a firm” while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm. For example, a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be “associated with” the firm generally under Rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be “associated with” the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of

other firm clients, the temporary lawyer should not be deemed “associated with” the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm’s office under circumstances likely to result in disclosure of information relating to the representation of other firm clients.

As the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms becomes more remote, it becomes more appropriate not to apply Rule 1.10 to disqualify a firm from representation of its clients or to prohibit the employment of the temporary lawyer. Whether Rule 1.10 requires imputed disqualification must be determined case by case on the basis of all relevant facts and circumstances, unless disqualification is clear under the Rules.

The distinction drawn between when a temporary lawyer is or is not associated with a firm is only a guideline to the ultimate determination and not a set rule. For example, if a temporary lawyer was directly involved in work on a matter for a client of a firm and had knowledge of material information relating to the representation of that client, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client of the first firm to engage the temporary lawyer during the pendency of the matter, even for work on other matters. The second firm should make appropriate inquiry and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter.

Although at the time of the adoption of the Model Code in 1969 the temporary lawyer phenomenon had not yet appeared, the purpose of DR 5-105(D),<sup>6</sup> the imputed disqualification provision of the code, coincides with the purpose of Rule 1.10. The committee is of the opinion that the foregoing functional analysis applies equally under DR 5-105(D).

For the reasons discussed above, in order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters on which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose

matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.

### **Confidentiality of information**

Model Rule 1.6 prohibits revealing “information relating to representation of a client,” subject to exceptions set forth in the Rule. The Rule applies to each lawyer in a firm with respect to each client of the firm and not solely to clients with whom that lawyer works. The prohibition against revealing information relating to representation of a client serves its purpose only to the extent that each lawyer with a firm (who may have information about any firm client) is bound by the Rule with respect to each client of the firm. Similarly, the temporary lawyer who works for a firm on matters of a firm client is bound by Rule 1.6 not to reveal information relating to the representation of that client (except as otherwise authorized by the Rule). The temporary lawyer also is bound not to reveal information relating to representation of other clients of the firm which the temporary lawyer learns as a result of working with the firm.

The application of Rule 1.6 does not, however, generally depend upon the source of information relating to representation of a client. Thus, a lawyer with a firm is prohibited from revealing information relating to representation of a client of the firm even if the lawyer’s knowledge of the information did not arise from the representation or through the firm and even if knowledge was acquired before the lawyer-client relationship existed.

In contrast, the definition of protected information set forth in DR 4-101 of the Code is narrower than that of Rule 1.6. DR 4-101 protects information subject to the attorney-client privilege and information “gained in the professional relationship” which would be embarrassing or detrimental to the client or which the client has asked be held inviolate.<sup>7</sup>

The extent to which the prohibitions in the Rules against revealing protected information will affect a temporary lawyer depends on the nature of the relationship between the temporary lawyer and the firm. Thus, a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients ordinarily would be deemed to be “associated with” the firm as to all other clients of the firm,



unless through accurate records or otherwise, it can be demonstrated that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access cannot be demonstrated, the temporary lawyer in that situation must not disclose information relating to the representation of persons known to the lawyer to be firm clients regardless of the source of the information.

Under other circumstances, however, the relationship of the firm with the temporary lawyer is more like the relationship between a firm and a totally independent lawyer. This ordinarily is the case where the temporary lawyer has been screened from access to information relating to the representation of firm clients for whom the temporary lawyer is not working, whether the temporary lawyer is working in the firm office or not. In that situation, the temporary lawyer's obligations under Rule 1.6 are, in the committee's opinion, limited to not revealing (1) information relating to the representation of any client for whom the temporary lawyer is working, and (2) information relating to the representation of other firm clients only to the extent that the temporary lawyer in fact obtains the information as a result of working with the firm.

Thus, where the temporary lawyer is in a position to have obtained information relating to the representation of other clients in the course of employment by the firm, it is assumed for purposes of the Rules that such information was in fact learned in that capacity. On the other hand, where the temporary lawyer actually has information relating to the representation of a firm client which could not have been obtained in the course of employment by the firm, the Rule is no more applicable to the temporary lawyer than it would be to a totally independent lawyer associated with a firm in a particular matter only, who obtains information relating to the representation of firm clients other than through working with the firm.

The same standards apply with respect to other provisions of the Rules which relate to disclosure or use of information relating to representation of a client, such as Rule 1.8(b) prohibiting use of such information to the disadvantage of the client.<sup>8</sup>

Under the Code, the temporary lawyer could learn "confidences" and "secrets" of firm clients, as defined in DR 4-101, only as a direct result of working with the firm. When the relationship with the firm is limited, it is less likely that the temporary lawyer will learn confidences or secrets about firm

clients for whom the temporary lawyer is not working. However, under the Code, if the temporary lawyer does learn the confidences or secrets of a firm client, then the temporary lawyer must not reveal those confidences or secrets regardless of the nature of the temporary lawyer's relationship with the firm.

Supervising lawyers with the firm also have an obligation to make reasonable efforts to ensure that the temporary lawyer conforms to the rules of professional conduct, including those governing the confidentiality of information relating to representation of a client. Rule 5.1(b) and (c); DR 4-101(D).<sup>9</sup>

### **Disclosure to client**

Rule 7.5(d), which prohibits lawyers from implying that they practice in a partnership or other organization when that is not the fact, articulates the underlying policy that a client is entitled to know who or what entity is representing the client. A question therefore arises as to whether the client must be told that a temporary lawyer engaged by the firm is working on the client's matter as well as other information relating to the arrangement between the firm and the temporary lawyer. Relevant to the inquiry are Rule 1.2(a), requiring a lawyer to consult with the client as to the means by which the client's objectives are to be pursued, and Rule 1.4, relating to client communication.

The committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.<sup>10</sup>

Assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the

payments thereafter to the client as a disbursement, the firm has no obligation to reveal to the client the compensation arrangement with the temporary lawyer. Rule 1.5(e), relating to division of a fee between lawyers, does not apply in this instance because the gross fee the client pays the firm is not shared with the temporary lawyer. The payments to the temporary lawyer are like compensation paid to nonlawyer employees for services and could also include a percentage of firm net profits without violation of the Rules or the predecessor Code. *See* ABA Informal Opinion 1440 (1979).

If, however, the arrangement between the firm and the temporary lawyer involves a direct division of the actual fee paid by the client, such as percentage division of a contingent fee, then Rule 1.5(e)(1) requires the consent of the client and satisfaction of the other requirements of the Rule regardless of the extent of the supervision.

The requirement of Rule 1.5(a) that the total fee be reasonable is, of course, a restriction only on the fee charged to the client and not on how much is paid to the temporary lawyer. That requirement must be satisfied in all events.

EC 7-7 and EC 7-8 are Code analogues to Rules 1.2(a) and 1.4 defining the obligations of the law firm in informing a client of the use of a temporary lawyer and, in appropriate instances, to obtain client consent. The committee notes that DR 2-107(A) of the Code requires client consent to a division of fees between lawyers and that EC 2-22 provides: "Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm." The committee nevertheless is of the opinion that where a temporary lawyer is working under the close firm supervision described above, such employment does not involve "association with a lawyer outside the firm," within the meaning of this Ethical Consideration. The underlying purposes of the Rule and Code provisions and their functional analyses are similar. For the reasons set forth above, absent a division with the temporary lawyer of the actual fee paid by the client to the firm, the client need not be informed of the financial arrangement with the temporary lawyer under the Model Code since it does not involve a division of the gross fee between lawyers.

#### **Arrangements with placement agencies**

Law firms wishing to hire temporary lawyers frequently use lawyer placement or other employment agencies. Questions have been raised whether a law

firm which engages a temporary lawyer through such an agency may pay the agency a fee which is a percentage of the compensation paid by the law firm to the temporary lawyer without violating the provisions of Model Rule 5.4 or DR 3-102(A) of the Code.<sup>11</sup>

Arrangements among placement agencies, law firms and temporary lawyers vary. Usually the law firm will contact the placement agency and provide general information as to the nature of the matter and the area of practice and level of experience desired in the temporary lawyer.

The placement agency maintains files on attorneys willing to accept independent contractor assignments or may recruit a lawyer with the desired capabilities and will attempt to match the lawyer with the task and attributes needed by the law firm. Some agencies allow each attorney to establish his or her own hourly rate, and this will be part of the information in the file of that attorney maintained by the placement agency. The placement agency informs the law firm of the name and background of the lawyer and the hourly cost to the law firm for that lawyer's services. This hourly cost includes the attorney's hourly rate as set by the lawyer and the fee to be paid to the placement agency, which is either a fixed hourly sum that does not vary in relation to the temporary lawyer's hourly rate or a percentage of the lawyer's compensation. Under either arrangement, the amount of the placement agency's fee will, of course, vary with the number of hours worked by the temporary lawyer for the law firm on the engagement.

This committee is of the opinion that an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation, does not involve the sharing of legal fees by a lawyer with a nonlawyer in violation of Rule 5.4 or DR 3-102(A) of the Code. There is a distinction between the character of the compensation paid to the lawyer and the compensation paid to the placement agency. The temporary lawyer is paid by the law firm for the services the lawyer performs under supervision of the firm for a client of the firm. The placement agency is compensated for locating, recruiting, screening and providing the temporary lawyer for the law firm just as agencies are compensated for placing with law firms nonlawyer personnel (whether temporary or permanent).

Moreover, even assuming there is a total amount comprised of a lawyer's compensation and the placement agency fee that is split, the total is not a "legal

fee” under the commonly understood meaning of the term. A legal fee is paid by a client to a lawyer. Here the law firm bills the client and is paid a legal fee for services to the client. The fee paid by the client to the firm ordinarily would include the total paid the lawyer and the agency, and also may include charges for overhead and profit. There is no direct payment of a “legal fee” by the client to the temporary lawyer or by the client to the placement agency out of which either pays the other.

In addition, the rationale for the rule forbidding the sharing of legal fees with nonlawyers, the maintenance of the lawyer’s professional independence, does not support the view that these arrangements involve fee-splitting. The title of Rule 5.4 itself focuses on this underlying rationale: “Professional Independence of a Lawyer.” In Formal Opinion 87-355 (Dec. 5, 1987), the committee concluded that the sponsor of a for-profit prepaid legal service plan might retain a portion of the monthly fee paid by plan members to cover the plan sponsor’s overhead and profit without violating the fee-sharing prohibitions of Rule 5.4 or of Rule 7.2(c) (prohibition against giving anything of value to a person for recommending a lawyer’s services). That opinion restated the two principal reasons for the fee-sharing prohibition: “first, to avoid the possibility of a nonlawyer being able to interfere with the exercise of a lawyer’s independent professional judgment in representing a client; and second, to insure that the total fee paid by a client is not unreasonably high.” *See also* Informal Opinion 1440 (1979) (a law firm’s compensation arrangement with its office administrator, including payment of a percentage of the net profits of the law firm, did not involve improper fee splitting).

The committee perceives no adverse impact upon the exercise of the temporary lawyer’s independent professional judgment in the lawyer’s work for the law firm which results from payment of a placement agency fee as a percentage of or in proportion to the lawyer’s compensation. The same factors that are present in any law firm which relates its compensation of lawyers to the time worked by the lawyer are presented by the arrangement here. The only variation is that another payment in relation to the time spent by the lawyer is paid for a different service to a third party, the placement agency.

With respect to the reasonableness of the total fee to each client on whose matters the temporary lawyer works, the case is no different than that of a law firm hiring a temporary secretary or other temporary help through an agency. There is no meaningful difference between the practice of lawyer placement

agencies charging a fee to a law firm for recruiting a permanent associate or partner, which often is a percentage of the lawyer's first year compensation (a practice not challenged), and a fee based on the temporary lawyer's actual compensation paid over a period of less than a year. There is no reason to assume that the actual cost to the law firm of the temporary lawyer hired through an agency (and consequently the impact on the fee to the client) would be higher than the cost of that lawyer's services hired direct by the firm, without the intervention of a placement agency. The increasing use of placement agencies for temporary lawyers lends support to the view that this is an efficient and cost-effective way for law firms to manage their work flow and deployment of resources.

The committee is aware that the temporary lawyer often is on a permanent roster maintained by the placement agency and may wish repeated placements by the agency with a succession of law firms. This factor conceivably could limit the temporary lawyer's exercise of independent professional judgment in some respects because of the lawyer's need to maintain the goodwill of the placement agency. *See* ABA Formal Opinion 87-355, Section I, and ABA Formal Opinion 87-354. Unlike the situation in those opinions where the lawyers are dealing directly with clients, here the temporary lawyer is working for a law firm which itself has supervisory obligations over the temporary lawyer by the provisions of Rule 5.1. But as long as the temporary lawyer avoids the excessive controls exercised by nonlawyers noted in those opinions, the arrangement is in our opinion permissible under the constraints imposed by the Rules and the predecessor Code.<sup>12</sup>

Sound practice suggests that the agreement between a temporary lawyer and a placement agency should make clear in explicit terms that the agency will not exercise any control or influence over the exercise of professional judgment by the lawyer, including limiting or extending the amount of time the lawyer spends on work for the clients of the employing firm. Moreover, the law firm must make certain that the compensation received by the temporary lawyer, whether paid directly by the firm to the lawyer or paid by the placement agency to the lawyer from sums which the firm pays the agency, is adequate to satisfy the firm that it may expect the work to be performed competently for the firm's clients. These matters fall within the responsibilities of the law firm.

In summary, both the temporary lawyer and the law firm hiring the lawyer must be sensitive to the need to protect and prevent misuse of information

relating to the representation (or under the Code, the secrets or confidences) of firm clients. The application of the conflicts rules of the Model Rules or the predecessor Model Code depend upon all the facts and circumstances of the arrangement between the temporary lawyer and the firm in accordance with the general guidelines discussed in this opinion. Disclosure to a firm client on whose matters the temporary lawyer works of the arrangement with a temporary lawyer may be required, except where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm. Provided the temporary lawyer maintains independence of professional judgment against any influence by a placement agency, the law firm may pay placement agency fees, even where the amount of the fees is related to the amount of the temporary lawyer's compensation.

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<sup>1</sup> For purposes of this opinion, "firm" or "law firm" includes a sole practitioner and a corporate legal department. *See* ABA Model Rule of Professional Conduct (1983, amended 1987), Terminology, Rule 1.10 Comment. The term "temporary lawyer" means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. The term does not, however, include a lawyer who works part-time for a firm or full-time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an extended period and does legal work only for that firm. That person's relationship with the firm, during the period of employment, is more like the relationship of an associate of the firm, and the Model Rules or the predecessor Model Code of Professional Responsibility (1969, amended 1980) will govern the lawyer and the firm and their relationship as with any associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or who is retained in a matter as independent associated counsel.

<sup>2</sup> The consent of the current client may also be required under Rule 1.7(b).

<sup>3</sup> The Code does not address specifically representation of a client with interests adverse to a former client, but the standards relating to confidentiality and disqualification rules applied by the courts ordinarily would prohibit representation of the second client under the Code in the same circumstances as under the Rules.

<sup>4</sup> The Comment to Rule 1.10 explains the Rule as follows: "The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a

lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).”

<sup>5</sup> Based on a reading of the entire Rule and the Comment to the Rule and an analysis of the reasons for the restrictions in the Rule, the committee perceives no substantive difference between the terms “in” and “with” in the context of the Rule.

<sup>6</sup> DR 5-105(D) provides: “If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.” *See also* Footnote 4, *supra*.

<sup>7</sup> DR 4-101(A) provides: “‘Confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

<sup>8</sup> *See* Rule 1.9(b) and the Comment to Rule 1.10 quoted *supra*. The Code analogue, DR 4-101(D), applies only with respect to disclosures of client confidences and secrets.

<sup>9</sup> Rule 5.1(b) provides: “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Rule 5.1(c) provides: “A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” The temporary lawyer, of course, also remains subject to the Rules. Rule 5.2(a) thus provides: “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” The only analogue in the Code to Rules 5.1 and 5.2 is DR 1-103(A), which requires disclosure to the proper tribunal or authority of a lawyer’s unprivileged knowledge of the misconduct of another lawyer. Both the temporary lawyer and the lawyers with the firm engaging the temporary lawyer retain all the general obligations of lawyers prescribed by the Model Rules. For example, the lawyers with the firm have the obligation to provide competent representation to the client under Rule 1.1, as does the temporary lawyer who undertakes work for the client. *See* DR 6-101 of the Code.

<sup>10</sup> *See* Rule 1.6 and the Comment to Rule 1.6 which provides in part: “Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to the representation of the client of the firm unless the client has instructed that particular information be confined to specified lawyers.”



<sup>11</sup> The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York in Opinion No. 1988-3, April 6, 1988 (amended in Opinion No. 1988-3-A, May 23, 1988), concluded that an arrangement under which the law firm pays the agency and the agency, after retaining a percentage as its fee, pays the lawyer constitutes improper sharing of fees with a nonlawyer and aiding in the unauthorized practice of law by the placement agency in violation of the New York Lawyer's Code of Professional Responsibility. The committee also found infirm an arrangement where the law firm pays the lawyer directly and pays the agency a placement fee related to the compensation paid to the lawyer. The Committee on Professional Ethics of the Connecticut Bar Association in Informal Opinion 88-15 (Aug. 1, 1988) concluded that an arrangement under which the law firm pays the lawyer's compensation direct to the lawyer and separately pays the placement agency its fee based on a percentage of the lawyer's compensation does not violate the Connecticut Rules of Professional Conduct.

<sup>12</sup> One could, of course, hypothesize the operation by nonlawyers of an agency which places lawyers directly with clients (and not through the legal department of the client) who pay compensation to the agency for the lawyers' services. But in such a case the agency would also not only be sharing fees with its lawyers but would almost certainly be engaged in unauthorized practice of law under the law of every American jurisdiction.

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.