LEGAL ETHICS OPINION 1712 TEMPORARY LAWYERS WORKING THROUGH A TEMPORARY PLACEMENT SERVICE.

You have presented a hypothetical situation in which a staffing agency recruits, screens and interviews lawyers ("Lawyer Temps"), then places them with law firms or corporate law departments to practice law on short-term projects. The staffing agency places Lawyer Temps on its payroll and pays them an hourly rate (deducting all appropriate taxes and paying all required payroll taxes) during their work on the temporary assignments. The staffing agency then bills the law firm and/or law department for that rate, plus a mark-up that covers the staffing agency's overhead and profit. The staffing agency is careful to match the lawyer's skill and experience to the practice needs of the law firm or corporate law department requesting a Lawyer Temp. The staffing agency does not, however, assert any control over the Lawyer Temp's exercise of his/her professional and legal judgment while he/she is working on the assignment. Moreover, the staffing agency's contract with the law firm or the corporate law department requires that the Lawyer Temp be supervised by a lawyer associated with the firm or the corporate law department.

Initially, you inquired whether it is ethically permissible for a lawyer to enter into an agreement with a staffing agency under which the agency places the lawyer with law firms or corporate legal departments to practice law on short-term assignments. You have also made some specific inquiries concerning the ethical duties of the staffing agency, the Lawyer Temp, and the hiring law firm or corporate law department.

The Committee recognizes the increasing utilization of Lawyer Temps by law firms and corporate law departments to meet temporary or unusual staffing needs or to provide special expertise not possessed by other lawyers associated with the firm or corporate law department. May a lawyer enter into an agreement with a staffing agency that places him/her with a law firm or a corporate law department, and may the law firm or corporate entity hire such a temporary lawyer? The Committee believes that such an arrangement is ethically permissible subject to compliance with applicable disciplinary rules. Though not entirely in agreement on all ethical issues and duties arising out of the relationship, all legal authorities found by the Committee have approved a law firm's use of a Lawyer Temp. Alaska Bar Ass'n Ethics Op. 96-1 (1996); Supreme Court of Texas Professional Ethics Committee Op. 515 (1996); California State Bar Ethics Op. 1992-126 (1992); Supreme Court of Ohio, Bd. Of Commissioners of Grievances & Discipline Op. 90-23 (1990); New Jersey Supreme Court Advisory Committee on Professional Ethics Op. 632 (1989); *Oliver v. Bd. Of Governors, Kentucky Bar Ass'n*., 779 S.W.2d 212 (Ky. 1989); City of New York Bar Ass'n Formal Op. 1989-2 (1989); Florida State Bar Ass'n Op. 88-12 (1988); ABA Formal Op. 88-356 (1988).

This Committee has previously opined that there is no prohibition against a lawyer having dual separate law practices. Virginia Legal Ethics Opinion 1659, LE Op. 1659. A lawyer licensed in Virginia may be an associate of two or more firms for the practice of law. Virginia Legal Ethics Opinion 802, LE Op. 802. Therefore, it would be ethical for a licensed Virginia lawyer to serve as a Lawyer Temp for more than one law firm or corporate law department. However, the parties to such an arrangement have a number of ethical issues to address, many of which are raised in your inquiry.

Based on the facts you have presented, you have asked the Committee to opine as to the following:

1. What are the obligations of the staffing agency, the Lawyer Temp, and/or the law firm to avoid conflicts of interest in accordance with DR:5-105?

A Lawyer Temp placed by a staffing agency with a law firm to work on particular matters for clients of that firm "represents" the firm's clients for purposes of DR:5-105. ABA Formal Op. 88-356. DR:5-105 addresses the representation of multiple clients with conflicting interests and the representation of a client in a matter substantially related to the representation of a former client. A Lawyer Temp may work on a single matter for a law firm or may work generally for the firm for a limited period on a number of different matters. A Lawyer Temp assigned by a staffing agency to a law firm may simultaneously perform work for clients of other law firms to which the Legal Temp is assigned. In each instance, the Lawyer Temp may face situations where he/she is assigned to matters in which clients of the law firms have conflicting interests. DR:5-105(A), (B). Moreover, even if the Lawyer Temp has no assignments with other law firms pending, he or she must avoid accepting assignments with a law firm that are "substantially related" to any matters handled for clients of his/her former law firm if the interests of the current client conflict with those of the former client, unless the former client consents after full disclosure. DR:5-105(D). The personal conflicts of Lawyer Temps are treated as if they are conflicts of the law firm's regular professional staff.

The Committee reviewed several opinions advising that in order to avoid conflicts of interest, the law firm and the Lawyer Temp should each keep records of the matters worked on during the period of the assignment. A recent article in ABA *Litigation News* reported that one Lawyer Temp placement agency requires each lawyer to keep a log containing the names of all the Lawyer Temp's former clients for whom the lawyer worked either as a law firm employee or as a Legal Temp. The placement agency does not review the log but makes it available to placement employers. 23 ABA *Litigation News* 5 (No. 3 Mar. 1998). Prior to hiring a Lawyer Temp, the law firm and the Lawyer Temp should meet to determine that there will be no conflicts between the Lawyer Temp's past placements or employment and the law firm's proffered placement. *See* California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion Number 1992-126, 1992-WL 166234. In this regard, the situation is like that of a lateral transfer interviewing or negotiating for a position with a new law firm. *See, e.g.*, ABA Formal Op. 96-400 (1996).

ABA Formal Opinion 88-356 advises that a Lawyer Temp should not be placed with a law firm that represents a party adverse to a client of the Lawyer Temp or a former client of the Lawyer Temp in a "substantially related" matter. ABA Opinions 88-356 and 96-400 impose obligations on both the hiring law firm and the lawyer seeking placement to screen for possible conflicts. The law firm that is negotiating to hire the Lawyer Temp must make inquiry of the extent to which the Lawyer Temp was involved with the representation of an adverse party. Otherwise, the placement of the Lawyer Temp may result in the firm's disqualification from representing a client adverse to a client then or formerly represented by the Lawyer Temp. The Lawyer Temp and the law firm must be able to have substantive discussions about current and former clients of the Lawyer Temp in his/her other placements. If the Lawyer Temp is aware that the law firm with which he/she is seeking placement represents a client in a matter adverse to a client for whom the Legal Temp worked or works with another law firm, the Lawyer Temp would need to consult with his/her client to determine whether and to what extent the Lawyer Temp could disclose information about the client and the subject of the representation to lawyers conducting the interview and negotiations for the hiring firm.

Exactly how the ABA opinions expect "an appropriate inquiry" and "screening for conflicts" to occur in all situations is unclear. Even the identity of clients and the subject

of their legal matters may be entitled to confidentiality under DR:4-101 as client secrets. Virginia Legal Ethics Op. 1300, LE Op. 1300 (1989). This Committee has previously opined, however, that it would not be improper to reveal the identity of a former client in order to cure a possible conflict of interest where the former client is the opposing counsel in a pending matter and such information needed to be disclosed to the current client to obtain consent. Virginia Legal Ethics Op. 1147, LE Op. 1147 (1989). The Committee has also opined that once the fact of representation of a client is a matter of public record, then disclosure of the mere fact of such representation would not violate DR:4-101 unless the client has requested such information to remain confidential or the disclosure of such information would be detrimental or embarrassing to the client. *Id*.

Hence, the Lawyer Temp's disclosure of his/her current or former clients on assignments with other law firms is tested by DR:4-101(A)'s definition of a "secret." It is "information gained in the professional relationship [which includes the fact of the representation] 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." If the Lawyer Temp's current or former client does not request him/her or the law firm to hold the fact of representation in confidence, and if the Lawyer Temp reasonably determines that disclosure of the fact of representation would not be embarrassing to the client or would not likely be detrimental to the client's interests, then the Lawyer Temp may include such clients in his/her client log for disclosure to another hiring law firm without client consent. The committee cautions, however, that a client's request that information gained "be held inviolate" is a function of inquiry of the client. The broad public perception is that information gained by lawyers is confidential. Indeed, lawyers foster that perception. Thus, the client's failure to exact an affirmation of confidentiality, or to instruct the lawyer to hold information inviolate, does not permit the lawyer to assume without inquiry that the client consents to disclosure of the fact of representation to third persons. Client consent permits disclosure of confidences and secrets under DR:4-101(C)(1), but the consent contemplated is a meaningful one that entails the lawyer's disclosure to the client of the significance and ramifications of revealing confidences and secrets.

There are two practical considerations for Lawyer Temps. First, if the Lawyer Temp concludes that client consent to disclosure is not necessary under DR:4-101(B), the Lawyer Temp should confirm his conclusion with the law firm with which he/she worked or works for those clients. It seems fair to say that the client would have a more intimate relationship with the law firm than with the Lawyer Temp assigned to work on the client's matter. The Lawyer Temp thus can be guided by the law firm's perception or informed judgment of the client's desires as to disclosure of the fact of the Lawyer Temp's representation.

The second practical consideration is that whether the Lawyer Temp is permitted to disclose the fact of representation of a client should be addressed at the outset of the placement with the law firm. The risk of wrongful disclosure could be minimized if each of the Lawyer Temp's hiring law firms made a disclosure to clients for whom he/she would work, explained that the nature of transitory placement with law firms required the Legal Temp to maintain a client log, and requested consent to inclusion of the client's name in the Lawyer Temp's log. If a client objects to disclosure of the fact of the Lawyer Temp's representation, the Lawyer Temp acts at his/her peril under DR:4-101 in disclosing the fact of the client's representation. Likewise, the hiring law firm acts at its peril under DR:5-105 if it fails to assess the possibility of conflicts of interests between clients.

In those situations where an exchange of information between the Lawyer Temp and the hiring firm is not permitted with respect to identification of current or former clients

of the Lawyer Temp, the Lawyer Temp must be cognizant of conflicts of interest and decline employment when required to do so under the applicable rules. In effect, the personal conflicts of a Lawyer Temp are to be analyzed and resolved in the same manner as the personal conflicts of any lawyer switching firms. LE Op. 1419, LE Op. 1428, LE Op. 1430 and LE Op. 1629. Both the Lawyer Temp and the lawyers hiring the Lawyer Temp would be barred from representing any party adverse to any client in whose legal matter the Lawyer Temp has "actively participated," or from whom the Lawyer Temp gained confidences and secrets, unless the clients consent after full disclosure. DR:5-105; Legal Ethics Opinion 1428, LE Op. 1428.

> *2. Is the Lawyer Temp considered "associated with" the firm for the purposes of the imputed disqualification provision of DR:5-105(E)? What steps can be taken so that a temporary attorney is not deemed "associated with" the firm?*

The most difficult conflict of interest issues involving Lawyer Temps turn on whether the Lawyer Temp is considered "associated with" the hiring firm for purposes of the "imputed disqualification" rule under DR:5-105(E), which states:

> If a lawyer is required to decline employment or to withdraw from employment under DR:5-105, no partner or associate of his or her firm may accept or continue such employment.

For example, suppose a Lawyer Temp is working on a legal matter for Firm X which represents Client A, and the staffing agency assigns the Lawyer Temp to work for Firm Y which represents A's adversary, B. Must the Lawyer Temp withdraw from representing A unless A consents to Firm Y's employment of the Lawyer Temp? If Client A objects, can Firm Y still continue its representation of B? Can Firm Y effectively "screen" the Lawyer Temp from its representation of B so that the conflict is curable? If the Lawyer Temp did not work on any matters for Client A while employed at Firm X, may firm Y hire the Lawyer Temp and continue to represent Client B?

Categorical answers cannot be given to those questions. DR:5-105(E) must be applied on a case-by-case basis after consideration of the particular circumstances and facts. A key factor in the consideration consists of the extent to which confidentiality is protected, which implicates the Lawyer Temp's access to client confidences and secrets as defined in DR:4-101(A).

For guidance, the Committee turns to some of its prior opinions involving lawyers moving laterally from one firm to another since those opinions analyze similar issues regarding protection of client confidences and secrets and imputed conflicts. In Legal Ethics Opinion 993, LE Op. 993, the Committee addressed a situation in which a lawyer left a law firm to establish his own practice and desired to represent a plaintiff in an existing case in which the defendant was represented by a partner in his old law firm. Since the lawyer was not involved in the case while at his old law firm, the Committee concluded the lawyer had rebutted any presumption that he had acquired confidential information from or about the client while employed at his old firm.

In Legal Ethics Opinion 1428, LE Op. 1428, a lawyer in a medical malpractice defense law firm made a lateral transfer to join a law firm that prosecuted plaintiffs' claims of medical malpractice. The Committee opined that absent client consent, both the lawyer and his new firm would be barred from representing any plaintiffs in matters in which the lawyer was "actively participating" while employed at the defense firm. In that situation, a screening device ("Chinese Wall") would not cure the conflict absent client consent. The lawyer and others in the plaintiff's law firm could represent clients whose interests

were adverse to clients of the defense firm if the lawyer switching firms did not work on those cases and did not acquire any former client confidences and secrets. *See also* Legal Ethics Opinion 1629, LE Op. 1629. Therefore, if a lawyer while with one firm acquired no confidential information relating to a particular client of the firm and did not participate in the firm's representation of the client, neither the lawyer individually nor any member of the second firm is disqualified from representing a client in the same or a related matter even if the interests of the two clients conflict.

If a Lawyer Temp was directly involved in work on a matter for a client of one law firm, thereby acquiring confidences and secrets relating to the representation of that client, a second law firm representing an adverse client in the same or a substantially related matter should not hire that Lawyer Temp, at least until the pending matter is concluded, without consent from the former client of the Lawyer Temp. In that situation, even if the Lawyer Temp was assigned to the second law firm to work on matters unrelated to his work at the former firm, absent the consent of the clients whose interests conflict, DR:5-105(E) would disqualify the second law firm from continuing its representation of a client whose interests were adverse to the client of the first law firm.

The risk of imputed disqualification for the hiring firm also depends on the Lawyer Temp's access to confidences and secrets of clients represented by other law firms even if the Lawyer Temp did not perform work for those clients.

If the Lawyer Temp works for a law firm, in its office, on a number of matters for different clients and has general access to the law firm's files and to office discussions of client matters, there will likely be a presumption that the Lawyer Temp acquired confidences and secrets. Such a presumption is not likely, or is more readily rebutted, where the Lawyer Temp worked on a single matter outside the law firm's office, or under such close supervision that it can be demonstrated the Lawyer Temp did not have access to confidential information about other law firm clients. Law firms hiring Lawyer Temps should maintain adequate records and documentation demonstrating restricted access to client files and confidential information. Even so, the second law firm's “screening” of a Lawyer Temp who “actively participated” in the representation of one client adverse to a client of the law firm will not cure the conflict and is not a substitute for client consent. Legal Ethics Opinion 1428, LE Op. 1428, *supra*.

The Standing Committee on Legal Ethics for the American Bar Association takes the position that Lawyer Temps should not necessarily be treated as “associated” with the law firm that hires them for purposes of imputed disqualification. Applying a “functional analysis” test, the ABA committee focused on a direct connection between the Lawyer Temp and the work he/she performed for clients with conflicting interests. ABA Formal Op. 88-356. Applying the Model Rules of Professional Conduct and the Code of Professional Responsibility, the ABA committee concluded that ordinarily screening is permissible for Lawyer Temps moving from firm to firm:

> In order to minimize the risk of disqualification, firms should, to the extent practicable, screen each Lawyer Temp from all information relating to clients for which the Lawyer Temp does not work. All law firms employing Lawyer Temps also should maintain a complete and accurate record of all matters on which each Lawyer Temp works. A Lawyer Temp working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the Lawyer Temp is not working. Since a Lawyer Temp has an equal interest in avoiding future imputed disqualification, the Lawyer Temp should also maintain a record of clients and matters worked on.

The committee concurs with the precautions suggested in ABA Formal Op. 88-356 to avoid a disqualifying conflict of interest. The committee observes that authorities in other jurisdictions have done likewise. *Oliver v. Board of Governors*, 779 S.W.2d 212, 216 (Ky. 1989); New Jersey Op. 632. (1989); and South Carolina Op. 91-09 (1991). The Committee cautions, however, that the screening measures recommended in ABA Formal Op. 88-356 will not always be practical or possible, and that the efficacy of screening (the "Chinese Wall") cannot be guaranteed in the light of the Virginia Supreme Court's disapproval of Legal Ethics Opinion 1302, LE Op. 1302. *See Building Chinese Walls in Virginia*, etc., 26 U. Rich. L. R. 391 (1992). The burden rests with the Lawyer Temp to recognize direct conflicts and avoid placement in law firms that the Lawyer Temp knows to represent clients adverse to current clients of the Lawyer Temp or to former clients in "substantially related" matters, unless an informed consent is received from the clients.

3. What are the obligations of the staffing agency, the Lawyer Temp, and/or the law firm to preserve the confidences and secrets of the clients in accordance with DR:4-101?

The appropriate and controlling Disciplinary Rule is DR:4-101, which requires a lawyer to preserve the confidences and secrets of a client except as disclosure is expressly authorized under the Rule. The Committee has previously opined regarding the ethical duties of a law firm and a lawyer serving as "of counsel" to the firm, and an associate of two firms or one firm with a separate practice, to avoid conflicts and protect client confidences and secrets. Virginia Legal Ethics Opinions 1293, LE Op. 1293 and 1659, LE Op. 1659. The lawyer serving as "of counsel" and the associate must adhere to the requirements of DR:4-101 for safeguarding confidences and secrets of the clients of each law firm.

It is the responsibility of the Lawyer Temp, therefore, to comply with the requirements of DR:4-101 by observing strict confidentiality regarding any confidences or secrets gained in the course of temporary employment. As stated above, if a Lawyer Temp works in a firm's office on matters for many of the firm's clients and generally has access to information concerning other clients on whose matters the Lawyer Temp is not working, the Lawyer temp will be deemed "associated" with the firm as defined in Model Rule 1.10 or regarded as an "associate" for purposes of imputed disqualification under DR:5-105(E).

The staffing agency must be mindful that it is not permitted to cause the Lawyer Temp to breach his/her duty to preserve client confidences and secrets. Consistent with DR:4-101 the Lawyer Temp may not discuss or otherwise reveal to the staffing agency or third parties any client confidences or secrets. In the absence of client consent, the subject matter and content of the services being provided to clients of the hiring firm should not be revealed to the staffing agency, and care should be taken not to reveal such information in any time records provided the staffing agency. City of New York Bar Op. 1988-3(1988).

It is the ethical responsibility of any lawyer using Lawyer Temps to "exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR:4-101(C) through an employee." DR:4-101(E).

4. Is the payment of the fee to the staffing agency (the hourly rate for the Lawyer Temp) deemed "dividing legal fees with a non-lawyer" in violation of DR:3-102(A)?

The appropriate and controlling Disciplinary Rule is DR:3-102(A), providing that a lawyer may not pay a portion of legal fees to a non-lawyer. Financial arrangements used by staffing or placement agencies differ. In the facts you present, the agency places the Lawyer Temps on its payroll and pays him/her an hourly rate (deducting all appropriate withholdings) while the Lawyer Temp works on the temporary assignments. The staffing agency then bills the law firm/law department at that rate, plus a mark-up for the staffing agency's overhead and profit.

On the facts presented, the Lawyer Temp clearly is not sharing or splitting legal fees with a non-lawyer, but instead receives full compensation for his/her services from the non-lawyer staffing agency. It is ethically permissible for a lawyer to be compensated by a non-lawyer who is not the lawyer's client, provided that such an arrangement does not interfere with the lawyer's ability to exercise independent professional judgment on behalf of the client. DR:5-106. Although the staffing agency bills the law firm to recoup the compensation paid to the Lawyer Temp, the staffing agency is not billing to collect "legal fees" as that term is commonly understood. A "legal fee" is a sum of money paid by a client to a lawyer, or to a law firm, for legal services provided by a lawyer or law firm to that client. The staffing agency is billing the law firm and seeking compensation for locating, recruiting, screening and providing the Lawyer Temp to the law firm. The agency is not "practicing law" and its customer, the law firm, is not a "client." The law firm, in turn, bills its client and is paid a "legal fee" for services rendered by the law firm to the client. The legal fee charged by the law firm to the client may include charges for the Lawyer Temp, and, as discussed in depth, *infra*, such charges may include overhead and profit if certain conditions are present. The client pays the legal fee to the law firm, not to the staffing agency or the Lawyer Temp.

A different procedure was suggested in Formal Opinion Number 1989-2 of the Association of the Bar of the City of New York. The opinion concluded that the temporary agency did provide a service, and that the compensation paid by the law firm was not a legal fee within the meaning of DR:3-102(A). The Committee suggested, however, that the law firm pay the Lawyer Temp directly for the work performed and pay the temporary agency a separate fee. Moreover, the agreement and invoices generated by the agency, it was said, should state separately the fee charged by the agency and should identify that fee as compensation for the agency's services in locating, recruiting, screening and placing the Lawyer Temp. In addition, the Committee stated that the agency's fee, however calculated, may not be included in the legal fee charged by the law firm to its client. If the firm wished to pass through the agency's fee to its client, as opposed to absorbing the fee in firm overhead, then the agency fee should be separately billed to the client as a "disbursement" (cost advance) like any other disbursements for non-legal services.

5. Does the law firm have an ethical duty to disclose to its client(s) that it has engaged the services of a Lawyer Temp?

The appropriate and controlling Disciplinary Rules are DR:1-102(A)(4), prohibiting a lawyer from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation, and DR:6-101(C), requiring a lawyer to keep the client reasonably informed about matters in which the lawyer's services are being rendered. EC:2-24 is also pertinent: "Without the informed consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm."

In the facts presented, the staffing agency's contract with the hiring law firms requires that a lawyer associated with the law firm shall supervise the Lawyer Temp. To the extent that the Lawyer Temp reports to and is supervised by a lawyer associated with the firm

(whether partner or associate), the Lawyer Temp is not a lawyer outside the law firm. The Lawyer Temp's work for a client is the work of the law firm for the client.

In the context of the law firm-provided supervision of the Lawyer Temp's work, the situation parallels, and has the same effect as, the law firm's assignment of lawyer resources to perform work for its clients. In practice, a client consults with a lawyer in the law firm about the legal services needed. The lawyer, in turn, makes an informed decision about the lawyer(s) in the law firm who are competent and available to do the work. The work may be assigned to any one or more of partners, senior associates or junior associates. Absent special circumstances, the law firm does not make and is not required to make a disclosure of all of its lawyers to whom some or all of the work will be assigned within the law firm, except possibly after-the-fact to the extent that the billing statements reflect the names or initials of lawyers who performed work on the matter. The client hires the law firm and not simply the lawyer consulted about the matter.

ABA Formal Opinion 88-356 addressed the necessity of disclosure to the client of the utilization of a Lawyer Temp. It concluded that, if the Lawyer Temp will work independently, without close supervision of a lawyer associated with the law firm, then the client must be informed of the Lawyer Temp's participation in the representation and the client's consent obtained. On the other hand, the ABA concluded, if the Lawyer Temp will work under the direct supervision of a lawyer associated with the law firm, the law firm ordinarily will not have to disclose to the client the fact of the Lawyer Temp's work on the client's matter. The ABA's conclusions were followed in New Jersey Opinion 632 (1989).

The committee concurs with ABA Formal Opinion 88-356. *Oliver v. Board of Governors*, 779 S.W.2d 212 (Ky. 1989), reached a different conclusion but on distinguishable facts. In that case the law firm occasionally hired unaffiliated solo practitioners on an hourly basis to cover court calls and other routine appearances. The delegation of work outside the law firm was held to require disclosure to and consent from the client. The law firm's direct supervision of the unaffiliated solo practitioners in the performance of their work was not apparent.

The committee cautions, however, that a law firm's disclosure to and consent from a client will be necessary whenever the client specifies the lawyer who is to handle the matter. In that circumstance the lawyer specified would violate the client's instruction, and mislead the client, if another lawyer, whether or not a Lawyer Temp, handled the matter without the client's consent. With that exception, however, the law firm's direct supervision of, and consequent responsibility for, the work of Lawyer Temps fairly comports with the client's expectation of the quality of services sought in the engagement of the law firm and its resources without the client's consent to the utilization of the Lawyer Temp. There is, of course, also an exception that is driven by common sense. If a Lawyer Temp is assigned to work on a litigation matter entailing an appearance at depositions or at trial, no law firm would want its client to attend without having received a disclosure of the Lawyer Temp and his/her role, just as the law firm would do in the case of an associate or a partner whom the client did not know.

6. Must the law firm disclose to the client the payment arrangement with the staffing agency? May the law firm charge the client a fee that exceeds the amount paid to the staffing agency?

The appropriate and controlling Disciplinary Rules are DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or

misrepresentation that reflects adversely on the lawyer's fitness to practice law; DR:2-105(A) which provides that a lawyer's fee shall be reasonable and adequately explained to the client; and DR:9-102(B)(3) which requires a lawyer to render an appropriate accounting to the client.

Whether a law firm retaining a Lawyer Temp must disclose its payment arrangement with the staffing agency to the client depends on the particular facts. ABA Opinion 88-356 stated, and California Formal Opinion 1994-138 agreed, that when the hiring firm does not charge the Lawyer Temp's compensation to the client as a disbursement, there is no obligation to disclose the compensation arrangement with the Lawyer Temp to the client. On the other hand, if the payment made to the staffing agency is billed to the client as a disbursement, or a cost advanced on the client's behalf (for example, "To-Reimbursement of costs advanced to staffing agency for temporary lawyer"), then the hiring firm must disclose the actual amount of the disbursement and also disclose any mark-up of or surcharge on the amount actually disbursed to the staffing agency. Any mark-up of or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993), as follows:

> When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.
>
> It is the view of the Committee that, in the absence of disclosure to the contrary, it would be improper if the lawyer assessed the surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount other client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create profit centers when the client had been told he would be billed for disbursements.

DR:2-105(A) and (B) obligate the hiring firm to give the client an adequate explanation of the legal fees, and at the client's request, to furnish the basis of the legal fees. A law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee. In LEO #1648, LE Op. 1648 (1995), the committee opined that it would be improper and dishonest for a law firm to charge, without disclosure to the client, additional "administrative fees," "processing fees" or "value billing" allocated to the originating attorney (a fixed percentage "add-on" from 20% to 200%) when the originating attorney did not actually work on the matter. The committee further stated that "any lawyer's bill which charges fees or costs for work not actually performed is fraudulent, unreasonable, not adequately explained to the client and breaches the lawyer's duty to properly account to the client."

Instead of billing the staffing agency's compensation as a disbursement to the client with a disclosed mark-up, the hiring law firm may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services. *See* California Formal Opinion 1994-138. Since the charge is not represented to be the hiring law firm's actual disbursement of funds for client-reimbursement, the hiring firm does not thereby misrepresent as an out-of-pocket disbursement what is actually its out-of-pocket

disbursement plus a mark-up. By analogy, law firms bill their clients at a certain rate for services rendered by salaried associates of the law firm without a disclosure of the salary of the associates. A law firm may, for example, charge $75 per hour for an associate's time when the associate is paid a salary of $60,000 per year and is expected to produce 1,800 billable hours per year, which is compensation paid the associate at the rate of $33 per hour. That the associate is an employee and the Lawyer Temp is an independent contractor seem to be a distinction without a difference in terms of non-disclosure of the spread between compensation paid and rates charged. In each instance the spread, or the mark-up, is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit. In each instance, too, DR:2-105(A)(1) mandates that a lawyer's fees shall be reasonable.

> *7. What are the obligations of the staffing agency, the Lawyer Temp, and/or the hiring law firm to ensure that the Lawyer Temp exercises independent professional judgment on behalf of a client?*

The same concerns expressed in the context of in-house liability claims against an insured, and the provision of legal services under prepaid legal service plans, apply with equal force to Lawyer Temp placement services, i.e., these are arrangements in which non-lawyer intermediaries exercise control over the delivery of legal services and therefore may engender interference with the lawyer's obligations to (1) exercise independent professional judgment on behalf of a client; (2) maintain client confidences and secrets; (3) avoid conflict of interests; and (4) practice law competently. *See, e.g.*, UPL Opinion No. 60 (1985) (liability insurer may use in-house staff counsel to defend claims brought against insureds). The staffing agency must recognize that the relationship between the Lawyer Temp and the client is not different from the traditional attorney-client relationship. The agency must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle. The Lawyer Temp may not enter into an employment agreement with the agency that restricts his or her ability to exercise independent professional judgment on behalf of a client or restricts his or her right to practice law. DR:5-106(A); DR:2-106(A).

These concerns are addressed in EC:5-23:

> A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. . . Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

Competence is a component of independent professional judgment. It is not ethically permissible for a Lawyer Temp to accept a temporary assignment that requires him/her to undertake representation in a matter in which he/she lacks the competence and specific legal knowledge employed in acceptable practice by lawyers undertaking similar matters. DR:6-101(A). Although the burden of DR:6-101(A) rests on the Lawyer Temp, the staffing agency should ascertain his/her practice areas of competence and not direct assignments for temporary legal services outside those practice areas. Were the staffing agency to do so, the directed assignments would not exonerate the Lawyer Temp under DR:6-101(A) since a lawyer is not permitted to circumvent a Disciplinary Rule through actions of another. DR:1-102(A)(2).

CONCLUSION

It is ethically permissible for a law firm or a corporate law department to retain the temporary services of a lawyer through a lay placement/staffing agency. Hiring a lawyer for temporary services is treated like hiring a lawyer from another law firm. Hence, the hiring law firm and the lawyer retained for temporary services have an ethical obligation to ascertain whether conflicts of interest exist with respect to current and former clients of each of the law firms and the lawyer.

In the absence of informed client from the clients affected, a law firm or corporate law department is not ethically permitted to retain a placement/staffing agency-provided lawyer who (i) currently represents a client in a matter adverse to a client of the law firm, or (ii) formerly participated in the representation of a client adverse to a client of the law firm in the same or a substantially related matter. Whether a lawyer retained for temporary services will be deemed "associated with the firm," and thus trigger imputed disqualification of the law firm under DR:5-105(E), is a fact-intensive issue. If the lawyer had broad access to client files and client communications in his/her temporary assignments, even though he/she was not involved in the representation of the client, there may be a presumption that client confidences and secrets were gained.

On the facts presented, the financial arrangement among the hiring law firm, the staffing agency, and the Lawyer Temp does not constitute a sharing of legal fees with a non-lawyer under DR:3-102 or a division of legal fees between lawyers not in the same firm under DR:2-105(D).

The law firm is not required to disclose to and get consent from the client to whose representation the Legal Temp is assigned that a Lawyer Temp will participate in the representation as long as the Legal Temp reports to and is under the direct supervision of a lawyer associated with the law firm.

If the law firm's payment to the staffing agency is billed to the client as a disbursement, or as a cost advanced by the law firm on behalf of the client, the disbursement shown must be the amount actually paid to the staffing agency. Upon disclosure to and consent from the client, the disbursement shown may be marked-up above the actual payment to the staffing agency. The law firm is not obligated, however, to bill the payment to the client as a disbursement. The law firm, in its statement for services rendered, may bill for the services of a Lawyer Temp at a rate or in the manner that it bills the time of salaried associates for services rendered, without disclosure of the amount paid the staffing agency.

The staffing agency is not permitted to interfere with or influence a Lawyer Temp's exercise of independent professional judgment on behalf of the clients for whom he/she provides services. The staffing agency should ascertain Lawyer Temp's practice areas of competence, and the Lawyer Temp should decline assignments for temporary services in matters outside his/her competence.

Committee Opinion
July 22, 1998