

The Association of the Bar of the City of New York

Committee on Professional and Judicial Ethics

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**THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK**

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

Formal Opinion No. 1988-3

Lawyer X has been approached by several non-lawyers who wish to start a temporary lawyer placement agency (the "Agency"), the business of which would be the assignment of attorneys to law firms on a per-diem or per-hour basis. The Agency would obtain from attorneys, not currently engaged in the full-time practice of law, expressions of interest in consulting with other lawyers or law firms on particular cases, or for defined periods of time. When placed by the Agency, those lawyers would serve as independent consultants to the participating firms (the "Firms"), and would be neither employees of, nor co-counsel with, those Firms. The Agency would not make any referrals of attorneys directly to clients of the Firms, and would not advertise, promote itself or operate as a law firm or as a legal referral service for the general public.

The following is an example of the manner in which the Agency proposes to operate: Firm XYZ does not have the capacity to handle certain trademark issues arising out of the incorporation of an existing client's new subsidiary. DR 6-101 would require Firm XYZ either to obtain the expertise needed to handle that aspect of the representation competently, or to decline the engagement. Rather than decline the engagement, however, Firm XYZ calls the Agency and asks about the availability of temporary attorneys able to handle matters in the field of trademark law. The Agency, having obtained from its participating attorneys a description of their backgrounds and areas of expertise, sends to Firm XYZ a roster of those attorneys who have expressed a desire to handle trademark matters. The Agency also sends the resumes and narrative descriptions of the areas of expertise, provided by the listed attorneys, to Firm XYZ. Firm XYZ reviews the roster and tells the Agency that it would like to interview Lawyers A and B. The Agency arranges for those interviews. Firm XYZ selects Lawyer B for this job. Lawyer B then reports to Firm XYZ and performs the consulting services requested. Each week, Lawyer B submits his time records to Firm XYZ and to the Agency. Then (as an illustration), the Agency sends a statement to Firm XYZ for 20 hours of

consulting services by Lawyer B, at \$150 per hour; Firm XYZ pays the Agency \$3,000. Lawyer B is paid directly by the Agency at the rate of \$100 per hour, and receives \$2,000. The Agency retains the balance.

Lawyer X asks whether he may properly represent the Agency in connection with its proposed venture. We conclude that he may not, based on two ethical infirmities with the proposal: (1) any lawyer representing the Agency or participating in its activities would be facilitating the unauthorized practice of law in violation of DR 3-101(A); and (2) the arrangement would violate the prohibition in DR 3-102(A) against the division of fees with a lay person. We discuss these infirmities in Part I below. In Part II, we set forth guidelines under which, in our opinion, a temporary lawyer placement agency may operate without running afoul of the various provisions of the Code of Professional Responsibility that would be implicated by its operations.

I

In the opinion of this Committee, given the fee arrangement proposed by the Agency, any lawyer who helped create the Agency, and any lawyer who found employment through the Agency and was compensated in the proposed manner, would be assisting the Agency in the unauthorized practice of law in violation of DR 3-101(A). As stated in N.Y. County 587 (1971):

It has long been settled that ethical impropriety exists and that a lawyer is aiding a lay agency, whether personal or corporate, to practice law "so long as a lay agency pays a lawyer one amount for his services and for those services charges a different amount to the person to whom they are rendered." ABA 8 (1925). "A lawyer may not properly share his professional emoluments with a layman or lay agency and may not properly accept employment from a lay intermediary with the knowledge that such lay intermediary is profiting, or expecting to profit, from his professional services." ABA 10 (1926).

Lawyer X attempts to justify the proposed fee structure by comparing it to that used by a traditional employment agency for lawyers. He suggests that the Agency would not be practicing law, because the law firms and temporary consultants, not the Agency, would decide how services should be rendered. He further suggests that

there should be no question of divided loyalties or other conflicts between the demands of the Firms and the interests of the Agency "since the interests . . . are the same, and the Agency is in no way the attorney's employer or client." We disagree. The interests of the Agency would never be the same as those of the Firms. The Agency's conduct, unlike that of the Firms, will not be governed by the Code of Professional Responsibility. The Agency may well seek to extend the time a lawyer spends on a particular matter, or alternatively, to have the lawyer finish one project quickly so that the lawyer is available to undertake a more lucrative project. The Agency's position on such matters would be influenced chiefly by profits, not by the client's interests. While the Agency may not as a technical matter be the participating attorneys' employer, it is nonetheless in a position to bring pressure to bear on them by refusing to continue listing their services if they do not accede to its demands.

Because the Agency would have a financial interest in the manner in which the temporary lawyers perform their work, the proposed fee structure is qualitatively different from that of an employment agency, which receives a fixed fee. Furthermore, an employment agency is paid by the employer; here, although the Agency would as an administrative manner handle the billing for the participating attorney, the money the Agency would receive is part of the attorney's fee. DR 2-103 precludes lawyers seeking employment from paying referral fees. It does not restrict lawyers from paying agency fees for locating desired employees. See N.Y. City 445 (1938) (improper under Canon 35 for attorneys to pay a 10% fee to employment agency that obtained client). An alternative fee structure (as discussed in Part II below) may alleviate many of these problems.

The proposed arrangement is ethically improper in an additional respect. The participating attorney's division of fees with the Agency would be barred by DR 3-102(A), which prohibits the division of legal fees with a non-lawyer. See N.Y. State 564 (1984) (payment to marketing and public relations firms of commission or percentage of fees from clients they obtained is division of fees barred by DR 3-102(A)). Finally, we note that Lawyer X would be violating DR 2-103(E), by accepting a client who seeks his services as a result of -- indeed to develop -- conduct prohibited under the Code.

II

Assuming that, as discussed below, a proper fee structure can be developed to minimize the risk of improper influence by the Agency on the temporary lawyer, a number of additional ethical concerns need be addressed. The Code has specific rules regulating the lawyer's professional representation of a client; although the Agency itself would not be bound by the Code, the temporary lawyer would be. The lawyer will be required to preserve the confidences of clients of the law firm and client for whom he works temporarily, Canon 4, abstain from employment involving conflicts of interest, Canon 5, and competently and zealously protect his client's interests, Canons 6 and 7. In addition, any consultant retained on a part-time or temporary basis would be required under DR 5-107(A)(1) to obtain consent (after full disclosure) from the client before accepting payment either from the law firm or the Agency. See N.Y. City 82-14 (client must consent to law firm using services of outside attorney to argue motions).

These ethical precepts control a lawyer's representation of clients regardless of whether he or she is working only on a part-time or temporary basis. It would be unethical for the lawyer to afford the financial considerations of the Agency preeminence over the interests of a client. Such concerns regarding the lawyer's representation of the client can best be addressed by monitoring the conduct of the individual lawyer, not the Agency.

The ABA has recently suggested guidelines for the operation of non-traditional, for-profit legal service delivery plans, particularly prepaid legal service plans. ABA Op. 87-355 (1987). Although these guidelines have been delineated under the Model Rules of Professional Conduct (see Rule 5.4) rather than the Code,* much of the ABA's reasoning can be applied by analogy to temporary lawyer placement services under the Code. The main concerns expressed by the ABA in the context of prepaid legal service plans apply equally to temporary lawyer placement services, *i.e.*, both are arrangements in which lay intermediaries have control over the delivery of legal services, and therefore may engender interference with the lawyer's abilities (i) to exercise independent professional judgment on behalf of the client, (ii)

* Under the Code, specifically DR 2-103(D)(4)(a), a lawyer's participation in a for-profit legal service plan is prohibited. Op. No such prohibition exists under the Model Rules. See Model Rule 5.4(d); ABA Op. 87-355 (1987).

to maintain client confidences, (iii) to avoid conflicts of interest, and (iv) to practice competently.

To avoid these problems, and to enable temporary lawyer placement agencies to be operated in a manner consistent with the precepts of the Code of Professional Responsibility, in this Committee's opinion the following guidelines should be observed, and should be memorialized in a written agreement between the Agency and the participating lawyer to the extent appropriate:

1. A suitable fee structure would initially entail the elimination of any fee-splitting between the Agency and the lawyer; such an arrangement is directly prohibited by DR 3-102(A). Even a fee arrangement in which the law firm hiring the temporary lawyer paid fees directly to the lawyer, with a fixed percentage to the Agency, although not squarely prohibited by DR 3-102(A), would raise similar questions. However, if the law firm paid an hourly wage directly to the attorney and paid the Agency a *fixed fee*, many of these ethical concerns would be eliminated, provided, as noted in Guideline 3 below, the Agency agrees not to limit or to control the amount of time a lawyer may spend on a matter.

2. The Agency must recognize that the relationship between the temporary lawyer and the client is no different from the traditional lawyer-client relationship, and must not interfere with that relationship.

3. The Agency must agree not to attempt to limit or in any way to control the amount of time a lawyer may spend on any particular matter. DR 5-107.

4. The Agency must agree not to attempt to control the kinds of matters a lawyer may handle or the manner in which they are handled, nor may it require a lawyer to take any case or handle any particular matter. DR 5-107(B).

5. The Agency must agree that it will not attempt to cause the lawyer to breach the lawyer's duty to preserve client confidences and secrets. DR 4-101. Consistent with DR 4-101, the temporary lawyer may not discuss or otherwise reveal, to the Agency or other third parties, any client confidences or secrets. Not even the subject matter of the services being provided to the Firm should be revealed to the Agency, and appropriate precautions should be taken to ensure that no

such revelation is made in the time records provided to the Agency or otherwise.

6. The Agency and the Firm must agree not to attempt to require a lawyer to take any matter in which there is a potential conflict of interest. DR 5-105. The lawyer, of course, bears the ultimate responsibility for ensuring his compliance with the requirements of Canon 5.

7. The temporary lawyer and the Firm have a duty to disclose the temporary nature of their relationship to the client. DR 5-107(A)(1).

8. The Agency must agree not to attempt to require a lawyer to handle a matter that the lawyer is unable to handle competently. DR 6-101.

9. As is required in all hiring decisions, the law firm must investigate the competence of the temporary lawyer, and here, in particular, be satisfied after investigation that the lawyer is competent to handle the matter assigned to him. DR 6-101.

CONCLUSION

While the Committee believes that an employment agency that placed attorneys in part-time and temporary positions may be established properly under these guidelines, the Agency, as currently proposed, is improper for the reasons discussed earlier in this opinion.

This Committee may advise lawyers only on matters of ethics and cannot address questions of law. We note that Article 15 of the New York Judiciary Law, particularly sections 476(a), 479, 482, 491 and 495, may govern the Agency as proposed and therefore should be considered. In addition, other statutory provisions or judicial decisions may have an effect on both the operation of temporary lawyer placement agencies and on the conclusions we have reached in this Opinion.

March 31, 1988

**THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK**
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

Formal Opinion No. 1988-3-A

The Committee has studied all of the submissions it received regarding Formal Opinion No. 1988-3 (temporary lawyer placement agencies), issued on March 31, 1988. Having done so, the Committee adheres to its conclusions based on the Code of Professional Responsibility as expressed in the Opinion. The Committee reiterates (see page 6), that temporary lawyer placement agencies may be established and operated in conformity with the Code provided there is compliance with the Guidelines set forth in the Opinion.

Disciplinary Rule 3-102 of the Code of Professional Responsibility states unambiguously (with exceptions not relevant here) that "a lawyer or law firm shall not share legal fees with a non-lawyer." The Disciplinary Rules of the Code, including DR 3-102, are mandatory and binding on all lawyers in this State, unless and until changed. Accordingly, as we concluded in Part I of Formal Opinion No. 1988-3, a temporary lawyer may not share with a placement agency the legal fees received pursuant to the hourly fee-sharing arrangement described in the Opinion. However, as we concluded in Part II of the Opinion, DR 3-102 is not violated if, unlike the percentage-sharing arrangement, the placement agency charges the law firm a fixed fee for the placement. The remainder of Part II of the Opinion sets forth Guidelines in the circumstances presented for assuring compliance with other relevant Disciplinary Rules, including those concerning the preservation of confidential information and the avoidance of conflicts of interest.

In view of the nature of some of the comments made in the submissions, the Committee clarifies paragraph 1 of the Guidelines set forth in the Opinion (see page 5) as follows: Our conclusion in that paragraph that the Agency be paid a "fixed fee" refers to a prearranged sum independent of the fee ultimately paid to the attorney. In determining that sum, it would be appropriate for the Agency and the Firm to consider the nature of the assignment, and any other pertinent professional considerations relating to the assignment including the reasonably predictable length of time and number of hours it would take to perform, and the experience and seniority of the attorney assigned to the matter.

May 20, 1988