

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1995-96/3
Temporary Lawyers - Temporary Lawyer Placement Agency
November 8, 1995

RULE REFERENCES:

*Rule 1.2(a)	*Rule 1.8(f)	*Rule 5.4	*Rule 7.2
*Rule 1.4	*Rule 1.9	*Rule 5.4(a)	*Rule 7.3
*Rule 1.5(f)	*Rule 1.10	*Rule 5.4(b)	*Rule 7.4
*Rule 1.6	*Rule 2.1	*Rule 5.4(c)	*Rule 7.5
*Rule 1.7	*Rule 5.1	*Rule 5.4(d)	*Rule 7.5(d)
*Rule 1.7(b)	*Rule 5.2	*Rule 5.5	*Rule 8.4
*Rule 1.8	*Rule 5.3	*Rule 7.1	*Rule 8.4(c)

SUBJECTS:

- *Adverse Effect on Professional Judgment
- *Attorney-Client Privilege
- *Business Activities
- *Confidentiality
- *Conflict of Interest
- *Fees
- *Independent Judgment
- *Law Firms

STATUTORY REFERENCES:

- *RSA 294-A:5
- *RSA 311:7
- *RSA 311:11

OTHER REFERENCES:

- *ABA Formal Ethics Opinion 88-356
- *NH Bar Association Ethics Committee Opinion No. 1989/90-9

ANNOTATIONS:

Rule 5.4 does not expressly prohibit the leasing of lawyers from a business not engaged in the practice of law. (Rule 5.4)

Full and adequate disclosure to existing and prospective clients must be made regarding the use of temporary lawyers in a client's case. (Rule 1.2(a); Rule 1.4; Rule 1.8 (f); Rule 7.1)

Any temporary lawyer-leasing arrangement could not involve a sharing of client fees, or a sharing of profits by a law firm with a non-lawyer. (Rule 1.5(f); Rule 5.4(a); Rule 5.4(d))

Any temporary lawyer leasing arrangement must allow for a temporary attorney to exercise independent judgment for and on behalf of all clients. (Rule 2.1; Rule 5.4(c); Rule 5.4(d)(3))

A temporary lawyer leasing arrangement must preserve client confidences and must avoid conflicts of interest. (Rule 1.6; Rule 1.7)

I. QUESTIONS PRESENTED:

Do the ethical rules prohibit a company or agency (hereinafter "employment agency") which employs or places licensed attorneys, law graduates and possibly law students to provide temporary legal and quasi-legal services through these individuals to law firms and other businesses.

II. BRIEF RESPONSE:

The ethical rules do not prohibit New Hampshire lawyers,¹⁷ from participating in an employment agency which places temporary lawyers; and law firms may hire lawyers through such an agency so long as temporary lawyers, employment agencies and law firms:

- A. Comply with the rules regarding the unauthorized practice of law and interference with professional judgment;
- B. Take appropriate steps to disclose the existence of a lawyer leasing arrangement to the client to the extent appropriate and necessary; and
- C. Comply with the rules prohibiting conflicts of interest and breach of client confidences.

See N.H. Ethics Committee Opinion #1989-90/9, July 25, 1990; accord, ABA Ethics Opinion 88-356(1988); California Ethics Opinion 1992-126 (1992), Illinois Ethics Opinion No. 92-7 (1993); South Carolina Ethics Opinion 91-09 (1991); North Carolina Ethics Opinion 104 (1991); See also United Transportation Union v. State Bar of Michigan 401 U.S. 576 (1971).

Nevertheless, the employment agency leasing arrangement creates a complex combination of potential ethical violations which will require lawyers involved in such arrangements to be conscious of the numerous ways ethical violations may develop.

III. RESPONSE:

A. FACTS

The inquiring attorney, has requested an opinion from the N.H. Bar Association Ethics Committee ("the Committee") regarding an employment agency he/she wishes to form to employ licensed attorneys (and perhaps law graduates and law students) to provide temporary legal and quasi-legal services to law firms and other businesses. As an alternative, the employment agency may not actually employ a temporary worker, but simply function as a placement agency.

B. DISCUSSION

Those involved in the temporary lawyer employment relationships must comply with the ethical rules relating to unauthorized practice of law, Rule 5.4(d)

Rule 5.4(d) provides as follows:

- (iv) "A lawyer shall not practice with or in the form of a professional corporation or associate authorized to practice law for profit, if:
 - (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of the lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;
 - (2) A non-lawyer is a corporate director or officer thereof;
 - (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer."

According to N.H. Bar Association Ethics Committee Formal Opinion No. 1989-90/9, July 25, 1990 (hereinafter "1990 Ethics Committee Opinion"), Rule 5.4(d) clearly prohibits lawyers from joining non-lawyers in a for-profit organization when the business of the organization involves the practice of law. Nevertheless, the 1990 Ethics Committee Opinion states that a lawyer is ethically permitted to:

- (i) Enter into a business relationship with non-lawyers that do not involve the practice of law; and
- (ii) Work with a non-profit organization controlled by non-lawyers in rendering legal services to clients associated with such organizations. Citing The United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

Thus, the initial inquiry concerning a corporation such as a temporary employment agency (assuming that it is a for-profit organization) "is whether the business of the corporation involves the practice of law." In such an inquiry, a finding of a mere existence of an employment relationship between a corporation or agency for profit and lawyers would not violate Rule 5.4(d) if the for-profit company's primary purpose is not to conduct the practice of law. Furthermore, neither the agency nor its non-lawyer employees would be authorized to practice law. (See Rule 5.5; R.S.A. 311:7 or R.S.A. 311:11). Based upon the information provided by the inquiring attorney, it appears that the temporary employment agency is not "involved in the practice of law". We have assumed that the activities of the agency and its non-lawyer employees are limited to administrative functions. Where the activities of the agency are so limited (i.e., functioning as a placement agency providing only general information regarding the lawyers area of practice and experience) the agency is not involved in the practice of law. (See ABA Ethics Opinion 88-356). However, when the services of the non-lawyer employees include activities that, when performed by a lawyers would constitute the practice of law, the agency would be deemed involved in the practice of law.

It is noted that a statement by the agency as to a particular lawyers qualifications for performing the services sought by the customer are particularly problematic because, if not carefully limited, the statements may be deemed to be a representation and/or an activity which is in the nature of practicing law.

It is clear that the law firm employing any temporary lawyer may not share or agree to share, in whole or in part, or directly or indirectly, with the employment agency any specific or other readily identifiable fees, client recoveries, or other forms of compensation or reimbursement from such law firm's clients. Rules 5.4(a), 5.4(d) and 1.5(f). Accordingly, the arrangements for paying fees to the lawyer should be carefully established to avoid fee-splitting between the lawyer and the agency. Additionally, a payment for legal services directly to the agency may cause the agency to be considered to be involved in the practice of law.

It is the opinion of the Committee that such limitations would, in addition, include a prohibition on sharing of profits by a law firm with the employment agency, including contingency fees and disbursements.

A temporary lawyer of the employment agency may not be influenced in the exercise of his or her independent professional judgment by the short or long-term financial interests of the lawyer employment agency. Rules 5.4(a), 5.4(d) 1 and 1.8(f). Consequently, to minimize any potential interference, the Committee suggests that a temporary lawyer be paid directly by a law firm for his or her services rendered with a separate payment by the law firm to the employment agency for its services rendered.

Perhaps more importantly, temporary lawyers of the employment agency must obtain an expressed written agreement from the employment agency giving the temporary lawyer complete and unconditional authority to exercise independent judgment for and on behalf of all his or her serviced clients. The employment agency must not in any way interfere or attempt to interfere directly or indirectly with the exercise of such judgment by any temporary lawyer. Rules 5.4(c), 5.4(d)(3) and 2.1. Specifically, to satisfy the requirement of independent judgment, a law firm leasing a temporary lawyer must have all supervisory responsibilities over the activities of the temporary lawyer involving the practice of law at the law firm.

Therefore, the Rules of Professional Conduct do not expressly prohibit the leasing of lawyers from an agency or organization not itself engaged in the practice of law.² Of course, the agency must insure that its activities are strictly related to the administration of the agency and not with the providing of legal services. Further, the employment agency must take precautions to insure compliance with ethical rules relating to full disclosure (of the employment relationship, protection of client confidences and avoidance of conflicts of interest).

IV. RECOMMENDATIONS:

The Committee believes that a temporary lawyer employment agency, a law firm and a temporary lawyer must observe the certain basic principles in connection with temporary lawyer leasing arrangements.

a. Disclosure

All parties must take reasonable steps, including appropriate disclosures to third parties to assure that the lawyer leasing arrangement does not violate Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The 1990 Ethics Committee Opinion (1989-90/9) interpreting Rule 5.4(d) is predicated on the assumption that by entering into a temporary lawyer leasing arrangement, the temporary lawyer, a law firm and an employment agency can assure compliance with Rule 8.4(c). In other words, neither the employment agency, the law firm, nor the temporary lawyer may directly or by implication misrepresent the nature and conditions of the employment relation to any of:

- (i) The clients of the law firm making use of a temporary lawyer;
- (ii) The creditors and insurers of the employment agency; and
- (iii) The creditors and insurers of the law firm.

The Committee expresses no opinion as to whether compliance with Rule 8.4(c) can be assured simply by disclosing to third parties the existence of the lawyer leasing arrangement. In view of the Committee's interpretation and recommendations in the 1990 Ethical Committee Opinions to ensure compliance by a lawyer leasing operator with Rule 5.4(c), 5.4(d)(3) and 2.1, additional disclosures may be appropriate and necessary pertaining to the terms and conditions of the employment and leasing relation between the temporary lawyer employment agency, the law firm and the temporary lawyer.

b. Confidentiality

A temporary lawyer of the employment agency and the law firm that hires the temporary lawyer must protect client confidences. Rule 1.6. The employment agency should not, in itself, ever be in a position to learn confidential information

of a firm client. Nevertheless, it should implement procedures to avoid any breach of confidence by the temporary lawyer, including preventing the disclosure of client confidences among employees of the temporary employment agency.

Confidential information learned by a temporary lawyer in the course of representation at a law firm must be protected by the temporary lawyer who bears the burden of non-disclosure. The law firm who employs a temporary lawyer has the obligation to screen the attorney from client's confidences unrelated to a particular matter. See California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1992-126. The Committee is particularly troubled by the potential for inadvertent disclosure of client confidences through temporary lawyers. We recognize that there is a potential for inadvertent disclosures when a temporary lawyer provides legal services in an office setting. The potential exists for the lawyer to learn confidential information from the law firm or corporate customer or to inadvertently disclose information concerning a prior customer of the agency. The temporary lawyers and customers of the agency should be advised to be conscious of this problem.

A potential problem could arise involving a breach of client confidences if a dispute arose between the employment agency and the temporary lawyer, the resolution of which requires the temporary lawyer to divulge client confidences. Absent a client waiver, an attorney would not be permitted to divulge client confidences to resolve the conflict. To avoid a potential breach of client confidences that could arise in a dispute between the temporary lawyer and the employment agency, the Committee suggests that the temporary lawyer be paid by the law firm directly with a separate payment to the employment agency for its services rendered.

c. Conflict of Interest

The temporary lawyer, law firms and the employment agency must also take measures to avoid conflicts of interest problems. Rule 1.7. The potential for unanticipated conflicts of interest for a law firm that hires temporary lawyers from an employment agency appears to be greater than a law firm which employs its own lawyers. Specifically, a temporary lawyer may arrive at a law firm with confidential information received while employed at a different law firm. This may create a conflict of interest with the second law firm and possibly create problems of vicarious disqualification. The Committee references the statements in ABA Formal Opinion 88-356 which suggests that if a temporary lawyer only works on a single matter for a law firm and has no access to information concerning other clients, then the temporary lawyer would probably not be deemed "associated" for imputed disqualification purposes.

The responsibility for checking conflicts of interest falls on both the law firm and the temporary lawyer. A prior employment client/case review between the law firm and the temporary lawyer should be part of the hiring process. As a result, it is necessary for a temporary lawyer to keep a personal record of clients and firms and to actively monitor for conflicts. Additionally, a law firm would have a direct obligation to maintain an accurate record of a temporary lawyer's work for each client, and to routinely monitor for conflicts.

e. Miscellaneous

- (i) The temporary lawyer, the employment agency and a law firm must also take measures to assure that a temporary lawyer's conduct is otherwise compatible with the professional obligations of an attorney and the New Hampshire Rules of Professional Conduct. Rule 5.1, 5.2, 5.3.
- (ii) The State of New Hampshire's statutory distinction between employee leasing companies and temporary employment firms (R.S.A. 277-(B), Employee Leasing Companies), would not effect the application of current ethics opinions concerning employee leasing on a temporary legal services business.
- (iii) The rules on attorney advertising apply to a temporary legal services business. See Rules 7.1, 7.2, 7.3, 7.4 and 7.5.
- (iv) The Committee incorporates into this Opinion all relevant statements of the 1990 Ethics Committee Opinion that address the issues discussed herein.

In conclusion, the ethical rules do not prohibit an employment agency from placing New Hampshire lawyers to perform services as temporary lawyers, so long as the following principles are recognized:

The employment agency should:

- a. Structure its activities and fee arrangements such that it is not involved in the practice of law.
- b. Avoid interference with the independent judgment of the temporary lawyers.
- c. Provide appropriate disclosures concerning its relationship with the temporary lawyers and its customers.

- d. Establish procedures to prevent disclosure of client confidences to agency employees or other temporary lawyers.

The temporary lawyers should:

- a. Preserve his/her independent judgment in providing legal services.
- b. Provide appropriate disclosures concerning his/her relationship with the agency.
- c. Provide appropriate disclosure for conflict evaluation purposes and routinely monitor for conflicts.
- d. Avoid inadvertent disclosure of client confidences and inadvertent receipt of confidential information.

The law firm customer of the agency should:

- a. Provide appropriate disclosures concerning the relationship with the temporary lawyer and agency.
- b. Monitor the temporary lawyers performance for compliance with ethical rules and quality of legal services.
- c. Perform appropriate conflict evaluation discussions and routinely monitor for conflicts.
- d. Establish procedures to prevent disclosure of client confidences to the temporary lawyer.

¹ Law graduates and law students present unique issues of unauthorized practice of law and disclosure which are not dealt with in detail here because they are, by definition, not members of the New Hampshire Bar and not authorized to practice law

² It is noted that some jurisdictions have in the past prohibited lawyer leasing arrangements under Model Rule 5.4(d). See eg Texas Ethics Opinion 508 (1994); North Carolina Ethics Opinion 365(1985) (overruled by North Carolina Ethics Opinion 104(1991) which permits temporary lawyer leasing) Alabama Ethics Opinion 87-151(1988). These decisions were based primarily on the concern that the particular arrangements either (a) misled the public, (b) necessarily infringed on the independent judgment of the temporary lawyer, (c) violated the provision prohibiting the sharing of fees with non-lawyers, or (d) presented too great a potential for conflicts of interest.