Distinct Issues

Use of Temporary Lawyers

by Michael Downey

The use of temporary or contract lawyers is increasing. According to the Bureau of Labor Statistics, the number of temporary lawyers rose from 10,000 in 1992 to 40,000 in 1995 and was expected to reach 62,400 by 2005. The November 2004 *National Law Journal* reported that in 2003 the nation's 250 largest law firms increased use of temporary lawyers by 55 percent. And earlier this year the *Chicago Daily Law Bulletin* predicted that by 2015, almost 15 percent of Chicago's attorneys will be temporary lawyers, roughly three times the current percentage.

A firm encounters many of the same ethical issues when hiring a temporary lawyer as it encounters when hiring any attorney, including competency, supervision, and conflicts from past representations. Hiring a temporary lawyer also involves distinct ethical issues.

Disclosure to the Client

The first ethical issue specific to hiring a temporary lawyer is whether the client must be told that a temporary lawyer will be providing legal services to the client.

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ABA Formal Opinion 88-356 (1988) lists three circumstances when a client should be told a temporary lawyer is performing legal services:

(1) The temporary lawyer is performing independent work without close supervision from a firm lawyer. Disclosure is required because the client cannot be deemed to have consented implicitly to the involvement of an independent lawyer;

(2) The temporary lawyer's fee is billed directly to the client as an expense; and

(3) The temporary lawyer and lawyer the client originally retained share the fee that the client pays.

ABA Opinion 2000-420 emphasizes that the primary factors in determining when a client should be told that a temporary lawyer is providing legal services are: the reasonable expectations of the client; and the degree of supervision provided by the retaining attorney.

To determine when a client should be told about a temporary lawyer's involvement, most jurisdictions have adopted the ABA's test or a similar test, which focuses on the materiality of the temporary lawyer's involvement. Several advisory opinions recommend consideration of a number of factors that should be weighed to assist this determination, such as:

- Change in who directs the legal services;
- Change in the amount of supervision the original lawyer retains;
- Change in who has final responsibility for the work;
- The sensitivity of the information that will be shared with the temporary lawyer;
- The type and importance of legal services the temporary lawyer will perform;
- The understanding or agreement that the client had regarding who would provide the legal services; and
- The likelihood the client will misperceive the temporary lawyer's relationship with the firm.

See generally California State Bar Ass'n Formal Opinion 2004-165; Michigan Opinion RI-310 (1998); *and* New York State Bar Ass'n Opinion 715 (1999).

A few jurisdictions, however, suggest disclosure of a temporary lawyer's involvement in *all* circumstances. The Kentucky Supreme Court recommends "disclosure to the client of the firm's intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement." *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 216 (Ky. 1989).

Likewise, Association of the Bar of the City of New York Opinion 1989-2 states, "The Committee continues to believe that the law firm has an ethical obligation in all cases (i) to make full disclosure in advance to the client of the temporary lawyer's participation in the law firm's rendering of services to the client, and (ii) to obtain the client's consent to that participation." But, as noted above, New York State Bar Association Opinion 715 appears to favor a more limited rule for when disclosure is required.

Fee Sharing

As noted above, one instance when a client must be told that a temporary lawyer is providing services is when the temporary lawyer shares in the lawyers' fee. The most common ways in which temporary lawyers are paid—an hourly or daily wage or a fixed amount for a project—are generally deemed not to involve fee sharing. But fee sharing does exist when a temporary lawyer receives a share of the fee. Model Rule 1.5 then requires disclosure and client consent. ABA Opinion 88-365; *accord Chambers v. Kay*, 56 P.3d 645 (Cal. 2002).

When an arrangement constitutes fee sharing under Model Rule 1.5(e),

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ABA Opinion 88-365 interprets Model Rule 1.5(e) as requiring the lawyer to tell the client the temporary lawyer would share the fee but not the detailed arrangements. Amendments to Model Rule 1.5(e), however, now require that a client agree to the shares each lawyer will receive. This 2002 amendment likely requires greater disclosure than ABA Opinion 88-365 describes.

Billing for Temporary Lawyers' Services

ABA Opinion 00-420 distinguishes between two ways a client may be billed for a temporary lawyer's services: the services may be billed as an expense or as legal services in a manner consistent with firm lawyer's services. When the contract legal services are billed as an expense separate from legal fees, the ABA directs that a lawyer may not add an undisclosed surcharge to the amount expensed to the client unless there is a prior arrangement about such a markup.

When the temporary lawyers' services are billed in the same manner as legal services provided by other firm lawyers, ABA Opinion 00-420 allows the billing firm to include a surcharge above the temporary lawyer's actual fee to the law firm without disclosing the surcharge. Alaska Bar Association Advisory Opinion 96-1 explains, "The reason is that the law firm has supervised and is responsible for the work of the contract attorney. The situation is more analogous to the law firm's use of an associate than to making a disbursement on the client's behalf."

Of course, client billing guidelines may limit or prohibit a surcharge, and ABA Opinion 00-420 emphasizes the total fee charged must ultimately be reasonable under Model Rule 1.5. Further, a lawyer who might seek to recover for a temporary lawyer's fees, including a surcharge, in a court proceeding may need to disclose a surcharge and reason for that surcharge to before recovery will be possible. *In re Wright*, 290 B.R. 145, 156 (Bankr. C.D. Cal. 2003).

Imputation of Conflicts

Finally, the use of temporary lawyers often raises concerns about conflicts from legal services the contract attorney has previously provided. Unfortunately no broad, simple pronouncement answers these concerns. Rather, ABA Opinion 88-356 states a "functional analysis of the facts and circumstances" should be employed to determine when a temporary lawyer should be deemed to be associated *in* or *with* an employing firm under Model Rule 1.10(a) and (b), or when no imputation of conflicts should occur.

This functional analysis focuses largely on the relationships the temporary lawyer had with retaining firms and whether the temporary lawyer had access to client information on matters other than those on which the temporary lawyer is working. An off-site, limited engagement to work on a single matter (where the temporary lawyer's role is akin to being at a separate firm cooperating on a matter) is less likely to result in disqualification than an on-site retention where the temporary lawyer worked on a number of matters and had general access to the firm's files.

ABA Opinion 88-356 further advises that firms retaining temporary lawyers should establish safeguards to avoid imputation. A firm should screen temporary lawyers from information on matters not related to the temporary lawyers' work. Firms should also avoid retaining a temporary lawyer who has done significant work for an opposing party in another matter the firm is handling—even if the temporary lawyer would not be asked to work on that particular case—until an adequate investigation into the nature of the conflict is performed to insure disqualification will not likely occur. In addition, the firm and temporary lawyer should keep careful, detailed records of the files to which the temporary lawyer had access to resolve future conflict issues more easily.

Final Thought

While the use of temporary lawyers raises a few special ethical concerns, both temporary lawyers and their employers should remember that a temporary lawyer is still a lawyer. Thus, a temporary lawyer remains subject to rules of professional conduct as other lawyers would be, including for example the duty to preserve client confidentiality both during and after the representation. FD