

# **Colorado Bar Association**

## **Ethics Opinion 105: Opinion on Temporary Lawyers, 05/22/99**

**The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association**

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### **105      Opinion      on      Temporary      Lawyers Adopted May 22, 1999**

#### ***Introduction and Scope***

##### ***Introduction***

The provision of legal services to clients and the public has undergone changes in recent years due to rapidly changing technology and economic factors affecting the supply and demand for lawyers' services. These changes include significant increases in the number of attorneys admitted to practice, increasing specialization of lawyers, increased and sometimes prohibitive costs of legal services and resulting pressures to reduce costs and expenses, technology that permits attorneys to work outside of the traditional office setting with greater ease, and the desire of many lawyers to achieve flexibility in their working schedules. As a result, alternative methods of practice have emerged; these include lawyers offering their services as "temporary" lawyers to other lawyers, law firms, or corporate or other institutional legal departments to work or assist on specific projects or matters.<sup>1</sup> The temporary lawyer may offer his or her services individually or through the auspices of a placement agency.<sup>2</sup>

##### ***Scope***

The use of the services of temporary lawyers as a means of providing legal services to clients warrants consideration of the ethical problems or issues that might be encountered by both the temporary lawyer and the lawyer or firm utilizing such services. Considering the myriad of possible arrangements by which temporary legal services can be provided or

utilized, this opinion does not attempt to comment on the ethical considerations implicated in every possible arrangement. Rather, this opinion addresses certain general ethical principles involved in the provision of legal services or assistance by temporary lawyers who are not otherwise regularly employed by the employing lawyer or law firm.<sup>3</sup>

This opinion is based on the premise that an attorney-client relationship exists between the temporary lawyer and the client(s) represented by the engaging law firm for whom the temporary lawyer provides services. While this opinion attempts to address certain key ethical issues facing both the temporary lawyer and the engaging law firm, the temporary lawyer must consider and observe all ethical duties arising from the attorney-client relationship. Among these are the duty to provide competent representation under Colo. RPC 1.1; to act with reasonable diligence under Colo. RPC 1.3; to protect the confidentiality of information relating to the representation under Colo. RPC 1.6; and to exercise independent professional judgment under Colo. RPC 2.1. In short, the temporary lawyer must observe all duties owing from lawyer to client, notwithstanding the temporary nature of the relationship or the interposition of the law firm.

### ***Syllabus***

A temporary lawyer represents the client of the employing lawyer or law firm, and the application of various provisions of the Colorado Rules of Professional Conduct is determined based on such attorney-client relationship. The proscriptions of the Rules of Professional Conduct relating to conflicts of interest apply to the temporary lawyer regardless of the extent or duration of his or her representation of the client. Conflicts of interest of the temporary lawyer or the engaging lawyer or law firm may be imputed, one to the other, depending on whether the circumstances surrounding the engagement establish that the temporary lawyer is associated with the engaging lawyer or with other lawyers in the engaging law firm. Whether such an association exists involves a functional analysis of, *inter alia*, the degree to which the temporary lawyer or the firm has access to information regarding each other's other clients. Prior to the employment, both the engaging lawyer or law firm and the temporary lawyer have the responsibility to identify actual or potential conflicts of interest and to take appropriate measures to insure against imputed disqualification. Such responsibilities cannot be delegated to a placement agency.

Whether the financial arrangement between the temporary lawyer and the engaging lawyer or law firm constitutes a division of fees, implicating the requirements of Colo. RPC 1.5(d), depends on whether the temporary

lawyer's compensation is directly tied to or dependent on the client's payment of fees to the engaging lawyer or law firm. If the temporary lawyer's fees are tied to, or dependent on, payment by the client, there is a division of fees. If the temporary lawyer is entitled (and the engaging lawyer or firm is obligated) to payment of his or her fees irrespective of payment by the client, the arrangement does not constitute a division of fees. Even if there is no division of fees requiring disclosure to and consent of the client, other applicable rules may require disclosure of the arrangement to the client under the circumstances.

Where the services of a placement agency are employed, both the temporary lawyer and engaging lawyer or law firm must insure that the financial arrangements do not involve the sharing of legal fees with non-lawyers, in violation of Colo. RPC 5.4(a), and that contractual arrangements with the placement agency do not constitute an unreasonable restriction on the right of a lawyer to practice after termination of the contract with the agency, contrary to Colo. RPC 5.6.

### **CONFLICTS**

A temporary lawyer who performs work for a client represents that client, regardless of the scope or duration of the work.<sup>4</sup> Therefore, in all instances involving clients for whom the temporary lawyer is working or actually has worked, the lawyer must adhere to the conflict rules regarding current and former clients. See Colo. RPC 1.7, 1.9. In practical terms, this means that, absent effective client consent,<sup>5</sup> the temporary lawyer must not work on any matter in which (a) the representation will be directly adverse to a client for whom the temporary lawyer is doing work at another firm, even if the two matters are unrelated; (b) the representation of a client may be materially limited by the temporary lawyer's responsibilities to another client for whom the temporary lawyer has performed work;<sup>6</sup> or (c) the client's interests are materially adverse to the interests of a former client for whom the temporary lawyer did work at another firm, if the two matters are substantially related.

The more difficult conflict question involves other clients of the engaging firm or lawyer for whom the temporary lawyer provides no services. Colo. RPC 1.10(a) provides: "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." The key question is whether a temporary lawyer is "associated in a firm." If yes, then the rule of imputation set forth in Colo. RPC 1.10(a) applies, and all of the clients (and conflicts) of the lawyer or firm employing the temporary lawyer are deemed to be the temporary lawyer's clients (and conflicts), and *vice versa*. If the temporary lawyer is *not* associated in a

firm under Colo. RPC 1.10(a), then the firm's other present or former clients for whom the temporary lawyer has not performed work are not deemed to be present or former clients of the temporary lawyer, and conflicts are not imputed one to the other.

The question of imputation is critical in determining whether a conflict exists, particularly where the temporary lawyer works for more than one firm. If the temporary lawyer is deemed to be "associated" with each of the firms for whom he or she does work, then the current and former clients of each firm might be deemed the current and former clients of the temporary lawyer *and* of all the other firms with which the temporary lawyer is associated. In that situation, a firm could face disqualification if one of its clients were adverse to a client of another firm with whom the temporary lawyer is associated, even if the temporary lawyer did not work on any matter for either client. *Cf.*, ABA Formal Op. 90-357 (May 10, 1990) (potential for conflicts will put a practical limit on the number of "of counsel" relationships undertaken by individual attorney: because "of counsel" attorney is associated with firm under Rule 1.10(a), "there is attribution to the lawyer who is of counsel of all the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications. . . . In consequence, the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.").

The Colorado Rules of Professional Conduct do not define "associated in a firm." However, the comment to Colo. RPC 1.10(a) provides some guidance:

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 the 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 information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

In a formal opinion issued in 1988, the American Bar Association Standing Committee on Ethics and Professional Responsibility adopted a "functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm." ABA Formal Op. 88-356 (Dec. 16, 1988). The ABA opinion focused primarily on the extent to which

the temporary lawyer has access to information regarding other clients of the firm:

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. *Id.*

Several state ethics opinions have adopted the approach of the ABA opinion to conflict issues confronting temporary employees and hiring employers. *See, e.g.,* N.J. Op. 632 (Oct. 12, 1989); Pa. Informal Op. 94-164 (Feb. 22, 1995); Va. Legal Ethics Op. 1712 (July 22, 1998) (agreeing with ABA's functional analysis but "caution[ing], however, that the screening measures recommended in ABA Formal Op. 88-356 will not always be practical or possible . . ." or effective). *See also, Oliver v. Board of Governors, Kentucky Bar Assn., 779 S.W.2d 212, 216-19 (Ky. 1989); but see* Restatement (Third) of the Law Governing Lawyers § 203, Comment c(i) (stating general rule instead of functional analysis: Section 203, "imputing conflicts to all lawyers associated in a firm, generally applies to such lawyer temporaries").

This Committee concurs with the ABA opinion's "functional analysis." *See* Colo. RPC 1.10, comm. ("Whether two or more lawyers constitute a firm . . . can depend on the specific facts."); *cf., People ex rel. Peters v. District Court,*

951 P.2d 926, 932 (Colo. 1998) (whether office-sharing attorneys were "associated in a firm" under Rule 1.10(a) "depends on factual questions"). The Committee agrees with the ABA opinion that the temporary lawyer's access to information regarding the firm's other clients is the key factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a).

Temporary lawyers and firms that wish to avoid imputation of conflicts, and minimize the risk of disqualification, should screen temporary lawyers from all information relating to other firm clients for whom the temporary lawyer is not working. In particular, the temporary lawyer should not have access to the firm's files for other clients, should not have access to the firm's computer network unless documents related to other clients are password-protected, and should not be exposed to meetings, discussions or other communications where matters of other clients are discussed. To position themselves to defend claims of imputed disqualification, temporary lawyers and firms should maintain accurate records of all clients for whom the temporary lawyer has performed work, and of the measures taken to ensure that the temporary lawyer has not had access to information relating to other clients of the firm. See ABA Op. *supra*; Calif. Formal Op. 1982-126 (1992); N.J. Op. 632; Pennington, "So You Want to be a 'Temp': Ethics and Temporary Attorney Relationships," 24 *The Colorado Lawyer* 805, 806-07 (April 1995); see also CBA Formal Op. 88 (Use and Misuse of "Confidentiality Walls," May 1991, amended April 1992);<sup>7</sup> CBA Formal Op. 89 (Office Sharing, Sept. 1991).<sup>8</sup>

Beyond the question of access to information regarding other clients of the firm, this Committee believes that the manner in which the temporary lawyer is presented to and perceived by clients, courts and third-parties is another important factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a). Specifically, if a temporary lawyer is expressly or implicitly identified as "an associate" or "employee" of the firm—whether in correspondence to the client or third-parties, in pleadings, during depositions or hearings, or otherwise—that designation will tend to indicate that the temporary lawyer is associated with the firm, even if the firm has adequately screened the temporary lawyer from information regarding its other clients. See Colo. RPC 1.10, comment ("If [attorneys] present themselves to the public in a way suggesting they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules."); Pennington, 24 *The Colorado Lawyer* at 806 ("[A] public holding out of a relationship between temporary attorneys and firms may be a giant step toward establishing an association that creates the imputed disqualification problem."). By contrast, where the firm discloses that the temporary lawyer is an independent contractor working for the firm on a limited basis, that

disclosure will further help avoid imputation.<sup>2</sup>

Temporary lawyers and firms should consider the possibility of imputation and conflicts of interest *before* the attorney is hired and begins performing work for clients of the firm. Failure to do so could result in an irreversible taint and disqualification even if the firm and the temporary lawyer ultimately take steps to screen the temporary lawyer from contact with other clients of the firm. Where temporary lawyers secure employment through placement agencies, it remains the responsibility of the temporary lawyers themselves and the hiring firms—not the agency—to identify and address actual or potential conflicts of interest, and to take steps to minimize the possibility of imputation under Colo. RPC 1.10(a). See Calif. Formal Op. 1982-126; Fla. Op. 88-12 (Aug. 1, 1988); N.J. Op. 632.

The nature and extent of the conflict-checking process may vary depending on the circumstances, including whether the temporary lawyer will be "associated in" the firm under the standards discussed above. In addition, in performing conflicts checks, both the hiring firm and the temporary lawyer must comply with Colo. RPC 1.6. In some circumstances, Rule 1.6 could limit or prevent the disclosure of client identities or other information necessary to perform the conflicts check, absent effective client consent.

### ***DIVISION OF FEES AND DISCLOSURE***

Financial arrangements regarding a temporary lawyer's services raise a number of ethics considerations. The hiring firm and the temporary lawyer should be especially aware of the rules regarding a division of fees between lawyers, improper fee splitting with non-lawyers, and the reasonableness of fees charged to clients.

The hiring firm's disclosure obligations to its client primarily turn on whether Colo. RPC 1.5(d), which governs a division of fees between lawyers who are not in the same firm (also known as fee-splitting), applies. Rule 1.5(d) states:

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed and responsibility assumed by each lawyer;
- (2) the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made;

(3) the total fee is reasonable; and

(4) the division is set forth in writing signed by the lawyers and by the client with informed consent.

In most circumstances, Colo. RPC 1.5(d) will apply to temporary lawyers and the firms that engage them. The Terminology section of the Colorado Rules of Professional Conduct defines a "firm" as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization." The comment to Colo. RPC 1.10 notes that "whether two or more lawyers constitute a firm within this definition can depend on the specific facts."<sup>10</sup>

Neither the Colorado Rules of Professional Conduct nor the comments provide specific guidance on whether temporary lawyers and the lawyers who hire them are "in the same firm" for purposes of Colo. RPC 1.5(d). The comment to Rule 1.5(d), however, states: "The fee splitting provisions of Model Rule 1.5(e), now 1.5(d), have been revised to resemble more closely DR 2-107(A) and to tighten up the client consent requirements." DR 2-107(A) prohibited the "division of fees with another lawyer who is not the partner or associate of the lawyer" unless certain requirements were met. DR 2-107(A) thus clearly encompassed arrangements between hiring firms and temporary lawyers. See City of N.Y. Formal Op. 1996-8 (July 15, 1996); see also Cal. Formal Op. 1994-138 (1994) (California's fee-splitting rule governs lawyers who are not partners, shareholders or associates of the same firm). Because temporary lawyers, by definition, are engaged only for a limited period of time, in most circumstances they will not be "in the same firm" as the hiring lawyers for purposes of Rule 1.5(d).

Assuming that the hiring firm and temporary lawyer are not "in the same firm," the firm and the temporary lawyer must determine if their financial arrangement constitutes a division of fees. Neither the Colorado nor the Model Rules of Professional Conduct define a "division" of a fee. The comment to Colo. RPC 1.5 states:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

An arrangement between a firm and a temporary lawyer constitutes a division of fees if the gross fee that the client pays the firm is shared with the temporary lawyer. ABA Formal Op. 88-356. Generally, this kind of



sharing occurs if the temporary lawyer's compensation is directly tied to or dependent on the client's payment of fees. See Cal. Ethics Op. 1994-138. For example, if the firm agrees to pay the temporary lawyer a portion of a contingent fee that may be received in connection with the case, the temporary lawyer's compensation would be dependent on the client's payment of fees.<sup>11</sup> Similarly, if the firm agrees to pay the temporary lawyer a percentage of a non-contingent fee (such as a fixed fee or an hourly rate-based fee), the temporary lawyer's compensation would be directly tied to the client's payment of fees. In such circumstances, there is a "single billing" to the client that covers both the firm's and the temporary lawyer's fees and, consequently, the firm and the temporary lawyer must comply with Colo. RPC 1.5(d).

In contrast, an arrangement generally does not constitute a division of fees if (1) the firm is responsible for paying the temporary lawyer regardless of whether the firm ever receives any payment from the client, and (2) the temporary lawyer's compensation is not a percentage of or otherwise directly tied to the amount paid by the client. See ABA Op. 88-356; Cal. Ethics Op. 1994- 138; *In re Marriage of Ziemann*, 574 N.E.2d 767 (Ill.App. 1991) (firm's payment to a non-employee lawyer of a flat hourly rate based on hours worked and not dependent on whether the firm received payment from the client did not constitute a division of fees). Under these arrangements, the firm and the temporary lawyer are not providing a "single billing" to the client and the concerns surrounding referral or forwarding fees that justify regulation of fee splitting do not arise.

Examples of arrangements that do not constitute fee-splitting include the following: (1) the firm agrees to pay the temporary lawyer an hourly rate for the temporary lawyer's services; (2) the firm agrees to pay the temporary lawyer a flat rate per day or week; (3) the firm agrees to pay the temporary lawyer a fixed fee for a project.<sup>12</sup> Typically, the temporary lawyer submits an invoice to the firm for services performed. If the firm has an hourly rate fee agreement with the client, the firm's invoice to the client may include time entries submitted by the temporary lawyer for the services performed, along with the time entries by lawyers in the firm, calculate the value of the temporary lawyer's time (either at the rate charged by the temporary lawyer to the firm or at a higher rate, as discussed further below), and disclose the name of the temporary lawyer. This is analogous to the method by which firms generally bill clients for work done by associates. As long as the firm, rather than the client, is directly responsible for the compensation paid to the temporary lawyer (as is the case with associates), the arrangement does not constitute a division of fees.

This type of disclosure generally will satisfy the firm's duty to disclose the

basis for the amount charged to the client, just as this type of disclosure normally suffices in connection with fees arising out of services performed by associates. See ABA Formal Op. 93-379 (1993). This is so even if the firm bills the client for the temporary lawyer's time at a higher rate than that paid by the firm to the temporary lawyer. This differential, or mark-up, is analogous to that between compensation paid by the firm to its employees (including associates and paralegals) and amounts charged to clients for those employees' time. A firm generally charges more for its employees' time than it pays to those employees, to both cover overhead and earn a profit. Just as the firm does not have any duty under the Rules of Professional Conduct to disclose to the client the amount of profit it makes from the use of associates or paralegals, the firm does not have a duty to disclose to the client the amount paid to the temporary lawyer or the profits made from using the temporary lawyer as long as the financial arrangement does not constitute fee-splitting under Colo. RPC 1.5(d).<sup>13</sup>

Even if the financial arrangement between the firm and the temporary lawyer does not constitute a division of fees under Colo. RPC 1.5(d), the firm is limited in what it may charge the client under other provisions of Rule 1.5. Colo. RPC 1.5(a) requires that the fee charged to the client be reasonable and lists factors for determining the reasonableness of a fee.<sup>14</sup> Rule 1.5(a) applies to fees charged by the firm for services provided by a temporary lawyer. When setting the hourly rate charged to the client for the temporary lawyer's time, the firm should consider the terms of the fee agreement with the client that may affect the appropriate rate, as well as factors similar to those considered in setting hourly rates charged for an associate's time, such as the nature of the services provided, the experience and skill of the person providing the services, and the range of rates charged in the community for similar services. See Alaska Bar Assn. Eth. Comm. Op. 96-1 (1996); Guyol, "Ethics and the Contract Lawyer," 57 *Oregon State Bar Bull.* 15 (Aug./Sept. 1997).

In addition to Colo. RPC 1.5(d), other provisions of the Colorado Rules of Professional Conduct relating to disclosure may be implicated by temporary lawyer arrangements: Colo. RPC 1.2(a) (lawyer shall consult with the client as to means by which objectives of representation are to be pursued); Colo. RPC 1.4 (lawyer shall keep client reasonably informed and explain matter to extent reasonably necessary to permit client's informed decisions regarding representation); and Colo. RPC 7.5 (lawyers shall not use or participate in the use of firm name or other professional designation that violates Colo. RPC 7.1 or state or imply that they practice in a partnership or other organization unless such is a fact).

Thus, where the temporary lawyer works without the close supervision of a lawyer associated with the hiring firm or organization, the client must be

informed of the arrangement and client consent 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." ABA Formal Op. 88-356. Conversely, where the temporary lawyer is under the direct supervision of a lawyer associated with the hiring firm or organization, the client ordinarily need not be informed that the temporary lawyer is working on the matter. Nevertheless, where circumstances are such that the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations, the client should be advised and client consent obtained. D.C. Bar Opinion No. 284, Sept. 15, 1998. Colo. RPC 1.10(a)

### **PLACEMENT AGENCIES**

When the law firm and temporary lawyer use a placement agency, the propriety of the relationship depends on the nature of the financial arrangement. Lawyers may not share legal fees with nonlawyers. Colo. RPC 5.4(a). In contrast to the situation involving fee splitting among lawyers, fee splitting with nonlawyers is prohibited regardless of any disclosure to the client.

Whether an arrangement constitutes fee splitting turns on the considerations discussed above concerning direct arrangements between the law firm and temporary lawyer. As one example of an appropriate arrangement, the law firm may pay the temporary lawyer on a fixed-dollar or an hourly rate basis and separately pay the placement agency either a fixed-dollar amount or a percentage of the temporary lawyer's compensation. See ABA Formal Op. 88-356; N.J. Eth. Op. 632 (1989). Because the agency provides services, including locating, recruiting, screening, and placing temporary lawyers, the compensation paid by the law firm to the agency is not a legal fee. See ABA Formal Op. 88-356; N.Y. C. Comm. on Pro. and Judicial Eth. Formal Op. 1989-2 (1989).

Likewise, the law firm may pay a total amount to the agency that then is split between the temporary lawyer and the placement agency. As long as the law firm is obligated to pay the agency regardless of any amounts actually paid by the client to the law firm, the fee that is being split is not a "legal fee." ABA Formal Op. 93-379; Texas Prof. Eth. Com. Op. 515 (1996).

Although this type of arrangement has been questioned because of a concern that the agency may improperly attempt to control the temporary lawyer and affect the temporary lawyer's judgment [*see, e.g.,* Rockas, "Lawyers for Hire and Associations of Lawyers: Arrangements that are Changing the Way Law is Practiced," 40 *Boston Bar J.* 8 (Nov./Dec. 1996)],

that concern does not render the arrangement fee splitting. Nonetheless, law firms and temporary lawyers entering into such a relationship need to consider all of the circumstances and safeguard against any intrusion upon the temporary lawyer's independent, professional judgment that may result from the financial arrangement or any other aspect of the relationship. See Colo. RPC 1.7(b), 5.4(c).

Colo. RPC 5.6(a) provides that a lawyer "shall not participate in offering or making . . . a[n] employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . ." Placement agency contracts frequently include provisions that require the firm or the temporary lawyer to give notice to the placement agency or to pay the placement agency a fee in the event that the temporary lawyer accepts permanent employment with a firm at which the agency placed the temporary lawyer. A literal application of Rule 5.6(a) would prohibit a lawyer from entering into such an agreement (and indirectly prohibit an agency from including such provisions in their contracts) because such provisions could restrict the right of the temporary lawyer to practice after termination of his or her relationship with the agency. The Committee believes, however, that Rule 5.6(a) was not intended to apply so as to absolutely bar such provisions in placement agency contracts. The comment to Rule 5.6(a) reflects that the rule was intended to apply to agreements restricting a lawyer's right to practice "after leaving a firm." The Committee does not believe that the rule was intended to apply literally to such provisions in placement agency contracts for temporary lawyers, provided they are reasonable in nature.<sup>15</sup>

The Colorado Rules of Professional Conduct are "rules of reason" that "should be interpreted with reference to the purposes of legal representation. . . ." Colo. RPC, *Scope*. The comment to Colo. RPC 5.6 indicates two purposes underlying Rule 5.6(a): protection of (a) an attorney's professional autonomy, and (b) a client's choice of counsel. At first blush, a restriction in a placement agency contract might seem to limit a temporary lawyer's mobility and freedom to accept permanent employment with a firm, but the Committee believes that banning reasonable provisions altogether would harm the ability of temporary lawyers and hiring firms to utilize the services of agencies in making placements. Reasonable restrictions in agency contracts are necessary to preclude firms from depriving agencies of agreed-upon fees by directly hiring temporary lawyers. If Rule 5.6(a) were read literally to prohibit reasonable restrictions in agency contracts with temporary lawyers, the agency would have no means of protecting its interest in agreed-upon placement fees. Placement agencies can provide a useful vehicle through which firms can provide the necessary resources, in certain circumstances,

to better serve their clients, and temporary lawyers can make their services available where needed. Such a reading of the rule could serve to restrict, rather than enhance, the ability of the profession to provide legal services to clients.

The second purpose of Colo. RPC 5.6(a), that of protecting a client's choice of counsel, generally will not be affected by agency contracts that reasonably restrict a firm's ability to hire directly a temporary lawyer. The firm is the client of the placement agency, but it generally is not the ultimate "client" contemplated by the comment to Rule 5.6. In some circumstances, however, where the "firm" is a corporate legal department, the firm *is* the ultimate client; in those circumstances, the restrictions in the agency contract must be carefully scrutinized to ensure they are reasonable.

In general, in the Committee's view, a placement agency contract should not violate Colo. RPC 5.6(a) if its restrictions are reasonable (in both duration and the amount of fees payable to the agency), if the hiring restrictions appear in the contract with the firm rather than the contract with the temporary lawyer, and if the firm rather than the temporary lawyer is responsible for payment of any hiring fees to the agency.

### ***SUPERVISORY RESPONSIBILITY***

Lawyers with supervisory responsibility have a duty to ensure that lawyers under their supervision act with competence and adhere to the Rules of Professional Conduct. See Colo. RPC 1.1 & 5.1(b). Clients are entitled to look to the law firm or supervisory lawyer to provide adequate supervision of temporary lawyers. See Pennington, "So You Want to be a 'Temp': Ethics and Temporary Attorney Relationship," 24 *The Colorado Lawyer* 805, 808 (April 1995).

The duty to supervise includes the duty to select and hire competent temporary lawyers. See Guyol, "Ethics and the Contract Lawyer, How to Approach Ethics Issues in Contract Lawyer Relationships—and Solve Them," 57 *Or. St. B. Bull.* 15, 20 (August/September 1997). In addition, the firm must take care to provide adequate supervision over a temporary lawyer in order to ensure that the client is provided competent representation and that the temporary lawyer conforms to ethical standards applicable to the representation.

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1. As used in this opinion, the term "temporary lawyer" means a lawyer who is engaged by a law firm for a limited period or purpose, either directly or through the services of a lawyer placement agency. The term does not include a lawyer, who is a part-time employee of a firm or one who is employed full time but without contemplation of permanent employment, who works only for the employing firm. Such relationships are more akin to that of an associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or one who is retained in a matter as independent associated counsel.

2. This opinion assumes that placement agency clients are lawyers (*i.e.*, law firms, corporate legal departments or law departments of governmental entities) and not lay individuals or entities represented by lay individuals. Referral of lay clients to lawyers (and *vice versa*) is governed by Colo. RPC 7.2(c) and is outside the scope of this opinion.

3. For purposes of this opinion the terms "law firm" or "firm" are used as defined in the Terminology section of the Colorado Rules of Professional Conduct as denoting a ". . . lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization."

4. This opinion is not intended to address those instances in which an attorney is specially engaged as counsel to advise or consult with a law firm or another lawyer with respect to particular areas of law without receiving information relating to the law firm's or lawyer's client protected under Colo. RPC 1.6. *See* ABA Formal Op. 98-411 (Aug. 30, 1998) (addressing ethical implications of attorney consultations with other attorneys on client matters).

5. Colo. RPC 1.7(c) limits effective client consent to those instances in which a "disinterested lawyer" would conclude that the client should agree to the representation under the circumstances.

6. Colo. RPC 1.7(b) additionally provides that representation of a client must not be undertaken, absent effective client consent, where the representation may be materially limited by the lawyer's own interests or responsibilities to a third person.

7. 20 *The Colorado Lawyer* 1371 (July 1991); *Colorado Ethics Handbook* (Denver, CO: Continuing Legal Education in Colorado, Inc., 4th ed., 1997).

8. 20 *The Colorado Lawyer* 2493 (Dec. 1991); *Colorado Ethics Handbook* (Denver, CO: Continuing Legal Education in Colorado, Inc., 4th ed., 1997).

9. If, under the functional analysis adopted in this opinion, an attorney is deemed "associated in a firm," then the rule of imputation set forth in Colo. RPC 1.10(a) generally will apply. However, a number of courts have held that the presumption of imputation is rebuttable where the conflict involves a *former* client. *See, e.g., Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985) (applying former Code of Professional Responsibility); *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F.Supp. 1498, 1507 (D.Colo. 1993); *see also* Glenn, "Conflict Issues When Attorneys Switch Jobs," 27 *The Colorado Lawyer* 49, 50 & nn.10-11 (May 1998). The Colorado courts have not decided, and this opinion does not address the rebuttability question. *See Peters*, 951 P.2d at 930 n.6 ("The question of whether this presumption [of imputation] is rebuttable is beyond the scope of this opinion.").

10. The comment also notes that lawyers may be considered to be a firm for purposes of one rule but not for another, and that the purposes underlying the rule at issue may be relevant to the determination. Thus, a temporary lawyer may not be part of the hiring firm for purposes of Colo. RPC 1.5(d), but may be "associated" with that firm for purposes of Colo. RPC 1.10.

11. *See* Chapter 23.3, Colorado Court Rules governing contingent fees for disclosure requirements

relating to "associated counsel" in contingent fee matters.

12. 10 Cal.Op. 1994-138 discusses a situation in which the temporary lawyer is paid the amount billed to the client as the fees are paid by the client, and finds that there is no division because the firm does not receive any portion of the fee, but merely acts as a clearinghouse for billing and collection functions. Acting as a clearinghouse, however, would not relieve the firm of other obligations, such as those concerning supervision, conflicts of interest, and confidentiality, discussed elsewhere in this opinion. Moreover, since this type of arrangement appears analogous to treating the temporary lawyer's compensation as a disbursement, the firm should consider the ethics ramifications regarding disbursements discussed in ABA Formal Op. 93-379.

13. Colo. RPC 1.5(b) requires that the basis or rate of the fee be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation "when the lawyer has not regularly represented the client." The Committee is of the opinion that the requirements of Rule 1.5(b) do not apply to a temporary lawyer who is under the close supervision and direction of the hiring lawyer or a lawyer or lawyers associated with the engaging lawyer or law firm.

14. Colo. RPC 1.5(a) sets forth the following factors:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

15. The Committee has discovered almost no authority on this Rule 5.6 issue. The absence of authority, including in ABA Opinion 88-356 (which specifically addresses other issues related to placement agencies), suggests that most ethics committees have not considered Rule 5.6 relevant in the context of placement agency contract provisions. *But see* Texas Prof. Eth. Com. Op. 515 (July 1996) (applying Texas version of Rule 5.6 literally to prohibit placement agency contract provision that required temporary lawyer to give notice to agency before performing work directly for an agency client).

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