THE DISTRICT OF COLUMBIA BAR

Opinion 284

Advising and Billing Clients for Temporary Lawyers

Whether a lawyer must disclose to the client the use of a temporary lawyer on the client's matter depends on the nature of the work, the reasonable expectations of the client, and the nature of the relationship between the employing lawyer and the "temporary" lawyer. The employing lawyer generally need not disclose to the client the temporary lawyer's cost to the lawyer or law firm, and the lawyer may bill the client for the temporary lawyer's work at any reasonable rate mutually agreeable to the lawyer and client. Agency fees or other fees associated with the hiring of a temporary lawyer may not be billed to the client at greater than the amount actually disbursed or at a specifically agreed to markup.

Applicable Rules

- Rule 1.2 (Scope of Representation)
- Rule 1.4 (Communication)
- Rule 1.5 (Fees)
- Rule 7.1 (Communications Concerning a Lawyer's Services)
- Rule 7.5 (Firm Names and Letterheads)

Inquiry

Ethics opinions from the American Bar Association[1] and from various state jurisdictions,[2] together with recent articles in legal periodicals,[3] indicate that changes in the legal workforce and legal marketplace have increased demand by lawyers and clients for "temporary" lawyers to assist in legal representations on a short-term basis. As this phenomenon has become more common, it has become necessary to apply traditional ethical considerations to a form of practice that may not easily fit into traditional models. Because we believe that there has been some confusion among lawyers and clients as to the ethical questions relating to: (1) requiring disclosure to the client of the use of temporary lawyers, and (2) billing the client at a markup for the temporary lawyer's work, we seek to clarify application of the Rules in the District of Columbia to these issues.

Discussion

A review of the literature on this subject suggests that there is a wide variety of employment arrangements between law firms and "temporary" lawyers. In essence, a temporary lawyer is one who is not a partner and who is employed by a practitioner or a law firm to work on either a specific project or matter or for a fixed or otherwise limited period of time. If the relationship is expected to last indefinitely, regardless of whether it actually does, the employment does not fall within the category that we discuss in this opinion. Nor does this category include part-time lawyers, whose employment may be less than full-time but who work for one law firm exclusively and the duration of whose employment is expected to be indefinite. The temporary lawyer may work for one law firm

at a time or for several law firms simultaneously. The temporary lawyer may be hired directly or through an employment agency for a fee, and may be paid directly by the law firm or by the agency.

Temporary lawyering offers benefits to clients as well as to the lawyers who use them. Yet, temporary lawyering also poses a number of complex ethical issues, including those relating to competence, independence, undivided loyalty, conflicts of interest and confidentiality. As noted, in 1988, the American Bar Association issued a formal opinion, 88-356 (Dec. 16, 1988), which addressed a number of these issues. Its analysis of the conflicts, undivided loyalty, and confidentiality issues as they pertain to temporary lawyers has met with uniform acceptance and is persuasive. In essence, a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets. Temporary lawyers and their employing lawyers each have an obligation to ensure that the appropriate standards and requirements are met.

However, the ABA's resolution of the issue relating to client disclosure has not been uniformly followed by courts or ethics committees in subsequent decisions. The ABA opinion concluded that the use of a temporary lawyer had to be disclosed to a client only if the temporary lawyer is not working under the close supervision of a regular lawyer at the firm. This conclusion has been rejected by the Supreme Court of Kentucky and bar associations in Illinois, New York, and Ohio.[4] These authorities have concluded that under the ethical rules in those jurisdictions a lawyer should invariably disclose to a client the proposed use of a temporary lawyer on the client's behalf and receive consent from the client.

In this opinion, we address the question of whether a lawyer must disclose to the client the proposed use of a temporary lawyer on a client's matter and the billing obligations of the lawyer for the temporary lawyer's work and any related agency fees.

Our disciplinary rules do not explicitly address the issues of disclosure and billing practices relating to temporary lawyers. Rather, there are a number of rules that, when considered in concert, in our judgment, lead to a middle ground between the ethical opinions (such as Illinois, New York and Ohio) that require an lawyer to disclose to the client any time that the lawyer proposes to use a temporary lawyer on the client's matter and the ABA opinion which limits disclosure only to the situations where the employing lawyer is not closely supervising the work of the temporary lawyer. In our view, Rules 1.2(a) and 1.4 dictate that the temporary status of a lawyer working on a client's behalf should be disclosed to the client whenever that status may reasonably be likely to be material to some aspect of the representation of the client.

On the other hand, our rules do not require that the client be advised of the temporary lawyer's cost to the lawyer or the law firm. The lawyer may bill the legal services provided by a temporary lawyer at any reasonable rate mutually agreed to by the lawyer and by the client, provided any disbursements associated with hiring a temporary lawyer (such as agency fees, if they are to be billed to the client) are billed at the amount of the disbursement or an agreed upon markup.

1. **Disclosing the Use of "Temporaries"**

There are a number of rules that bear on the issue. Rule 1.4 requires that in all matters the lawyer must keep the client reasonably informed so the client can make decisions regarding the representation. Similarly, Rule 1.2(a) provides that "a lawyer . . . shall consult with the client as to the means by which [the objectives of the representation] are to be pursued." Rule 7.5(c) provides that a lawyer may not mislead the client as to the lawyer's practice "organization." Finally, Rule 1.5(e)(2) provides that where a lawyer divides the client's fee with any outside lawyer, including a temporary lawyer, disclosure to the client is required. Thus, where there is to be a division of fees (as opposed to the payment of a salary or time-based payment by the law firm to the temporary employee), the rule mandates that "the client [be] advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged." The rule also requires that the client consent to the arrangement. *See also* Rule 1.5, Comment [14].

Read together, these provisions illustrate the requirements that lawyers actively advise clients of critical matters, including important staffing issues, and that they not mislead clients as to the associations in which they practice, including affiliations between themselves or their firms and lawyers outside of the firm hired to work on a particular matter. These rules establish that the client is reasonably entitled to expect that it will be informed of any matter that is material to the representation.

Often the temporary status of a lawyer who has been assigned to work for the client may well be material to the representation. For example, if the client's matter is expected to last for a considerable period of time but the temporary lawyer's involvement is to be limited to a shorter period because her employment is scheduled to end, then the client is entitled to know that fact. The client may not wish to employ and educate a lawyer to work on his case who will not reasonably be expected to be able to finish out her responsibilities regarding the case. Similarly, a client whose adversaries in unrelated matters have retained a particular law firm may well want and expect to know whether a temporary lawyer is currently or has in the recent past worked for that law firm. Finally, when the client is relying on the expertise and talents of the employing lawyer (or partners and associates of the lawyer or the reputation of the law firm) and the temporary lawyer will have important responsibilities and will not be closely supervised by such lawyers, then clearly the employing lawyer has a duty to disclose the temporary status to the client and to obtain consent for the temporary lawyer's work. Indeed, we agree with the ABA opinion that where the work of the temporary lawyer will not be closely supervised by the employing lawyer or law firm, the client should usually be advised of the proposed role to be played by the temporary lawyer and her status as a temporary lawyer. Exceptions would include when the temporary lawyer's work does not require the substantial exercise of judgment, such as the digesting of deposition transcripts.

On the other hand, there are situations in which the temporary status of the lawyer will be irrelevant to the client's interests. For instance, if a temporary lawyer is employed to write a single memorandum on a specific legal subject in the case without any expectation that the temporary lawyer would continue to be involved in the client's matter, then it is irrelevant that the employment of the temporary lawyer is limited in time where that time is as long or longer than the assignment for the client is expected to last.

There may be other circumstances that suggest that a client should be informed of the temporary status of the lawyer. For example, the client may have stated or manifested a desire that it have available to it a regular cadre of lawyers who will develop expertise and be available to work on a series of expected matters. Such a client would not likely wish to employ and educate a lawyer who is unlikely to be available to work on the client's future matters. In such a circumstance, the temporary status of a lawyer would be material to the client and the employing lawyer would have a duty to disclose at the outset of the temporary lawyer's assignment to the project.

In short, in our view, the combination of rules that we have cited mandates that a lawyer should advise and obtain consent from the client whenever 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.[5]

The disclosure of the temporary lawyer's role does not necessarily mean that the financial arrangement between the firm and the temporary lawyer must be disclosed. That is a wholly separate issue to which we now turn.

2. **Billing Clients for Temporary Lawyers**

The billing for services of a temporary lawyer raises the issue of whether the charge is more akin to seeking reimbursement for out-of-pocket disbursements or to charging for the time of a regular associate, whose salaries and benefits are not required to be, and are not generally, disclosed to the client. If the employing lawyer's payments to a temporary lawyer are considered to be out-of-pocket disbursements, there would have to be disclosure to the client of the costs, which could not be marked up without the client's consent. (*See* Op. No. 185).

All of the precedents in other jurisdictions and our analysis of the D.C. Rules convince us that the charges to be billed to the client for the services of a temporary lawyer are, like the services of a regular associate, a matter to be determined by mutual agreement between the lawyer and client. We find that fees generated by a temporary lawyer are, for purposes of the disciplinary rules, equivalent to fees generated by any other lawyer in a law firm working on the client's matter. Accordingly, the only disciplinary restriction on the fee billed to the client for the temporary lawyer's time is that it be " reasonable." *See* Rule 1.5(a).

No court decision or bar association opinion has suggested that the employing law firm must disclose to the client the salary it pays to the temporary lawyer or the

markup the firm charges the client for the temporary lawyer's time. It is, of course, usually the case that the law firm does not disclose to clients the compensation arrangements of partners, contract partners, of counsel, or regular associates. We see in the rules no reason for a distinction for the compensation paid to a temporary lawyer, unless there is an actual division of fees. As noted, when there is an actual division of fees, Rule 1.5(e) requires notice to the client and the client's consent. In the absence of fee splitting, the only requirement is that the billing rate charged by the firm for the temporary lawyer's time be reasonable and be agreed to by the client. If there is in fact an agreed division of a client's payment for the services of a temporary lawyer between the temporary lawyer and the employing the law firm, we believe that the requirements of 1.5(e), including notice and the client's consent, must be met. The payment of a salary to a temporary lawyer, of course, just like the payment of the salary of a regular employee would not be considered a division of fees.

Finally, in addition to the charges incurred by the law firm for work done by a temporary lawyer, in some instances the firm might make payments to a "placement agency" or other referral firm in connection with finding and hiring the temporary lawyer. As the ABA formal opinion concludes, these expenses are disbursements and are not salary for purposes of billing the client. In accordance with Rule 7.1's requirements that a lawyer not make false or misleading statements about the lawyer's services and Rule 8.4 prohibiting a lawyer from any misrepresentations, if these disbursements are billed to the client, they must be limited to no more than the actual disbursement amount or any mark-up that is specifically disclosed to and agreed to by the client. *See also* Op. No. 185 (1987) (finding that under the Code of Prof. Conduct, provisions regarding integrity and honesty required that disbursements for third party services be billed to clients at cost). The payment to the agency may not be based on the amount of the fees paid by the client to the firm for the legal services rendered because no fee splitting is permitted with non-lawyers. *See* Rule 5.4(a).

Inquiry No. 97-3-15

Adopted: September 15, 1998

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1. ABA Formal Opinion 88-356 (Dec. 16, 1988).
2. N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. 632 (Oct. 12, 1984), *Oliver v. Board of Governors*, Ky. Bar Ass'n 779 S.W.2d 212, 216 (Ky. 1989); Ill. St. Bar Ass'n Advisory Op. on Prof. Conduct 92-97 (Jan. 22, 1993); Ohio Bd. of Comm'rs on Grievances and Discipl. Op. No. 90-23 (Dec. 14, 1990): Bar of City of New York Comm. on Prof. and Judicial Ethics Op. No. 1988-3 (Mar. 31, 1988), *reaff'd*, Ethics Op. 1989-2 (May 10, 1989).
3. Johnson, *Law Firm Salaries and Billing Rates*, Legal Times, Dec. 16, 1996, at 536; Adelman, *Choosing Among Different Models to Charge Clients for Contract Lawyers Can Be Tricky Business*, Legal Times, June 30, 1997, at 569; *see also* Turano and Dolido, *When is a Law Firm an Employer and Responsible for its Contract Lawyers*, Legal Times, July 15, 1996, at 11.
4. But see, e.g., Oliver v. Board of Governors, Ky. Bar Ass'n, *supra* note 2 ("We cannot accept the ABA's distinctions and would recommend disclosure to the client of the firm's intention . . . to use a temporary lawyer . . . in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement."). *See also* Ill. St. Bar Ass'n Advisory Op. on Prof. Conduct Op. 92-97 (Jan. 22, 1993); Ohio Bd. of Comm'rs on Grievances and

Discipl. Op. No. 90-23 (Dec. 14, 1990) (requiring disclosure of temporary lawyers under Code of Prof. Conduct); Bar of City of New York Comm. on Prof. and Judicial Ethics, Op. No. 1988-3 (Mar. 31, 1988), *reaff'd*, Ethics Op. 1989-2 (May 10, 1989) ("The Committee continues to believe that the law firm has an ethical obligation in all cases . . . to make full disclosure in advance to the client of the temporary lawyer's participation . . . and to obtain the client's consent . . ."); *but see* N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. No. 632 (Oct. 12, 1989) (agreeing with ABA that disclosure turns on level of supervision).

5. Because we recognize that there may be different considerations relating to temporary nonlawyers, employed to assist a lawyer, our analysis and this opinion is limited to temporary lawyers.

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