

State Bar of Georgia Formal Advisory Opinion No. 05-9

Approved And Issued On April 13, 2006 Pursuant To Bar Rule 4-403

By Order Of The Supreme Court Of Georgia Thereby Replacing FAO No. 97-1

Supreme Court Docket No. S06R0802

QUESTION PRESENTED:

Is it ethically proper to work on a temporary basis for other attorneys? Is it ethically proper for a lawyer, law firm, or corporate law department to hire other attorneys on a temporary basis?

SUMMARY ANSWER:

Yes. While a temporary lawyer and the employing firm or corporate law department must be sensitive to the unique problems of conflicts of interest, confidentiality, imputed disqualification, client participation, use of placement agencies and fee division produced by the use of temporary lawyers, there is nothing in the Georgia Rules of Professional Conduct that prohibits the use of temporary lawyers.

OPINION:

I. Conflicts of Interest

An attorney is ethically obligated to avoid conflicts of interest with respect to that attorney's client. A temporary lawyer represents the client of a firm when that lawyer works on a matter for a client. Thus, a temporary lawyer employed to represent clients or assist in representation of clients enters into an attorney/client relationship with those particular clients as an associate of the firm. Accordingly, the general rules pertaining to all attorneys regarding conflicts of interest are applicable to the temporary lawyer. Specifically, the temporary lawyer and the employing law firm or corporate law department must comply with Rules 1.7, 1.8, 1.9, and 1.10 governing personal interests, simultaneous representation, and subsequent representation conflicts of interest, and imputed disqualification. Generally, a temporary lawyer should not represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation without obtaining the consent of the affected clients in accordance with the consent requirement of Rule 1.7.

The opportunity for conflicts of interest is heightened in the context of the employment of temporary lawyers. The very nature of a temporary lawyer invokes conflict of interest issues. Obviously, a temporary lawyer is likely to be employed by many different firms or legal departments during the course of his or her practice. Therefore, the potential for conflicts of interest is great. As a practical matter, this potential for conflict imposes upon temporary lawyers and employing law firms or corporate law departments an obligation of great care in both record keeping and screening for conflicts. In fact, the potential for conflict is so high that law firms or corporate law departments that employ temporary lawyers would be acting unethically if they did not carefully evaluate each proposed employment for actual conflicting interests and potentially conflicting interests. Additionally, the temporary lawyer should maintain a record of clients and matters worked on in order to evaluate possible conflicts of interest should they arise. All firms employing temporary lawyers should also maintain a complete and accurate record of all matters on which each temporary lawyer works.

One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or corporate law

department for which he or she is temporarily working, the normal rules governing imputed disqualification apply. Specifically, Rule 1.10(a) provides that if any attorney is individually precluded from undertaking representation by Rules 1.7, 1.8(c), 1.9, or 2.2, then a firm with whom the attorney is associated is also precluded from undertaking that representation. Also, and most importantly in the temporary lawyer context, Rule 1.9(b) says that a lawyer "shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired [confidential] information . . . , unless the client consents after consultation." The effect of these rules working in conjunction is that a firm employing a temporary lawyer would be disqualified by imputed disqualification from any unconsented to representation materially adverse to a former client of the former firms of the temporary lawyer in the same or a substantially related matter if the temporary lawyer had acquired confidential information about the former representation.

II. Confidentiality

In addition to avoiding conflicts of interest, an attorney also is obligated to protect the client's confidences. As noted above, a temporary lawyer who is involved in the representation of clients or who provides assistance in the representation of clients enters into an attorney/client relationship with those clients. Therefore, the temporary attorney is obligated not to disclose client confidences. A temporary attorney is required to keep all information gained in the professional relationship with a client confidential in accordance with Rule 1.6.

Furthermore, Rule 5.1 requires:

- (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Georgia Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable effort to ensure that the other lawyer conforms to the Georgia Rules of Professional Conduct.

This Rule obligates the employing firm or corporate law department to impose upon temporary lawyers obligations of confidentiality identical to those requirements imposed on an associate or any other employee. This obligation of confidentiality includes all information regarding the representation of all clients of the firm or departments when the temporary lawyer acquires that information during his or her engagement.

To protect confidentiality and to avoid excessive risks of imputed disqualification it is a prudent practice for all law firms and corporate law departments, to the extent practicable, to screen each temporary lawyer from access to any information relating to clients that is not related to the temporary lawyer's assignment. Moreover, a temporary lawyer working for several firms shall make every effort to avoid exposure within those firms to any information relating to clients on matters not assigned to the temporary attorney.

III. Use of Placement Agency for Temporary Attorneys

Placement agencies participate in a business that furnishes law firms and corporate departments with the services of lawyers desiring to obtain part-time or temporary employment. Firms and corporate legal departments look to these agencies to find temporary attorneys. In accordance with ABA Formal Opinion 88-356 (1988), a firm does not violate ethical regulations by utilizing a placement agency. However, there are certain guidelines that should be followed to ensure that no

ethical violations occur. First of all, the firm or corporate legal department must prevent any third party from exerting any control as to the client representation. Such control would be a violation of Rule 5.4(c). For example, an agency may have an interest in an attorney's taking additional time on a project so that it will result in higher fees. The solution is to prevent any control by the agency of the attorney's time.

Furthermore, there is an increased risk of disclosure of confidential information even though there must be compliance with the Rules relating to confidential information and conflicts of interest. This risk of disclosure may be lessened by the screening of temporary attorneys by the firm that, as discussed above, insures the temporary lawyers do not obtain unnecessary information. Moreover, a client is entitled to be informed that a temporary attorney is being used. A client reasonably assumes that only attorneys within the firm are doing work on that client's case, and thus, a client should be informed that the firm is using a temporary attorney to do the firm's work. Because there is some risk of third party interference with the representation, the client should be advised of that risk. Compliance with Rule 5.4(c), which prohibits third party control of the client representation requires full disclosure to the client of the arrangement.

IV. Fee Arrangements

The last consideration that needs to be addressed is the appropriate manner in which to handle the fee arrangement. In accordance with the rationale contained in ABA Formal Opinion 88-356, a fee division with a temporary attorney is allowed. If a temporary attorney is directly supervised by an attorney in a law firm, that arrangement is analogous to fee splitting with an associate in a law firm, which is allowed by Rule 1.5(e). Thus, in that situation there is no requirement of consent by the client regarding the fee. Nevertheless, the ethically proper and prudent course is to seek consent of a client under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed even if there is no direct supervision if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee splitting situation and consents; and (3) the total fee is reasonable. Rule 1.5(e).

In that the agency providing the temporary lawyer is not authorized to practice law, any sharing of fees with such an agency would be in violation of Rule 5.4(a). Therefore, while it is perfectly permissible to compensate an agency for providing a temporary lawyer, such compensation must not be based on a portion of client fees collected by the firm or the temporary lawyer.

In summary, employment as a temporary lawyer and use of temporary lawyers are proper when adequate measures, consistent with the guidance offered in this opinion, are employed by the temporary lawyer and the employing firm or corporate law department. These measures respond to the unique problems created by the use of temporary lawyers, including conflicts of interest, imputed disqualification, confidentiality, fee arrangements, use of placement agencies, and client participation. Generally, firms employing temporary lawyers should: (1) carefully evaluate each proposed employment for conflicting interests and potentially conflicting interests; (2) if conflicting or potentially conflicting interests exist, then determine if imputed disqualification rules will impute the conflict to the firm; (3) screen each temporary lawyer from all information relating to clients for which a temporary lawyer does not work, to the extent practicable; (4) make sure the client is fully informed as to all matters relating to the temporary lawyer's representation; and (5) maintain complete records on all matters upon which each temporary lawyer works.