

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 90-23**

December 14, 1990

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

**SYLLABUS:** It is ethical for a proposed business venture operating as a placement service to provide lawyers or law firms with temporary lawyers so long as the business venture operates within certain narrow, ethical guidelines.

**OPINION:** We have before us your request for an advisory opinion on whether it is ethical for a proposed business venture to provide lawyers, law firms, sole practitioners, and corporate legal departments with the placement and use of temporary lawyers. According to your request the proposed business venture would be conducted by an Ohio corporation whose shares are owned by two attorneys licensed to practice law in Ohio. Any practice of law would be maintained separately from the business venture and would be completely unrelated to the business of placing temporary lawyers.

Several state bar ethics committees and the ABA Standing Committee on Ethics and Professional Responsibility have considered the issue of temporary attorney services. Such services have been approved by those states and the ABA when the services followed guidelines designed to avoid ethical problems arising under the Model Code. The ABA's approach in Formal Opinion 88-356 (1988) is thorough and well reasoned in its treatments of ethical issues including conflict of interest, confidentiality of client information, disclosure to the client of arrangements between the firm and the lawyer, and arrangements with the lawyer placement agencies. Although Ohio did not adopt the Model Code, the Ohio Code of Professional Responsibility incorporated provisions that address similar ethical concerns. To avoid unethical practices and to enable temporary lawyer placement services to be operated in a manner consistent with the Ohio Code of Professional Responsibility, the following guidelines should be observed and included in a written agreement governing the use and placement of temporary lawyers.

First, a suitable fee structure must be developed that would eliminate fee-splitting between the agency and the lawyer as prohibited by DR 3-102(A). DR 3-102(A) states that a lawyer or law firm shall not share legal fees with a non-lawyer. The placement agency intends to receive compensation directly from the law firms as a fee based on a percentage of the lawyer's compensation. Recently the Committee on Professional Ethics of the Association of the Bar of The City Of New York in Formal Opinion 1989-2 concluded that since the agency unquestionably provides services in locating recruiting, screening, and placing temporary lawyers and those services are not legal services, the compensation paid by the law firm to the agency for those services is not a legal fee within the meaning of DR 3-102 (A). It can therefore be concluded that such a fee arrangement to an agency does not constitute impermissible sharing of fees with non-lawyers. In Formal Opinion 1988-3 the Committee on Professional Ethics of the Association of the Bar of the City of New York suggested an elimination of many of the fee related ethical concerns by requiring the law firm to pay an hourly wage directly to the attorney and pay the agency a fixed fee.

The need to avoid interference by the placement agency with the exercise of a lawyer's judgment sets the stage for the second guideline. The agency must agree not to attempt to limit or in any way to control the amount of time a lawyer may spend on any particular matter or his professional judgments in the matter. Care should be taken not to violate DR 5-107(C)(3). The rule states that a lawyer shall not practice with a professional corporation or association if a non-lawyer has the right to direct or control the professional judgment of a lawyer. The proposed placement agency must agree to execute an agreement with the temporary lawyer that states that the agency will not exert any control or influence over the exercise of professional judgment by the lawyer, including limiting or extending the amount of time the lawyer spends on work for the clients of the employing firm.

Third, the agency must not interfere with the traditional lawyer-client relationship. The agency must agree not to breach the lawyer's duty to preserve client's confidences and secrets as stated in DR 4-101. The shareholders of the proposed agency intend to facilitate the ability of the temporary lawyers to maintain all confidences and secrets for undertaken matters.

Fourth, so as not to violate DR 5-107(B) that states "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services," the agency must agree not to attempt any such control.

Fifth, the proposed agency must avoid the conflicts of interest set forth in DR 5-105. A lawyer should decline or refuse to continue employment if the interest of another client may impair the independent professional judgment of the lawyer.

Sixth, there is a duty under DR 5-107 (A) (1) to disclose to the client the temporary nature of the relationship in order to accept compensation for the legal services.

Finally, the agency must comply with DR 6-101 and not require a temporary lawyer to handle a legal matter for which he is not competent. The hiring firm also has the ethical responsibility to insure the competence of the temporary lawyer.

The proposed placement agency further intends to advertise its service to law firms in newspapers and trade journals. Direct mail advertising with follow up phone calls is also contemplated. The Code of Professional Responsibility states that methods of advertising that are false, misleading or deceptive are prohibited. Here, where the target is a law firm, not consumers, it is unclear whether the advertising is even regulated by the Code. In any event, the likelihood that such advertising would be deceptive or misleading is small when it simply informs law firms of the availability of temporary legal services.

In conclusion, it is the Board's opinion and you are so advised that a proposed business venture that places and uses temporary lawyers may be established if it follows the ethical guidelines discussed above.

**This is an informal, nonbinding advisory opinion, based upon the facts as presented and limited to questions arising under the Code of Professional Responsibility.**