

# Avoid Conflicts Of Interest When Hiring Contract Lawyers

KIRSTEN CHRISTOPHER AND LAZAR EMANUEL

*Editor's Note: This article was conceived before the release by the NYSBA of Ethics Opinion 715 (3-98) on February 26, 1999. (See Page 7, Column 2). Because of the importance of Opinion 715, the article has been revised to quote its most salient sections. The May issue of NYPRR will carry a detailed summary of Opinion 715. The full text of Opinion may be found at [www.nysba.org](http://www.nysba.org).*

In this article, "temporary lawyer" means a "lawyer engaged for a limited period by one firm exclusively (although without contemplation of permanent employment)". We exclude lawyers who have "of counsel" relationships or are associated as independent counsel on a particular case, although these can also be characterized as "temporaries". Our definition tracks that used in ABA Formal Opinion 88-356.

**[In Ethics Opinion 715, the NYSBA refers to temporary lawyers as "Contract Lawyers." It defines a Contract Lawyer as one who is employed "at hourly rates to work on one or several matters or parts of matters or for a fixed period of time to meet temporary staffing needs. The Contract Lawyer might work from his or her own office or from home; or the Contract Lawyer might be provided with office space at the offices...(of the law firm)".]**

Before 1990, only small law firms and businesses employed lawyers to supply temporary legal help. A decade ago, the ABA/BNA Lawyers' Manual on Professional Conduct, an authoritative secondary source of ethics opinions, did not even have a category for "Temporary Lawyers" in its index. Ethics opinions on temporary legal services were non-existent. But a few years later, a 1994 article in The Wall Street Journal proclaimed, "... the use of legal temps has gone mainstream." The stream has reached flood-stage and today, the use of temporary lawyers is so extensive that a whole network of placement agencies has developed to serve as brokers between law firms and temporary hires.

The increasing number of temporary lawyers has forced the ethics committees of bar associations to consider the resulting ethical implications. This article is the first of several outlining the current status of the rules affecting temporary lawyers. In this article, we discuss problems arising from conflicts of interest. In subsequent articles, we will discuss imputed disqualification, clients' confidences and secrets, and the role of the employment agency.

## Recognizing Conflicts

Many lawyers now choose to work as temporaries instead of committing themselves to the intrigues and vicissitudes of permanent law firm employment. Some temporaries are between jobs or appointments. Some find contract work more compatible with a part-time home-and-work life style. Whatever her background, over the course of her career, the typical temporary lawyer will work for a variety of firms and clients.

Publications directed at law firms carry numerous advertisements by individual lawyers and by employment agencies offering the services of temporary lawyers. The process of screening applicants for existing and inherent conflicts can be a daunting one.

**[NYSBA Opinion 715 advises: "... lawyers may solicit, either in person or by written advertisements, other lawyers to employ them as employees or contract workers or to refer them to employment by clients, as long as the information in such solicitations is not false, deceptive or misleading within the meaning of DR2-101(A).]**

Whenever temporary lawyers are used, real and potential conflicts of interest are inevitable. Prudence requires that they be investigated, exposed and resolved at the outset of the relationship. In addition to performing an adequate conflict of interest check before the relationship begins, law firms should be wary of imputed disqualification concerns that may dictate that a temporary lawyer not be assigned to the work even if there is no real or possible conflict.

**[NYSBA Opinion 715 advises: "The principal problem that must be addressed whenever a Contract Lawyer works for more than one firm is that of conflicts of interest. DR 5-105(A) of the Code of Professional Responsibility prohibits a lawyer from representing conflicting interests . . .]**

## Present vs. Former Client

ABA Model Rules 1.7 and 1.9 cover conflicts of interest involving present and former clients. The key difference between these two rules is that representation **adverse to a former client** is prohibited only for the same or substantially related matters (Rule 1.9), while representation **adverse to a present client** may be prohibited even for unrelated matters (Rule 1.7).

ABA op. 88-356 does not discuss the sticky issue of how long a client remains a temporary's client. Suppose in her work at one firm, the temporary has handled a single matter concerning only one client of the firm. Does the client become a "former" client of the temporary immediately upon her completion of the work assigned to her, or does her relationship with the client continue throughout the firm's representation of the client in that matter? If the latter is the standard, the temporary lawyer may not actually know when the firm's representation ends. She may not even be around to find out or be told.

*[Editor's Note: NYSBA Opinion 715 does not appear to deal with this issue either.]*

**[In New York, Conflicts of Interest are governed by the provisions of DR-105. In Opinion 715, the NYSBA advises: "We believe it is impossible to represent opposite sides in the same litigation. Whether [clients'] consent would be appropriate in a litigated matter where the respective clients are not adversaries or in a non-litigated matter would depend on the nature of the matter and the nature of**

**the Contract Lawyer's role."]**

### **When Does Representation Arise**

What level of participation in a matter will determine whether a temporary lawyer has "represented the client?" What if she is asked only to research legal issues and to prepare notes for a memorandum of law? ABA Op. 88-356 says that a lawyer who does any work on a matter represents the client for purposes of the conflicts rules. Some courts have distinguished between senior lawyers who control a matter and lawyers who touch the matter only briefly and then on limited and specific legal questions. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

**[NYSBA Opinion 715 advises: "We believe that a lawyer should be deemed to represent a client if the lawyer is privy to factual information about the client that would constitute confidences or secrets of the client within the meaning of DR 4-101(A). In our opinion, this does not depend upon having any contact with the client."]**

Some commentators have suggested that a law firm can be effectively shielded from conflicts disqualification by ensuring that the temporary lawyer not learn the identity of the client. Apart from the practical difficulty of creating and maintaining an impenetrable fence between the temporary and the client's identity, there is the impossible problem of proving or disproving the scope of the temporary's knowledge upon a disqualification motion.

A far better solution is full and complete discussion of existing and potential conflicts between the hiring partner and the temporary lawyer. To enable this discussion, it's essential that both the law firm and the temporary lawyer maintain an up-to-date record of current and previous engagements.

**[NYSBA opinion 715 advises: "DR 5-105(E) requires a law firm to keep records of prior engagements and to check proposed engagements against current and previous engagements 'so as to render effective assistance to lawyers within the firm in complying with [DR 5-105(D)]'. We believe that both the Contract Lawyer and the firms that employ the Contract Lawyer must keep such a list of current and previous engagements so as to ensure compliance with the Code's prohibitions against direct and vicarious conflicts. Therefore, whenever a Contract Lawyer is doing more than pure legal research (i.e. whenever the Contract Lawyer is given any of the facts of the client's matter), the Contract Lawyer has a duty to inquire as to the identity of the client, so as to be able to perform a check for conflicts with present or future clients."]**

### **Approach In Other States**

A handful of other states have attempted to deal with the problem of conflicts posed by the hiring of temporaries. Kentucky and South Carolina have adopted ABA Op. 88-356. New Hampshire cautions that a lawyer who offers pro tempore coverage of court hearings on a regular basis may be considered part of the firm for conflicts purposes (Opinion 1993-94-8). The California State Bar Standing Committee on Professional Responsibility and Conduct notes that a firm must make a concerted effort to screen the temporary lawyer from confidential information that is not essential to the project. Formal Opinion 1992-126. The Committee further notes that the temporary lawyer must be mindful of the rule that confidential information of a former client may not be used.

The most effective way to avoid the potential for conflicts is to insist on a thorough and detailed screening process at the beginning of the engagement. If the temporary lawyer applies directly, this should be done at a personal interview between the temporary and the lawyer in charge of the matter to which she will be assigned. If placement is through an agency, review with the agency its policies for screening applicants.

In sum, both the hiring firm and the temporary lawyer bear the responsibility for checking conflicts, and a review of poor clients and matters by both should be part of the hiring process.

(See checklists, page 8)

---

*Kirsten L. Christopher is Vice-President & Director, Risk Management Services, Aon Services Group, Affinity Insurance Agency. She is an appointed member of the ABA Standing Committee on Lawyer Competence, Professional Discipline, and Lawyers' Professional Liability.*