



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

1990

On the Transformation of the Legal Profession: The Advent of Temporary Lawyering

Vincent R. Johnson

St. Mary's University School of Law, vjohnson@stmarytx.edu

Virginia Coyle

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

Vincent R. Johnson and Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 *Notre Dame L. Rev.* 359 (1990).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

On The Transformation of the Legal Profession: The Advent of Temporary Lawyering

Vincent R. Johnson*
Virginia Coyle**

TABLE OF CONTENTS

I.	THE CHANGING CONTOURS OF LAW PRACTICE	360
A.	<i>A Catalog of Change</i>	360
B.	<i>Departures from the Traditional Career Track</i>	368
II.	THE TREND TOWARD TEMPORARY EMPLOYEES	375
III.	PLACEMENT AND EMPLOYMENT OF TEMPORARY LAWYERS	379
IV.	Ethical Issues in Temporary Lawyering	389
A.	<i>Objections and Authorities</i>	389
B.	<i>The Interests Advanced By Temporary Lawyering</i>	392
1.	Institutional Flexibility	394
2.	Reconciliation of Supply and Demand	400
C.	<i>Perils Inherent in Core/Ring Employment Configurations</i>	404
D.	<i>Conflicts of Interest</i>	407
1.	Former Clients	408
(a)	<i>Movement Between Firms Under the Model Rules and Imputed Disqualification</i>	408
(b)	<i>Avoiding Actual Knowledge of Confidential Information</i>	411
(c)	<i>Peripheral Involvement</i>	412
(d)	<i>Appearances of Impropriety under the Model Code</i>	413

* Professor of Law, St. Mary's University School of Law, San Antonio, Texas, and Director of the St. Mary's Institute on World Legal Problems at the University of Innsbruck, Austria. J.D., University of Notre Dame; LL.M., Yale University. Professor Johnson served as the 1988-89 Judicial Fellow at the Supreme Court of the United States.

** Associate, Matthews & Branscomb, Austin, Texas. B.A., University of Minnesota-Duluth; J.D., St. Mary's University School of Law.

Professor Michael Ariens provided extensive information on recent developments in the legal profession, and useful advice and support were offered by Professor Geoffrey C. Hazard, Dean Barbara Bader Aldave, and Professor Gerald S. Reamey. Valuable research and editorial assistance were furnished by Sara Murray, Pat Barsalou, Michael Warren and James Bagnall.

(e) <i>Screening of Disqualified Temporary Attorneys "Associated With" a Firm</i>	414
2. Interests of Third Persons	418
3. Multiple Clients	420
4. Interests of the Temporary Lawyer	421
E. <i>Confidentiality</i>	423
F. <i>Impermissible Fee Splitting</i>	425
1. Fee Splitting Among Lawyers and the Necessity of Obtaining a Client's Consent to Employment of a Temporary Attorney	426
2. Fee Splitting With Nonlawyers	431
V. GUIDELINES: CHARTING A CONSERVATIVE COURSE	438
VI. CONCLUSION	441

I. THE CHANGING CONTOURS OF LAW PRACTICE

A. *A Catalog of Change*

The structure of the legal profession and the nature of law practice have changed dramatically during the past quarter of a century.¹ Indeed, the transformation has been so thorough² that it is difficult to say with confidence which of the many developments has had the greatest impact on the culture of law practice. The growth in the number of attorneys and law firms has surpassed the population growth rate;³ women and minorities com-

1 This Article carries forward the work of one of the co-authors chronicling various ethical dimensions of the ongoing transformation of the legal profession. See Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1 (1988) (developing a legal and ethical rationale to support limited departure-based solicitation of law firm clients by attorneys changing firms) [hereinafter *Solicitation of Law Firm Clients*]; Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOKLYN L. REV. 539 (1988) (offering a functional and economic analysis of the ethical standards applicable to lawyer financing of mega-trials and to fee allocation agreements which redistribute among worker-attorneys and investor-attorneys an award of fees and expenses in a successful mass tort class action) [hereinafter *Ethical Limitations on Creative Financing*]; Johnson, *Switching Firms—And Taking Clients*, 25 TRIAL 117 (Nov. 1989) (identifying doctrinal benchmarks among the uncertain legal and ethical standards applicable to attorneys switching law firms) [hereinafter *Switching Firms*].

2 See generally Address by William H. Rehnquist, Chief Justice of the United States, before the Australian Bar Association, in Sydney, Australia (Sept. 3, 1988) (discussing major changes in the legal profession during the past 35 years). Cf. Gilson & Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989) ("The traditional American corporate law firm, long an oasis of organizational stability, in recent years has been the subject of dramatic change.").

3 See Bradlow, *The Changing Legal Environment: The 1980s and Beyond*, 74 A.B.A. J. 72 (Dec. 1988). See also Goldberg, *Then and Now: 75 Years of Change*, 76 A.B.A. J. 56, 58

prise increasingly larger percentages of law school graduates,⁴ practitioners⁵ and the academic bar;⁶ the intra-firm ratio of asso-

(Jan. 1990) ("Over the last 75 years, the number of lawyers skyrocketed from 122,519 in 1920 to 725,000 in 1989. Instead of one lawyer for every 863 people, we now have one for every 415."); Raridon, *The Practice of Law—the Next 50 Years*, 15 LEGAL ECON. 31, 32 (Apr. 1989) (in 1979, there were approximately 500,000 lawyers in United States; in 1989, 700,000 attorneys; by 1992, the 1,000,000-attorney mark will be reached).

4 See C. EPSTEIN, *WOMEN IN LAW* 5 (1981) ("the proportion of women in the law schools rose from 4% in the 1960s to 8% by 1970, and then to 33% by 1980"). Forty-three percent of 42,860 persons entering law school in 1988 were women. Tigar, *Practice Puts New Demands on Litigation Unit*, Nat'l L. J., Aug. 7, 1989, at 32 (discussing changes in the legal profession and the need for response).

The percentage of black students enrolled in accredited law schools rose from 1% in 1965, to 4.3% in 1972, and to 4.7% in 1976-77. See G. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 6 (1983); see also Ramsey, *Affirmative Action at American Bar Association Approved Law Schools: 1979-1980*, 30 J. LEGAL EDUC. 377, 379 (1980) (noting that between 1969 and 1979 the number of minority law students increased significantly). In 1988, 5.5 percent of the persons entering law school were black. See Tigar, *supra*, at 32. Minorities as a whole accounted for twelve percent of law school enrollment in 1988. See Goldberg, *supra* note 3, at 58; but see Holley & Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 302 (1987) (expressing skepticism about various figures; "no more than 4.5% or 5.5% of the new lawyers entering the profession since 1970 were Black and Hispanic"). Women and minorities are also more readily included today on law journal editorial boards than in years past. See Butterfield, *First Black Elected to Head Harvard's Law Review*, N.Y. Times, Feb. 6, 1990, at A20, col. 4 (first female president of the *Harvard Law Review* was selected in 1977; first male of Chinese American descent in 1989; first black male in 1990).

5 See Epstein, *supra* note 4, at 5:

There were few women lawyers in the United States in the 1960s Ten years later, the picture had totally changed. By 1970 there were 13,000 women lawyers, and they were to increase in numbers even more dramatically After decades of virtually no movement, the number of women lawyers grew radically in the decade of 1970 to 1980, from 13,000 to 62,000 (from 4 percent to 12.4 percent)

Today, women account for approximately twenty percent of all lawyers. See Goldberg, *supra* note 3, at 58. See also Jensen, *Minorities Didn't Share in Firm Growth*, Nat'l L.J., Feb. 19, 1990, at 1, col. 2 ("the number and percentage of female partners and associates [in the nation's 250 largest law firms] continue to grow steadily"); Kaye, *Historical Observation: Yesterday, Today and Tomorrow*, 61 N.Y. ST. B.J. 12, 14 (May 1989), (Women "have entered every corner of the legal profession: private law firms, government, public interest, teaching, the judiciary.").

The progress of minorities, including blacks, Hispanics, and Asian-Americans, has been slow. See Goldberg, *supra* note 3, at 58 ("Greater numbers of blacks, Hispanics and Asians have entered law, but make up only 1 percent of large-firm partnerships."); Holley & Kleven, *supra* note 4, at 301 ("Blacks and Hispanics are, while on the increase, still notoriously underrepresented in the legal profession relative to their numbers in the general population."); Howell, *The Mission of Black Law Schools Toward the Year 2000*, 19 N.C. CENTRAL L. J. 40, 43 (1990) (noting "the negative reality of poor bar examination performance among Blacks"); Jensen, *supra*, at 28, col. 1 ("the go-go decade of the 1980s . . . failed to produce any significant increase in opportunities for black, Hispanic, Asian-American, or American Indian attorneys").

6 See Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Educa-*

ciate attorneys to partners⁷ & has climbed significantly,⁸ starting salaries in many major firms now approach or surpass judicial salaries;⁹ billable hours¹⁰ and billing rates¹¹ have soared; and a

tion or "The Fem-Crits Go to Law School," 38 J. LEGAL EDUC. 61, 69, 84 (1988) ("until quite recently, law teachers were almost exclusively white, middle-class males;" noting "increasing number of women [law] teachers"); Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87, 88 (1988):

Women law teachers are still a minority on the faculty of many law schools. However, at schools such as Brooklyn Law School and a few others there are a sufficient number of women law teachers (more than twenty at Brooklyn) to constitute a real critical mass, and many of the women play leadership roles within the law school community.

7 Some law firms differentiate between equity and non-equity partners. See, e.g., Miller & Green, *Top-Crossing Firm in Atlanta Adopts Two-Tier Partnership*, Wall St. J., June 6, 1990, at B2, col. 5. Unless the context indicates otherwise, no such distinction is drawn herein.

8 See Gibbons, *Law Practice in 2001*, 76 A.B.A. J. 69, 70 (Jan. 1990):

In the last 10 years, the ratio of associates to partners at all firms has increased from one associate for every one partner to 1.2 associates per partner

And at firms with more than 150 lawyers, the ratio has jumped from 1.2 associates for each partner to 1.5 associates per partner. The highest ratio . . . is at many of the biggest firms where there are now three associates for every partner.

See also R. ABEL, *AMERICAN LAWYERS* 191 (1989) ("the ratio increased significantly between 1975 and 1987"); Raridon, *supra* note 3, at 36 (citing Altman & Weil Survey of Law Firm Economics, discussing future trends for legal profession). In 1979, the overall ratio of associates to equity partners was .70; in 1987, the ratio was .97. *Id.*

9 See Raridon, *supra* note 3, at 31 (first-year associate salaries at New York City law firms are comparable to salaries paid to federal judges and often surpass the salaries of state judges).

In 1990, a representative sampling of the starting salaries paid by nonpatent law firms revealed the following figures: New York City, \$83,000; Los Angeles, \$70-75,000; Chicago, \$70,000; Washington, D.C., \$65-70,000; San Francisco, \$65,000. See Rutman, *Most Firms Put Brakes on Starting Salary Hikes*, Nat'l L.J., Sept. 24, 1990, at S3; *Special Report: Associate Salaries*, Legal Times, Aug. 13, 1990, at 10 (starting salaries have leveled off); The 16th Annual Salary Survey, 19 Student Lawyer 22, 23-25 (Nov. 1989) (survey based on projected July 1, 1989, salaries, without bonuses) [hereinafter *Salary Survey*]. See also Moss, *Associates' Pay at \$71,000*, 74 A.B.A. J. 17 (Jan. 1988) (large New York City firms' starting salary for 1988 was \$71,000); *Dallas Law Firm Beats Starting Salaries at Most New York Firms*, Wall St. J., Oct. 5, 1989, at B8, col. 6 (six new associates at Bickel & Brewer, a 40-attorney Dallas firm, were paid \$85,000 a year); Alston, *New-Hires Paid Near Apex of Novice Professionals*, Kansas City Bus. J., at § 1, p. 19 (noting that salaries for first-year lawyers have nearly tripled in the past decade); Goldberg, *supra* note 3, at 58:

"Salary wars" [on Wall Street] spun out of control, boosting starting rates at major firms from \$9,500 in the late '60s to \$83,000 in the late '80s. Partner draws at the same firms often hit the six- and seven-figure range. (Such compensation was, by no means, typical of the profession—a 1984 ABA survey showed that 77 percent earned less than \$75,000.)

Average starting salaries in large firms (firms with over 100 attorneys) increased 23% to 50% over the three-year period of 1985-88. *NALP Releases Employment Report on*

rapid proliferation of branch offices has produced regional, national and international "mega-firms,"¹² with some entities now

Class of 1988 Graduates, Nat'l Assoc. for Law Placement News Release, Oct. 31, 1989 (annual employment and salary survey of recent law graduates). The average percentage increase in attorney salaries between 1985 and 1988 differed depending on the city: New York City, 45.55%; Los Angeles, 45%; Chicago, 49.61%; Dallas, 23.70%; Milwaukee, 50.49%. *Id.*

10 According to one survey, the average number of hours billed by associates working at New York City's "hardest working" firms reached 2,500 in 1987. *See* Marcotte, *Hours Way Up: 2,500 Now Magic Number*, 74 A.B.A. J. 19 (Dec. 1988). The same "hardest working" firms averaged 2,210 billable hours a year in 1982. *Id.* Hours billed at "relaxed" large firms in New York City rose from 1,590 hours in 1982 to 1,860 in 1987. *Id.* The average for all large New York firms increased from 1,780 in 1982 to 2,290 hours in 1987. *Id.*

Nationally, the picture is much the same. *See* Gibbons, *supra* note 8, at 71 ("In 1979 partners averaged 1,544 billable hours; in 1988 they averaged 1,731 hours [T]he average associate [billed] 1,696 hours in 1979 and 1,834 hours in 1988.").

11 Billing rates for partners in several firms have reached \$500 per hour in New York, Chicago, and Boston. *Clients Beware: The \$500-an-Hour Lawyer Has Arrived*, Wall St. J., Nov. 20, 1989, at B2, col. 3. One Houston attorney charged \$400/hour in 1988, \$475/hour in 1989, and expected to raise his fee again on January 1, 1990. *Id.*

12 Statistics from the 250 largest law firms in the United States show that the number of attorneys who were associated with top firms and practiced in branch offices rose from 17% in 1978 to 28% in 1988. *See* Bellows, *Branches: Key to Growth: Survey of a Decade of Big-Firm Expansion Raises Questions About Future*, Nat'l L.J., Dec. 26, 1988-Jan. 2, 1989, at S13, col. 1 (analysis of trend toward branch office expansion in legal profession). If the trend toward branch offices continues at the same rate, by 1997 more attorneys will practice in branch offices than in home offices. *Id.* *But see* Lambert & Noah, *Law Firm Expansion Slowed in 1989 at 500 Largest Firms*, Wall St. J., May 24, 1990, at B8, col. 11 (The 500 largest firms grew 7.7% in 1989, compared with growth of 9.2% in 1988 and 9.9% in 1987."). Some firms "branch out" by merging with established firms in locations desired for expansion. *See, e.g., Chicago-Dallas Liaison*, Wall St. J., Nov. 8, 1989, at B8, col. 5 (180-attorney Chicago firm merged with a 6-lawyer Dallas firm in order to establish a presence in what was regarded as a "top growth city").

With the ongoing economic consolidation of western Europe and the removal of many political barriers in eastern Europe, a number of American firms are now opening European branch offices. *See, e.g., Lambert & Noah, Steptoe & Johnson Will Create Moscow Office as Joint Venture with Soviets*, Wall St. J., May 24, 1990, at B8, col. 1 (discussing first law office to be run jointly by Soviets and Americans); Cohen & Felsenthal, *Three Large Firms Negotiate to Form Venture in Europe and New York*, Wall St. J., May 18, 1990, B3, at col. 3 (discussing joint venture by law firms in Boston, San Francisco and Washington, D.C. to open offices in New York City and London, and noting that other offices may follow in Germany and Japan); Geyelin & Marcus, *Baker & McKenzie Opens New Offices in East and West Berlin*, Wall St. J., Mar. 19, 1990, at B8, col. 3 (discussing new branch offices "designed to take advantage of new investment opportunities"); Sullivan & Hayes, *U.S. Firm to Form Venture with Soviet, Austrian and Finnish Lawyers*, Wall St. J., Feb. 21, 1990, at B7, col. 3 (U.S. firm formed partnership with Soviet, Austrian and Finnish lawyers, which was the first multinational joint-venture law firm in Soviet Union); Harlan & Lambert, *New York Law Firm Affiliates with New London Firm*, Wall St. J., Feb. 20, 1990, at B8, cols. 5-6 (noting New York firm's affiliation with new London firm, and observing that "[p]artnerships between U.S. and European lawyers are permitted in some nations" and that "informal affiliations have become popular in anticipation of the dropping of

numbering more than 1,000 attorneys.¹³

At first glance, many of these developments appear to relate more to the professional lives of attorneys in mid- to large-size firms than to the career pursuits of the majority¹⁴ of lawyers who practice alone or with only a few colleagues. But in fact, for several reasons, the impact of many recent changes has been felt at every level of the profession. To begin with, events which affect larger firms have a "trickle down" effect. Many attorneys move from larger firms to smaller practices;¹⁵ the high media profile of larger firms shapes public and professional expectations;¹⁶ the litigation and negotiation tactics of larger firms force smaller ones to respond in kind;¹⁷ and, as has long been the case, attorneys

trade barriers in 1992"); Marcus & Brannigan, *Eastern Bloc*, Wall St. J., Feb. 14, 1990, at B11, col. 4 (noting branch offices recently opened in Budapest and Moscow); Abramson & Brannigan, *U.S., British Firms Plan Budapest Practice*, Wall St. J., Feb. 9, 1990, at B4, col. 1 (firms in London, Washington and Chicago united to launch a new practice in Budapest); *Law Firms From Three Nations Join Forces to Open Brussels Office*, Wall St. J., Jan. 5, 1990, at B5, col. 6 (Los Angeles, London and Paris firms jointly open Brussels office); Hagedorn & Pollock, *Legal Beat*, Wall St. J., Nov. 7, 1989, at B12, col. 2 (discussing new offices in Brussels opened by several different firms); *Europe Gets New Wave of U.S. Law Firms*, Wall St. J., Nov. 7, 1989, at B10, col. 4 (four large firms opened offices in Brussels within a period of several weeks). See also Bower, *U.S. Legal Profession Faces 'Fortress Europe'*, Nat'l L.J., Mar. 19, 1990, at 15, col. 1 (noting "rash of announcements of European mergers, affiliations and strategic alliances by U.S. law firms").

13 A 1990 article indicated that three mega-firms employed over 1,000 attorneys: Baker & McKenzie (1,519); Jones Day (1,202); and Skadden Arps (1,133). See *Firm Rankings*, Nat'l L.J., Sept. 24, 1990, at S4 (results of annual survey of the 250 largest law firms in the United States). Five years earlier, Baker & McKenzie was the largest firm with 704 attorneys. *Id.* Baker & McKenzie was the first and only firm to surpass the 1,000-attorney landmark in 1988. *1988's Unsettled Legacy*, Nat'l L. J., Dec. 26, 1988-Jan. 2, 1989, at S2, col. 1. See also Goldberg, *supra* note 3, at 59 ("Over the last 12 years . . . the number of firms with more than 100 lawyers increased five-fold—from 47 to 245. The number of lawyers in these firms jumped from 6,558 to 51,851."); Miller & Green, *Baker & McKenzie Nabs 14-lawyer Real-Estate Finance Group*, Wall St. J., June 6, 1990, at B2, col. 5.

14 See Goldberg, *supra* note 3, at 58 (in 1990, as in 1915, "most lawyers are in private practice and work alone or in small firms").

15 Cf. *Solicitation of Law Firm Clients*, *supra* note 1, at 4 n.2 and 7 n.8 (movement from large to small firms is suggested by the fact that few law school graduates begin their careers as sole practitioners, although many end up self-employed).

16 Cf. Jost, *What Image Do We Deserve?*, 74 A.B.A. J. 47, (Nov. 1, 1988) (discussing how media portrayals of the legal profession shape public perceptions); Machlowitz, *Lawyers on TV*, 74 A.B.A. J. 52, 55, (Nov. 1, 1988) (television portrayals of attorneys have an enormous influence on the public's attitudes about the legal profession); Kanarek, *Law Students Must Have Realistic Expectations*, 21 SYLLABUS, Spring 1990, at 1. (Law students' "decisions to pursue law as a career have been influenced in large part by media coverage of the biggest deals and cases, and the focus of most legal periodicals [is] on life in the country's largest law firms."); Redlich, *Why Must Law Schools Blur Students' "Vision"?*, Nat'l L.J., Aug. 18, 1986, at S-18 (even law students' perceptions of the legal profession are affected by media portrayals).

17 Cf. Galanter & Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament*

in larger firms frequently play leading roles in defining and applying the ethical standards which govern the entire profession.¹⁸ In addition, all attorneys have been affected by Supreme Court decisions during the past three decades which have served to catalyze the transformation of the legal profession. These rulings have promoted attorney mobility and competition in the delivery of legal services by striking down minimum fee schedules,¹⁹ residency requirements for admission to the bar,²⁰ striking down various limitations on lawyer advertising,²¹ or by otherwise influencing

and the Growth of Large Law Firms, 76 VA. L. REV. 747, 748 (1990) ("Many features of the big law firm's style . . . have been emulated in other vehicles for delivering legal services. The specialized boutique firm, the public-interest law firm, and the corporate law department all model themselves on a style of practice developed in the large firm."). See generally Cook, *The Search for Professionalism*, 52 TEX. B.J. 1302 (1989) (self-destructive methods of litigation evoke retaliation from other lawyers and make problems worse); Walker & Cerniglia, *American Inns of Court: A Return to Civility in Practicing Law*, 52 TEX. B.J. 1306 (1989) ("Thrown into a system where discovery methods are often employed as weapons, young attorneys see no alternative but to adopt similar tactics in order to survive."). But see Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPPERDINE L. REV. 637, 651-52 (1990) (A distinguished jurist recommends that when confronted with "unfair tactics by an adversary," the better course is "[n]ever [to] fight fire with fire.").

18 Illustrative of this proposition is the fact that Robert J. Kutak, the chairman of the ABA committee which drafted the 1983 Model Rules of Professional Conduct, was a senior partner in the large (100-125 lawyer) Omaha, Nebraska firm of Kutak, Rock & Campbell. Cf. Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, 88 W. VA. L. REV. 623, 623 (1986):

[P]rofessional ethics is a creature of the establishment; it comes to us from the old boys who run things. As ethics, it is and has always been the study of what the better doctors and lawyers do. As professional regulation, it has for about a century been what the better lawyers and doctors impose on their colleagues and on the country—a negative matter, mostly, of what better professionals try to keep lesser professionals from doing.

See generally Taylor, *Defending Lawyers in Disciplinary Proceedings*, 31 AM JUR TRIALS 633, 758 (1984) ("[T]he members [of an attorney grievance committee] are usually members of large or medium size firms, middle-aged or older, and ordinarily not trial lawyers . . . they are not likely to engage in family law or criminal or general practice, although there may be a few exceptions.").

19 *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

20 *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (Virgin Islands bar residency requirement violated privileges and immunities clause); *Frazier v. Heebe*, 482 U.S. 641 (1987) (federal court bar residency requirement invalidated under supervisory power as unnecessary, irrational, and in contravention of principles of right and justice); *Supreme Court v. Piper*, 470 U.S. 274 (1985) (state bar residency requirement violated privileges and immunities clause).

21 See *Peel v. Attorney Registration and Disciplinary Comm.*, 110 S. Ct. 2281 (1990) (invalidating broad restrictions on advertisement of attorney certification); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (rejecting prohibition on use of targeted mail); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (rejecting prohibition on illustrations in lawyer ads); *In re R.M.J.*, 455 U.S. 191 (1982) (rejecting requirement that

the customs and norms which define the practice of law.²² Further, the appearance of national legal periodicals such as the *American Lawyer*, the *National Law Journal*, and *Legal Times* have fueled changes throughout the profession by providing current information to attorneys on all facets of law practice.²³

The problems accompanying these major changes affect virtually all lawyers. To mention but a few examples: malpractice suits escalate annually;²⁴ clients concerned about rising attorney fees²⁵ are more willing to "shop" for legal services;²⁶ attorneys

lawyer advertisements must use only approved language for describing categories of practice); *Bates v. State Bar*, 433 U.S. 350 (1977) (rejecting prohibition against advertisement of the cost and availability of routine legal services).

22 See *Keller v. State Bar*, 110 S. Ct. 2228 (1990) (discussing constitutional limitations on use of state bar dues); *Nix v. Whiteside*, 475 U.S. 157 (1986) (decision bearing upon the extent of an attorney's duty to prevent perjury by a client); *In re Snyder*, 472 U.S. 634 (1985) (discussing permissible range of attorney criticism of the judiciary); *Upjohn v. United States*, 449 U.S. 383 (1981) (considering applicability of attorney-client privilege to corporate clients). See generally Martineau, *The Supreme Court and State Regulation of the Legal Profession*, 8 HASTINGS CONST. L.Q. 199 (1981) ("Since 1945 more and more issues involving the legal profession have been brought to . . . [the United States Supreme Court]; and, since 1957, it has found various federal constitutional and statutory provisions violated by states' efforts to control the practice of law.").

23 See Moss, *Law Job Trends*, 76 A.B.A. J. 36 (Apr. 1990) (One placement agency "headhunter" attributes the rapid rise in attorney mobility during the 1980s to the advent in 1979 of the legal tabloid *American Lawyer* and has stated: "All of a sudden people had access to what was going on with lawyers and what was going on in the country as a whole."); K. EISLER, SHARK TANK: GREED, POLITICS, AND THE COLLAPSE OF ONE OF AMERICA'S LARGEST LAW FIRMS 113, 121 (1990) (*American Lawyer* magazine provided previously unavailable information on law-related money matters which was voraciously consumed in legal circles.).

24 See I R. MALLIN & J. SMITH, LEGAL MALPRACTICE 1.6 (3d ed. 1989) (legal profession's rapid growth has caused a substantial, steady rise in the frequency of malpractice suits); Zeldis, *New York Firms are Biting the Bullet*, Nat'l L. J., Sept. 19, 1988, at 2, col. 2 (observing that between 1986 and 1987, there was a "100 percent rise in claims filed against big firms"); *1988's Unsettled Legacy*, *supra* note 13, at S2 (malpractice suits skyrocketed in 1988).

25 See, e.g., Lambert & Brannigan, *American Home Products Corp. is Contesting More than \$26 million in Professionals' Fees*, Wall St. J., Mar. 23, 1990, at B8, col. 2 (fees charged by lawyers, bankers, and accountants for work on corporate reorganization denounced as excessive).

26 See Bradlow, *supra* note 3, at 72 (more clients shop for cost-efficient legal services and challenge questionable billings). Cf. Bayer & Welch, *Keeping Tabs on Outside Legal Counsel*, Legal Times, Feb. 19, 1990, at 25, col. 1 ("in-house counsel monitor outside legal costs by comparing bills from different law firms for similar cases and by watching for signs of unannounced 'value billing'"); Goldberg, *supra* note 3, at 59 ("Corporate clients have gotten more demanding . . . , often choosing three and four firms to represent them in different practice areas, and requesting detailed billing statements and price discounts for volume work"); Marcotte, *Cost-Conscious Corporate Counsel*, 76 A.B.A. J. 22 (Mar. 1990) (corporate legal departments continue to use various "cost-control measures" to keep outside legal bills down); Raridon, *supra* note 3, at 32 (corporations are cutting legal costs through competitive bidding and alternative dispute resolution); Ray, *When*

switch firms and take clients with them;²⁷ and job-related stress²⁸ and psychological "burnout"²⁹ are common professional maladies.

Law Firms Go Under, 76 A.B.A. J. 55 (Mar. 1990) (demise of major firm was precipitated, in part, by numerous clients objecting to high fees).

27 See generally Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEXAS L. REV. 1, 2 (1988) ("Law firms . . . are in turmoil."); *Solicitation of Law Firm Clients*, *supra* note 1, at 4-6 (thousands of associates leave law firms annually, either to move to different firms or to practice on their own); *Switching Firms*, *supra* note 1, at 117 (discussing ethical and legal problems which arise when attorneys switch firms and attempt to take clients with them); Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMPLE L. REV. 1055 (1988); Comment, *Lateral Moves and the Quest for Clients: Tort Liability of Departing Attorneys for Taking Firm Clients*, 75 CALIF. L. REV. 1809 (1987) (noting increase in lateral moves by associates and partners).

28 See Goldberg, *supra* note 3, at 58:

Says Stephen Gillers of New York University Law School: "I've noticed profound and disquieting changes among practitioners—a feeling of anxiety and angst because of a loss of control. A profession that was traditionally able to write the rules governing the terms of its practice is losing control of that power to others and to the market." "We're working harder, yet there's less social esteem and self-esteem," comments Geoffrey Hazard of Yale Law School "The pressure to learn one's field and deliver a better product never lets up. Stress has become a fact of life."

LaMothe, *Endangered Species*, 23 STAN. LAW. 15, 31 (Spring/Summer 1989) ("Most studies show that working mothers report much greater stress than all other workers due to their combined job and family demands. Men too report stress when child care duties force them to miss work."); Hayes, *Law*, Wall St. J., Feb. 6, 1990, at B1, col. 2 (discussing Connecticut survey documenting high levels of job-related stress suffered by one in every five attorneys); Goldberg, *Simon Rifkind Remembers*, 76 A.B.A. J. 61 (Jan. 1990) (senior partner in major New York firm, who began law school in 1922, asserts: "The critical difference between then and now is the level of anxiety").

29 See Harper, *The Best and Brightest, Bored and Burned Out*, 73 A.B.A. J. 28, 29 (May 15, 1987) ("associates burn out because of too many hours, a lack of control over cases and boredom with doing the same type of work repeatedly"); Martel, *Lawyer Burnout*, 24 Trial 62 (July 1988) (analysis of high incidence of burnout among trial lawyers). See also Moss, *supra* note 23, at 36: [According to one placement agency "headhunter":]

Lawyers are looking to get out of law because work is drying up while the pressure grows to bring in business and bill more hours [T]he competitive environment has forced older lawyers to spend more time in practice and less time training their junior counterparts. The result is that younger attorneys are feeling dissatisfied and unfulfilled. Lawyers come to me all the time and say: "What else is there for me to do other than practice in a law firm or corporation?"

Cf. Gibbons, *supra* note 8, at 74 ("firms are waking up to the fact that they have to change, which means . . . finding ways to keep lawyers from burning out"). But see Marcus & Harlan, *Lawyers are Overwhelmingly Satisfied with Their Job Choices*, Wall St. J., May 21, 1990, at B2, col. 5. (Although 79% of 1000 lawyers polled said they were satisfied with their careers and would choose to become lawyers again, 15% of the women and nearly one-third of the black lawyers surveyed said they planned to leave the profession).

A potential solution to these problems lies on the cutting edge of change in the legal world. It is an entirely new³⁰ way of practicing law: temporary lawyering.³¹ While some see this as a radical departure from legal tradition, it is more properly viewed as merely the latest step away from the traditional associate-to-partnership career track.

B. Departures from the Traditional Career Track

The difficulties resulting from the transformation of law practice—which in many respects parallel dilemmas currently faced by the medical profession³²—impose high costs on law firms with

30 A temporary lawyer placement agency by the name of Lawyer's Lawyer existed in Washington, D.C., as early as 1984. Its founder, Janis Goldman, had worked for four different law firms and decided to start the agency after all four firms contacted her during a self-imposed maternity leave, asking her to do short term contract work for them. Telephone interview with Janis Goldman Mar. 6, 1990 [hereinafter Goldman interview].

There is reason to suspect that Lawyer's Lawyer was not the first agency to place temporary lawyers. A 1977 ethics opinion of the District of Columbia Bar approved the use of a lay referral agency for the purpose of placing lawyers in temporary assignments under an arrangement whereby the agency charged users of the service an hourly rate, which varied with the experience of the referred attorney, and retained part of that amount as a fee. See District of Columbia Bar Op. 39 (1977), summarized in O. MARU, 1980 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS, ¶ 10738 (1982) [hereinafter District of Columbia Op. 39 (1977)].

Although the placement of temporary attorneys by agencies is new, "historically the position of 'temp' was ubiquitous, and in some jurisdictions compulsory," for, in earlier days, new members of the profession regularly served in apprenticeship positions. Letter from Geoffrey C. Hazard to Vincent R. Johnson (July 12, 1990).

31 "Temporary lawyer" is defined herein consistently with the usage of the same term in ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356 (1988):

The term 'temporary lawyer' means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. The term does not, however, include a lawyer who works part-time for a firm or full-time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an extended period and does legal work only for that firm Similarly, 'temporary lawyer' does not include a lawyer who has an 'of counsel' relationship with a law firm or who is retained in a matter as independent associated counsel.

Id. at n.1.

For a concise description of the temporary lawyering process, see McMinn, *ABA Formal Opinion 88-356: Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. (forthcoming, 1990) (describing placement and supervision process).

32 See Altman & Rosenthal, *Changes in Medicine Bring Pain to Healing Profession*, N.Y. Times, February 18, 1990, at 1, col. 4 ("[I]n the last 10 years, doctors have seen their autonomy eroded, their future earnings potential jeopardized, their prestige reduced and their competence challenged."); *Id.* at 20, cols. 1-2 (discussing recent increase in number

respect to both the marketing of legal services³³ and the recruitment, training and retention of competent lawyers.³⁴ In an effort to address these human and economic costs,³⁵ a number of firms have implemented—or at least have considered—alternatives to the traditional associate-to-partner track, the typical full-time ca-

of physicians, shift from individual to group practice, influx of women and minorities, growing scrutiny of costs, and increased disenchantment among doctors); *Id.* at 21, col. 1 (discussing "savage competition for patients").

33 See *Altman & Weil Releases Results: 1988 Survey of Law Firm Economics*, 51 TEX. B.J. 852 (1988) ("Overhead expenses incurred by U.S. law firms in 1987 continued to outpace increases in gross revenue."); Cohen, *Street's Law Firms May See Lower Profit*, Wall St. J., Mar. 1, 1990, at B8, col. 6 ("lawyers at many firms say they're feeling intense pressure from clients to cut legal costs"). Cf. Bradlow, *supra* note 3, at 72 (identifying need for firms to adapt to increased costs and competition in legal profession). As firms respond to the increase in competition and costs associated with changes in the legal profession, Bradlow predicts that nine major trends will emerge: (1) sound marketing plans will increase and will be crucial to a firm's ability to survive and grow, (2) the number of specialists will increase throughout the profession, in both small firms and mega-firms, (3) firms will offer a greater mix of areas of practice, (4) automation will become critical to a firm's ability to compete, (5) as hiring criteria broadens, firms will search for new associates who offer more than mere academic credentials, (6) quality associates will become increasingly more difficult to attract and retain, (7) effective financial management will become critical to a firm's survival, (8) long and short term strategic planning will be increasingly important to ensuring a firm's success, and (9) managerial expertise will be as important as legal expertise to a firm's survival. *Id.*

Rising costs and higher salaries have forced some mid-size firms to either merge with larger firms or fold completely. See Brannigan & Blumenthal, *Midsized Law Firm Folds After 123 Years*, Wall St. J., Nov. 9, 1989, at B16, col. 4 ("[t]here is a notion that law firms need one million dollars in revenues per partner to continue to be successful").

34 See Goldberg, *supra* note 3, at 58 ("[c]ompetition among Wall Street firms [has] intensified—not just for clients, but for new associates as well"); Pollock, *Lawyers Are Cautiously Embracing PR Firms*, Wall St. J., Mar. 14, 1990, at B1, col. 5:

Lawyers and legal consultants generally link lawyers' increased use of PR firms to heightened competition within the top tier of the legal profession. Many law firms have grown rapidly in the past decade, and they have had to fight harder both for clients and for graduates of top law schools, which haven't expanded as quickly as the firms.

Cf. Ray, *supra* note 26, at 55 (the sudden increase in law firm break-ups is attributable to "lack of firm loyalty by attorneys, spiraling salary costs and rapid, poorly planned and underfinanced expansions").

35 See Gibbons, *supra* note 8, at 70 ("[C]hange in the legal profession is tied first and foremost to economics. As law firms increasingly face a financial squeeze . . . [m]any are beginning to admit that the time has come for lawyers to rethink how they do business."); Brannigan & Blumenthal, *supra* note 33, at B11, col. 5 ("Midsized law firms, defined as those with 15-100 lawyers, have been struggling to survive in a more competitive legal market. Rising costs, higher salaries, and a demand by clients for broader services have forced many firms to fold or to look for mergers."). See generally Bradlow, *supra* note 3 (predicting that firms which fail to adapt to changes in the legal profession will flounder); Raridon, *supra* note 3 (the "profit squeeze" in the legal profession will force firms to reorganize and streamline in order to remain competitive).

reer path followed by most attorneys engaged in private practice with other lawyers.³⁶ Three such developments—creation of “staff attorney” positions, differentiation between “equity” and “non-equity” partners and increased use of “of-counsel” relationships—are now widespread.³⁷

Typically, staff attorneys (sometimes called “contract associates”³⁸ or “career attorneys”³⁹) are lawyers hired on fixed-term

36 See Galanter & Palay, *supra* note 17, at 753 (“[F]irms have increased the use of personnel who are either not promoted to partner or are never eligible for promotion.” (citations omitted)); Gibbons, *supra* note 8, at 71 (noting legal consultant’s prediction that “[m]ost midsize and large law firms will rethink their up-or-out philosophy for associates” and indicating that some firms now have a middle tier of well-paid non-partner career attorneys); Gilson & Mnookin, *supra* note 2, at 567 (“The ‘up-or-out system’—the long dominant career pattern by which employee (associate) lawyers are either promoted to partnership or fired—also appears to be changing. From a structure in which there were only two categories of lawyer—partner and associate—firms are creating new categories of employee lawyers, some with labels more euphemistic than others—permanent associate, staff lawyer, special counsel, non-equity partner, junior partner.”); Miller & Green, *supra* note 7, at B2, col. 5 (“[An Atlanta firm’s move to two-tiered partnership] reflects something of a national trend at major firms: The long and winding road to partnership is getting longer and more winding—and the chances are increasing that the path will not lead to full equity partnership at all. Driven by the economic realities of a more competitive legal environment, such alternatives to equity partnership are becoming more common Some firms are adopting other alternatives, such as ‘senior attorney’ or ‘senior counsel’ posts, or in effect creating different tiers of partners by varying compensation among them.”). See also Feiden & Marks, *Working Part Time: A Work Option That Can Reap Unexpected Benefits*, 14 LEGAL ECON. 27 (July/Aug. 1988) (number of part-time and job-sharing opportunities for attorneys increases as law firms respond to rise in demand for alternative work schedules by both men and women); Marcotte, *Contract Associates*, 73 A.B.A. J. 24 (Feb. 1987) (changing attitudes toward work and economic pressures force more law firms to offer alternatives to traditional associate-to-partner track).

One of the more interesting approaches to the high cost of law firm operations—which undoubtedly qualifies as a departure from traditional practices—is attorney leasing. Under such an arrangement, a firm terminates its employees, who are then hired by a leasing agency, which leases the attorneys back to the firm. Because the leasing agency can combine the attorneys (and other employees) of many clients, it can provide more favorable insurance, retirement and other benefits. Such an arrangement was approved in New Jersey Supreme Court Advisory Comm. on Professional Ethics Op. 631 (1989), summarized in 5 Law. Man. on Prof. Conduct (ABA/BNA) 393 (Dec. 6, 1989).

37 Cf. Wagner, *Variations on the “Of-Counsel” Theme*, 6 CAL. LAW. 59, 60 (July 1986) (In California alone, of-counsel associations increased 42% from 1980 to 1985.). See also, ABA Comm. on Ethics and Professional Responsibility Formal Op. 90-357 (1990) (noting “proliferation” of the use of the of-counsel designation); Graham, *Where the Big Dollars Are*, 73 A.B.A. J. 23 (May 1987) (In 1987, a legal management consultant noted that use of two-tiered partnerships had “mushroomed” since 1982, at which point only about 5% of the nation’s major firms had such arrangements. A 1985 survey showed that 42 of 99 non-New York firms with between 31 and 100 lawyers had non-equity partners.).

38 See Goldberg, *supra* note 3, at 59.

39 See Gibbons, *supra* note 8, at 71.

contracts, subject to renewal, often for a period of one or more years. New staff attorneys normally are paid considerably less than first-year, partnership-track associates,⁴⁰ and generally work shorter hours.⁴¹ Although some staff attorneys remain with firms more or less permanently, and ultimately earn generous salaries, few staff attorneys are ever made partners. Staff attorneys generally have no equity interest in their firms and are excluded from the highest levels of decision-making. While some staff attorney positions are filled by lawyers whose credentials would not qualify them for the partnership track,⁴² others are occupied by well-qualified attorneys who have voluntarily foregone the potential economic benefits of partnership in favor of the non-economic advantages of a less pressured career.⁴³

In contrast, non-equity partnerships are positions created for the purpose of retaining high-quality lawyers who are not elevated to full partnership status after completion of their periods as

40 In 1988, staff attorneys at Jones, Day, Reavis & Pogue were hired at \$30,000/year, plus a \$5,000 cost-of-living allowance in Los Angeles and New York City. First-year associates, in contrast, started at a salary of \$60,000/year. See Couric, *Contract Attorneys*, 17 STUDENT LAWYER 21 (Sept. 1988). See also *Law Firms Offer Second Path for Non-Partners*, 9 SAN DIEGO BUS. J., 1, at 22 (Jan. 2, 1989) [hereinafter *Second Path for Non-Partners*] (At some law firms, 1989 law school graduates entering partnership-track positions earned \$45,000-\$65,000 starting salaries, while new staff attorneys on a non-partnership-track earned \$30,000).

Lower salaries for staff attorneys result in lower billing rates and enable law firms to continue making a profit while keeping client bills down. See *Staff Attorneys Find Market for Their Services*, 5 CINCINNATI BUS. COURIER, sec. 1, at 1 (Feb. 27, 1989) [hereinafter *Staff Attorneys Find Market*].

41 See *Staff Attorneys Find Market*, *supra* note 38 (staff attorneys are able to spend evenings and weekends away from the office; associates routinely work up to 70 hours a week). Cf. Couric, *supra* note 38, at 22 (Staff attorneys work considerably fewer hours than do associates in order to bill a comparable number of hours, because staff attorneys are not required to participate in non-billable activities, such as pro-bono legal services and firm committee work.).

42 See generally Couric, *supra* note 38, at 21 (Staff attorney positions are often filled by law school graduates who are otherwise unable to find employment with big firms because of grades or because they graduated from less prestigious law schools.); *Staff Attorneys Find Market*, *supra* note 38 (If all a firm needs is a licensed attorney, it is uneconomical to pay the high salary demanded by the top law graduate.).

43 See Couric, *supra* note 38, at 21 (staff/contract positions meet needs of attorneys desiring fewer hours, lenient parental leave, or sabbatical options in lieu of trauma and stress of partnership); Jones, *Alternatives to Full-Time Lawyering*, 50 TEX. B.J. 1018 (1987) (part-time and flex-time schedules, as well as staff and temporary lawyer positions, meet the needs of lawyers demanding relief from long hours); *Second Path for Non-Partners*, *supra* note 38 (today's young, talented attorneys have multi-faceted lives and often don't want to commit to the hours necessary to become a partner). Cf. *Second Path for Non-Partners*, *supra* note 38, at 22 (Firms utilizing staff attorneys often recruit at law schools for both associates and staff attorneys.).

associates.⁴⁴ Although the structure of such positions varies,⁴⁵ a non-equity partnership provides an opportunity for a long-term relationship with a firm which does not exist under an up-or-out policy.⁴⁶ Depending on the firm and the performance and qualifications of the individual, the position may be an interim stage in the lawyer's career prior to full equity partnership.⁴⁷ In other cases, a lawyer will not advance beyond non-equity partnership status.⁴⁸

Generally, a non-equity partner, unlike an equity partner, is paid on a salaried basis.⁴⁹ In some firms, non-equity partners are permitted to attend partnership meetings, but may not vote.⁵⁰

Whereas the use of staff attorneys and non-equity partnerships are relatively recent developments, of-counsel relationships have long been employed to accommodate the special needs of more senior members of the profession—retired partners,⁵¹ former judges,⁵² legislators and specialist attorneys—experienced lawyers willing or able to provide valuable services or professional contacts, but often only on a limited basis. Until recently, the typical of-counsel attorney tended to serve more in an advisory capacity than as an active front-line participant in litigation and other aspects of law practice.⁵³ Today, however, an of-counsel

44 See Miller & Green, *supra* note 13, at B2, col. 5. Put less charitably, non-equity partnership is an organizational device which permits law firms to "extract the maximum surplus [income] from employed lawyers." Abel, *supra* note 8, at 195. See also Reidinger, *Still Got Something to Say*, 73 A.B.A. J. 11, 14 (May 1987) (suggesting that two-tier partnerships have resulted, in part, from the fact that partners are being added in greater numbers than ever before and that "it's harder to be certain of their loyalty to the firm").

45 See B. HEINTZ & N. MARKHAM-BUGBEE, TWO-TIER PARTNERSHIPS AND OTHER ALTERNATIVES: FIVE APPROACHES 33-41 (Section of Economics of Law Practice, American Bar Association, 1986). For a brief synopsis of non-equity partnerships and other alternatives for structuring a law firm, see Muns, *Partner Compensation*, LEGAL ECONOMICS 52, 57-58 (Mar. 1989).

46 See Miller & Green, *supra* note 13, at B2, col. 5.

47 *Id.*

48 *Id.* Cf. Gibbons, *supra* note 8, at 71 (Some firms are creating a "midtier hierarchy" in which "lawyers, who may have little or no chance of making partner, will be 'career attorneys' with salaries significantly larger than what associates would earn.").

49 See B. HEINTZ & N. MARKHAM-BUGBEE, *supra* note 45, at 34.

50 See Miller & Green, *supra* note 13, at B2, col. 5; Fousekis, *Firm Structure and Management*, 478 PLI/COMM. 13 (1988) ("Usually the lower tier [in a two-tier partnership system] has no vote on most issues and has a set salary structure.").

51 See ABA Comm. on Professional Ethics Informal Op. 678 (1963) (retired and semiretired partners used as example).

52 See ABA Comm. on Professional Ethics Informal Op. 710 (1964) (retired judge used as example).

53 See generally Wagner, *supra* note 35, at 59. The term "of-counsel" dates to the

association may denote a relationship similar to that of an independent contractor and may involve all facets of practice.⁵⁴ Sole practitioners, law professors and even non-legal experts provide firms with expertise and knowledge by serving in of-counsel positions.⁵⁵

Common to staff attorney, non-equity partnership, and of-counsel employment is the fact that such positions normally anticipate the existence of a substantial and continuing relationship between the individual lawyer and the law firm.⁵⁶ In this respect, these positions differ from the most recent significant departure from the standard associate-to-partner career track: the use of temporary lawyers.

Although other forms of placement are possible,⁵⁷ most temporary lawyers (sometimes also called "lawyer temporaries," "legal temps," "law temps"⁵⁸ or "contract lawyers"⁵⁹) are placed with law firms⁶⁰ by employment agencies. They work for law firms

1500's. It was used to refer to one in the confidence of a high-ranking official, such as a monarch. Not until the 17th or 18th century did the term begin to take on a special legal meaning; it was the late 18th century before the "of-counsel" title acquired the status of honor it has enjoyed in recent times. *Id.*

54 *Id.* (The "of-counsel" designation now includes entrepreneurial, independent contractors and is no longer reserved for retired partners, legislators and judges.)

55 *See generally id.* (Of-counsel relationships have become more entrepreneurial in the past decade, allowing firms to have access to specialized knowledge and skills as needed.)

56 *See* ABA Comm. on Ethics and Professional Responsibility Formal Op. 90-357 (1990) (The term "of counsel" denotes a "close, regular, personal relationship," which enjoys the "characteristic of continuing and frequent professional contact." The "of counsel" designation is inappropriate where a relationship involves only an individual case.); ABA Comm. on Professional Ethics Informal Op. 84-1506 (1984) (indicating that a continuing relationship is a characteristic of an "of-counsel" relationship); Wash. State Bar Ass'n Code of Professional Responsibility Comm., Op. 178, *summarized in* 1 *Law. Man. on Prof. Conduct* (ABA/BNA) 488 (1984) (To be listed as of-counsel, a lawyer must have a "close, i.e., regular and frequent, continuing relationship" with the lawyer or law firm.)

57 For example, some attorneys seeking temporary positions contact potential employers directly. In other cases, firms interested in hiring a temporary lawyer propose that arrangement to a specific attorney who might be willing to work on those terms.

58 *See* G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 195 (1985 and Supp. 1989).

59 Some persons involved in the temporary placement of lawyers prefer the term "contract lawyer" over any term using the word "temporary." They reason that many potential employers have had bad experiences with non-lawyer temporaries and that unfavorable terminological associations should be avoided. Telephone interview with Mr. Edgar A. Bircher, Esq., (founder and President of Lawyers Now, Houston, Texas), March 15, 1989 [hereinafter Bircher Interview].

60 Unless the context indicates otherwise, the term "firm" or "law firm," as used herein, includes a sole practitioner or corporate law department. *Cf.* MODEL RULES OF

under circumstances which, from the very beginning, envision a limited period of association and an end to the relationship. The services of the temporary attorney are expected to be discontinued once the firm's purposes have been accomplished. This may mean, for example, that employment will cease when a particular case or project is completed, when an attorney on leave returns to the firm, when unusually heavy client demands subside or when a qualified full-time attorney is hired and able to commence work. Whatever the triggering event for discontinuance of the relationship, everyone involved anticipates that the employment of the attorney referred by the agency will only be temporary.

The advent of temporary lawyering carries with it difficult ethical questions.⁶¹ The legal ethics codes now in force were not drafted with this permutation of law practice in mind.⁶² And it is not at all clear that ethical standards suited for commonplace arrangements (e.g., traditional forms of private practice, government service and corporate employment) are readily transferable to developments such as temporary lawyering, which are unusual or innovative. It has been argued, for example, that conflict of interest rules require a different construction in the context of mass tort litigation than they do in a run-of-the-mill accident case,⁶³ and that the rise of firm-switching by partners and associates necessitates a different reading of fiduciary standards than would be required in a less mobile world.⁶⁴ So too, the evolution of temporary attorneys may demand that the legal profession rethink the manner in which rules bearing upon such ethical is-

PROFESSIONAL CONDUCT (Terminology Section) (1989).

61 Cf. Kuhlman, *Temporary Maneuvers*, 76 A.B.A. J. 90 (Feb. 1990) (ethics column opining that an attorney who accepts a temporary position must "exercise considerable caution"); Berkman, *Temporarily Yours: Associates for Hire*, Am. Law., Mar. 1988, at 24 ("[c]onflict of interest could become a hot issue").

62 See MODEL RULES OF PROFESSIONAL CONDUCT (1989) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). To some extent, the codes of ethics in force in virtually every state are patterned upon, and parallel to, either the Model Rules or the Model Code. See [1985-1990 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 01:3 (1989) (setting forth ethics codes of states which have adopted new legal ethics rules since 1983); 2 G. HAZARD & W. HODES, *supra* note 58, at App. 4 (noting significant departures from the model language in states which now have codes patterned on the Model Rules); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (1988) (setting forth codes of legal ethics by state).

Neither the Model Code nor the Model Rules contains a provision specifically addressing the ethical issues implicated by temporary lawyering.

63 See *Ethical Limitations on Creative Financing*, *supra* note 1, at 542-43 & n.17.

64 See *Solicitation of Law Firm Clients*, *supra* note 1, at 102-03.

sues as confidentiality, zealous representation and independent professional judgment are to be applied to such arrangements.

This Article focuses on the ethical problems associated with the increasing⁶⁵ use of temporary attorneys. The discussion begins by detailing the social background of this latest development in the delivery of legal services. After describing the mechanics of the temporary lawyer placement process and assessing the values which are served or imperiled by this form of employment, specific ethical concerns are addressed. The conclusion to the Article outlines basic guidelines relating to this form of law practice.

II. THE TREND TOWARD TEMPORARY EMPLOYEES

Although the hiring of temporary lawyers is relatively new, American employers in general have become increasingly dependent⁶⁶ in recent decades upon various categories of "contingent employees,"⁶⁷ including part-time and temporary workers. It has been estimated that over thirty million Americans now work part-time,⁶⁸ and according to the Department of Labor, approximately eight percent of the total workforce is comprised of temporary workers.⁶⁹ The temporary employment industry has

65 See Roth, *Rent-A-Lawyer*, *Litigation News*, Apr. 1990, at 6, col. 1 ("the use of temporary lawyers has grown"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988) (noting "increasing use by law firms of temporary lawyers"). See also Gibbons, *supra* note 8, at 71 (noting career development consulting firm prediction that law firms "will rely more heavily on temporary attorneys working on a project-to-project basis").

66 See generally J. NAISBITT, *MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES* 236 (1982) (observing that in recent years the temporary service industry doubled every 3.5 years); *Part-Time Work New Labor Trend*, *N.Y. Times*, July 9, 1986, at A1, col. 1 [hereinafter *New Labor Trend*] (The trend toward part-time workers is a drastic change after a fifty-year increase in job stability.); B. OLMSTEAD & S. SMITH, *CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT AND MANAGE ALTERNATIVE WORK OPTIONS* 375 (1989) (The use of temporary workers was 400 percent higher in 1986 than in 1970.); *id.* at 402 (noting various studies recognizing trend); U.S. DEP'T OF LABOR, *FLEXIBLE WORKSTYLES: A LOOK AT CONTINGENT LABOR I* (1988) ("Increasing numbers of jobs . . . deviate from [the] traditional picture of a permanent full-time position.").

67 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 373 ("The term *contingent employment* was coined in the mid-1980s to describe the growing trend toward using more nonregular part-time, temporary, and independently contracted workers.").

68 See, e.g., *New Labor Trend*, *supra* note 66, at A14, col. 1; *Busy Lawyers Fuel Explosion in Temp Field*, 8 WASH. BUS. J., § 1, at 1 (Aug. 28, 1989) [hereinafter *Busy Lawyers Fuel Explosion*] (the number of temporary workers hired through agencies increased from 400,000 in 1980 to 1.1 million in 1988).

69 See *Short-Timer Chic*, 9 NEW JERSEY SUCCESS, § 1, at 29 (June 1989) (In New Jersey alone, 26,000 temporary jobs were being filled daily at the time the article was written.). Nationally, the total temporary payroll increased from \$431 million in 1971 to over

grown at an annual rate of twelve to fourteen percent during the last three years, making it one of the three fastest growing businesses in the country.⁷⁰

The trend toward nontraditional forms of employment is attributable in part to declining union strength, growth in the number of working women, and increasing competition.⁷¹ It is also part of a larger reordering of the American workforce,⁷² as recently expressed by two co-authors:

A not-so-quiet revolution is taking place in human resources management. Like successive shocks from an earthquake, pressures from international competition, fast-paced technological change, and projected labor force shortages are interacting with slower economic growth and concerns about continuing balance-of-trade and budget deficits, sending private-sector employers scrambling to maintain a foothold. Regaining stability and recapturing a competitive edge through increased profitability have become primary concerns of the business community.⁷³

From the viewpoint of the employer, there are several advantages to hiring temporary workers, not the least of which is increased flexibility in responding to economic upturns and downturns.⁷⁴ The temporary employer is spared the expense of recruiting and screening applicants for permanent positions,⁷⁵ as well as the cost associated with the payment of taxes and benefits which are due in the case of permanent employees. On the ground that temporary workers are properly classified as independent contractors rather than standard employees, an employer normally avoids the burden of paying withholding and social security taxes, vacation and sick pay, unemployment insurance, pen-

\$10 billion in 1988. *Id.* See also Marcotte, *Boom in Lawyer Temporaries*, 74 A.B.A. J. 30, 31 (June 1988) (by the year 2000, the temporary worker industry is projected to include 10 million workers).

70 See *Short-Timer Chic*, *supra* note 69 (discussing the growth of the temporary employment service industry).

71 See *New Labor Trend*, *supra* note 66, at A14, col. 1.

72 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 402.

73 *Id.* at vi.

74 See *id.*, at 373 (noting advantages).

75 See *The Personnel Matchmakers: Employment Agencies*, 10 ADVANTAGE, § 1, at 29 (June 1987) (hereinafter *The Personnel Matchmakers*). For example, one classified advertisement can generate over 100 applicants for a single job. An employment agency is able to screen applications and forward only the top three to five people to an employer. Employment agency personnel are also trained in recruitment and interviewing, so the entire process is more efficient and faster than it would be if handled by most employers. *Id.*

sion contributions and health insurance on their behalf.⁷⁶ These savings can be considerable.⁷⁷ Tax and benefit payments, when added to the overhead costs associated with payroll record-keeping, may add as much as fifty percent to an employer's payroll costs.⁷⁸ These savings, along with the labor cost savings which result from the fact that temporary employees are hired only when needed,⁷⁹ represent a substantial inducement for contingent employment.⁸⁰

In terms of management theory, the use of temporary workers is a strategy that creates workplace flexibility by establishing what has been called a "core/ring" configuration.⁸¹ A primary ("core") group of full-time employees is supplemented, as necessary, by other ("ring") workers to whom the employer owes fewer duties in terms of training, compensation, benefits, career development and the like.⁸² The arrangement endeavors to facilitate short-term responsiveness through prompt adjustments in the supply of goods and services.⁸³ The core/ring approach may be distinguished from what has been called the "stretch" strategy.⁸⁴ The stretch strategy in human resources management focuses on long-term objectives and seeks to build a totally flexible, non-tiered workforce through the use of such tactics as integrated work schedules, on- and off-site space arrangements, and cross-training of employees.⁸⁵ Whether a core/ring strategy is

76 See *Short-Timer Chic*, *supra* note 69, at 29. Many temporary employment agencies, however, offer temporary workers vacation and other benefits after working a requisite number of hours (usually 1,300-1,500 hours) through the agency. *Id.* See also *Busy Lawyers Fuel Explosion*, *supra* note 68 (paralegal temporary agency provides health and vacation benefits as a means of attracting experienced temporaries).

77 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 379 ("In the short term, use of contingent workers can indeed cut some labor costs . . . very directly.").

78 See *Short-Timer Chic*, *supra* note 69, at 29. A \$400/week salary, for example, may entail over \$200 in additional costs for an employer. *Id.*

79 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 382.

80 *Cf. id.* at 374 (American managers have been receptive to contingent employment as a means of controlling labor costs); *New Labor Trends*, *supra* note 66, at A1, col. 1 (employers and economists state that the use of temporary and part-time workers lowers labor costs, which in turn results in less expensive goods and services).

81 See B. OLMSTEAD & S. SMITH, *supra* note 66, at viii.

82 See *id.* at viii and 374.

83 See *id.* at 378-79 ("From an employer's perspective, the purpose of using a contingent employment configuration is to lower labor costs, stabilize the core of the organization, and increase its potential for a highly flexible response to future changes in labor market conditions.").

84 See *id.* at ix.

85 *Id.*

preferable to a stretch strategy, or vice versa, depends upon the facts and circumstances of the particular employment context.

In terms of mechanics, most temporary workers are hired through temporary employment agencies or services. Upon registering with an agency, the potential temporary worker's skills and experience are inventoried. The agency then matches that individual's abilities with the needs of an employer.⁸⁶ The temporary typically is paid a flat hourly rate by the agency, which in turn bills the employer at the hourly rate plus markup.⁸⁷

Although flexibility is a primary reason many temporaries prefer this employment alternative over full-time work,⁸⁸ many teachers, artists, actors, writers, and students are attracted by the opportunity to earn money while pursuing other objectives.⁸⁹ Some temporaries are mothers who want to stay current in careers from which they have been temporarily side-tracked; others are persons between jobs or in the process of professional relocation; some are individuals interested in upgrading job skills or hoping to find a temporary assignment that will lead to full-time employment.⁹⁰

Traditionally, temporary workers have been employed primarily in those sectors of the economy involving retail sales, education, food processing, agriculture and office work.⁹¹ More recently, however, temporary workers have moved into professional services and other callings.⁹² Employers increasingly seek tempo-

86 See *The Personnel Matchmakers*, *supra* note 75, at 29 (a variety of tests are now used to determine an individual temporary's skills and expertise).

87 See *Short-Timer Chic*, *supra* note 69, at 29.

88 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 373-74 (contingent workers often desire more flexibility and control over their own time than they would have in traditional work settings).

89 See *Short-Timer Chic*, *supra* note 69, at 29 (demographics of temporary workers in today's workforce).

90 See *id.* See also *The Personnel Matchmakers*, *supra* note 75, at 29 (temporary workers thrive on challenge and variety, are highly skilled, and search for jobs where their expertise and talent are needed and will be fully utilized); B. OLMSTEAD & S. SMITH, *supra* note 66, at 375:

For some workers, the opportunity for a temporary job serves as a reentry period; for others, it is a way to remain partially employed after retirement. Some like the variety of experience that comes from being assigned to work in different companies or use the temporary-agency experience as a way to try out employers—sort of a probationary period in reverse.

91 See *New Labor Trend*, *supra* note 66, at A14, col. 3.

92 See *Short-Timer Chic*, *supra* note 69, at 29 (Temporaries are as likely to be technicians, doctors, CPAs or CEOs as word processors or secretaries.); *Temporary Workers are Going Upscale*, N.Y. Times, March 22, 1987, § 12, at 5, col. 1 (temporary workforce includes increasing numbers of doctors, accountants and lawyers); J. NAISBITT, *supra* note

raries with specialized expertise, and temporary employment services have been quick to respond. Today, temporary employment agencies routinely fill requests for specialists in computer programming and systems analysis, health care, medicine, certified public accounting, paralegal services, and law.⁹³ As many as fifty percent of today's temporaries are college-educated persons.⁹⁴

III. PLACEMENT AND EMPLOYMENT OF TEMPORARY LAWYERS

Perhaps surprisingly, the pool of attorneys willing to work as temporaries is large. One New York agency found that two advertisements attracted one thousand resumes.⁹⁵ Lawyers willing to work on a temporary basis include recent law school graduates, lawyers newly relocated or otherwise between jobs, attorneys with young children, retired judges, law school professors, sole practitioners, "burned-out" lawyers in need of shorter work weeks, lawyers with enough assets that they can be choosy about assignments and "dual careerists."⁹⁶ Although mothers with young chil-

66, at 236 (noting that temporary-service firms which employed "white-collar information workers" prospered more than firms which employed "blue-collar temps").

93 See, e.g., *Short-Timer Chic*, *supra* note 69, at 29; *The Personnel Matchmakers*, *supra* note 75, at 29; *New Labor Trend*, *supra* note 66, at A14, col. 3.

94 *New Labor Trend*, *supra* note 66, at A14, col. 3.

95 See Mansnerus, *Law Firms, Too, Hire Lawyers By the Hour*, N.Y. Times, Mar. 4, 1988, at B10, col. 3.

96 See, e.g., *Boom in Lawyer Temporaries*, *supra* note 69, at 30 (lawyers available to work as temporaries include parents with young children, recent graduates, retired attorneys looking for part-time work, lawyers between jobs, sole practitioners and law professors supplementing their income); *Lawyer Offers an Alternative Through Free-Lance Legal Assistance*, Wash. Post, May 22, 1989, at 6 [hereinafter *Free-Lance Legal Assistance*] (lawyers placed through temporary agencies include retired government attorneys, parents of small children and sole practitioners, as well as attorneys who practice law only as a means to support other interests); *Use of Legal Temps Is on the Rise—But Practice Faces Bar Challenges*, Wall St. J., May 12, 1988, at 25, col. 4 [hereinafter *Legal Temps*] (temporary lawyers include young parents, "retired" lawyers and aspiring actors); Blodgett, *Temporary Duty*, 71 A.B.A. J. 17 (July 1985) (sole practitioners, women re-entering the workforce, and mothers with children); *Temporary Workers are Going Upscale*, *supra* note 92, at 6 (attorney planning to open own firm can gain valuable experience as a temporary attorney); Bircher Interview, *supra* note 59 (contract lawyers include choosy attorneys with assets, mothers with children, lawyers in transition who cannot afford to go without income); Telephone Interview with Sally Marks, President of Lawyer to Lawyer, Inc., Dallas, Texas (March 14, 1990) [hereinafter Marks Interview] (temporary attorneys include, among others, young mothers, retired persons who want to stay busy, lawyers who want more flexible schedules and "burned out" attorneys from large firms who want to work fewer hours); Mansnerus, *supra* note 95, at B10 ("dual careerists" include writers, painters, songwriters and actors).

One agency reports that it has temporary attorneys who are skiers, who work only in the summer and not in the winter, as well as other attorneys who are sailors, whose

dren are included within this group, one agency head estimated that only ten percent of the lawyers placed by her agency were women in that category.⁹⁷ According to one writer, "Most of the lawyers placed by brokers are sole practitioners, retired in-house counsel or lawyers between jobs."⁹⁸ Often, candidates for temporary lawyer positions have impressive credentials. One legal temporary employment agency places only Ivy League law school graduates.⁹⁹ Another states that it offers employers only "first-rate lawyers, top graduates of top law schools."¹⁰⁰ A third agency "recruits only graduates of top ten schools, or those who graduated in the top ten percent of their class at other law schools or who worked at major firms or corporations."¹⁰¹

The demand for temporary lawyers is impressive.¹⁰² Employers of temporary lawyers include firms of all sizes, corporate law departments, and even sole practitioners. The best market appears to consist of medium-size law firms—firms of about ten to twenty-five lawyers.¹⁰³ "With firms under ten lawyers," one placement agency reports, "you get into credit problems; with firms over

schedules are the reverse. See Goldman Interview, *supra* note 30. See also Jones, *supra* note 41, at 1020 (pilot/lawyer flies half the month and works as temporary attorney the other half of the month); *Free-Lance Legal Assistance*, *supra*, at 6 (attorney works as temporary to allow herself freedom and time to set own schedule, sail and try a variety of cases). Some attorneys serve as temporaries while writing books. See Goldman Interview, *supra* note 30. It is reported that in California some lawyers work as temporaries while trying to break into acting or other segments of the entertainment business. See *Legal Temps*, *supra* note 96, at 25, col. 5 ("it's better than waiting tables").

97 See Mansnerus, *supra* note 95, at B10.

98 See Berkman, *supra* note 61, at 26. But see Jones, *supra* note 41, at 1020 (Attorneys who are merely "between jobs" are a minority of those working as legal temporaries.).

99 See *Boom in Lawyer Temporaries*, *supra* note 69, at 30.

100 *How to Expand Your Staff Without Adding to Headcount* at 3 (undated pamphlet published by Lawyers Now, Houston, Texas).

101 Mansnerus, *supra* note 95, at B10.

102 Cf. Blodgett, *Temporary Duty: Part-time Option For Lawyers*, 71 A.B.A. J. 17 (July 1985) (temporary employment agency for lawyers was created as a result of sole practitioner needing short-term assistance); *Free-Lance Legal Assistance*, *supra* note 96, at 6 (the idea for a temporary lawyer placement service grew from mother/attorney's awareness that many attorneys were ready for an alternative to the traditional way of practicing law); *Lawyers Working as Freelancers, Temps*, UPI (Sept. 10, 1989) [hereinafter *Lawyers Working as Freelancers*] (idea to expand into the placement of temporary attorneys was planted when a regular client asked the owner of an employment agency if she knew of a municipal bond attorney available for a short period of time).

103 See Bircher Interview, *supra* note 59. See also Marks Interview, *supra* note 96 (indicating that fewer large firms than small firms use Dallas agency); Mansnerus, *supra* note 95, at B10 (A New York agency indicated that most of its placements were with small or medium-size firms.); Berkman, *supra* note 61, at 24 ("typically small and mid-sized shops . . . are turning to temporary lawyers").

twenty-five lawyers, there is a 'not bred here' attitude,"¹⁰⁴ an elitism which causes large firms to resist considering the advantages offered by temporary lawyering.¹⁰⁵ Some agencies have found that the biggest problem in placing lawyers on a temporary basis is "getting a foot in the door," overcoming the inertia attributable to the fact that this form of employment is non-traditional.¹⁰⁶ To address this obstacle, placement agencies frequently tailor and target their promotional messages to different potential audiences.¹⁰⁷ A number of agencies report that a large portion of

104 Bircher Interview, *supra* note 59. Cf. Manserus, *supra* note 95, at B10 ("Major firms tend to be wary.")

105 See generally Zeldis, *Temporary Lawyers Progress at Major Firms, But Slowly*, N.Y.B.J., Apr. 3, 1989, at 1.

106 See Bircher Interview, *supra* note 59.

107 Lawyers Now, of Houston, states the following in a handsome promotional brochure for smaller law firms:

Small-to-medium-sized firms get caught in a manpower bind now and then. It's part of running a law firm, but the manpower bind can cost you growth opportunities, business, and sometimes even clients.

You've seen it. A client suddenly needs help in an area of law you can't support . . . like a real estate client with a mineral rights problem. Or a client who used to fit your firm like a glove has grown, or changed, and isn't sure you can still provide the services he needs. Or you get hit with a problem that takes more man-hours than you can spare . . . such as out-of-town depositions or an appeal of a verdict you won. In addition, if you're going to grow you have to add different specialities, which means adding lawyers. You can't attract the business without the lawyers to handle it. But hiring specialists and hoping the business comes in is a high-risk proposition.

So you can't afford to let opportunities, clients and growth slip away, but you can't afford to hire more lawyers either. It sounds impossible—but not quite

Contract lawyers give you lots of benefits. You expand your capabilities quickly . . . quicker than if you were to hire against your sudden need. You get exactly the expertise you need. You focus your contract lawyer on one case or one problem area. You can start with a specialist on a part-time basis, then increase the hours as you grow the business.

Contract lawyers spare you lots of problems. There's no deluge of resumes because Lawyers Now has pre-screened your candidates. You have no withholding obligations or benefit costs because the lawyer is an independent contractor. You have no open-ended employment commitment because your contract is for an agreed period. You don't even have to take a contract lawyer full-time; you can contract for a few hours a day or a few days a week.

As your business grows you can replace your contract lawyer with a full-time employee and know you have enough business to justify it. Meanwhile, you've kept your clients happy and you've made a profit on your contract lawyer's time.

Full Service For Your Client (undated pamphlet published by Lawyers Now, Houston, Texas). In contrast, Lawyers Now's promotional materials for corporate law departments states:

their business is derived from repeat clients.¹⁰⁸

A growing number of temporary employment agencies now supply a full range of legal support—legal secretaries, paralegals, and lawyers—in addition to the more traditional pool of non-law-related temporary workers.¹⁰⁹ However, agencies which specialize in providing temporary placement services for lawyers are increasingly common.¹¹⁰ They carry such trade names as “Lawyers Now,”¹¹¹ “Special Counsel, Inc.,”¹¹² “Temp Law, Inc.,”¹¹³ “LAW/temps,”¹¹⁴ “Lawyer to Lawyer, Inc.,”¹¹⁵ “Lawyer’s Law-

The problem is that everyone’s staffing plan looks great on paper, but begins breaking down as soon as it’s exposed to real life.

The main reason is that we have to hire human beings. They don’t fit into staffing plans as neatly as their theoretical, paper counterparts. Paper law department employees deliver their annual number of man-hours spread evenly throughout the year.

In practice, real employees get sick or pregnant and may be lost for months at a time. You can hire a replacement after a resignation, but it may be months before the slot is filled. Then there are vacations and temporary assignments.

A second reason why reality breaks up staffing plans is that unforeseen emergencies occur. It may be a major action against the company, some matter of catastrophic proportions that makes all the law department’s other work secondary while your whole effort is to contain the crisis. You may need to add specialized expertise to your staff, or find help to do the routine work while your staff tackles the problem.

The usual solutions give us three choices . . . none of them good.

. . . .

3. You can assign work to a law firm. After all, that’s why you retain them. But you made the choice earlier to keep that work in-house for a reason, and assigning it to a law firm reverses your own decision.

How to Expand Your Staff Without Adding to Headcount, supra note 100.

108 See, e.g., Telephone interview with Mr. Bob Webster, President of The Lawsmiths, in San Francisco (March 14, 1990) [hereinafter Webster Interview]; Marks Interview, *supra* note 96.

109 See *Lawyers Working as Freelancers, supra* note 102 (discussing Sacramento legal employee placement franchise which was a spinoff of an agency opened in 1973 to provide paralegals and legal secretaries to law firms).

110 See *Temporary Workers are Going Upscale, supra* note 92, at 5, col. 1 (discussing increase in the number of temporary employment agencies which specialize in placing lawyers, certified public accountants and doctors). See, e.g., Goldman interview, *supra* note 55 (Lawyer’s Lawyer, in Washington, D.C., places attorneys only); Marks Interview, *supra* note 96 (Lawyer to Lawyer, Inc., in Dallas, places attorneys only, not legal support staff).

111 See Bircher Interview, *supra* note 59.

112 Marcotte, *supra* note 69, at 30.

113 Marcotte, *Splitting Fees Still Unethical*, 74 A.B.A. J. 31 (June 1988).

114 Marcotte, *Boom in Lawyer Temporaries, supra* note 69, at 30.

115 See Marks Interview, *supra* note 96.

yer,¹¹⁶ "Contract Attorneys, Inc.,"¹¹⁷ and "The Lawsmiths."¹¹⁸ Specialized agencies, normally headed by attorneys,¹¹⁹ have recently opened in major cities throughout the country (including Chicago, Dallas, Detroit, Houston, Los Angeles, Miami, New York City, San Antonio, San Francisco, and Washington, D.C.). Although most such agencies operate regionally,¹²⁰ some have franchised outlets in a number of locations.¹²¹ A few agencies provide temporary lawyers with opportunities for various employment-related benefits, such as health insurance and retirement plans,¹²² although others do not.¹²³

Attorneys interested in working as temporaries register with an agency, indicating their areas of interest, expertise and experience. Typically, the agency then interviews each candidate, verifies credentials, checks references, and inquires whether the attorney has been the subject of grievance or malpractice actions.¹²⁴ If the attorney is added to the agency's "pool" of job candidates, which may include as many as two or three hundred lawyers,¹²⁵ information about the attorney is kept on file, including data reflecting preferences as to length, location and types of assignments.¹²⁶ When a request for services is received, the agency tentatively matches the expressed needs of the corporation or law

116 Marcotte, *Boom in Lawyer Temporaries*, *supra* note 69, at 31.

117 *Id.*

118 *Id.*

119 *But see* Marks Interview, *supra* note 96 (The president of Lawyer to Lawyer, Inc. in Dallas, is not a lawyer.).

120 *See* Berkman, *supra* note 61, at 24.

121 *See* Webster Interview, *supra* note 108 (independently-owned branches of The Lawsmiths exist in Chicago, Los Angeles, New York City and San Francisco); *Lawyers Working as Freelancers*, *supra* note 102 (Legalstaff, Inc., which had franchises in operation in four California cities, Houston and Philadelphia expected 100 franchises to be sold by 1992.).

122 *See* *Lawyers Working as Freelancers*, *supra* note 102 (some placement agencies offer temporary attorneys an opportunity for health benefits and retirement plans).

123 *See* Goldman Interview, *supra* note 30 (no benefits); Bircher Interview, *supra* note 59 (no benefits; there is a "strict independent contractor relationship" between the temporary attorney and the employer); Marks Interview, *supra* note 96 (no benefits); Mansnerus, *supra* note 95, at 10 (no benefits).

124 Goldman Interview, *supra* note 30 (describing process); Bircher Interview, *supra* note 59 (describing reference checking, credential verification and grievance inquiry); Marks Interview, *supra* note 96 (describing reference checking, credential verification and possible interview); Webster Interview, *supra* note 108 (describing reference checking and credential verification).

125 *See* Berkman, *supra* note 61, at 24 (describing seven agencies with between 50 and 300 attorneys each).

126 Marks Interview, *supra* note 96 (describing data bank); Webster Interview, *supra* note 108 (describing portfolio of attorneys).

firm with the skills of attorneys in the pool of available temporaries,¹²⁷ taking into account geographic and other considerations.¹²⁸ The potential employer is normally sent a list of available attorneys and a summary of their qualifications, as well as information on the compensation rates for which the attorneys are willing to work.¹²⁹

Some employers interview the candidates referred by an agency.¹³⁰ The actual decision regarding whether a particular attorney will be hired by an employer is made by the employer and the individual attorney, not by the placement agency.¹³¹ However, according to one writer, once an agency has established credibility with a firm, the firm may rely almost exclusively on the agency's judgment in selecting the right temporary attorney.¹³² Some agencies indicate that they maintain contact with both the employer and the temporary attorney throughout the duration of the placement to ensure that both parties are satisfied with the arrangement.¹³³ Others indicate that no contact is maintained, but that the employer is encouraged to contact the agency with relevant information.¹³⁴

The challenge of avoiding conflicts of interest is normally left to the attorney and the employer.¹³⁵ However, in some instanc-

127 See Thomas, *Lawyer Temporaries—More Firms Find Hiring "Contract" Lawyers Makes Sense*, 41 Wash. St. B.N. 29, 30 (Sept. 1987) [hereinafter *Lawyer Temporaries*] (temporary attorney placement service provides pre-screened list of qualified candidates, allowing firm to by-pass recruitment process); *Free-Lance Legal Assistance*, *supra* note 96 (temporary attorney placement agency matches client law firms with attorneys based on needs for, and areas of, expertise). Cf. *More Firms Turn to 'Temp' Lawyers*, Nat'l L.J., July 28, 1986, at 10, col. 1 [hereinafter *Firms Turn to 'Temp' Lawyers*] (temporary agency matched an attorney specializing in asbestos litigation with firm needing such expertise).

128 Goldman Interview, *supra* note 30.

129 See Jones, *supra* note 41, at 1018; Bircher Interview, *supra* note 59 (agency forwards three resumes with prices).

Before forwarding resumes, some agencies contact prospective candidates to discuss whether the candidate will accept the position and the rate to be offered to the potential employer. *Id.*

130 See Marks Interview, *supra* note 96 (describing placement process); Webster Interview, *supra* note 108 (San Francisco agency requires potential employer to interview candidates).

131 See Webster Interview, *supra* note 108; Jones, *supra* note 41, at 1020.

132 See Berkman, *supra* note 61, at 24.

133 See Bircher Interview, *supra* note 59 (Before a bill is sent, the agency will talk to the temporary attorney's supervisor to determine whether the employer is satisfied. "A dissatisfied employer will long remember the placement agency, although it will completely forget the attorney."); Webster Interview, *supra* note 108 (the agency checks with both the attorney and the employer to ensure there are no problems).

134 See Marks Interview, *supra* note 96.

135 Goldman interview, *supra* note 55; Bircher Interview, *supra* note 59; Marks Inter-

es, an employment agency may receive generic, non-detailed information at an early stage in the placement process so that the most obvious conflicts of interest can be avoided.¹³⁶ Some agencies indicate that potential employers disclose no specific information about the prospective assignment or actual client, and that the request initiating the placement process simply states what type of attorney is preferred, such as, "a lawyer with two to five years of general or civil litigation experience."¹³⁷

Although there are no reported cases on point, it seems clear that a law firm can be held civilly liable for the negligence of a temporary attorney it employs,¹³⁸ just as liability may be imposed on a firm for the actions of non-lawyer staff members.¹³⁹ Consequently, a firm's use of temporary lawyers should affect its malpractice insurance rate. If a firm's use of independent contractors is covered by its malpractice policy, the firm will likely be insulated from liability, at least in part.¹⁴⁰ A firm should disclose the fact that it uses temporary lawyers to its malpractice carrier.¹⁴¹

Temporary lawyers, of course, are civilly responsible for their own negligence. Thus, it is not surprising that some temporaries voluntarily carry their own malpractice insurance¹⁴² and that others have been required to do so by the agencies through which they are placed.¹⁴³ Some agencies specifically instruct their attorneys to discuss the subject of malpractice liability with

view, *supra* note 96; Webster Interview, *supra* note 108.

According to one agency, it is possible to make too good of a match between a qualified temporary lawyer and a firm in need of assistance. In the case in question, a temporary lawyer was placed with a firm to deal with an environmental law matter. The attorney soon called the agency to report that the complaint to which the firm needed to respond was a document which the temporary lawyer had drafted while working for the federal government. The attorney withdrew from the case immediately, and the agency dispatched another temporary attorney. Goldman interview, *supra* note 55.

136 Goldman interview, *supra* note 55. *But see* Berkman, *supra* note 61, at 24 ("brokers earn their commissions by . . . screening . . . potential conflicts").

137 *See* Webster Interview, *supra* note 108.

138 *See* Blodgett, *supra* note 96, at 17. *Cf.* 1 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 5.5, at 275 (1989) ("An attorney is responsible for the efficiency and conduct of employed attorneys and office staff.").

139 *Id.* § 5.5, at 277 (discussing secretaries, legal clerks and paralegals).

140 *See* Berkman, *supra* note 61, at 24 (discussing malpractice coverage).

141 *See id.* at 24 (recommending that carrier be informed).

142 *See* Blodgett, *supra* note 96, at 17.

143 *See* Oliver v. Board of Governors, Kentucky Bar Ass'n, 779 S.W.2d 212, 213 (Ky. 1989).

the temporary employers for whom they work.¹⁴⁴ Other agencies do not raise the subject.¹⁴⁵ Many agencies indicate that they do not carry insurance to cover the risk of liability arising from the professional malpractice of attorneys they place.¹⁴⁶ Perhaps one reason for this is that because the temporary attorney industry is so new, there have been few, if any, claims against placement agencies.¹⁴⁷ For the same reason, underwriters do not offer such coverage; they have not yet determined how to price it.¹⁴⁸ Another reason is that some agencies assume that malpractice is not a serious problem because temporary attorneys generally do not do "high risk" work.¹⁴⁹

Attorney placement agencies frequently take steps beyond mere reference checking and credential verification to minimize their risk of being sued based on the deficient performance of a temporary attorney. Some agencies refuse to place lawyers who have less than a certain amount of legal experience¹⁵⁰ or who otherwise seem unlikely to do competent work.¹⁵¹ Other agencies decline to refer candidates to potential employers who are unable or unwilling to assure that work on complex projects will be overseen by firm members with appropriate expertise. Some agencies require candidates for temporary positions¹⁵² and/or potential employers¹⁵³ to sign "hold harmless" agreements pursuant to which the temporary lawyer or employer agrees to indemnify the agency for losses. Additionally, to avoid charges of facilitating the unauthorized practice of law, agencies generally re-

144 See Marks Interview, *supra* note 96.

145 See Goldman Interview, *supra* note 30 (no inquiry is made); Webster Interview, *supra* note 108 (no inquiry is made and the issue of potential liability is not considered to be serious).

146 See Goldman Interview, *supra* note 30; Marks Interview, *supra* note 96 (agency does not secure malpractice insurance to cover misdeeds of temporary attorneys); Webster Interview, *supra* note 108; Marcotte, *Boom in Lawyer Temporaries*, *supra* note 69, at 31; Berkman, *supra* note 61, at 24 (as long as the temporary is supervised by the firm, there is no theoretical problem).

147 See Berkman, *supra* note 61, at 24 (an insurance carrier for 355 large firms indicated that no malpractice claim had ever arisen from the use of a temporary lawyer).

148 See Marks Interview, *supra* note 96 (underwriters "don't know what to do" with temporary attorney agencies); Webster Interview, *supra* note 108 (similar).

149 See Webster Interview, *supra* note 108. See also Berkman, *supra* note 61, at 24 ("a temporary's work is usually routine and highly supervised").

150 See Bircher Interview, *supra* note 59 (one year minimum).

151 See *id.* (Houston agency declines to place many potential candidates).

152 See *id.*

153 See *id.*

fuse to supply temporaries to non-lawyers,¹⁵⁴ and some even require a law firm or law department to guarantee that the temporary lawyer's work will be part of the firm or department's law practice.¹⁵⁵

An attorney temporarily placed with a firm is normally paid from monies received by the agency from the employer.¹⁵⁶ In such instances, the agency typically charges the employer a flat hourly rate for the attorney's work based on the type of services involved and the lawyer's credentials and experience. For example, for ordinary legal work, figures may range between thirty-seven dollars per hour for a lawyer with one year of experience, to eighty-five dollars per hour for a lawyer with ten years of experience.¹⁵⁷ In contrast, specialized work,¹⁵⁸ or an unusually prolonged assignment,¹⁵⁹ may be priced at a higher rate, with the ultimate figure determined by negotiation. Some agencies discount hourly rates for high-volume users.¹⁶⁰ Predictably, in depressed markets, the amounts charged for temporary legal services can be considerably less than those which would prevail in other parts of the country.¹⁶¹ In general, "temporary lawyers are willing to accept less than they would charge as sole practitioners because they do not have to court clients or pay overhead."¹⁶²

The agency's fee for its services is typically paid to the agency

154 *See id.*

155 *See id.*

156 *See, e.g., Temporary Duty, supra* note 96, at 71 (agency bills the client firm for the temporary attorney's time; the attorney is then paid by the agency); *Legal Temps, supra* note 96, at 25, col. 5 (the agency charges a client a flat hourly rate, retains a percentage as commission, and pays the temporary attorney the balance); Goldman Interview, *supra* note 30 (indicating that agency pays temporary attorney). *But see Free-Lance Legal Assistance, supra* note 96 (temporary lawyers are paid by the client law firm). Lawyers Now, in Houston, takes the position that it receives payment from the temporary employer on behalf of the temporary lawyer, and that the 20% thereof which the agency retains is paid to it by the temporary lawyer as a placement fee. Whether this arrangement would be sufficient to avoid problems under the ethical rules against fee splitting is unclear. *See infra* notes 358-419 and accompanying text.

157 These rates were used in early 1990 by a Houston agency. The president of the agency indicated that although some lawyers are placed at different rates, generally it is not possible to increase the rate based merely on the fact that a lawyer has more than ten years of experience. *See Bircher Interview, supra* note 59.

158 *See id.*

159 *See id.*

160 *See Berkman, supra* note 61, at 24.

161 In 1988, rates averaged \$25 to \$35 per hour in San Francisco, but \$45 per hour in New York City. *See Mansnerus, supra* note 95, at B10 (describing San Francisco as a "depressed market").

162 Berkman, *supra* note 61, at 24.

by the employer of the temporary lawyer. The amount paid may be a percentage of the amount charged for the temporary lawyer's services, ranging, for example, between fifteen and thirty-five percent,¹⁶³ or it may be a flat fee that is unrelated to the attorney's hourly rate.¹⁶⁴ Agencies often exercise care to make sure that the two amounts—the temporary lawyer's legal services fee and the agency's placement fee—are clearly itemized for the employer or billed separately.¹⁶⁵ In one form or another, the cost of the temporary attorney's work and the agency's services is passed on to the ultimate client. That amount may be considerably less than if the firm were billing for similar work performed by its associates. According to at least one writer, firms are reluctant to make a profit on services performed by temporary lawyers by charging clients the higher associate rate.¹⁶⁶

The variety of work for which temporary attorneys are hired is as broad as the practice of law. In addition to other types of legal assistance, it encompasses corporate representation, court appearances, depositions and general litigation.¹⁶⁷ These services are typically performed under the direct supervision of a firm attorney assigned to the particular case.¹⁶⁸ Some temporary at-

163 See, e.g., *Boom in Lawyer Temporaries*, *supra* note 69, at 30 (Detroit's Lawyer on Call adds a 15% agency fee to the hourly rate charged by the lawyers.); *Legal Temps*, *supra* note 96, at 25 col. 5 (Special Counsel Inc., of New York, keeps 25-35% of the hourly rate charged); Bircher Interview, *supra* note 59 (Houston's Lawyers Now charges 20%).

164 See, e.g., Marks Interview, *supra* note 96 (A flat fee is charged for the agency's services.); Webster Interview, *supra* note 108 (The agency's fee is totally unrelated to the attorney's fee.); Blodgett, *Temporary Duty*, *supra* note 96, at 17 (Stating in 1985: "LAW/temps pays the lawyers between \$15-\$60/hr., depending on experience, and, in turn, bills the client firms \$25-\$70/hr.").

165 See Marks Interview, *supra* note 96 (Dallas agency bills the customer/firm on behalf of the attorney, then bills an additional flat fee for the the agency's services, carefully separating the billing to prevent the slightest appearance of prohibited fee-splitting.); Webster Interview, *supra* note 108 (The attorney sets his or her own rate, which is billed to the employer by the agency; the agency then separately bills the employer for its services at an amount completely unrelated to the attorney's fee.).

166 See Berkman, *supra* note 61, at 24. See also Zeldis, *Temporary Lawyers Progress At Major Firms, But Slowly*, *supra* note 105, at 1 (describing as "unusual" firm's decision to bill temporary recruits at a lower rate than full-time associates).

167 See, e.g., *Boom in Lawyer Temporaries*, *supra* note 69, at 31 (temporary agency routinely provides specialists in international trade or federal regulatory law); *Free-Lance Legal Assistance*, *supra* note 96, at 6 (temporary agency provides attorneys with expertise in securities regulations, litigation, general corporate work and legal research); *Firms Turn to "Temp" Lawyers*, *supra* note 127, at 10, col. 3 (firms hire temporary attorneys to make court appearances and take depositions); Berkman, *supra* note 61, at 24 ("Most frequently temporary lawyers' work is litigation-related."); Roth, *supra* note 65, at 6 (agency heads estimate that 70-75% of their placements are litigation related).

168 Cf. *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 213 (Ky.

torneys work on a single matter for a firm; others do general work for a limited period of time.¹⁶⁹ While these services are often performed in the firm's offices, some temporaries work at other locations and visit the firm's offices only when the assignment requires.¹⁷⁰

Assignments may last anywhere from a few hours¹⁷¹ to a year or more.¹⁷² Litigation assignments commonly last about six months¹⁷³ and typical short research and writing assignments last roughly one week.¹⁷⁴ In some instances, the temporary attorney may never meet the client on whose behalf the legal work is performed.¹⁷⁵

Although many temporaries work exclusively for one firm at a time, others work simultaneously for multiple firms.¹⁷⁶ When work for an employer is completed, the temporary attorney leaves the law firm and is available to accept another assignment. An employer who is impressed with the quality of a temporary's work may extend an offer of permanent employment to that attorney. In such instances, the agreement between the employer and the agency may provide for the agency to receive a placement fee from the employer.¹⁷⁷

IV. ETHICAL ISSUES IN TEMPORARY LAWYERING

A. *Objections and Authorities*

There has been a divergence of opinion among ethics com-

1989) (describing supervision as a feature of the placement arrangement under review); Berkman, *supra* note 61, at 24 (the work of temporary attorneys is "highly supervised")

169 See ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356 (1988).

170 See *id.*

171 See Goldman Interview, *supra* note 30 (discussing three-hour assignment in which a temporary attorney explained real estate forms to an attorney who was beginning to practice in that area); Marks Interview, *supra* note 96 (ten hour assignment).

172 See Goldman Interview, *supra* note 30 (year-and-a-half assignment); Bircher Interview, *supra* note 59 (three-year contract with a corporation which occasionally needed environmental law services); Marks Interview, *supra* note 96 (three years).

173 See Goldman Interview, *supra* note 30. See also Webster Interview, *supra* note 108 (assignments of several months are typical).

174 See Goldman Interview, *supra* note 30.

175 See *id.*

176 See ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356, at 2 (1988).

177 See Goldman Interview, *supra* note 30 (referring to such arrangements as a "lease with an option"); Bircher Interview, *supra* note 59 (firm is required to pay the agency 20% of the attorney's first year salary).

mittees,¹⁷⁸ commentators¹⁷⁹ and courts¹⁸⁰ concerning whether the use of temporary lawyers is ethically permissible. Such arrangements have been perceived as (1) fraught with conflict of interest,¹⁸¹ (2) predicated upon impermissible fee split-

178 See ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356 (1988) (approving use of temporary lawyers, subject to various limitations); Connecticut Bar Ass'n Comm. on Professional Ethics Informal Op. 88-15 (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) 301-02 (1988) (approving temporary lawyer placement services, subject to limitations, and finding that payments made directly to a temporary attorney and separate payments to the placement agency based on a percentage of the attorney's compensation were not unethical) [hereinafter Connecticut Informal Op. 88-15 (1988)]; District of Columbia Op. 39 (1977), *supra* note 30 at ¶ 10738 (approving use of lay referral agency which placed lawyers in temporary assignments and charged users of the service an hourly rate, based on the experience of the referred lawyer, part of which amount was retained by the agency as a fee); Florida Bar Professional Ethics Comm., Op. 88-12 (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) 330-31 (1988) (corporation providing temporary legal services to lawyers violates ethics rule against fee splitting with nonlawyers if the company charges customers an hourly rate and is controlled by nonlawyers) [hereinafter Florida Op. 88-12 (1988)]; Kentucky Bar Ass'n Ethics Comm., Op. KBA E-328 (1988) (disapproving business which would refer attorneys to law firms and corporate law departments on a temporary basis), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) 155 (1988), and *vacated in part* by *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 221 (Ky. 1989) [hereinafter Kentucky Op. KBA E-328 (1988)]; New Jersey Sup. Ct. Advisory Comm. on Professional Ethics, Op. 632 (1989), *summarized in* 5 Law. Man. on Prof. Conduct (ABA/BNA) 393-94 (1989) (approving use of temporary lawyer placement agency, subject to limitations) [hereinafter New Jersey Informal Op. 632 (1989)]; Ass'n of Bar of City of N.Y., Formal Op. 1988-3 (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) 122-23 (1988) (prohibiting, on unauthorized practice of law and fee splitting grounds, the use of temporary lawyer placement agencies, except where the agency is paid a "fixed fee" and the temporary relationship between the employer-firm and the temporary lawyer is disclosed to the ultimate client) [hereinafter NYC Bar Op. 1988-3 (1988)]; Ass'n of Bar of City of N.Y., Formal Op. 1988-3-A (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) (1988) (modifying NYC Bar Op. 1988-3 (1988) by indicating that a placement agency "fixed fee" must be calculated independently of the fee ultimately paid to the temporary attorney and may take into account the nature and predicted length of the assignment and the experience and seniority of the temporary attorney) [hereinafter NYC Bar Op. 1988-3-A (1988)]; Ass'n of Bar of City of N.Y., Formal Op. 1989-2 (1989), *summarized in* 5 Law. Man. on Prof. Conduct (ABA/NBA) 171 (1989) (modifying NYC Op. 1988-3 (1988) and NYC Op. 1988-3-A (1988)); (compensation of a temporary lawyer placement agency does not violate nonlawyer fee-splitting rules if such compensation is separately stated; requiring that agency fee billed to client be separately stated) [hereinafter NYC Bar Op. 1989-2 (1989)].

179 See Weston, *Temporary Lawyers to the . . . Rescue?*, COMPLETE LAW. 38, 38-40 (1988) (identifying ethical issues and arguing that temporary lawyers represent "an excellent opportunity" for the small firm and sole practitioner to handle matters that previously have been impossible because of staffing limitations).

180 See *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 220 (Ky. 1989) (approving operation of temporary attorney placement agency, if the temporary lawyer is paid directly by employer-firm and the employment of the temporary attorney is made to clients on whose matters the temporary attorney works).

181 See Blodgett, *Temporary Duty*, *supra* note 96, at 17 ("considerable potential for

ting,¹⁸² (3) likely to jeopardize client confidences¹⁸³ and (4) potentially involving the unauthorized practice of law.¹⁸⁴ Some authorities have endorsed the use of temporary lawyers, subject to various limitations,¹⁸⁵ while others have taken the position that such forms of employment are generally improper or have otherwise discouraged their use.¹⁸⁶ Although an American Bar Association Formal Ethics Opinion¹⁸⁷ has placed its qualified impropri-

conflict of interest"); Marcotte, *Boom in Lawyer Temporaries*, *supra* note 69, at 30-31 ("potential for conflicts exists with temporaries working on litigation at different firms . . . [but in] a practical sense it's not been a problem so far"); Kuhlman, *supra* note 61, at 90 (noting potential conflicts of interest).

182 See e.g., Florida Op. 88-12 (1988), *supra* note 178, at 3. See generally *infra* notes 358-419 and accompanying text.

183 See Blodgett, *Temporary Duty*, *supra* note 96, at 17. See generally *infra* notes 347-57 and accompanying text.

184 See Florida Op. 88-12 (1988), *supra* note 178, at 2-3 (identifying issue but holding that it was beyond the scope of the opinion); NYC Bar Op. 1988-3 (1988), *supra* note 178, at 2 ("It has long been settled that ethical impropriety exists and that a lawyer is aiding a lay agency . . . to practice law 'so long as a lay agency pays a lawyer one amount for his services and for those services charges a different amount to the person to whom they are rendered.'").

185 See ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356 (1988) (approving use of temporary lawyers, subject to various limitations); Connecticut Informal Op. 88-15 (1988), *supra* note 178, at 1 (supplying guidelines for a lawyer-recruiter providing law firms and businesses with legal and paralegal temps, and finding that payments made directly to a temporary attorney and separate payments to the placement agency based on a percentage of the attorney's compensation are not unethical); District of Columbia Op. 39 (1977), *supra* note 55, at ¶ 10738 (approving use of lay referral agency which placed lawyers in temporary assignments and charged users of the service an hourly rate, based on the experience of the referred lawyer, part of which amount was retained by the agency as a fee); New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (A firm's hiring of a temporary lawyer from a placement agency to which the firm pays a fee based on the temporary lawyer's per diem remuneration is permissible, subject to conflict of interest and confidentiality limitations); *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 221 (Ky. 1989) (temporary placement of attorneys is permissible if the temporary attorney is paid directly by the employer-firm and disclosure of the employment is made to clients on whose matters the temporary employee works).

186 See Florida Op. 88-12 (1988), *supra* note 178, at 3 (holding that temporary legal services corporation violates rule against splitting fees with nonlawyers if the company charges firms an hourly rate and is controlled by nonlawyers); Kentucky Op. KBA E-328 (1988), *supra* note 178, at 148-49 (holding that lawyers may not own or participate in a service that supplies temporary lawyers), *vacated in part* by *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 221 (Ky. 1989); NYC Bar Op. 1988-3 (1988), *supra* note 178, at 5-6 (imposing strict guidelines on temporary lawyer placement agencies); NYC Bar Op. 1988-3-A (1988), *supra* note 178, at 1 (reaffirming limitations on temporary lawyer placement agencies).

187 ABA Comm. on Ethics and Professional Responsibility Formal Op. 88-356 (1988) (approving the use of lawyer placement agencies to obtain temporary lawyer services). Opinion 88-356 is discussed in: Marcotte, *Temporary Lawyer Firms Get OK*, 75 A.B.A. J. 28 (Mar. 1989); Reich, *Beyond Yes and No*, 75 A.B.A. J. 108 (Mar. 1989).

matur on this development in the delivery of legal services, the issues surrounding the use of temporary lawyers are far from resolved in most jurisdictions. In the only major court decision on the subject, the Kentucky Supreme Court recently split 4-3, with a bitter dissent.¹⁸⁸ Moreover, the ABA opinion was written in part to negate two 1988 opinions of the Association of the Bar of the City of New York,¹⁸⁹ "which had been hostile to temporary lawyer placement agencies."¹⁹⁰ As one lawyer recently commented, "Law firms will need even more guidance on how to structure arrangements with temporary lawyers than the ABA opinion provides."¹⁹¹

The following sections argue that no insuperable ethical obstacles exist to temporary employment of attorneys. The employment relationship may be tailored to fully safeguard all relevant societal and professional interests.

B. *The Interests Advanced By Temporary Lawyering*

To a large extent, the standards of conduct applicable to lawyers are the product of the legal profession's careful evaluation of both the values served and the values sacrificed by alternative courses of action.¹⁹² Thus, in certain instances, conduct is deemed permissible, notwithstanding the fact that it poses a risk of harm to clients, the profession, or the general public, because such undertakings are needed to achieve important objectives.¹⁹³ The risk of harm in these situations is viewed as a "necessary

188 *Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212 (Ky. 1989).

189 NYC Bar Op. 1988-3 (1988), *supra* note 178, at 1; NYC Bar Op. 1988-3-A (1988), *supra* note 178, at 1.

190 Roth, *supra* note 65, at 6. *See also* Marcotte, *supra* note 187, at 28 ("The New York City bar opinion had the effect of making lawyers think temporary agencies were unethical.").

191 Roth, *supra* note 65, at 6.

192 *Cf. Solicitation of Law Firm Clients, supra* note 1, at 82 ("[M]any of the standards governing attorneys are the result of a decades-long process of careful weighing and deliberation. Bar associations and scholars, ethics committees and courts, have labored at length over the task of fairly balancing competing interests."); *Ethical Constraints on Creative Financing, supra* note 1, at 563 (Stating, with respect to conflicts of interest: "Impermissibility is a question of context. There may be interests advanced by . . . [an] arrangement that make the risk of divided loyalties worth taking. Or there may be checking mechanisms, presently in place or capable of adoption, which acceptably minimize the chances of the risk coming to fruition.").

193 *Cf. Solicitation of Law Firm Clients, supra* note 1, at 43-48 (arguing that although solicitation of law firm clients by an attorney switching firms is fraught with risks, such conduct should not be prohibited, but rather reasonably regulated, since it is important for consumers to obtain information bearing upon the selection of counsel).

evil," an inevitable cost of allowing lawyers to strive to secure a greater good.

An apposite example is furnished by the rules on contingent fees.¹⁹⁴ A contingent fee contract confers on a lawyer a personal stake in the success of litigation.¹⁹⁵ To that extent, the arrangement tempts a lawyer to base litigation decisions on personal interests, rather than on the interests of the client.¹⁹⁶ Notwithstanding this palpable conflict, contingent fees are deemed ethical in most fields,¹⁹⁷ for such contracts tend to ensure that legal services will be available to persons with meritorious claims who cannot otherwise afford representation.¹⁹⁸ Similarly, lawyers are permitted to engage in truthful advertising in spite of the fact that some consumers could misunderstand the information provided.¹⁹⁹ The justification is that provision of data concerning legal services is an indispensable step in empowering laypersons to intelligently direct their own affairs.²⁰⁰

In the context of temporary lawyering, it is useful to begin any discussion of potential ethical problems by considering the interests which may be advanced by this form of professional employment. The foregoing sections have alluded to a number of possible advantages. Chief among these is the fact that temporary

194 See generally MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(c), (d) and 1.8(j) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980).

195 See G. HAZARD & W. HODES, *supra* note 58, at 173 (Contingent fee interest "could be considered to be champerty ('investing' in litigation), and could skew a lawyer's judgment.").

196 See C. WOLFRAM, MODERN LEGAL ETHICS, § 16.2.3 at 529 (A contingent fee creates an incentive for a "quick kill" before many hours are spent on a case.).

197 See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(c), (d) and 1.8(j)(2) (1989) (contingent fees not permitted in criminal cases and certain domestic relations cases); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980) (contingent fees not permitted in criminal cases).

198 See G. HAZARD & W. HODES, *supra* note 58, at 173; C. WOLFRAM, *supra* note 196, at 529; J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 46 (1976) (indicating that the relationship between contingent fees and access to the justice system has been argued since at least the beginning of the twentieth century).

199 Cf. *Peel v. Attorney Registration and Disciplinary Comm'n*, 110 S. Ct. 2281, 2292 (1990) ("Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.").

200 See Pearson & O'Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer*, 9 U. PUGET SOUND L. REV. 293, 303 (1986) (Because "an individual is constantly confronted with the necessity of making life-affecting decisions . . . there must be not only a freedom to speak but also a freedom to hear.").

lawyering opens the door to a wide array of potential professional contributors who might otherwise be barred from providing services to the public. Falling within this class are parents with child care responsibilities, academics, lawyers who have recently relocated and retired attorneys. Attorneys who leave government service find it possible to practice law as temporaries even though they may have only a limited breadth of prior experience.²⁰¹ Temporary lawyering can help increase lawyer competence by allowing sole practitioners to develop a broader range of skills while serving under the short-term guidance of an established firm.²⁰² Lawyer competence is also enhanced by permitting lawyer-parents to secure temporary employment and thereby maintain legal skills and knowledge which might otherwise erode during periods when substantial time must be devoted to familial responsibilities.

Two other potential advantages of temporary lawyering deserve more detailed consideration. The first advantage is the opportunity for cultivating institutional flexibility. The second advantage is the ability of temporary legal employment to reduce delay and expense in the delivery of legal services by reconciling supply with demand. These advantages will be discussed below, along with the perils posed by the introduction of a core/ring employment configuration into the sphere of law practice.

1. Institutional Flexibility

Pressures which favor standardization over individuality and bureaucratic structure over institutional flexibility²⁰³ pose perhaps the greatest dangers now faced by the legal profession.

201 Goldman Interview, *supra* note 30 (point stated by manager of Washington, D.C. agency, where "early government out" attorneys are common).

202 Cf. Jones, *supra* note 41, at 1020; *Firms Turn to 'Temp' Lawyers*, *supra* note 127, at 1 (attorneys accept temporary assignments to supplement income while establishing own practice); Blodgett, *Temporary Duty*, *supra* note 96, at 17 (sole practitioners serve as temporaries to supplement income); Goldman Interview, *supra* note 30 (sole practitioners can develop reputation and experience).

203 Cf. Johnson, *Law-givers, Story-tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341, 345-50 (1989) ("Absent the story-tellers' sensitive appreciation of the human dimension of law practice, otherwise competent lawyering degenerates into mere legalism . . . [T]here is more to law practice than law."); Gilson & Mnookin, *supra* note 2, at 592 ("[T]he practice of corporate law firms has changed from one characterized by longstanding relationships with continuing clients to one in which one-shot transactional work for a succession of clients is of growing importance. The result has been increased emphasis on the technical specialization necessary to support a transactional practice, rather than on developing the detailed knowledge of and relationships with longstanding firm clients that are at the core of traditional practice.").

These pressures threaten to subordinate the individual lawyer to the collective corporate personality,²⁰⁴ and in so doing threaten to transform the profession from a stage where once any attorney could play a leading role to one where lawyers are routinely relegated to little more than bit parts.²⁰⁵

As the number of lawyers multiplies,²⁰⁶ as firms increase in size,²⁰⁷ and as law practice ever more resembles the corporate world driven by the balance sheet,²⁰⁸ there is a serious risk that the profession will be less able and less willing to respond to the needs, dreams and ideas of individual lawyers, or to avail itself of their unique talents.²⁰⁹ To the extent that is the case, law will be a less fulfilling vocation,²¹⁰ clients will less likely be satisfied

204 See Linowitz, *Pride of the Profession: A Call for Return to Traditional Values*, 24 TRIAL 68 (July 1989) (dehumanization of legal profession has negatively affected public perceptions of lawyers); Coffin, *The Law School and the Profession: A Need for Bridges*, 11 NOVA L. REV. 1053, 1057-64 (1987) (increasingly dehumanized legal profession mandates legal education modifications); Freeman, *A Critical Legal Look at Corporate Practice*, 37 J. LEGAL EDUC. 315, 320-21 (1987) (associates in large corporate firms often lose their identity while trying to conform to the corporate mold). Cf. Altman, *Fostering Firm Culture Can Stop Dehumanization of a Practice*, Nat'l L.J., Jan. 12, 1987, at 15, col. 1 (an increasingly dehumanized legal profession is causing many attorneys to leave practice); Hochberger, *Money Can't Buy Job Satisfaction*, Nat'l L.J., Sept. 1, 1986, at 13, col. 2 (large firms dehumanize law practice, causing many attorneys to leave profession).

205 When associates' work consists merely of "one memo-writing assignment after another—unconnected to the overall transaction, out of touch with the client, and severed from the related brainstorming and decision making"—job dissatisfaction comes as no surprise. Lopez, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 350 (1989). See also Freeman, *supra* note 204, at 322 (large legal matters, assigned to associates in fragments, are making work boring); Hochberger, *supra* note 204, at 13 (large firms' associates often work on isolated fragments of clients' matters, not whole cases); Linowitz, *supra* note 204, at 68 (large firms' associates rarely meet clients and often prepare only fragments of cases).

206 See *supra* note 3.

207 See *supra* note 13.

208 See American Bar Association Commission on Professionalism Report to the House of Delegates, 112 F.R.D. 243, 260-61 (1986) (the legal profession is now preoccupied with merely attracting clients and increasing billable hours); Brown, *A Profession Losing its Soul*, 72 A.B.A. J. 38, 40 (1986) (too many lawyers view law practice as merely a business, not a profession); Janofsky, *Is the "S" in "Esquire" Becoming a \$ Sign?*, 59 WIS. B. BULL. 13, 13-14 (1986) (the emphasis upon making money erodes the quality of legal profession, to detriment of all); Linowitz, *supra* note 204, at 68 (the legal profession is now a business, controlled by the bottom line).

209 Cf. Commission on Women to Develop Model Policies, 21 SYLLABUS, Spring 1990, at 1 (newsletter of the ABA Section on Legal Educ. and Admission to the Bar) ("The growing pressures for law firms to be successful businesses and for lawyers to produce even greater billable hours results in lawyers becoming dehumanized.").

210 Freeman vividly describes being a corporate lawyer as,

boring and intellectually dissatisfying, not to mention emotionally destructive if

with their lawyers, and the practice of law will be less important in the larger scheme of things.²¹¹

At its best, the practice of law has always been an interpersonal enterprise.²¹² It has been a profession where individual judgment and personal conscience have been the hallmarks of the endeavor;²¹³ it has been a profession where clients have been treated as uniquely important individuals.²¹⁴

In recent years, there has been a tendency, especially in larger firms, to regard clients as fungible sources of income and lawyers as interchangeable producers of marketable products.²¹⁵ As

you are trying to maintain a life with human relationships in it.

The experience is not only boring but necessarily alienating, for you must take on a role to do the job, a role in which you are the object of constant scrutiny of other corporate lawyers as you attempt to become one of them—while they themselves are all playing the very same role The elite corporate lawyer should be a self-assured, calm individual. He or she should play the role of legal intellectual and rationalizer. To perform in this role, associates have to withdraw from their true selves so that they may conform to the image. All kinds of crazy things happen to people in the process.

Freeman, *supra* note 204, at 320-21. See also Altman, *supra* note 204, at 15 (an increasing number of lawyers are unhappy practicing law); Hochberger, *supra* note 204, at 13 (large firms pay exorbitant salaries to dissuade dissatisfied associates from leaving); Manning, *From Learned Profession to Learned Business*, 37 BUFFALO L. REV. 658, 664 (1988-89) (lawyers primarily leave the profession because they dislike their work life).

211 See Brown, *The Quiet Revolution in the American Law Profession: Remarks Before the Commission on Professionalism of the American Bar Association*, 14 FORDHAM URB. L.J. 855, 867 (1985) (the erosion of legal professionalism adversely affects lawyers' integral role in American society).

212 Cf. R. RODES, *THE LEGAL ENTERPRISE* 141 (1976) ("[O]ur most serious failing . . . is our lack of attention to the quality of human relations within the legal enterprise itself."); T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 140 (1981) ("Justice . . . is a gift people give to one another Justice can be administered, because the idea of justice cannot be separated from the process of administering justice The lawyer, as a just person seeking to be faithful to his client, . . . is doing justice").

213 See Lee, *Dedication Address*, 16 ST. MARY'S L.J. 533, 539-40 (1985) ("There are those among us who say that . . . concern, one lawyer for another . . . is a thing of the past and is totally unrealistic. I hope they're wrong. Those performances represent professionalism at its highest They result from a genuine concern for the problems of other people.").

214 As eloquently stated by Solicitor General Kenneth W. Starr at a meeting of the American Law Institute:

[A]t its greatest, the [legal] profession stands not for profits, it stands for the rule of law. It stands not for amassing billable hours, it stands for human dignity, for the recognition of the ultimate value of every man, woman, and child It means fostering a sense of community, within the profession and beyond.

Luncheon Address by Kenneth W. Starr, III, 66th Annual Meeting of the American Law Institute (May 18, 1989), (quoted in Reavley, *supra* note 17, at 638).

215 Cf. *Corti v. Fleisher*, 93 Ill. App. 3d 517, 51, 417 N.E.2d 764, 769 (1981) (refus-

the Chief Justice has remarked, one gets the sense that firms which require associates to bill more than two thousand hours per year are treating associates "very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal."²¹⁶ To be sure, there are many firms which genuinely strive to respond to the individual needs and desires of both lawyers and clients. But, there are reasons to conclude that these firms represent a decreasing segment of the profession.²¹⁷

Pressures favoring conformity and assembly-line-like standardization are readily apparent in legal education,²¹⁸ and the practice of law. Students are taught—implicitly, if not explicitly—that to be truly successful, one must earn high grades, write on law review, and clerk for prestigious firms during the summer.²¹⁹ The

ing to enforce a provision in an attorney employment agreement on the ground that to do so would "allow clients to be unknowingly treated like objects of commerce, to be bargained for and traded by merchant-attorneys like beans and potatoes"); Brown, *supra* note 208, at 40 (large-firm associates have "become articles of commerce driven to constant night and weekend work, generating, in treadmill style, the commodity of billable hours"); Sella, *Moving Out and Up: Legal Placement in the Age of Free Agency*, 75 A.B.A. J. 82, 84 (Oct. 1989) ("[F]irms haven't tended to the care and feeding of young associates It's benign neglect. And that's amplified at lower levels—lower associates feel at times like canon fodder. Burnout sets in.").

216 Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 153 (1986). See also LaMothe, *supra* note 28, at 17 (Asking rhetorically: "What are the basic values of a law firm where 2000 billable hours a year is increasingly considered the irreducible minimum for the associate who wants to make partner or the partner who wants to advance?").

Large corporate firms often measure an associate's success "in terms of billable hours, productivity and rates of return, with no regard for quality of work, expertise, loyalty, seniority, public image, general reputation, integrity or other subjective characteristics by which we tend to judge our fellow human beings outside the office setting." Altman, *Fostering Firm Culture Can Stop Dehumanization of a Practice*, Nat'l L.J., Jan. 12, 1987, at 15.

217 Cf. LaMothe, *supra* note 28, at 15-16 (suggesting that "job conditions for lawyers generally may be getting worse," noting evidence that partner sabbatical programs are disappearing, that lawyers are working harder, that lawyers are increasingly concerned about competition and profitability, and are expressing growing discontent).

218 See Lopez, *supra* note 205, at 307 (1989):

Legal education conceives of and treats people—their traditions, their experiences, their institutions—as essentially fungible. It declares, at least tacitly, that who people are, how they live, how they struggle, how they suffer, how they interact with others, how others interact with them, and how they relate to conventional governmental and corporate power need not be taken into account in any sustained and serious way in training lawyers. Generic legal education teaches law students to approach practice as if all people and all social life were homogeneous.

219 T. SHAFFER, *LAWYERS, LAW STUDENTS AND PEOPLE* 46 (1977) ("Success in law school requires conformity and effort . . . [and the] demands for conformity and effort are heavy"); S. TUROW, *ONE L: AN INSIDE ACCOUNT OF LIFE IN THE FIRST YEAR*

aspiring student who eschews law review in favor of working for a pro bono clinic, or who fails to clerk for a "good" firm between second and third year, is under a heavy obligation to demonstrate why he or she should not later be passed over for many job opportunities. In law practice, the evidence is much the same. While women are being hired in unprecedented numbers,²²⁰ they still account for only a small portion of law firm partners.²²¹ Many attribute the failure of women to break through the professional "glass ceiling"²²² encountered midway on the career ladder to the fact that women often have demanded greater flexibility in terms and conditions of employment.²²³ Law firms frequently have been unwilling to provide even minimal accommodation to those who seek to diverge from the conventional path of long hours, dull assignments and work on a full time basis.²²⁴ As a result, "[women have] desert[ed] the megafirms in droves for lack of mentors, client contact, camaraderie, and flexible hours."²²⁵

A principal advantage that can flow from the profession's accommodation of temporary lawyers is that such arrangements can introduce a much needed measure of flexibility and individual tailoring into the arena of legal employment.²²⁶ The presence of

AT HARVARD LAW SCHOOL 10 (1977) ("[T]he struggle for jobs in the future and for first-year honors leads at most schools to the same emphasis on grades and the same atmosphere of tension, competition and uncertainty.").

²²⁰ See *supra* note 4.

²²¹ See Repa, *Is There Life After Partnership?*, 74 A.B.A. J. 70 (June 1988) (only 8% of large firms' partners are women). Cf. LaMothe, *supra* note 28, at 16 ("Overall, 94 % of all law firm partners are men; and women partners are increasing by only about 1 percent a year.").

²²² Moss, *Women in Law: The Glass Ceiling*, 74 A.B.A. J. 49 (June 1988).

²²³ Cf. Blodgett, *Whatever Happened to the Class of '81?*, 74 A.B.A. J. 56 (June 1988) (discussing how unmet needs for flexible scheduling cause women to leave large-firm practices); LaMothe, *supra* note 28, at 32 ("Young women are increasingly unwilling to make the historical compromises of remaining single and childless in order to fit into male-created institutions.").

²²⁴ Cf. Blodgett, *supra* note 223, at 58 (After the birth of her first child, one woman associate left a firm because its personnel committee refused to authorize a three-day-per week work schedule.); LaMothe, *supra* note 28, at 15 (normal life is all but impossible for women in law firms); Blodgett, *Temporary Duty*, *supra* note 96, at 17 ("My boss wouldn't hear of part-time work or job-sharing, so I quit and started to look for part-time work as a lawyer.").

²²⁵ Moss, *supra* note 222, at 49.

²²⁶ See Zeldis, *Working 'Temp' Makes Sense for Some Attorneys, Firms*, N.Y.L.J., Dec. 24, 1987, at 1, col. 1 (discussing advantages). Cf. LaMothe, *supra* note 28, at 31 ("Law firms need to create programs to make firm life livable and attractive at all levels."); Address by Barbara Bader Aldave, Bexar County Women's Law Association, Annual Bench Brunch (Oct. 22, 1989) (recognizing need for "partners in law firms or decisionmakers in corporations to consider implementing part-time and flex-time arrangements and pa-

temporary lawyers in traditional work environments can provide a sobering example of alternative modes of practice for lawyers too easily absorbed in the monomaniacal pursuit of increased power and greater wealth. It may be valuable to remind lawyers on the partnership track that there can be more to life than one's career. That value lies not in persuading attorneys to radically alter career plans, but in injecting into the pursuit of professional goals a sense of moderation and restraint. To the extent that some lawyers rationally elect to forego income and power in favor of other interests, and that some lawyers are able to successfully combine private practice with a family, or with public service, or with avocational interests, associate attorneys on the partnership track may be less willing to permit law firms to demand even greater billable hours.²²⁷ So too, because the use of temporary lawyers sometimes requires firms²²⁸ to adjust their demands to the unique needs or limited availability of those interested in taking such positions, there is a modicum of hope that firms may begin to demonstrate greater willingness to accommodate similar needs on the part of full-time, permanent employees.²²⁹ Firms might, for example, be less resistant to granting leaves of absence or permitting flexible work hours. The accommodation of individual needs becomes possible once requests for special treatment are perceived as important and capable of resolution without undue inconvenience. A few years ago it would have been virtually inconceivable for a lawyer to ask a law firm to provide child care support, but as the need and desire for such services has become more apparent, a number of major law firms have begun to provide and subsidize day care services for children of employees.²³⁰ These firms have recognized that accommodating such

rental leave policies" in order to alleviate problems currently faced by lawyers with children).

227 Cf. Goldberg, *supra* note 3, at 60 ("The constant metering of a young lawyer's hours squeezes out time for pro bono, outside interests and a personal life. There's also pressure to specialize in a single area of law.").

228 Some placement agencies report that while a limited number of sole practitioners utilize temporary lawyers, most are placed with law firms. See Goldman Interview, *supra* note 30 (stating that bulk of work came from ten large firms in Washington, D.C. area).

229 Cf. LaMothe, *supra* note 28, at 16 ("Law firm partners should realize that by paying attention to the so-called women's issues, they may improve the morale and productivity of all [employees].").

230 See Cohen & Brannigan, *Washington Law Firms are Going Into the Day Care Business*, Wall St. J., Mar. 14, 1990, at B6, cols. 5-6 (discussing four Washington, D.C. firms).

individual needs is conducive to attracting and retaining talented lawyers and staff members,²³¹ and ultimately to remaining competitive.²³² Similarly, numerous potential gains might flow from the increased institutional flexibility fostered by the use of temporary lawyers, including such indirect benefits as reduced absenteeism and greater productivity during work hours.²³³

2. Reconciliation of Supply and Demand

Expense and delay are two common characteristics of the delivery of legal services.²³⁴ Routinely, clients are asked to wait a long time for the work they request; they are also forced to pay a high price for the services they receive.²³⁵ In part, these untoward features of legal representation are the result of a fundamental failure on the part of the profession to adjust the supply of lawyer time and talent to fluctuations in client demand.

Supply/demand mismatch stems from the fact that traditionally lawyers have been hired on a long-term basis, while the needs of clients ebb and flow on a short-term scale. If, for example, the demands placed on a firm by clients are twice as high in October as in August or September, conventional wisdom suggests that only limited options are available for increasing lawyer services. Among the alternatives, the firm can: (1) require attorneys to work longer hours, (2) refer cases to other lawyers, or (3) permanently hire additional legal talent.²³⁶ If one is attempting to

231 Cf. B. OLMSTEAD & S. SMITH, *supra* note 66, at viii (Flexibility is generally "seen as a way to attract and retain good employees in a labor market that is steadily becoming more competitive.").

232 Cf. *id.* at ix ("The key to remaining competitive is . . . an open-ended setting in which the individual is allowed to grow at his or her own rate.").

233 Cf. Blodgett, *Temporary Duty*, *supra* note 96, at 17 ("Less paid absenteeism, less idle time and fewer sick days and fringe benefits are advantages of hiring part-timers.").

234 Cf. Comment, *Fee Splitting With Nonlawyers*, 12 J. LEGAL PROF. 139, 148 (1987) (describing legal process as "both slow and expensive").

235 Cf. Bok, *A Flawed System*, HARV. MAG., 38, 40 (May-June 1983) ("[T]he cost of hiring a lawyer and the mysteries of the legal process discourage most people of modest means from trying to enforce their rights."); *Allman & Weil Releases Results: 1988 Survey of Law Firm Economics*, *supra* note 31, at 852 ("For lawyers with six to ten years of practice, the average rate for those in firms with fewer than nine lawyers is \$101 per hour. For lawyers in firms of seventy-five or more lawyers, the average is \$128 per hour.").

236 Of course, a firm may be better able to cope with temporary increases in client demand if it augments its nonlawyer staff, improves its technology and equipment, or takes other measures not directly involving lawyers. The discussion in the text focuses on increased demands for the type of work which, as a matter of professional ethics, cannot be delegated to a non-lawyer and must be performed by a licensed member of the bar—work calling for the exercise of independent legal judgment on a client's behalf.

avoid expense and delay, each of these alternatives has substantial disadvantages.

While attorneys in a firm may be able to generate more work by foregoing vacations, working weekends and staying longer hours at the office, such efforts are subject to the principle of diminishing marginal utility and the fact that there are a finite number of hours in a day. Inasmuch as most attorneys already put in long work weeks, it is reasonable to conclude that increased efforts by fixed personnel frequently will be insufficient to satisfy substantial periodic increases in client demand. Unless work is turned away, or additional lawyers are hired, clients will have to wait longer for legal services. In addition, costs may be higher for clients; once matters are delayed, duplicative research, investigation, or legal analysis is often required before a project can be completed.

Referring cases to other attorneys is also an unsatisfactory solution to the problem of temporary increases in client demand. When a firm refers a case, it generally forfeits the right to earn a profit by providing legal services. Needless to say, pressures of economic self-interest make it likely that a firm unable to satisfy increased demands will resist referring cases, even when not doing so causes clients delay. This is especially true when the rise in the demand for legal services appears to be short-lived.

In limited situations, a firm making a referral is entitled to collect a "forwarding fee" for doing nothing more than sending a case to another firm.²³⁷ However, the opportunity in these cases to earn a substantial fee by doing little more than making a phone call or writing a letter is not sufficient to ensure that referrals will readily be made. A forwarding fee is but one small part of the total fee. Avarice, or less self-interested economic pressures, may tempt a firm to endeavor to keep the entire fee for itself. Moreover, because forwarding fee arrangements unnecessarily

237 As late as the early 1980s, straight referral fees could be paid in only four states: California, Maine, Massachusetts, and Texas. See Franck, *Referral Fees: Everybody Does It But Is It Okay*, 71 A.B.A. J. 40, 40 (Feb. 1985). Recently, the restrictions on such payments have been relaxed by state adoption of new ethics codes patterned on the Model Rules of Professional Conduct ("Model Rules"). Under Rule 5.4 of the Model Rules, a fee may be shared with a forwarding lawyer, without regard to the services performed by that lawyer, if (a) by written agreement with the client, each lawyer assumes joint responsibility for the representation, (b) the client is advised of and does not object to the participation of all lawyers involved, and (c) the total fee is reasonable. The commentary to the rule makes clear that the client need not be advised as to the share of the fee the forwarding lawyer will receive.

increase the cost of legal services,²³⁸ they subject the legal profession to further criticism. Under a strict referral fee, a firm is paid a substantial amount for doing little, and the fee bears no relation to the services performed.²³⁹

There are several disadvantages of permanent hiring as a response to short-term fluctuations in client needs. First, such a course commits a firm to increased expenditures for legal personnel without any assurance of a sustained increase in revenues. If workload in fact subsides, this scenario is likely to result in higher legal fees for clients. Second, permanent hiring can be particularly inefficient in addressing specialized client needs. If a firm hires a "specialist" to cope with these demands, it may find no need for such expertise in the future, and the specialist may be unable to be employed with equal efficiency in run-of-the-mill cases. In contrast, if a "generalist" is hired to address specialized needs, the client may be subject to increased expenses and delay while the new attorney "gets up to speed."

The use of temporary lawyers avoids many of these delays and expenses.²⁴⁰ Temporary workers can alleviate diminutions in work force strength resulting from extended searches for permanent associates,²⁴¹ maternity and paternity leave,²⁴² prolonged illness, sabbaticals, or temporary government service. Sole practitioners who find it necessary to be in "two or more places at once," or who have no time for necessary legal research, find that it may be better to hire one or more temporary lawyers than to take on a full-time associate.²⁴³ While temporary lawyers must be hired, directed, and supervised, the time that these efforts require is offset by the resulting increases in the total number of

238 Johnson, *Yellow Pages Legal Ads in Texas: The Complexities of DR 2-101(B) & (C)*, 17 ST. MARY'S L.J. 1, 13-14 (1985) ("To the extent that forwarding arrangements add an unnecessary layer of middlemen to the provision of legal services, they exacerbate a critical problem besetting those who need the assistance of the profession, namely, unaffordability.").

239 In contingent fee personal injury cases, a referring attorney often receives one-third of the total fee. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 98-99 (1978). Compare Franck, *No Referral Fee for No Work*, 71 A.B.A. J. 40, 44 (Feb. 1985) (20% to 33 1/3%) with Halstrom, *Referral Fees Are a Necessary Evil*, 71 A.B.A. J. 40, 42 (Feb. 1985) (25% to 50%).

240 See McLean, *Temp Attorneys: An Economical Alternative*, Cal. L. Bus., Nov. 7, 1988, at 3, col. 1 (discussing efficient compliance with short deadlines).

241 See Berkman, *supra* note 61, at 24.

242 Cf. *id.* at 24 (child care leave).

243 See Blodgett, *supra* note 96, at 17. See also Marcotte, *Boom in Lawyer Temporaries*, *supra* note 69, at 31 (noting requests from sole practitioners for temporary attorneys with specialized expertise).

hours worked. Many employers have found that dissatisfaction with the quality of temporary work is the exception, rather than the rule.²⁴⁴ If prudence is exercised in selection, and qualified temporaries are given suitable tasks, it should be possible to increase productivity beyond that degree which might be achieved through harder work or longer hours on the part of a fixed workforce. These gains do not require a firm to commit itself to a permanent increase in personnel expenditures.²⁴⁵ Moreover, while temporary attorneys and placement agencies must be paid, such costs need not be excessive. The pool of potential temporaries is large, and in most cases placement agency costs are more than offset by amounts which a firm can save on taxes and employee benefits.²⁴⁶ These savings will be increasingly viewed as important, for some sources have opined that in view of the recent escalation in attorney salaries "[c]ontaining the cost of benefits is the [number one] goal for law firms entering the 1990s."²⁴⁷ Although expert temporary services may carry a high price, it is arguably more economical and fair to acquire such assistance on a short term basis, and charge them to the client who needs them, than to attempt to address that client's needs without expertise or permanently hire an expert when it is unclear whether such services will be needed in the future.²⁴⁸ In addition, by using a temporary specialist, a firm can test whether it should ex-

244 See Berkman, *supra* note 61, at 24.

245 By using temporary attorneys, law firms are able to generate new income without a significant rise in overhead expenses. See Thomas, *supra* note 127, at 29.

One temporary lawyer agency indicates that it has two advertising themes: first, "overworked/overdeadlined"; second, "stay the same size and grow." According to the agency, the firms utilizing its services generally fall within one of these categories. Either the firm has too many deadlines and too little time, and therefore needs extra help for short periods, or the firm is in a slight growth pattern, but is not assured of sufficient continued growth to be able to hire additional full-time personnel. See Goldman Interview, *supra* note 30.

246 See, e.g., Berkman, *supra* note 61, at 24 (non-payment of benefits and overhead results in a 50% savings to employer); Marcotte, *supra* note 69, at 30 (temporary lawyers are cost effective because hiring firms pay no employee benefits or payroll taxes); Jones, *supra* note 41, at 1020 (temporary attorneys are independent contractors and therefore responsible for own benefits, social security, and withholding taxes).

247 Goldschmidt, *Looking Ahead to Benefit Options*, Tex. Law., May 14, 1990, at 8, cols. 3 & 4.

248 It is not surprising that in the wake of the October 1988 stock market crash several New York firms put a freeze on permanent hiring and called upon temporary attorneys as a hedge against economic uncertainty until business improved. See Berkman, *supra* note 61, at 24. Cf. *Legal Temps*, *supra* note 96, at 25, col. 4 (temporary attorneys can be hired for a fraction of the cost that would be incurred by hiring an outside lawyer).

pand into a new field of law practice.²⁴⁹

C. *Perils Inherent in Core/Ring Employment Configurations*

As noted earlier,²⁵⁰ the use of the temporary workers to augment the services of permanent employees is described by theorists as an example of the core/ring configuration of workplace management. Greater production efficiency is achieved by this configuration, not by devoting greater or different resources to the training and support of a single, permanent group of employees (the "stretch theory"), but by creating a tiered work force consisting of both long-term and short-term employees, who play different roles in producing goods or services.²⁵¹

The core/ring configuration holds definite advantages in terms of reducing short-term labor costs, increasing production flexibility, and promptly responding to changes in the market.²⁵² At the same time, however, the utility of this management scheme is hedged by several perils. When groups within a tiered work force are entitled to different benefits, privileges, and job security, there are risks of inter-group jealousy and non-cooperation, accompanied by lack of institutional loyalty and diminished motivation.²⁵³ Tiered systems also run the risk of creating classes of "haves" and "have-nots," with the attendant possibility that certain employees drawn from disfavored classes (e.g., women, racial minorities, and immigrants) will be barred from entry into the most lucrative, prestigious, or otherwise-desirable tiers of employment.²⁵⁴

Whatever the magnitude of these concerns in other employment contexts,²⁵⁵ there is less reason to think that they are so

249 See Weston, *supra* note 179, at 38.

250 See *supra* note 81 and accompanying text.

251 See *supra* notes 81-85 and accompanying text.

252 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 379 (a contingent employment configuration gives an organization "rapid access to a quality talent pool").

253 *But see id.* (the use of contingent employees has not been studied sufficiently to determine the long-term effects of this arrangement on morale and turnover); *id.* at 403 (discussing potential negative impact of contingent hires on retention and recruitment of permanent workers).

254 See *id.* at viii (Some argue that a two-tiered work force may deprive a significant number of workers of the chance to achieve their full potential.); *id.* at 383 (A core/ring configuration could presage the beginning of a division of the American work force into "haves" and "have nots.").

It has similarly been argued that dual tracking may ultimately result in staff attorneys being treated as second class professional citizens. See *Second Path for Non-Partners*, *supra* note 38, at 18; see also Couric, *supra* note 38, at 23.

255 See B. OLMSTEAD & S. SMITH, *supra* note 66, at 375 ("A negative aspect of the

great in the field of law as to bar the use of temporary attorneys.²⁵⁶ No credible facts suggest that any class of attorneys will be forcibly excluded from the ranks of permanent employment and relegated to the potential vicissitudes and insecurity of temporary lawyering. The prospect of such discrimination might legitimately be a concern in other employment sectors. But, the fact that lawyers have the benefit of a professional education, and have relatively easy access to the corridors of power, tend to ensure that even those lawyers drawn from the weakest socio-economic classes have considerably greater bargaining power than the average worker. While that power does not guarantee that some members of the profession may not try to use temporary lawyering as a vehicle for discrimination, it considerably reduces the chances that such discrimination will be successful.²⁵⁷ There is every reason to think that lawyers who believe they are victims of discrimination will readily seek redress in the courts and in legislative and executive branch forums.²⁵⁸

Certain precautions are in order when a firm seeks to avail itself of the advantages of hiring temporary attorneys.²⁵⁹ Salary and benefit disparities between temporary and full-time lawyers cannot be grossly disproportionate to the services performed and the responsibilities assumed by either group.²⁶⁰ Otherwise, the

expanded use of temporary employees is the growing number of involuntary temps—workers who can find no regular employment. This is the segment of the contingent work force that appears to be growing fastest.”).

256 *But see id.* at 383 (“Since the rationale for using contingent workers is to lower labor costs, the result may be permanently lower pay scales and loss of fringe benefits as well as a loss of access to training and knowledge of the industry for many members of the workforce. *This may happen even with highly skilled, independently contracted professionals, such as lawyers.*”(emphasis added)).

257 *Compare* B. HEINTZ & N. MARKHAM-BUGBEE, *supra* note 45, at 37 (arguing that the creation of non-equity partnership positions will not likely be a successful vehicle for relegating women, minorities, or persons of ethnic background to dead-end positions, because court decisions have allowed lawyers to challenge partnership decisions that were perceived as discriminatory).

258 *See, e.g.,* Hishon v. King & Spalding, 467 U.S. 69 (1984) (former law firm associate alleged that sex-based discrimination motivated denial of partnership status). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (female accounting firm partnership candidate alleged sex discrimination by firm). *But see* Madek & O'Brien, *Women Denied Partnerships: From Hishon to Price*, 7 HOFSTRA LABOR L. J. 257, 258 (1990) (noting the “complacency which American men and women display toward the issue of women’s job rights”).

259 *See generally* B. OLMSTEAD & S. SMITH, *supra* note 66, at 397-98 (listing steps for “Orienting Contingent Employees to the Workplace”).

260 *See id.* at 380 (“Inequality breeds devisiveness.”); *id.* at 382 (“[H]aving employees who work side by side, performing the same tasks but with different conditions of work

disadvantaged group (quite correctly) will perceive itself to be unfairly treated and will contribute less productively to the work of the firm. Also, the scheduling courtesies extended to temporary attorneys predictably may be resented, when a firm inflexibly demands long hours of regular employees.²⁶¹ For example, if during an extended period of high client demands, a firm permits a temporary attorney to leave each day at 6:00 p.m., while requiring regular employees to work until midnight, it should come as no surprise that regular employees may be jealous of the temporary lawyer and that relations between these individuals may be strained. Of course, a good manager can avoid these difficulties. If the regular employees are made to feel that they, unlike the temporary attorney, have a permanent stake in the venture, that their input and work is especially valued, and that they will be appropriately rewarded for their sacrifices, either now or in the future, the regular attorneys may appreciate the added support provided by the temporary lawyer, rather than resent the fact that that individual is permitted to leave earlier. As is the case in many contexts, effective communication and good interpersonal relations with regular employees can determine whether a variation from the ordinary terms of employment is an asset or a liability.

In addition to fully explaining the role of temporary lawyers to all co-workers, efforts must also be made to treat temporary lawyers with appropriate professional respect.²⁶² Similarly, care must be exercised both in screening applicants for temporary positions, to ensure that they really prefer less commitment than regular employment demands,²⁶³ and in determining which tasks are suitable for lawyers working on a non-regular basis.²⁶⁴ If at-

and pay scales, can have a very negative effect on morale.”)

261 *See id.* at 380 (“If scheduling flexibility is possible only on a contingent basis, the morale of the firm’s core work force will be eroded.”)

262 Treating temporary lawyers with appropriate deference, in light of their educational attainments and professional standing, is undoubtedly one means of addressing what some authorities believe is the difficult problem of motivating non-regular workers with no long-term stake in the venture. *See id.* at 396 (Contingent workers sometimes see themselves as “merely marking time or putting in their hours.”)

263 *See id.* at 381.

264 *See id.* at 391. The cited authority perceives the potential disadvantages of contingent employment, in terms of diminished benefits, impaired morale, potential discrimination, and the like, as being so great that the only safe course is for such employees to be hired “only in cases where it would be inappropriate or impossible to fill the position or handle the situation using regular employees on reduced or flexible schedules.” *Id.* at 384.

torneys who need regular employment accept temporary work merely because nothing else is available, it is less likely that they will be content in their new positions. The same will undoubtedly be true when temporary attorneys are given inappropriate tasks, are inadequately supervised, or are deprived of the support they need for completing assigned projects.

With the foregoing considerations in mind, the discussion will now turn to the three principal grounds on which temporary legal services have been challenged: conflict of interest, improper fee splitting, and breach of confidentiality.

D. Conflicts of Interest

The term "conflict of interest" covers exceptionally broad territory and can refer to any of a multitude of sins. It encompasses at least four distinct categories of cases—those in which the interests of a client potentially conflict with the interests of: (1) a past client;²⁶⁵ (2) a nonclient;²⁶⁶ (3) a present client;²⁶⁷ or (4) the attorney.²⁶⁸ It is difficult to generalize about the policies underlying these standards. At a minimum, the law seeks, in each of these areas, to ensure that a lawyer will exercise independent professional judgment on behalf of each client,²⁶⁹ safeguard confidences,²⁷⁰ and provide zealous representation within the bounds of the law.²⁷¹

Although some authorities have asserted that a temporary attorney placement agency must establish a sophisticated mechanism for screening conflicts of interest before assigning any participating lawyer to an employer-firm,²⁷² others have taken a contrary position, admonishing law firms not to disclose even the subject matter of the desired temporary services to the placement agency.²⁷³ The following discussion makes it clear that often the applicable conflicts inquiry is so fact-specific that it is impossible for an agency to do little more than identify the most obvious conflicts. In the end, the attorneys who provide the legal services

265 See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989).

266 See generally *id.* at Rules 1.7(b) & 1.8(f).

267 See generally *id.*

268 See generally *id.* at Rules 1.7(b) & 1.8.

269 See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980).

270 See generally *id.* at Canon 4.

271 See generally *id.* at Canon 7.

272 See Florida Op. 88-12 (1988), *supra* note 178, at 2.

273 See NYC Bar Op. 1988-3 (1988), *supra* note 178, at 5.

must bear the primary burden for recognizing and avoiding conflicts.²⁷⁴

1. Former Clients

(a) *Movement Between Firms Under the Model Rules and Imputed Disqualification.*—The most serious ethical problem presented by the use of temporary lawyers falls into the category of former-client conflicts of interest. Within this category, it is generally agreed that, absent consent by a prior client, an attorney is barred from undertaking representation of a new client if that representation is “substantially related” and “materially adverse” to the representation of the prior client.²⁷⁵ This rule takes on special significance in the context of temporary lawyering because of a related rule concerning the doctrine of “imputed disqualification.” Under that doctrine, a lawyer “associated” with a firm is deemed to be disqualified from representing a client if any attorney in the firm would be disqualified by reason of conflict of interest.²⁷⁶ With limited exceptions not relevant here,²⁷⁷ a firm is treated as a single attorney; if any lawyer is disqualified, all are disqualified.²⁷⁸ Imputed disqualification is based upon the reasonable assumption that attorneys within a firm discuss the affairs of clients and presumably have access to confidential client information concerning even those clients whom they do not personally represent.²⁷⁹

When an attorney moves from one firm to another, a question arises as to the extent of the conflicts of interest that the attorney brings to the new firm.²⁸⁰ When the attorney personally represented the former client in question, there is little doubt that both the attorney and the firm to which the attorney has

274 Cf. Florida Op. 88-12 (1988), *supra* note 178, at 2 (The primary burden must be borne by the participating lawyer and the placement agency.).

275 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1989).

276 See *id.* at Rule 1.10(a).

277 For example, the usual rules of imputed disqualification do not apply to certain conflicts involving former government attorneys, judges, law clerks, and neutral arbitrators. See notes 309-12 *infra* and accompanying text.

278 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989).

279 See *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories*, 607 F.2d 186, 196 (7th Cir. 1979) (en banc) (Fairchild, C.J.) (“It is reasonable to presume that members of a law firm freely share their client’s confidences with one another. That presumption of shared confidences underlies, either implicitly or explicitly, many of the cases requiring the disqualification of counsel.”).

280 See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989) (discussing lawyers moving between firms).

moved are disqualified from participating in any cases "substantially related" and "materially adverse" to the representation of the prior client, absent consent.²⁸¹ The more difficult question is whether the attorney and the new firm are disqualified from providing representation in cases which are "substantially related" and "materially adverse" to the representation of prior clients who were previously served not by the moving attorney, but by the attorney's colleagues while the attorney was associated with the former firm. There is a substantial question as to whether imputed disqualification follows a departing attorney to the attorney's new professional home and, if so, whether the imputed confidences on which that disqualification is based will be re-imputed to the attorney's new firm so as to bar representation of new clients by other attorneys in the new firm.²⁸² If both of these questions were answered in the affirmative, temporary attorneys—persons who make their living by moving from firm to firm as the need arises—would be regarded as ethical "Typhoid Marys."²⁸³ At each stop, the temporary attorney would infect a firm with a whole host of conflicts problems, and leave with even more problems than she arrived with. Soon the temporary attorney would be regarded as a very unwelcome visitor who causes employers to be disqualified from a wide range of cases.

The Model Rules of Professional Conduct take a sensible position with respect to conflicts of interest involving movement between firms. The former-client conflict of interest rule is intended in large part to protect client confidences,²⁸⁴ and the Model Rules' standard is therefore articulated in terms of access to confidential information.²⁸⁵ The Rules provide that the departing at-

281 See G. HAZARD & W. HODES, *supra* note 58, at 195-96 ("Plainly, a lawyer who has formerly worked for a client X, whether on her own, as a member of a firm, or as a law temp for a firm, cannot go to a different firm as a law temp and oppose client X in a related matter."). See generally MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9(a), 1.10(a) (1989).

282 See generally *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128-30 (5th Cir. 1971) (discussing the double imputation issue).

283 G. HAZARD & W. HODES, *supra* note 58, at 191 (using such term).

284 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comments (1989). Cf. *Silver Chrysler Plymouth v. Chrysler Motors Corp.* 518 F.2d 751, 754 (2d Cir. 1975) (The purpose of disqualification based on former representation is to "enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.").

285 "When they were originally promulgated in 1983, the Model Rules treated all problems of imputed disqualification in Rule 1.10 In 1989, the ABA revised Model Rules 1.9 and 1.10; mainly by moving Rule 1.10(b)—which dealt with a lawyer's new

torney and the firm to which the attorney moves are disqualified only in those cases where the attorney obtained "actual knowledge of information" about the affairs of the former client.²⁸⁶ If the proposed representation is "substantially related" and "materially adverse" to the representation of the former client, and the attorney in question gained knowledge of that client's affairs, by serving the former client or otherwise, then, absent consent both the attorney and the new firm are disqualified. Thus, if the attorney changing firms never learned of the affairs of the former client, then neither the attorney nor the firm to which the attorney moves is disqualified.²⁸⁷ This is a sound position, for unless the departing attorney gained access to confidential client information, there is no chance that the confidences of the former client will be breached.

The Model Rules' position with respect to former-client conflicts of interest and movement between firms minimizes the risk that a temporary attorney, or the employers of that attorney, will be subject to disqualification based upon the temporary attorney's prior work for other employers. The temporary attorney, and the firms with which the temporary attorney subsequently becomes associated, will be disqualified from representing clients whose interests are "substantially related" and "materially adverse" to the representation of those former clients the temporary attorney served personally (absent effective consent by the prior client).²⁸⁸ But, neither the temporary attorney, nor that attorney's subsequent employers, will be disqualified because a new client's interests are "substantially related" and "materially adverse" to those of a client represented by other attorneys in a firm with

firm—into 1.9, and changing its focus. As re-aligned and reworded, new Rule 1.9(b) now focuses on the *individual lawyer* who has moved to a new firm; focus on that lawyer's new *firm* remains in Rule 1.10" G. HAZARD & W. HODES, *supra* note 58, at 188. "The revision was perhaps unwise, for the new text loses much in familiarity, while gaining very little in overall clarity and virtually nothing of substance." *Id.* at 174.1. As a result of the described changes, there may be a discrepancy between the current numbering of the Model Rules and references to substantively equivalent provisions in state codes adopted prior to the 1989 amendments or antecedent ethics opinions or court decisions.

²⁸⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) and comment (1989).

²⁸⁷ See *id.*

²⁸⁸ Cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 3 (1988) ("[U]nder Rule 1.9, a temporary lawyer who worked on a matter for a client of one firm could not thereafter work for a client of another firm on the same or substantially related matter in which that client's interests are materially adverse to the interests of the client of the first firm (in the absence of consent of the former client and subject to the other conditions stated in the Rule).").

which the temporary attorney was previously associated—unless the temporary attorney had in fact acquired relevant confidential information about the former client's affairs.

(b) *Avoiding Actual Knowledge of Confidential Information.*—In states adhering to the Model Rules' position, it is preferable for conflict of interest purposes that temporary attorneys not become broadly involved in the affairs of the firms for which they work.²⁸⁹ Whether an attorney acquires confidential information about clients whom the attorney has not personally served is generally a question of fact, and circumstantial evidence and the reasonable inferences drawn therefrom typically aid the resolution of this question.²⁹⁰ Where the evidence shows that a temporary attorney worked exclusively on a particular matter, dealt with a limited number of persons in the firm, was not included in general discussions of firm business, and did not have access to the files of other firm clients, it will be difficult to conclude that the attorney gained actual information about the affairs of clients not personally served during temporary work for the firm.²⁹¹ To that extent, the temporary attorney and the attorney's subsequent employers will less readily be found to have an impermissible conflict of interest. It may be difficult, however, to make a convincing showing of limited involvement in firm affairs in the case of work for a sole practitioner, for such employment typically takes place in an intimate office environment.²⁹² Moreover, while limiting a temporary lawyer's involvement in the larger affairs of a law firm may minimize conflict of interest problems, it may give rise to other difficulties. Attorneys routinely excluded from professional discussions, or broadly barred from access to certain persons or materials, may find work considerably less rewarding than if they were treated as an equal. Many lawyers might be unwilling to ac-

289 See New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (To minimize the risk of imputed disqualification, firms employing temporary lawyers should shield such lawyers from all information relating to clients for whom the temporary does no work.).

290 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989).

291 See *id.* (Where a lawyer has "access to the files of only a limited number of clients and participate[s] in discussion of the affairs of no other clients . . . it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those [sic] of other clients.").

292 Cf. Berkman, *supra* note 61, at 24 ("[S]olo practitioners, because of the typically intimate office environment, should raise questions about possible conflicts both when hiring a temporary lawyer and when someone they have used goes on to work for opposing counsel.").

cept an employment arrangement necessitating that they be "out of the loop." And those willing to abide by such terms may conclude that temporary lawyering does indeed entail second class professional status. Of course, it is risky to indulge in generalizations. Some persons undoubtedly enjoy the opportunity to work in relative isolation from others, and much will depend upon the individuals involved. Still, it would be unwise to ignore the fact that quarantining temporary attorneys from the life of the law firm carries potential disadvantages.

(c) *Peripheral Involvement*.—It is possible that a temporary lawyer's engagement may be so limited that the attorney and the attorney's subsequent employers will not acquire any new conflict of interest "baggage" based upon that work.²⁹³ When an attorney's assignment is limited to research on a technical point of law or a procedural issue under circumstances in which that work is unrelated to specific facts, courts have held that it is possible for the attorney to rebut the presumption that an attorney acquires confidential information about the client on whose behalf work is undertaken.²⁹⁴ In addressing this point, although not focusing specifically on temporary lawyers, Professors Hazard and Hodes state:

Rule 1.9 [the general former-client conflict of interest rule] (again in common with the other conflict of interest rules) operates only if the lawyer has, or has had, a client-lawyer relationship with each affected client, or has been in a position to acquire confidential information about them. If a lawyer was only tangentially involved in the prior matter, or merely engaged in perfunctory discussions about a case in general or even hypothetical terms, it could be said that no professional relationship was actually established. If so, the lawyer has not "represented" anybody in the matter, and would be free to represent someone else, even without the consent of the first individual. Similarly, a partner or associate in a firm who has *no* knowledge of a particular client's affairs

293 See *id.* (Professor Monroe Freedman states "that if a lateral associate, or in this case a temporary lawyer, had peripheral involvement in a case, there may not be sufficient access [to client information] to warrant a firm's disqualification.").

294 See *Silver Chrysler Plymouth v. Chrysler Motors Corp.* 518 F.2d 751, 756 (2nd Cir. 1975) ("[T]here is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions.")

has not "represented" that client [W]hen he leaves the firm he will not be under the ban of Rule 1.9.²⁹⁵

These rules should apply to temporary lawyers just as readily as they apply to attorneys who seek to establish more lasting employment upon changing firms.

(d) *Appearances of Impropriety under the Model Code.*—Not all states adhere to the Model Rules' position with respect to former-client conflicts of interest in the context of movement between firms.²⁹⁶ In some jurisdictions, the issue has been framed as whether there is an "appearance of impropriety."²⁹⁷ Where that standard, which was embraced by the now-superseded Model Code of Professional Responsibility,²⁹⁸ is still retained, temporary attorneys may encounter greater conflicts difficulties than must be faced under the Model Rules.²⁹⁹ This is especially true when, over a period of time, a lawyer has done stints with several of the major firms in a city.³⁰⁰ It may reasonably be anticipated that in view of the increasing use of disqualification motions,³⁰¹ a temporary lawyer and the lawyer's employer may be charged with a conflict of interest in cases where there is no risk that the confidences of a former client will be disclosed, but only an asserted appearance of impropriety. For example, a temporary

295 G. HAZARD & W. HODES, *supra* note 58, at 176.2 (emphasis and parentheses in original).

296 See Law. Man. on Prof. Conduct (ABA/BNA) 51:202 (Supp. 1987) (discussing deviations from Model Rule 1.9).

297 See *id.* at 51:203 ("Some courts have relied on the Model Code's proscription against the appearance of impropriety.")

298 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

299 A recent ABA ethics opinion states: "The Code does not address specifically representation of a client with interests adverse to a former client, but the standards relating to confidentiality and disqualification rules applied by the courts ordinarily would prohibit representation of the second client under the Code in the same circumstances as under the Rules." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988). To the extent that the foregoing is read to mean that a conflict of interest exists under the Code where an attorney seeks to represent a client in a matter "substantially related" and "materially adverse" to a former client, it is unobjectionable. It is likely, however, that the Code's appearance of impropriety standard would also require disqualification in other cases not falling within those precisely defined standards. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989).

300 See Berkman, *supra* note 61, at 24 ("Conflict of interest could become a hot issue if a new class of temporary lawyer develops—one filled with lawyers who over time have done stints with many of the major firms in a city.")

301 See *Manning v. Waring*, 849 F.2d 222, 224 (6th Cir. 1988) ("[A] motion to vicariously disqualify the law firm of an attorney who is himself disqualified . . . is becoming an increasingly popular litigation technique.")

lawyer's former employer may allege that there is an appearance of impropriety where the temporary accepts a subsequent assignment from a firm which is serving as opposing counsel in a case wholly unrelated to the work which the temporary attorney performed for the former employer.³⁰² The appearance of impropriety standard is so vague³⁰³ that such charges may be given credence, even though there is no risk of a breach of client confidences.³⁰⁴ If that is the case, firms may be unwilling to hire lawyers on a temporary basis, since the risk of disqualification carries with it serious consequences for both law firm and client, including delay, expense, and professional embarrassment.³⁰⁵ The answer to this dilemma is not to discourage the use of temporary lawyers. The answer is to abandon the appearance of impropriety standard in favor of a different rule which, like the Model Rules, realistically seeks to balance competing interests, including those considerations³⁰⁶ favoring ethical accommodation of temporary lawyers.

(e) *Screening of Disqualified Temporary Attorneys "Associated With" a Firm.*—Another alternative, which is potentially applicable regardless of whether a jurisdiction adheres to the Model Rules' "actual knowledge of information" standard or to the Model Code's "appearance of impropriety" view, is to permit "screening" of temporary attorneys. "Screening" is a method whereby an attorney in no way participates in a particular matter as a lawyer or adviser, supplies and receives no material information, and derives no direct financial benefit from the representation.³⁰⁷ The

302 See, e.g., Berkman, *supra* note 61, at 24 (Deborah Trotter, a San Francisco lawyer working as a temporary for a sole practitioner, mentioned that her next assignment was with a major firm. Her temporary boss replied that the firm happened to be opposing counsel in a case unrelated to her work. He immediately threatened to disqualify the firm, according to Trotter. She turned down the assignment.).

303 See C. WOLFRAM, *supra* note 196 at 319-22 (criticizing the appearance of impropriety standard and noting that it has been denounced by other commentators).

304 Cf. Berkman, *supra* note 61, at 24 ("According to Professor Monroe Freedman of Hofstra University School of Law, the simple appearance of conflict of interest may be cause for concern. 'You clearly have a conflict of interest situation,' he explains, when a temporary lawyer moves on to a firm representing his old firm's opponent.").

305 See G. HAZARD & W. HODES, *supra* note 58, at 177 (detailing the consequences).

306 See *supra* notes 192-249 and accompanying text.

307 See TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment 3, reprinted in TEX. GOV'T CODE ANN. art. 10, sec. 9 (Vernon 1990) (discussing screening); Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399, 410-11 (1990) (discussing requirements for effective screening).

screening mechanism—sometimes referred to as the erection of a “Chinese wall”³⁰⁸—as been approved in many jurisdictions as a reasonable means of avoiding disqualification of an entire firm based upon a conflict of one of its attorneys. The cases in which screening has been permitted have typically involved former government attorneys,³⁰⁹ judges,³¹⁰ law clerks,³¹¹ and neutral arbitrators,³¹² although there is some precedent which does not fall within these categories.³¹³ In general, these decisions have recognized that a prior client’s interest in continued confidentiality and loyalty must sometimes be protected by a means other than the stringent disqualification rule. For example, in the former government attorney context, it is widely agreed that screening is appropriate, for any other rule would impose “too severe a deterrent against entering public service.”³¹⁴ That is, adherence to the usual standards of imputed disqualification could disqualify a former government attorney’s firm from a much broader circle of cases than is typically true with respect to non-governmental representation, since the actions of government frequently touch the lives of a great number of individuals.³¹⁵ As discussed earlier,³¹⁶ there are important interests to be advanced by temporary lawyering, including enhanced institutional flexibility, reconciliation of the supply and demand for legal services, and accommodation of the needs of individuals and firms. If this is the case,

308 See C. WOLFRAM, *supra* note 196, at 401.

309 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1989). See also C. WOLFRAM, *supra* note 196, at 401-02 (“The tentative judicial applause that has greeted screening has been confined to a small handful of cases dealing with the arguably different conflict of interest problems of former government lawyers.”).

310 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.12(c) (1989).

311 See *id.*

312 See *id.*

313 See, e.g., Manning v. Waring, 849 F.2d 222, 226 (6th Cir. 1988); Nemours Found. v. Gilbane Bldg. Co., 632 F. Supp. 418, 428 (D. Del. 1986); NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332, 334-35 (D. Mass. 1983); Lemaire v. Texaco, Inc., 496 F. Supp. 1308, 1310-11 (E.D. Tex. 1980). See generally Moser, *supra* note 307, at 399 (arguing in favor of screening as “a more rational approach” to imputed disqualification); *id.* at 406-10 (discussing the “growing number” of courts relying upon Chinese Walls in cases involving lawyers and the use of Chinese Walls in non-lawyer professional contexts).

314 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 comment (1989).

315 See G. HAZARD & W. HODES, *supra* note 58, at 210 (“Since government lawyers become involved in so many ‘matters’ involving so many different citizens, barring the entire firm of a former government lawyer would make such a lawyer virtually unemployable in the private sector in areas of his or her technical competence. This in turn would deter lawyers from entering government in the first place.”).

316 See *supra* notes 192-249 and accompanying text.

there is a reasonable foundation for the argument that screening should be viewed as a permissible avenue for avoiding conflicts of interest in the context of temporary legal employment. This position has found support in the writings of respected legal ethics commentators³¹⁷ and in the language of a recent American Bar Association ethics opinion.³¹⁸ In discussing the issue, the ABA Standing Committee on Ethics and Professional Responsibility wrote:

The basic question [with respect to conflicts of interest] is under what circumstances a temporary lawyer should be treated as "associated in a firm" or "associated with a firm" [as those terms are used in Model Rule 1.10]

. . . .
. . . [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 [and therefore the firm will be subject to imputed disqualification], 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 [and the firm should not be subject to imputed disqualification under Rule 1.10(a)].³¹⁹ Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two inde-

317 See G. HAZARD & W. HODES, *supra* note 58, at 196 ("This resolution seems sound, and takes proper account of the twin principles involved in imputed disqualification—guarding against leaked confidences and guarding against a disloyal switching of sides.").

318 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988).

319 Model Rule 1.10(a) speaks in terms of a lawyer being "associated in" a firm. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1989) (emphasis added). To the extent that Formal Opinion 88-356—which was promulgated prior to the 1989 amendments to the Model Rules (see *supra* note 285)—talks in terms of a lawyer being "associated with" a firm, the opinion focuses on the language of subsections 1.10(b) (now Model Rule 1.09(b)) and 1.10(c) (now 1.10(b)) of the former Rule. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1988) (emphasis added). However, the ABA opinion recognized that there was "no substantive difference between the terms 'in' and 'with' in the context of the Rule." (ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 4 n.5 (1988)). Therefore, it is appropriate to interpret the opinion as also dealing with imputed disqualification under Rule 1.10(a).

pendent 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 Rule 1.10 [and the firm should not be subject to imputed disqualification under Rule 1.10(a)]. 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.

As the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms becomes more remote, it becomes more appropriate not to apply Rule 1.10 to disqualify a firm from representation of its clients or to prohibit the employment of the temporary lawyer. Whether Rule 1.10 requires imputed disqualification must be determined case by case on the basis of all relevant facts and circumstances, unless disqualification is clear under the Rules.³²⁰

The issue of screening is somewhat different from the question of whether an individual attorney has gained actual information about the affairs of a client not personally served. "Screening," as the term is normally employed, refers to mechanisms within a firm designed to ensure that confidential knowledge possessed by an individual attorney has not been, and will not be, shared with, or used for the benefit of, other attorneys in the firm who represent a client whom the individual attorney could not ethically represent. In contrast, whether an attorney has acquired actual information about the affairs of another lawyer's client relates not to the question of whether representation may be undertaken while the attorneys are members of the same firm, but whether representation may be undertaken, either by the departing attorney or by the remaining attorneys, once the relationship between the attorneys has been severed. Undoubtedly, there may be cases where an individual attorney within a firm is

320 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 4-7 (1988) (footnote added). See also *id.* at 4 ("The question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes of the Rule."); New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (if a temporary lawyer is deemed to be "associated with" the law firm, then under Rule 1.10 the firm may be restricted or prohibited from representing those clients who the temporary lawyer is restricted or prohibited from representing).

so effectively quarantined that the attorney's colleagues are effectively screened from any conflict affecting the individual attorney, and the individual attorney gains no confidential information about the clients of other attorneys in the firm. But, whether a particular attorney is a "source" of confidential information is a separate question from whether that attorney is positioned to "receive" confidences. These questions must be treated separately, even though the factors bearing upon these inquiries may overlap.³²¹

2. Interests of Third Persons

A second potential conflict of interest faced by temporary attorneys involves the exercise of influence by third persons. It is generally agreed that a lawyer may not enter into any arrangement in which third persons are permitted to interfere with the lawyer's exercise of independent professional judgment on behalf of a client.³²² Thus, it is uniformly recognized that a lawyer's fee may not be paid secretly by a third person.³²³ Likewise, the di-

321 Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989) (In discussing imputed disqualification, the commentary states: "[I]t is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.").

322 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21 (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989). Model Rule 1.7, the general conflict of interest rule, provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

323 Model Rule 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of profes-

rectors of a legal services organization normally may not meddle in the handling of particular cases by organization staff attorneys if such cases fall within broad, previously established policy guidelines.³²⁴

In the context of temporary lawyering, there is potential for a third-person conflict of interest because a placement agency often plays a roll in facilitating the provision of legal services. This potential is all the more substantial because the temporary lawyer may find it essential to remain in the good graces of the agency in order to obtain repeated placements.³²⁵ If the agency is permitted to influence the nature or extent of client representation, then a lawyer acts unethically by participating in the arrangement.

Thus far, there is little indication that placement agencies have any inclination to interfere in the work performed by the attorneys they place in temporary positions. While the issue has been addressed by various ethics committees³²⁶ and courts,³²⁷ one is left with a sense that the problem is largely theoretical. This may be due in part to the fact that most agencies are headed by lawyers³²⁸—persons cognizant of the applicable ethical strictures—who are eager to win acceptance of temporary lawyering and are themselves subject to professional discipline. In the usual case,³²⁹ once an employer has hired a temporary attorney, the placement agency has little contact with either the employer or the attorney, except in relation to the transfer of monies or

sional judgment or with the client-lawyer relationship; and
 (3) information relating to representation of a client is protected as required by Rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1989). The reason for the rule is that "if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-22 (1984).

324 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974).

325 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988) (recognizing a "lawyer's need to maintain the goodwill of the placement agency"); NYC Bar Op. 1988-3 (1988), *supra* note 178, at 3 ("While the Agency may not as a technical matter be the participating attorney's employer, it is nonetheless in a position to bring pressure to bear on them by refusing to continue listing their services if they do not accede to its demands.");

326 See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 13-14 (1988); New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (basing its analysis on the assumption that the placement agency has no ability to influence the manner in which the temporary attorney performs work for a firm).

327 See *Oliver v. Kentucky Bar Ass'n*, 779 S.W.2d 212 (Ky. 1989).

328 See *supra* note 119 and accompanying text.

329 See *supra* notes 133-34 and accompanying text.

for purposes of ascertaining whether the placement has resulted in any problems which the agency can resolve.

It would be improper for an agency to attempt to induce an attorney to prolong an assignment, so that both the attorney and the agency could earn greater fees, or to seek termination of an assignment, so that the attorney could be directed to a more lucrative placement.³³⁰ As of yet, there are no indications that such problems have occurred in the nascent enterprise of temporary lawyering.

3. Multiple Clients

Multiple-client conflicts of interest are often not a problem because many temporary lawyers work for only one employer at a time and are assigned to a single case by that employer. However, when temporary attorneys are simultaneously engaged by different firms, or work for a variety of clients while employed by one firm, multiple-client conflicts of interest may arise.³³¹ In the latter case, such conflicts should be easy to identify, and the temporary attorney will be subject to the same standards that apply to all attorneys in the firm. Under the general conflict of interest³³² and imputed disqualification³³³ provisions of the Model Rules, the temporary attorney may not, absent effective client consent, represent a client whose interests are "directly adverse" to the interests of any other client of any attorney in the firm.³³⁴ Under the parallel provisions in the Model Code,³³⁵ the outcome is essentially indistinguishable.³³⁶

330 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988) (The agreement between a temporary attorney and placement agency "should make clear in explicit terms that the agency will not exercise 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.").

331 See *id.* at 3 (discussing multiple client conflicts of interest arising from simultaneous work for different firms).

332 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989).

333 See *id.* at Rule 1.10.

334 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 3 (1988) ("[A] temporary lawyer could not, under Rule 1.7, work simultaneously on matters for clients of different firms if the representation of each were directly adverse to the other (in the absence of client consent and subject to other conditions set forth in the Rule).").

335 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

336 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 3 (1988) ("[A] temporary lawyer could not, under DR 5-105, work simultaneously for clients of different firms with differing interests except as permitted by DR 5-105(C)."); *id.* at 7 ("[T]he purpose of DR 5-105(D), the imputed disqualification provision of the Code,

These same ethical constraints apply to multiple-client conflicts of interest arising from a temporary attorney's simultaneous work for multiple firms.³³⁷ However, such conflicts may be more difficult to avoid. Only by being apprised of the full range of representation of each firm can a temporary attorney serving multiple firms ensure that no attorney in any of the firms is representing interests directly adverse to those represented by any other attorney in the firms. If such a conflict exists and the temporary attorney is treated as "associated" with the firms for purposes of imputed disqualification,³³⁸ then the temporary attorney, and every other attorney in the firms in question, is subject to disqualification, absent client consent or some provision for screening, in connection with former client conflicts of interest.³³⁹ Because disqualification may impose a high cost on both law firms and clients,³⁴⁰ a temporary attorney is well advised to avoid simultaneous employment by multiple firms, unless there is no significant chance of a multiple-client conflict of interest.

4. Interests of the Temporary Lawyer

A fourth area of attorney conflicts of interest involves conflicts between the interests of the client and the interests of the attorney. These conflicts may take a variety of forms. They may arise, for example, from the clash between attorney's pre-existing economic, familial, or other personal interests and the objectives of the client,³⁴¹ from the attorney's legal or moral obligations to

coincides with the purpose of Rule 1.10. The Committee is of the opinion that the foregoing functional analysis applies equally under DR 5-105(D).").

337 Cf. *id.* at 3 (discussing simultaneous work for different firms).

338 See *supra* note 320 and accompanying text. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7. (1988):

The distinction drawn between when a temporary lawyer is or is not associated with a firm is only a guideline to the ultimate determination and not a set rule. For example, if a temporary lawyer was directly involved in work on a matter for a client of a firm and had knowledge of material information relating to the representation of that client, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client of the first firm to engage the temporary lawyer during the pendency of the matter, even for work on other matters.

339 See *supra* notes 307-20.

340 See *supra* note 305 and accompanying text.

341 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1989) ("lawyer's own interests"); AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 80 (1984) ("A lawyer may not allow his or her professional judgment on behalf of a client to be affected adversely by the lawyer's own financial, property, or other

non-clients which threaten to impede the attorney's zealous representation of the client,³⁴² or from the fact that the attorney and client plan to jointly participate in a business transaction in which the interests of the two are potentially adverse.³⁴³ Usually problems within this category form a substantial portion of the ethics of conflict of interest. Nevertheless, there is little reason to think that the rules governing attorney-based conflicts will play a significant role in the development of temporary lawyering.

While temporary attorneys undoubtedly must guard against such conflicts while on assignment with a firm, the application of ethical standards to these cases would appear to be straightforward. For example, if a temporary lawyer has a substantial financial interest which threatens to adversely affect the attorney's ability to represent a client of the employer-firm, the attorney must decline the assignment—just as an attorney regularly employed by the firm would have to forego the representation under similar circumstances. As is the case with former-client conflicts of interest and multiple-client conflicts of interests, the difficulties with respect to attorney-based conflicts appear to relate primarily to the application of the imputed disqualification rule. With limited exceptions,³⁴⁴ attorney-based conflicts normally may be imputed to other attorneys in a firm. If, as discussed earlier,³⁴⁵ a temporary attorney is "associated" with a firm for purposes of conflict

personal interests.”).

342 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1989) (“responsibilities to . . . a third person”).

343 See *id.* at Rule 1.8. Model Rule 1.8(a) provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

344 Model Rule 1.8 is titled “Conflict of Interest: Prohibited Transactions.” These transactions may reasonably be described as attorney-based conflicts, as distinguished from conflicts involving multiple clients, former clients, or third parties. Not all of the “prohibited transactions” addressed by Model Rule 1.8 are bases for imputed disqualification. Model Rule 1.10(a) provides only that “[w]hile 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.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1989).

345 See *supra* note 276 and accompanying text.

of interest, then the temporary attorney must not only avoid any conflict between the attorney's interests and those of the client the attorney serves, but also any conflict with the interests of clients served by other attorneys in the firm. If the temporary attorney cannot serve a client, it will generally be the case that other members of the firm cannot serve that client.

Firms can deal with these difficulties by carefully determining at the outset of the temporary employment relationship whether the interests of the temporary lawyer clash with the interests of firm clients. An alternative course is to attempt to isolate the temporary attorney from the work of the firm in which the attorney is not personally involved. If courts accept the screening argument discussed earlier in connection with former-client conflicts of interest,³⁴⁶ then it is possible to argue that a screened temporary attorney is not "associated" with the firm for the purposes of imputed disqualification. Thus far, the opinions discussing the ethical permissibility of temporary legal services have not focused on attorney-based conflicts as a matter of special concern.

E. Confidentiality

It is somewhat surprising that confidentiality has been singled out by various ethics opinions³⁴⁷ and writers³⁴⁸ as a potential area of concern with respect to the employment of temporary lawyers. The rules governing client confidences operate essentially the same in this context as in others. There is no reason to think that temporary lawyers are more likely to breach their obligation of confidentiality than regularly employed attorneys.

Absent special circumstances, a temporary lawyer is obliged not to reveal confidential information obtained while working for a client³⁴⁹ or obtained about other firm clients during the attorney's employment as a temporary lawyer.³⁵⁰ Moreover, under the Model Rules,³⁵¹ although not under the Model

346 See *supra* notes 307-321 and accompanying text.

347 See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7-9 (1988).

348 See, e.g., *supra* note 183.

349 See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7-8 (1988). See also Florida Op. 88-12 (1988), *supra* note 178, at 2 (A temporary lawyer is ethically obligated to preserve in confidence any information obtained in the course of representation.).

350 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 8 (1988) (rule stated).

351 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1989) (The application of

Code,³⁵² an attorney is prohibited from revealing information "even if the lawyer's knowledge of the information did not arise from the representation or through the firm and even if knowledge was acquired before the lawyer-client relationship existed."³⁵³ To the extent that this additional obligation under the Rules is significant (which, at the least, is difficult to predict in the abstract), the question remains whether that obligation is imposed upon a temporary attorney with respect to all clients of an employer-firm or only with respect to the clients personally served by the temporary attorney. Quite sensibly, the ABA ethics committee has taken a position congruent with its approach to imputed disqualification and has concluded that the answer "depends upon the nature of the relationship between the temporary lawyer and the firm."³⁵⁴ Formal Opinion 88-356 states:

[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 ordinarily would be deemed to be "associated with" the firm as to all other clients of the firm, unless through accurate records or otherwise, it can be demonstrated that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access cannot be demonstrated, the temporary lawyer in that situation must not disclose information relating to the representation of persons known to the lawyer to be firm clients regardless of the source of the information.

Under other circumstances, however, the relationship of the firm with the temporary lawyer is more like the relationship between a firm and a totally independent lawyer. This ordinarily is the case where the temporary lawyer has been screened from access to information relating to the representation of firm clients for whom the temporary lawyer is not working, whether the temporary lawyer is working in the firm

Rule 1.6 does not depend upon the source of the information relating to the representation of a client.).

352 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) (DR 4-101 protects only information subject to the attorney-client privilege and information "gained in the professional relationship" which would be embarrassing or detrimental to the client or that the client has asked be held inviolate, not information gained outside the attorney client relationship).

353 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 8 (1988).

354 *Id.*

office or not. In that situation, the temporary lawyer's obligations under Rule 1.6 are, in the Committee's opinion, limited to not revealing (1) information relating to the representation of any client for whom the temporary lawyer is working, and (2) information relating to the representation of other firm clients only to the extent that the temporary lawyer in fact obtains the information as a result of working with the firm.³⁵⁵

A similar approach to the issue has been taken by the New Jersey ethics committee³⁵⁶ and the Kentucky Supreme Court.³⁵⁷

F. *Impermissible Fee Splitting*

On more than one occasion, temporary lawyering has been attacked on the ground that it involves an impermissible splitting of fees.³⁵⁸ To intelligently address these charges, one must recognize that there are two different sets of fee splitting rules and that these standards are animated by different considerations. The first set of rules, the "attorney fee splitting rules," governs the sharing of fees with attorneys outside of one's firm, and is arguably relevant to those arrangements pursuant to which an employer-firm compensates a temporary attorney for providing legal services. The second set of fee splitting rules, the "nonlawyer fee splitting rules," prohibits the sharing of fees with nonlawyers, and potentially impacts the compensation of placement agencies for channeling attorneys to temporary positions.

355 *Id.*

356 See New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (Where a temporary attorney has access to information relating to the representation of clients other than the matters on which the attorney is working, the temporary attorney must not disclose information relating to the representation of persons known to be firm clients, regardless of the source of the information. Where, however, the temporary attorney has been screened from access to information relating to firm clients for whom the temporary attorney is not working, different rules apply and disclosure is prohibited only where the information relates to a firm client served by the temporary attorney or where the information was obtained as a result of working for the firm.).

357 See *Oliver v. Board of Governors, Ky. Bar Ass'n*, 779 S.W.2d 212, 219-20 (Ky. 1989) (extensively quoting with approval ABA Formal Op. 88-356).

358 See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 9-11 (1988); Florida Op. 88-12 (1988), *supra* note 178, at 3 (issue discussed); New Jersey Informal Op. 632 (1989), *supra* note 178, at 394.

1. Fee Splitting Among Lawyers and the Necessity of Obtaining a Client's Consent to Employment of a Temporary Attorney

Under both the Model Code³⁵⁹ and the Model Rules,³⁶⁰ fee splitting with an outside lawyer is permissible only where the client consents to the outside lawyer's involvement in the case and the total fee is reasonable. In addition, the Model Code requires that any such division be in proportion to the services performed and the responsibility assumed.³⁶¹ This last requirement has been considerably liberalized by the Model Rules,³⁶² which provide that fee splitting is also permissible in any instance where the client, even without knowledge of the relevant percentages,³⁶³ consents in writing to a division of fees and each attorney assumes joint responsibility for the representation.³⁶⁴

In the context of temporary lawyering, the significance of the attorney fee splitting rules lies not in the fact that they impose a reasonable fee requirement. Few would contend that, under any circumstances, an attorney may charge an unreasonable fee. Nor does their significance lie in the rules' possible imposition of a proportionality stricture. In the usual case, a temporary attorney is paid an hourly salary and there should be little difficulty establishing that the amount of that payment is proportional to the services rendered. The import of the attorney fee splitting rules is that, if applicable to the employment of temporary lawyers, they require the disclosure of such arrangements to clients and the consent of those clients.

It is not difficult to imagine that, for any of a variety of reasons, a firm may not want to disclose the fact that it is employing a temporary lawyer to work on a client's case. Where the temporary attorney's term of employment will be brief, but will involve services benefiting multiple clients, a firm simply may not want to be troubled with securing informed consent from each of the affected clients. A firm might also not want to reveal to clients that it is presently overburdened and that it has been forced to employ temporary legal talent, or that the recent defection of several attorneys has left the firm seriously short staffed, or that

359 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(1), (3) (1980).

360 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(2), (3) (1989).

361 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(2) (1980).

362 See G. HAZARD & W. HODES, *supra* note 58, at 85 ("more lenient view").

363 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment 4 (1989).

364 See *id.* at Rule 1.5(e)(1).

an assignment requires expertise which the firm does not have. Such issues will arise once disclosure is required to obtain client consent.

Critical to determining whether the attorney fee splitting rules apply to compensation of a temporary attorney is the language of the provisions. Model Rule 1.5(e) states that the requirements of that Rule apply to a "division of a fee between lawyers who are not in the same firm."³⁶⁵ Similarly, Disciplinary Rule 2-107(A) of the Model Code states that it governs an attorney's sharing of a "fee for legal services with another lawyer who is not a partner in or associate of his firm or law office,"³⁶⁶ which Ethical Consideration 2-22 interprets as prohibiting unconsented sharing of fees by an attorney with "another lawyer outside of his firm."³⁶⁷ A 1988 American Bar Association ethics opinion dealing with temporary lawyers states, in its discussion of DR 2-107(A) and EC 2-22, that "where a temporary lawyer is working under . . . close firm supervision . . . , such employment does not involve 'association with a lawyer outside the firm' within the meaning of this Ethical Consideration."³⁶⁸ Therefore, presumably, the Model Code's attorney fee splitting rules do not apply in cases of "close supervision." The result would likely be the same under the Model Rules, for the opinion expressly notes that the "underlying purposes of the [Model Rules and Model Code] provisions and their functional analyses are similar."³⁶⁹ The significance of "close supervision" is illuminated by a passage in the opinion which states:

The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be 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. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact

365 *Id.* Rule 1.5(e).

366 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1980).

367 *Id.* at EC 2-22.

368 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, 11 (1988).

369 *Id.*

that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.³⁷⁰

The ABA opinion's position on the "outside" lawyer requirement in attorney fee splitting is in many respects consistent with its approach,³⁷¹ to the issue of whether a temporary attorney should be regarded as "associated" with a firm for purposes of imputed disqualification. In other words, the resolution of the issue depends not upon satisfaction of a "bright line" test, but rather a more flexible inquiry taking into account the nature and circumstances of the services performed, particularly those facts which demonstrate or disprove that the attorney acted independently from other lawyers in the firm. If an attorney enjoys a high degree of independence in furnishing legal services, under the ABA approach the temporary attorney is treated as the equivalent of an "outside" lawyer, and the attorney's participation in the representation must be approved by the client. In contrast, if the temporary attorney's work is subject to close supervision by lawyers in the firm, disclosure and consent are not required.

The ABA opinion complicates the analysis of the attorney fee splitting issue by stating:

Assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement, the firm has no obligation to reveal to the client the compensation arrangement with the temporary lawyer. Rule 1.5(e), relating to division of fees between lawyers, does not apply in this instance because the gross fee the client pays the firm is not shared with the temporary lawyer. The payments to the temporary lawyer are like compensation paid to nonlawyer employees for services and could also include a percentage of firm net profits without violation of the Rules or the predecessor Code. See ABA Informal Opinion 1440 (1979).

If, however, the arrangement between the firm and the temporary lawyer involves a direct division of the actual fee

370 *Id.*

371 *See supra* note 320 and accompanying text.

paid by the client, such as percentage division of a contingent fee, then Rule 1.5(e)(1) requires the consent of the client and satisfaction of the other requirements of the Rule regardless of the extent of the supervision.³⁷²

These statements, in particular the last quoted sentence, may be read to suggest that the ABA Committee endorsed the view that the rules on attorney fee splitting are applicable to "inside" (i.e., closely supervised) attorneys who are compensated on a percentage basis. Such a reading would be inconsistent with Model Rule 1.5(e), which, by its very terms, is applicable only to "lawyers who are not in the same firm."³⁷³ To avoid this dilemma, the preferable course is to interpret the ABA opinion as providing that, for purposes of the attorney fee splitting rules, a temporary attorney is best treated as a member of a different firm either when the attorney is not closely supervised, or when the attorney has a special financial stake in the litigation aside from any interest in fair compensation for services performed. If so interpreted, the "outside" attorney requirement is satisfied. The disclosure and client consent requirements are then likely to apply in those cases where it is probable that clients will have the greatest interest in scrutinizing the temporary attorney's involvement: namely, cases where the temporary attorney may have a substantial impact on the client's affairs, due to the lack of supervision, or where the temporary attorney's judgment might be unreasonably clouded by financial self-interest based on the temporary attorney's stake in any profit arising from the representation. As such, the proffered interpretation is consistent with the policies underlying the attorney fee splitting rules, which in part seek to ensure that a client has an opportunity to decide who will provide legal representation.³⁷⁴ The proposed reading is also consistent with Model Rule

³⁷² ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 10 (1988) (emphasis added).

³⁷³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1989).

³⁷⁴ Five potential justifications for the attorney fee splitting rules, not all of which are persuasive, are discussed in *Ethical Limitations on Creative Financing*, *supra* note 1, at 553-55 & n.55 ((1) avoidance of unnecessary increases in the cost of legal services; (2) protection of an attorney's exclusive right to a fee; (3) avoidance of unnecessary "commercialization" of the profession; (4) prevention of "stirring up" of litigation; and (5) assurance that the client knows who will be working on his or her case). The attorney fee splitting rules' salutary objective of providing a client with notice of who will do the client's work and be privy to the client's secrets has been recognized by court decisions (see, e.g., *Fontenot & Mitchell v. Rozas*, 425 So.2d 259, 261 (La. Ct. App. 1982), *cert. denied*, 432 So. 2d 268 (La. 1983)) and underlies other rules of ethics (see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 9-10 (1988) ("[T]he un-

1.4, which states that an attorney has an obligation to take reasonable steps to ensure that a client has "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."³⁷⁵

The ABA opinion, however, also includes expressions which suggest that compensation of a temporary lawyer will rarely, if ever, threaten to violate the attorney fee splitting rules. The opinion states in part: "[A]bsent a division with the temporary lawyer of the actual fee paid by the client to the firm, the client need not be informed of the financial arrangement with the temporary lawyer under the Model Code since it does not involve a division of the gross fee between lawyers."³⁷⁶ When read together with other portions of the opinion,³⁷⁷ this sentence strongly suggests that the payment of an hourly fee to a temporary attorney for services performed does not qualify as "fee splitting" within either the Model Rules or the Model Code. Thus, regardless of whether the temporary attorney is treated as an attorney "outside" the firm, there may be no sharing of fees that require disclosure of the arrangement and client consent. Indeed, under the ABA interpretation, it seems probable that the attorney fee splitting rules will pose only a minor obstacle to the development of temporary lawyering, limited in application to those cases where the temporary attorney receives some portion of the gross fee paid by the client, which portion is not determined on an hourly or per diem basis.

However, even if the attorney fee splitting rules do not mandate disclosure, disclosure may be warranted on other ethical or

derlying policy [of Rule 7.5(d) is] that a client is entitled to know who or what entity is representing the client.")).

375 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 comment (1989). See also *id.* at Rule 1.2(a) (discussing the obligation to consult a client about the means by which the objectives of the representation are pursued).

376 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 11 (1988).

377 See *supra* note 372 and accompanying text (stating in part: "Rule 1.5(e), relating to division of a fee between lawyers, does not apply in this instance because the gross fee the client pays the firm is not shared with the temporary lawyer. The payments to the temporary lawyer are like compensation paid to nonlawyer employees for services and could also include a percentage of firm net profits without violation of the Rules or the predecessor Code."). See also NYC Bar Op. 1989-2 (1989), *supra* note 178, at 171 (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), regardless of whether the agency's fee is fixed or proportionate to the temporary attorney's compensation.).

prudential grounds. One state, Kentucky, has rejected the supervision-based distinctions set forth in the ABA opinion. In their place, Kentucky "recommend[s]":

disclosure to the client of the firm's intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement.³⁷⁸

The Florida ethics committee also requires disclosure whenever "the client would likely consider the information material."³⁷⁹ Similarly, the New York City ethics committee has held that disclosure is required under DR 7-102 of the Code, which provides that except with the consent of the client, a lawyer shall not accept compensation from one other than the client.³⁸⁰ Whether or not disclosure is mandatory under any of these rationales, a course of action—such as full disclosure—which treats clients as intelligent, independent agents, and which enables them to decide their own affairs, has considerable merit.

2. Fee Splitting With Nonlawyers

With limited exceptions not here relevant,³⁸¹ both the Model Rules³⁸² and the Model Code³⁸³ prohibit an attorney from splitting fees with a nonlawyer. These rules are primarily intended to protect the lawyer's independent professional judgment from interference by nonlawyers who are motivated by financial self-interest and not bound by the ethical obligations of attorneys.³⁸⁴ The rules also help to ensure that the total fee paid by

378 *Oliver v. Board of Governors, Ky. Bar Ass'n*, 779 S.W.2d 212, 216 (Ky. 1989).

379 Florida Op. 88-12 (1988), *supra* note 178, at 3.

380 See NYC Bar Op. 1988-3 (1988), *supra* note 178, at 6.

381 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(1), (2) (1989) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A)(1), (2) (1980) (the death of a lawyer); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(3) (1989) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A)(3) (1980) (compensation or retirement plans for nonlawyer employees).

382 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1989).

383 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A) (1980).

384 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 comment (1989); *Grassman v. State Bar*, 18 Cal. 3d 125, 553 P.2d 1147, 132 Cal. Rptr. 675 (1976) ("prohibited fee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate").

a client is not unreasonably high³⁸⁵ and that nonlawyers do not engage in the practice of law.³⁸⁶

An agreement which compensates a temporary attorney placement agency other than by paying a flat fee³⁸⁷ may run afoul of the nonlawyer fee splitting rules.³⁸⁸ As noted earlier,³⁸⁹ in exchange for their "match-making" services, agencies normally are paid an amount which varies according to the length of the temporary attorney's placement. Typically, that amount is either a percentage of the hourly fee earned by the temporary attorney or a flat fee per hour unrelated to the amount of the temporary attorney's compensation. In such cases, the agency's compensation is equivalent to a percentage of the temporary lawyer's hourly salary.

In addressing the nonlawyer fee splitting issue in the context of temporary lawyering, the ABA ethics committee has taken the position that:

[A]n arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation[] does not involve the sharing of legal fees by a lawyer with a nonlawyer in violation of Rule 5.4 or DR 3-102(A) of the Code.³⁹⁰

This conclusion has been accepted by some authorities³⁹¹ and rejected by others.³⁹² While there are good arguments to

385 See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1440 (1979) (justification asserted). *But see* G. HAZARD & W. HODES, *supra* note 58, at 471-472.1 (arguing that the prohibition against fee splitting with nonlawyers may be rooted in economic protectionism).

386 See Comment, *Fee Splitting With Nonlawyers*, 12 J. LEGAL PROF. 139, 143 (1987).

387 See Florida Op. 88-12 (1988), *supra* note 178, at 3 (indicating that violations of the nonlawyer fee splitting rules may be avoided if a placement agency charges customer firms a flat fee); NYC Bar Op. 1988-3 (1988), *supra* note 178, at 5 (same); NYC Bar Op. 1988-3-A (1988), *supra* note 178, at 1 (same).

388 See, e.g., New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (discussing issue); Florida Op. 88-12 (1988), *supra* note 178, at 3 (finding violation).

389 See *supra* note 163 and accompanying text.

390 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988).

391 See District of Columbia Op. 39 (1977), *supra* note 55, at para. 10.738 ("Proceeding on the assumption that the referred lawyer becomes an employee of the hiring law firm or lawyer, even though a temporary or part-time one, there is no sharing of legal fees with a layman. The referred lawyer is paid a salary, based on an hourly rate, from which a fixed part is paid to the agency. A fee is what a lawyer charges a client and is not a salary paid to an employee who does a part or all of some work.")

392 See Florida Op. 88-12 (1988), *supra* note 178, at 3 (If nonlawyers are involved in the ownership or management of the placement agency, a billing system which charges a

support the conclusion, the reasoning offered by the ABA committee is not entirely persuasive. The committee states, in support of its position:

There is a distinction between the character of the compensation paid to the lawyer and the compensation paid to the placement agency. The temporary lawyer is paid by the law firm for the services the lawyer performs under supervision of the firm for a client of the firm. The placement agency is compensated for locating, recruiting, screening and providing the temporary lawyer for the law firm just as agencies are compensated for placing with law firms nonlawyer personnel (whether temporary or permanent).³⁹³

This arguably explains why a temporary lawyer may not be charged with impermissibly sharing fees with a nonlawyer, even when a placement agency receives monies from an employer-firm intended to compensate both the temporary lawyer and the agency. The portion of the total amount received by the agency that was intended by the employer-firm to cover the agency's placement services was never a legal fee belonging to the temporary lawyer. Consequently, the temporary lawyer could not be charged with impermissibly sharing a fee with the agency by allowing the agency to retain that portion of the total monies received by the agency which was intended to compensate placement services.

However, the nonlawyer fee splitting issue may be viewed from a different perspective—namely whether the employer-firm has impermissibly split its fee with the placement agency. If it has done so, then lawyers in the employer-firm may be subject to discipline. Moreover, if the temporary attorney has knowingly facilitated the arrangement, that attorney might also be charged with wrongdoing for having engaged in “conduct that is prejudicial to the administration of justice.”³⁹⁴ This distinction is not sufficient to preclude a finding that a placement agency shares in the fees of the employer firm. In other words, the fact that the agency is not being compensated for providing legal services is irrelevant to the issue of whether the firm has impermissibly shared its fees with the agency. The ABA opinion further provides:

certain amount per hour, with only a portion of that amount being paid to the lawyer, must be considered an impermissible splitting of fees with nonlawyers.).

393 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988).

394 MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1980).

Moreover, even assuming there is a total amount comprised of a lawyer's compensation and the placement agency fee that is split, the total is not a "legal fee" under the commonly understood meaning of the term. A legal fee is paid by a client to a lawyer. Here the law firm bills the client and is paid a legal fee for services to the client. The fee paid by the client to the firm ordinarily would include the total paid the [temporary] lawyer and the agency, and may also include charges for overhead and profit. There is no direct payment of a "legal fee" by the client to the temporary lawyer or by the client to the placement agency out of which either pays the other.³⁹⁵

This language may explain why a temporary lawyer typically cannot be charged with impermissibly sharing a fee with a nonlawyer, but it does not explain why an employer-firm may not be charged with violating the same prohibition. If viewed from the latter perspective, the statements seem to suggest that the amount paid to a placement agency by a law firm is not paid as a legal fee, and therefore there is no impermissible sharing of fees, because the payment does not flow from the client directly to the placement agency.

Surely this is not correct. The nonlawyer fee splitting rules are limitations on the action of a "lawyer or law firm";³⁹⁶ they are not restrictions on the conduct of a client. To hold that for these rules to be violated a payment must flow from the client to the placement agency without passing through the hands of the firm would mean that it is only possible for lawyers in a firm to run afoul of the nonlawyer fee splitting rules by acting indirectly. Such a requirement would serve no purpose, particularly in the absence of supporting statutory language. Moreover, such an interpretation would be inconsistent with the ABA's position on the attorney fee splitting rules. As discussed earlier,³⁹⁷ if a firm pays a temporary lawyer a percentage of its gross fee, there is an impermissible splitting of fees. Likewise, if a similar percentage of the firm's gross fee is paid to the placement agency, the payment should be regarded as the sharing of a fee, regardless of the fact that the payment is disbursed by the employer-firm rather than the ultimate client.

395 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988).

396 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A) (1980).

397 See *supra* note 372 and accompanying text.

Nevertheless, the ABA Committee on Ethics and Professional Responsibility is correct in concluding that the nonlawyer fee splitting rules should not prohibit a payment to a placement agency based on a percentage of a temporary lawyer's compensation. First, the policies underlying the rule are inapplicable to such arrangements. As the ABA Committee's opinion correctly states, "the [principal] rationale for the rule forbidding the sharing of legal fees with nonlawyers, the maintenance of the lawyer's professional independence, does not support the view that these arrangements involve [impermissible] fee splitting."³⁹⁸ Such arrangements confer upon agencies no special ability or significant incentive to interfere with a firm's exercise of judgment concerning the representation of affected clients. Theoretically, an agency might hope to prolong a temporary attorney's placement with a firm, since the longer the placement, the greater the agency's compensation for facilitating the match. But, it is probable that any such temptation is more than offset by the fact that most agencies are run by lawyers who are personally subject to professional discipline for interfering with another attorney's relationship with a client.³⁹⁹

The other policies underlying the nonlawyer fee splitting rules—prevention of unauthorized practice⁴⁰⁰ and avoidance of unreasonable fees⁴⁰¹—also do not warrant the application of the nonlawyer fee splitting rules to arrangements compensating an agency based on a percentage of the temporary lawyer's compensation. There is little risk that an agency will engage in unauthorized practice of law since such agencies typically have no contact with firm clients and only limited contact, if any, with either the employer-firm or the temporary attorney once a placement has been arranged.⁴⁰² In addition, because temporary lawyering is "an efficient and cost-effective way for law firms to manage their

398 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 11 (1988).

399 Presumably such actions would qualify as conduct prejudicial to the administration of justice. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1980). Of course, if there are no nonlawyers involved in the operation of the placement agency, it might successfully be argued that the nonlawyer fee splitting rules are wholly inapplicable to issues involving compensation of the agency. See Florida Op. 88-12 (1988), *supra* note 178, at the 331 (accepting the argument).

400 See *supra* note 387 and accompanying text.

401 See *supra* note 386 and accompanying text.

402 See *supra* notes 133-34 and accompanying text.

workflow and deployment of resources,"⁴⁰³ there is little risk that such arrangements will unreasonably increase the cost of legal services. "There is no reason to assume that the actual cost to the law firm of the temporary lawyer hired through an agency (and consequently the impact on the fee to the client) would be higher than the cost of that lawyer's services hired direct by the firm, without the intervention of a placement agency."⁴⁰⁴

Relying upon a similar analysis of the interference and cost-containment policies discussed above, at least three state ethics committees have concluded, in agreement with the ABA Committee, that the payment of a placement fee to an agency based on a percentage of the temporary attorney's compensation does not result in impermissible fee splitting with a nonlawyer.⁴⁰⁵

Arrangements which provide for an agency to be paid a percentage of the temporary lawyer's compensation are essentially indistinguishable from other professional practices that do not run afoul of applicable rules of attorney conduct. As the ABA Ethics Committee has stated,

There is no meaningful difference between the practice of lawyer placement agencies charging a fee to a law firm for recruiting a permanent associate or partner, which often is a percentage of the lawyer's first year compensation (a practice not challenged), and a fee based on the temporary lawyer's actual compensation paid over a period of less than a year.⁴⁰⁶

In addition, similar arrangements are used with respect to permanent or temporary employment of nonlawyers.⁴⁰⁷ As to the reasonableness of the total fee to each client on whose matters the temporary lawyer works, "the case is no different than that of a law firm hiring a temporary secretary or other temporary help through an agency."⁴⁰⁸

403 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988). See also *supra* notes 234-249 and accompanying text.

404 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988).

405 See New Jersey Informal Op. 632 (1989), *supra* note 178, at 394; NYC Bar Op. 1989-2 (1989), *supra* note 178, at 171; DC Bar Op. 39 (1977), *supra* note 55, at ¶ 10.738. See also *Oliver v. Board of Governors*, Ky. Bar Ass'n, 779 S.W.2d 212, 215 (Ky. 1989).

406 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 12 (1988) (parentheses in original).

407 *Id.* at 11.

408 See *id.* at 12.

Compensation arrangements with some placement services have been structured so that the employer-firm pays the temporary attorney directly for the legal work performed and then separately pays the placement agency an amount proportional to the temporary attorney's expected compensation.⁴⁰⁹ The Connecticut⁴¹⁰ ethics committee has concluded that this arrangement for separately negotiating and paying the fees of the recruiting agency and the temporary lawyer precludes the possibility of a fee splitting issue arising. On similar grounds, the New York City ethics committee requires that the agreement between the placement agency and the law firm separately state the fee paid to the agency and identify that fee as compensation for the agency's services.⁴¹¹ Such action, the committee reasons, will guard against the possibility that a placement agency might indirectly share in a legal fee. The New York City committee also requires that if a firm plans to bill a client for the costs of temporary legal services, rather than absorb those costs in overhead, the costs must be separately stated for the client, like other disbursements for non-legal services, and not included in the legal fee charged by the firm to the client.⁴¹²

The Supreme Court of Kentucky has endorsed a separate payment approach, but not for fee splitting reasons.⁴¹³ The Kentucky court concluded that an arrangement whereby a temporary attorney is paid by the placement agency has "the potential to jeopardize the professional independence of the temporary attorney rendering legal services to the ultimate client."⁴¹⁴ Citing Model Rule 5.4(c), which provides that a "lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment,"⁴¹⁵ the court stated that "an attorney's primary loyalty will, as a practical matter, rest with the person or entity who pays him."⁴¹⁶ In support of that conclusion, the court quoted the ethics committee of the New York City Bar:

The temporary placement agency may well seek to extend the time a lawyer spends on a particular matter or, alternatively, to have the lawyer finish one project quickly so that the lawyer is

409 See Connecticut Informal Op. 88-15 (1988), *supra* note 178, at 1.

410 See *id.*

411 See NYC Bar Op. 1989-2 (1989), *supra* note 178, at 171.

412 See *id.*

413 *Oliver v. Board of Governors, Ky. Bar Ass'n*, 779 S.W.2d 212, 215 (Ky. 1989).

414 *Id.* at 215.

415 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1989).

416 *Oliver*, 779 S.W.2d at 215.

available to undertake a more lucrative project. The agency's position on such matters would be influenced chiefly by profits, not by the client's interests.⁴¹⁷

The Kentucky court nevertheless found that "no adverse impact upon the temporary lawyer's independent professional judgment in the lawyer's work for the law firm . . . [would result] from payment of a placement agency fee as a percentage of or in proportion to the lawyer's compensation."⁴¹⁸ Whether other courts would reach the same conclusions—namely, that the employer firm must pay the temporary lawyer and the placement agency separately, but that no problem arises from the fact that the agency receives an amount equivalent to a percentage of the lawyer's compensation—is at least open to question. It would seem that the danger, if any, of an agency seeking to prolong or shorten the length of a particular placement arises from the fact that the agency's compensation is tied to the length of the placement, not from the fact that the temporary lawyer's compensation may be routed through the hands of the placement agency.

While a separate payment arrangement may chart a safe course, such artificial segregation of the compensation of an agency and a temporary lawyer would not appear to be required by the nonlawyer fee splitting provisions of either the Model Code or the Model Rules. So long as the agency and the temporary attorney ultimately receive the amounts to which they are entitled, no principle of legal ethics is offended by allowing a placement agency to collect on a temporary attorney's behalf the amounts which that attorney is due. Nor are there persuasive reasons to preclude an employer-firm from transmitting to a placement agency both the agency's fee and the temporary lawyer's compensation by means of a single check.

V. GUIDELINES: CHARTING A CONSERVATIVE COURSE

While there is considerable risk in attempting to reduce a complex and relatively uncharted area of legal ethics to a simple set of guidelines, the following suggestions begin to define a conservative course for the benefit of those attorneys who wish to participate in arrangements for temporary legal services with minimal risk of professional discipline or related sanctions. This list of

417 *Id.* (quoting NYC Bar Op. 1988-3 (1988), *supra* note 178).

418 *Id.* (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-3556, at 12 (1988)).

guidelines is not comprehensive, and does nothing more than identify the more important considerations in this field of legal ethics. As in so many areas of law practice, the best course is for the individuals involved in the temporary lawyering enterprise to clearly spell out in writing the rights and responsibilities of the parties.⁴¹⁹

Attorneys serving as temporary lawyers should:

(1) ensure that any agreement between the temporary attorney and a placement agency makes "clear in explicit terms that the agency will not exercise any control or influence over the exercise of independent 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,"⁴²⁰

(2) arrive at a clear and definite understanding with the employer firm concerning the terms and conditions of employment, including the anticipated extent of involvement in, or access to, information concerning the affairs of firm clients;⁴²¹

(3) "observe strict confidentiality regarding any information obtained in the course of temporary employment"⁴²² and clearly apprise the placement agency of this obligation;

(4) "maintain a record of clients and matters worked on;"⁴²³ and

(5) if working for multiple firms simultaneously, "make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working."⁴²⁴

419 See NYC Bar Op. 1988-3 (1988), *supra* note 178, at 5 (recommending that guidelines be memorialized in a written agreement between the agency and the temporary lawyer).

420 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 13-14 (1988). See also, *Oliver v. Board of Governors, Ky. Bar Ass'n*, 779 S.W.2d 212, 215-16 (Ky. 1989) (adopting ABA opinion language). Florida Op. 88-12 (1988), *supra* note 178, at 2 (a temporary lawyer's contract with a placement agency must specify that that lawyer cannot permit the agency to control the lawyer's exercise of independent professional judgment).

421 See Marcotte, *supra* note 69, at 30 ("it's important for the [law firm] client and [the temporary] lawyer to have a detailed understanding of what the obligations are at the outset").

422 *Oliver*, 779 S.W.2d at 213 (describing practice).

423 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7 (1988). See also New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (it is incumbent upon temporary attorneys to maintain complete and accurate records of all matters on which the temporary attorney does work); *Oliver*, 779 S.W.2d at 213.

424 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7

Law firms employing temporary attorneys should:

(1) prior to hiring a temporary lawyer, fully inquire into conflicts of interest which might arise based on that lawyer's prior or present work for other clients or firms,⁴²⁵ and refrain from hiring any temporary attorney if employment would place that attorney in a conflicts position;⁴²⁶

(2) in any case where there is reason to think that a client might object to the employment of a temporary lawyer, "obtain the client's consent and provide information on the lawyer's former affiliations;"⁴²⁷

(3) "to the extent practicable, screen each temporary lawyer from all information relating to clients for whom the temporary lawyer does not work;"⁴²⁸

(4) "maintain a complete and accurate record of all matters on which each temporary lawyer works;"⁴²⁹ and

(5) "make certain that the compensation received by the temporary lawyer, whether paid directly by the firm to the lawyer or paid by the placement agency to the lawyer from sums which the firm pays the agency, is adequate to satisfy the firm that it may expect the work to be performed competently for the firm's clients"⁴³⁰ and that the lawyer is competent to handle the matters assigned.⁴³¹

(1988).

425 *Cf. Id.* (Where a temporary lawyer works for two firms, "[t]he second firm should make appropriate inquiry and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter."); Florida Op. 88-12 (1988), *supra* note 178, at 330 (a firm should not attempt to hire a temporary lawyer if doing so would place the lawyer in a conflict position).

426 *See* Florida Op. 88-12 (1988), *supra* note 178, at 2 (recognizing such a duty).

427 Berkman, *supra* note 61, at 24 (attributing advice to Professor Monroe Freedman).

428 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 7 (1988).

429 *Id.* *See also* New Jersey Informal Op. 632 (1989), *supra* note 178, at 394 (it is incumbent upon firms to maintain complete and accurate records of all matters on which each temporary attorney does work); *Oliver v. Board of Governors*, Ky. Bar Ass'n, 779 S.W.2d at 213.

430 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356, at 14 (1988); *Oliver*, 779 S.W.2d at 216 (adopting ABA opinion language).

431 *See* NYC Bar Op. 1988-3 (1988), *supra* note 178, at 6 (stating guideline). *Cf.* Florida Op. 88-12 (1988), *supra* note 178, at 2 (recommending that the contract between the placement agency and the temporary lawyer should state that the lawyer will not be asked to undertake representation the lawyer is incompetent to handle).

VI. CONCLUSION

As society matures, expectations concerning acceptable professional conduct change to reflect the emerging needs of society and its willingness and ability to devote resources to those needs. Thus, professional conduct which at one time and place might have been deemed unobjectionable may come to be regarded as unethical.⁴³² Similarly, conduct previously considered beyond the pale of acceptability may develop into the professional norm.⁴³³

In resolving questions of professional ethics, it is important to be sensitive to the evolving context in which these issues arise. The propriety of temporary lawyering can only be determined in light of both the on-going transformation of the legal profession and the basic changes in the American workforce which have recently taken place.

One might confidently assert, as certain jurists have, that "there is no convincing evidence that the temporary [lawyer] employment service is needed or of any benefit to the public or the legal profession;"⁴³⁴ that there is "no reason to believe that the traditional method used by new attorneys to approach law firms seeking employment requires intervention by a profit-making placement agency;"⁴³⁵ and that there is no basis for concluding that attorneys who have "limited time or who wish to restrict their legal associations can[not] do so freely on an individual basis as they have done for centuries."⁴³⁶ One might also indignantly charge that agencies placing temporary attorneys "reduce the professional image of lawyers and cheapen[] the sacred responsibility of lawyer to client."⁴³⁷ Such claims, however, ignore the realities of practicing law in an ever-more-competitive profession

432 An excellent example is the changing standards with respect to political activity by members of the judiciary. Whereas it was once the case that sitting judges frequently engaged in such conduct (see B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982) (surveying Justices in politics from 1789 to 1916)), the same types of activity are now broadly prohibited in virtually every jurisdiction (see *CODE OF JUDICIAL CONDUCT* Canon 7 (1972)).

433 The metamorphosis of the ethical standards applicable to lawyer advertising is a classic example. See generally Wallace & McKelvey, *Regulating Lawyer Advertising*, 18 *TEX. TECH. L. REV.* 761 (1987).

434 *Oliver*, 779 S.W.2d at 221 (Wintersheimer, J., dissenting in an opinion in which Combs and Vance, JJ., joined).

435 *Id.*

436 *Id.*

437 *Id.*

which now numbers more than three-quarters of a million members. These claims further fail to recognize the difference between an innovation which is "cheap" and one which is cost efficient, or the fact that the legal profession's "image" might well be improved by the adoption of practices which are characterized by flexibility and willingness to accommodate the needs of the individual. In short, such views represent an approach to legal ethics which is either uninformed or frozen in the past.

Those persons who carefully consider the advent of temporary lawyering will find that it offers the profession an opportunity to intelligently address pressing individual and institutional needs. It warrants the support of the profession, limited only by those measures necessary to insure that the interests of clients are faithfully served and that clients are given the maximum opportunity to intelligently decide their own affairs.