NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1184 (03/10/2020)

Topic: Freelance or per diem attorney; trade names; maintenance of bank accounts and records conflicts

Digest: A New York attorney seeking to market services as a "freelance attorney" to provide contract or per diem services to other attorneys or law firms may use the name and domain name Surname Esquire. Depending on the nature of services provided, the lawyer need not comply with the strict rules on maintaining separate bank accounts but may need to comply with certain recordkeeping requirements. The lawyer is otherwise subject to the ethical rules, including the obligation to check for and avoid conflicts of interest.

Rules: 1.0(a), 1.1, 1.4(a)(3), 1.6, 1.7, 1.8, 1.9, 1.10(e), 1.15(d), 3.3(f)(1), 4.1, 4.2, 7.1, 7.4, 7.5

FACTS

1. The inquirer is a New York attorney who seeks to perform work on a freelance or per diem basis for other attorneys and/or law firms without forming a law firm. The inquirer proposes to market services on a website with the domain name "[Surname] Esquire.com" directly solely to other lawyers. The proposed website would contain the inquirer's biographical information and would state that the inquirer is available for retention by other attorneys or law firms on a contract basis. The inquirer proposes also to say on a LinkedIn profile that the inquirer works as a "Freelance Attorney" at [Surname] Esquire. For our purposes, a "freelance" attorney is the same as a per diem or contract lawyer.

2. The inquirer asks whether such conduct is permissible under the N.Y. Rules of Professional Conduct (the "Rules"), whether the inquirer is required to maintain a separate bank account for the legal practice, and whether any other ethical restrictions or requirements exist on this type of freelance or per diem legal practice.

QUESTIONS

3. May the inquirer market legal services to other lawyers or law firms using the name and website of "[Surname] Esquire" and describing the inquirer as a "Freelance Attorney"?

4. Is the inquirer required to maintain a separate bank account(s) for the proposed legal practice?

5. Are there any other ethical restrictions on the inquirer's proposed practice?

OPINION
Firm Name & Advertising

6. Although the inquirer disclaims an intention to form a "law firm," Rule 1.0(h) defines a "law firm" to include a sole proprietorship. Thus, under the Rules, the proposed [Surname] Esquire is a law firm governed by the same ethical provisions as any other law firm.

7. Rule 7.5(b) provides, in relevant part, that "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." We have previously opined that, while the prohibition against using trade names is broad, the use of an attorney's surname in a firm name is permissible, and in fact customary. In N.Y. State 1152 ¶ 6 (2018), we noted:

> In our view, Rule 7.5(b) embeds an understanding that a law firm's name consists of the surnames of lawyers who either practice there or once did. We are unaware of any authority or precedent that breaks from this pattern, and it cannot be denied that, at the time the Rules and their predecessors were adopted, the universal practice in this state was to confine the names of law firms to the surnames of its current or former lawyers.

See also N.Y. State 1167 ¶ 6 (2019) (lawyer who practices under a full surname may use a law firm name that includes only the lawyer's middle name and last name, without including the lawyer's first name); N.Y. State 1003 ¶ 9 (2014) (sole practitioner may use initials with full surname as law firm name); N.Y. State 869 ¶ 11 (2011) (a sole practitioner may practice under the name "The [Surname] Law Firm"). These precedents make clear that the inquirer may practice in a law firm using solely the inquirer's surname as the name of a law firm and as a domain name.

8. Likewise, the use of the term "Esquire" or "Esq." by an attorney admitted to practice in New York does not constitute an improper trade name or a name that is misleading about the identity of the lawyer. In N.Y. State 1147 (2018) and N.Y. State 1089 (2016), we considered the use of the term "Esq." or "Esquire" by lawyers not admitted in New York and by retired lawyers, respectively. We cited with approval N.Y. City 1994-5, which states:

> The title "esquire" does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

9. Accordingly, we concluded that a lawyer not admitted in New York or a retired lawyer could use the title "Esq.," so long as he or she took care to avoid the risk of confusion by indicating the limitations on his or her right to practice. The obvious implication of these opinions is that an attorney licensed and actually practicing in New York may use the term "Esquire" or "Esq." to indicate that he or she is a lawyer. There is, therefore, no ethical bar to the inquirer using the name and website "[Surname] Esquire" to market per diem, freelance, or other legal services.

10. The inquirer indicates an intention to market services only to other attorneys, rather than to the public. We assume for our purposes that this is possible to do on a website or LinkedIn profile, though it may be that, to the extent that these media are available to the general public, a disclaimer may be needed to clarify the inquirer's intention. To the extent that the marketing is aimed solely at other lawyers, then the content of the marketing does not fall under the rubric of attorney advertising and thus is not subject to the provisions of Rule 7.1 that govern the content of attorney

advertisements. Rule 1.0(a) (providing that the definition of an "advertisement" specifically "does not include communications to . . . other lawyers"); *see* Rule 7.1, Cmt. [7] ("communications to other lawyers…are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm").

11. Nevertheless, as Comment [6] to Rule 7.1 says:

> All communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law." *See also* 8.4(c).

12. The inquirer's designation of a practice as "freelance attorney" does not violate the rules prohibiting attorney fraud, dishonesty, misrepresentation or deceit if it accurately describes the inquirer's practice. The same is true of any biographical information accompanying the designation.

13. Rule 7.4 regarding "Identification of Practice and Specialty" applies to a lawyer or law firm's public identification even when the advertising rules do not apply. This rule permits a lawyer or law firm to "publicly identify" areas of law in which he or she practices and permits a lawyer to state that "the practice of the lawyer or law firm is limited to one or more areas of law." Thus, insofar as the inquirer intends to identify the areas of law in which a lawyer's practice is limited – for example, appeals, depositions, wills – the inquirer should, as we understand the inquirer intends, identify the limited nature of the inquirer's practice, that is, as a freelance or contract attorney.

Bank Accounts

14. Whether the inquirer must maintain a separate bank account for the law firm depends on the financial arrangements the inquirer makes with a contracting lawyer or firm and the nature of the work the inquirer would be doing.

15. Rule 1.15(a) says that a lawyer "in possession of funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b) and Rule 1.15(c) contain specific requirements on the handling of funds or other property belonging to a person other than the lawyer. In the event that, by reason of the contractual nature of the services being provided, the inquirer comes into possession of funds or property in which others have an interest, then all these provisions apply, including specifically the maintenance of a separate bank account within New York State.

16. In our experience, however, contract and per diem lawyers typically work on an hourly or flat fee basis and are paid directly by the hiring lawyer or law firm for services rendered. To us, such payments are the functional equivalent of a distribution made to a partner or a salary paid to an associate, in-house counsel, government lawyer, and the like – that is, the money belongs solely to the lawyer, who presumably deposits the funds into a personal bank account in the lawyer's own name without need to worry about the regulations in Rule 1.15(a), (b), or (c).

17. Yet the Rules seem to say otherwise. Specifically, Rule 1.15(d) provides, in relevant part, that: "(1) A lawyer shall maintain for seven years after the events that they record: (i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of

each withdrawal or disbursement." Rule 1.15(d)((2) expressly requires a lawyer to make "accurate entries" of all financial transactions "in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded." The financial records required by this Rule shall be maintained at the principal New York office of the lawyer and a failure to do so will be "deemed a violation of those rules" and subject the lawyer to discipline. Rule 1.15(i) and (j). Nothing in the Rule prohibits the inquirer from, for example, depositing payments for services rendered directly into a personal account. But nothing excuses the inquirer from the recordkeeping requirement.

18. Although skeptical that the framers of the Rule intended this result, we have no choice in light of its language but to conclude that, if Rule 1.15 applies to the inquirer's practice, then the inquirer must comply with the recordkeeping requirements of Rule 1.15(d).

Other Ethical Considerations

19. Finally, the inquirer seeks guidance regarding any other ethics issues that the inquire may encounter in operating a freelance or per diem legal practice. As we noted in N.Y. State 1113 (2017):

> We will not attempt to catalog all of the ethical duties of per diem lawyers, but we will suggest several. Under Rule 1.1, they should be competent, and thus should obtain whatever knowledge is necessary to handle an appearance. Under Rule 1.3(a), they must be diligent, and must be on time for the matters they have been retained to handle. Under Rule 1.4(a)(3), they must keep the client (through the client's agent, the hiring lawyer) reasonably informed about the status of the matter. Under Rule 1.6, they must preserve the confidentiality of any client confidential information to which they are privy . . . [U]nder Rule 1.10(e) they must check for conflicts and, if consentable, obtain consent or decline the proffered representation…
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> Per diem lawyers also owe duties to adversaries. For example, under Rule 4.1, they must not make a false statement of fact or law to an adversary or other third person. Under Rule 4.2, they must not communicate on the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.
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> In addition, per diem lawyers owe duties to courts. Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal, so per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear . . . [C]ourt rules may impose additional obligations, but interpreting those rules is beyond our jurisdiction.

20. The obligations of a contract or per diem attorney to avoid conflicts of interest pursuant to Rules 1.7, 1.8, and 1.9 and to engage in conflicts checking pursuant to Rule 1.10(e) has been addressed previously by this Committee and has been the subject of numerous bar association ethics committee opinions. *See* N.Y. State 1113 (2017); N.Y. State 715 (1999); N.Y. City 1996-8 (1996); N.Y. City. 1989-2 (1989); N.Y. City 1988-3 and 3-A (1988); ABA 88-356 (1988).

21. In N.Y. State 1113 this Committee noted that a per diem lawyer who handled a specific appearance, or argued a specific motion, could not later appear on behalf of the other side in that case or substantially related case. Critically, under 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements and a system by which proposed engagements are checked against current or previous engagements. The per diem lawyer has the

same obligation as the hiring lawyer to check for and identify conflicts. *See* N.Y. State 1113.

CONCLUSION

22.. A lawyer may market services as a "freelance," contract, or per diem attorney to other attorneys using the name and website with the lawyer's surname and the word Esquire. If such services are being marketed solely to other attorneys, the freelance attorney is not required to comply with restrictions on attorney advertising. A freelance attorney who does not hold funds for other people is not required to maintain a separate trust or escrow account, but must comply with the record keeping requirements of Rule 1.15(d) regarding any other bank account that concerns or affects the lawyer's practice of law. Finally, a freelance attorney must comply with all other ethical obligations.

(24-19)