



New York State Bar Association Committee on Professional Ethics

Opinion 1113 (1/10/17)

Topic: Per diem lawyers; online legal directories

Digest: A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay a flat fee for listing their availability in and having access to the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. Both the hiring lawyer and the per diem lawyer are responsible for checking for conflicts.

Rules: 1.1, 1.2(c), 1.3(a), 1.4(a), 1.5(b), (c) & (g), 1.6(a), 1.7, 1.8, 1.9, 1.10(a) & (e), 3.3(f), 4.1, 4.2, 5.1, 7.1, 7.2(a) & (b)

FACTS

1. The inquirer wishes to use the services of an online service that connects litigators to per diem lawyers (the “Service”). The Service provides users (referred to herein as “hiring lawyers”) with a list of lawyers who are available to handle court appearances and calendar calls on a per diem basis (“per diem lawyers”). (We refer to both the hiring lawyers and the per diem lawyers as “participating lawyers”).
2. The Service is operated by non-lawyers. It charges a flat fee to participating lawyers, whether as hiring lawyers or per diem lawyers.
3. Participating per diem lawyers provide their rates, availability and areas of practice to the Service. A hiring lawyer sends a request to the Service indicating the date, time and location of the requested appearance, as well as the case caption. The Service generates a list of attorneys who are available to act at the time and place specified, and sends that list to the hiring lawyer, along with information as to each per diem lawyer’s rate. The hiring lawyer then may choose an attorney from the list to retain on a per diem basis. The per diem lawyers set their own rates.
4. The Service does not permit non-lawyer clients or other non-lawyers to access the listings or to hire per diem lawyers directly. The Service and the services provided by per diem lawyers in the directory are strictly lawyer-to-lawyer services.

QUESTIONS

5. May a New York lawyer use an online service owned by non-lawyers to request and hire per diem lawyers to cover court appearances for the lawyer's clients?
6. May a prospective per diem lawyer ethically arrange to be listed in an online legal directory owned by non-lawyers and accept assignments to cover court appearances for other lawyers?
7. Must a hiring lawyer obtain client consent before hiring a per diem lawyer to cover a court appearance?

OPINION

8. Lawyers throughout New York State sometimes need the services of per diem lawyers. Lawyers and law firms may have unavoidable scheduling conflicts or may be obliged to appear in distant courts for routine, non-substantive calendar calls. While some courts permit telephone appearances by counsel for ministerial or routine matters, courts do not permit telephone participation in all circumstances.
9. One solution has been the creation of a market for per diem lawyers to appear on behalf of the attorneys of record. Some providers of per diem legal services are law firms. This inquiry, however, involves a service that would be provided by an entity owned by non-lawyers. The inquirer asks whether a hiring lawyer or a per diem lawyer seeking assignments may use the Service.

Background: The Per Diem Relationship

10. Per diem lawyers are hired by the attorneys of record, not by the clients. Per diem lawyers typically do not have client contact and are unlikely to have ongoing involvement in the pending matter after appearing on the specific date for which they are hired. They may or may not be privy to confidential client information. Per diem lawyers may be hired to cover a court appearance to assure that record counsel is not defaulted or to ensure that the client is not prejudiced for failing to appear on a scheduled date. Sometimes, per diem lawyers are hired for more substantive appearances, including for status conferences or for arguments on particular motions.
11. Although per diem lawyers are hired by the attorney of record, they represent the client and are being hired to "appear" on behalf of the client. *See* N.Y. City 1988-3 (the relationship between the temporary lawyer and the client is no different from the traditional lawyer-client relationship); ABA 88-356 (temporary lawyer who works on a matter for a client of a firm "represents" that client for purposes of the conflicts rules). As such, they have professional obligations under the Rules of Professional Conduct and other court rules. Per diem lawyers, although hired for a limited purpose, owe duties to clients, adversaries, and courts. The nature and extent of those duties depends on the circumstances.

12. 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. As further explained below, under Rule 1.10(e) they must check for conflicts and, if consentable, obtain consent or decline the proffered representation. *See generally* D.C. Op. 284 (1998) (a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets, and temporary lawyers and their employing lawyers each have an obligation to ensure that the appropriate standards are met); ABA 88-356.

13. 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.

14. 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. As noted below, court rules may impose additional obligations, but interpreting those rules is beyond our jurisdiction.

Distinction Between an Online Directory and a Legal Referral Service

15. The answer to the questions posed here depends on whether the Service is a "directory" or a "referral service." This matters because Rule 7.2(b)(3) generally prohibits a lawyer from being recommended by or cooperating with a "lawyer referral service" unless the service is "operated, sponsored or approved by a bar association or authorized by law or court rule."

16. In N.Y. State 799 (2006), this Committee discussed the differences between a legal "directory" and a legal "referral service" and attempted to determine at what point an online directory becomes a referral service. For example, we said that an online version of the "yellow pages" that was available to ultimate clients could provide tools by which a potential client can filter a list of attorneys by geography and/or practice area (*e.g.*, to create a list of attorneys in a particular geographical area who do a particular kind of legal work) without becoming a referral service. We noted, however, that the line would be crossed if the website recommended a particular lawyer or lawyers for the prospective client's problem. Consistent with this distinction, we assume that the Service gives a hiring lawyer access to the names of all of the per diem lawyers who meet the requirements of the hiring lawyer (*e.g.*, time, jurisdiction, area of expertise, and billing rate) without winnowing down the list in any manner other than using criteria supplied by the hiring lawyer. If our assumption is correct, then the Service would not be making recommendations, and would not be a referral service. *Compare* N.Y. State 976 (2013) (if payments to the non-lawyer would include not only a monthly fee but other fees that could constitute payments for recommendations, those payments would violate Rule 7.2(a)); N.Y. State

902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer).

17. Even if the Service is not a “referral service,” however, Rule 7.2(a) prohibits a lawyer from compensating a person or organization “to recommend or obtain employment by a client” or as a reward for having made a recommendation resulting in employment by a client. Rule 7.2 appears in a section of the Rules relating to advertising and solicitation. Although the definition of “advertisement” in Rule 1.0(a) specifically excludes communications to other lawyers, Rule 7.2 is not limited to advertisements and does not exclude communications to other lawyers. Consequently, Rule 7.2 applies to a lawyer-to-lawyer service such as the one here. But paying a fee to the Service to be listed in does not violate Rule 7.2(a) if the Service is a “directory” rather than a “referral service.” As Comment [1] to Rule 7.2 points out, paragraph (a) “does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of . . . online directory listings.”

Conflicts of Interest

18. We assume that in the typical case the per diem lawyer is retained by the hiring lawyer to represent a client of the hiring lawyer. Consequently, conflict of interest rules regarding current and former clients will apply. Rule 1.7, 1.8, 1.9. *See* N.Y. State 715 (1999) (contract lawyers, like other lawyers, must comply with the conflicts rules with respect to current and former clients).

19. Even if the per diem lawyer is hired solely to cover a specific appearance or to argue a specific motion, a per diem lawyer could not later appear on behalf of the other side in that case or one that is substantially related. *See* Rule 1.9 (“Duties to Former Clients”). *See also* ABA 88-356; N.Y. City 1996-8, 1989-2, 1988-3 and 1988-3A.

20. Moreover, under Rule 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements, at or near the time of each new engagement, and maintain a system by which proposed engagements are checked against current and previous engagements. Under Rule 1.10(e)(3), this conflict check must be performed by the hiring firm whenever the firm hires or associates with another lawyer. Although the Service may assist participating lawyers in identifying conflicts by obtaining information about the case caption and about the hiring lawyer, the obligation under Rule 1.10 to check for and identify conflicts falls on both the hiring lawyer and the per diem lawyer.

21. Although the direct conflict rules apply to the per diem lawyer, vicarious disqualification would not apply in the case of a one-off representation by a per diem lawyer. Rule 1.10(a) provides: “While 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 Rule 1.7, 1.8 or 1.9” (Emphasis added.) In the case of a one-off representation arranged by the Service here, the per diem lawyer would not be “associated” with the hiring law firm for purposes of Rule 1.10(a). *See* N.Y. State 715 (whether vicarious disqualification applies depends upon whether the relationship of the contract lawyer to the employing law firm rises to the level of an “association” with the firm); D.C. Opinion 352 (2010) (whether a temporary contract attorney is “associated with” the hiring law firm will depend on the scope and nature of the temporary contract attorney’s relationship with the firm and the potential for exposure to the confidences of

the firm's clients for matters on which the temporary lawyer is not working); ALI, *Restatement, The Law Governing Lawyers*, Section 123, Comment c(iii) (co-counsel who associate for purposes of handling a particular case are not subject to vicarious disqualification). Consequently, Rule 1.10(a) does not impute to a per diem lawyer or hiring firm whatever conflicts the other may have under Rules 1.7, 1.8, or 1.9 with respect to matters not related to the per diem representation.

Sharing Fees with Non-lawyers

22. The inquirer states that the Service would charge flat fees for attorneys' participation in the Service. Assuming that the fees collected by the Service are not related to the amount of the fees charged by the per diem lawyers, the inquiry does not involve a lawyer sharing legal fees with a non-lawyer. *See* N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services); N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the non-lawyer company and the value of the services performed.)

Lawyer Ratings and Reviews

23. The inquiry states that hiring lawyers will choose per diem lawyers based on various factors, including "the per diem lawyer's rate, rating and reviews," but it does not state whether the Service will provide for such ratings and reviews. This Committee has issued several opinions on ratings and reviews, focusing on lawyers who advertise such ratings or reviews. *See* N.Y. State 1052 (2015) (lawyer may give clients a credit on their legal bills if they rate the lawyer on an internet website, if the credit is not contingent on the content of the rating and the ratings and reviews are done by the clients, not the lawyer); N.Y. State 1007 (2014) (lawyer may advertise inclusion in "best lawyers" publication if the lawyer's assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process); N.Y. State 877 (2011) (lawyer's website may accurately quote bona fide professional ratings or comments from any ratings publication if the ratings or comments are factually supportable when published and are not be false, deceptive or misleading). Consistent with these opinions, we believe that, if the Service publishes ratings and reviews of a per diem lawyer, the per diem lawyer should ensure that they are accurately described. *See generally* Rule 7.1, Cmt. [13] (Bona Fide Professional Ratings).

Limited Scope Representation

24. A per diem lawyer usually is hired for purposes of a single court appearance, and typically has no ongoing involvement in the matter once the court appearance is over. Rule 1.2(c) permits limited scope representations under prescribed circumstances: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." *See* N.Y. State 856 (2011). However, we do not believe that the inquiry before us implicates Rule 1.2(c), because the per diem lawyer is contracting with the hiring lawyer, not with the client. The hiring lawyer is not entering into a limited scope representation with the client. The hiring lawyer is simply outsourcing a particular, discrete task to a lawyer outside the lawyer's own office.

Considerations Under Relevant Court Rules

25. As noted above, 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. Thus per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear. While it is outside our jurisdiction to interpret court rules, we note that the Uniform Rules for the Supreme Court and the County Court, 22 NYCRR §202.12(b), require attorneys appearing at preliminary conferences to be “thoroughly familiar with the action and authorized to act on behalf of the party” and to be “sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery.” See *also* Rule 1(a) of the Commercial Division, 22 NYCRR §202.70(g), (which requires all counsel who appear to be fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients).

26. Failure to comply with these court rules may result in the imposition of sanctions and professional discipline. See 22 NYCRR §130-2.1(a) (imposing sanctions or awarding costs and legal fees upon attorney who, without good cause, fails to appear at a court-scheduled matter); Commercial Division Rules 1(a) & 12, 22 NYCRR §202.70(g) (authorizing sanctions, including dismissal, for failure of fully authorized counsel to appear); *Alveranga-Duran v. New Whitehall Apartments, LLC*, 40 A.D.3d 287, 836 N.Y.S.2d 24 (1st Dep’t 2007) (appearance of per diem lawyer without settlement authority at conference required imposition of sanction). Such failure may also violate Rule 1.3(a) (“A lawyer shall act with reasonable diligence and promptness in representing a client”).

Client Consent to Hire a Per Diem Lawyer

27. The inquirer asks whether a hiring lawyer must obtain client consent before hiring a per diem lawyer to cover a court appearance. Ethics opinions decided under the Code of Professional Responsibility were based largely on DR 2-107(A) (prohibiting a lawyer from dividing a fee for legal services with another lawyer not in the lawyer’s law firm without client consent), EC 2-31 [formerly EC 2-22] (prohibiting a lawyer, without the consent of the client, from associating in a particular matter another lawyer outside the lawyer’s firm) and EC 4-2 (prohibiting a lawyer from associating another lawyer outside the first lawyer’s firm in the handling of a matter with client consent). Although the prohibition against dividing fees now appears in Rule 1.5(g), which also requires client consent where there will be a division of fees, we do not believe that Rule 1.5(g) applies where a hiring lawyer is hiring a per diem lawyer on an hourly or fixed fee basis that is based on the fair value of the work and that is similar to what the hiring lawyer would pay an employee of the firm. Rather, as we noted in N.Y. State 715, whether a hiring law firm needs to disclose to the client and obtain consent for the participation of a contract lawyer depends upon whether confidences will be disclosed to the lawyer, the degree of involvement of the per diem lawyer in the matter and the significance of the work the lawyer will perform.

28. In 2015, the New York State Bar Association amended the Comments to Rule 1.1 to address the outsourcing of legal work by law firms to lawyers outside the firm. As explained by Professor Simon, “To help ensure that outside lawyers perform legal work competently [the State Bar Association expanded] the Comments to New York Rule 1.1 (“Competence”) to provide

greater guidance and clarity regarding a lawyer's responsibilities when engaging outside lawyers to provide legal services to clients." Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 65 (Thompson Reuters 2016 ed.)

29. The most relevant new comment provision is Rule 1.1, Comment [6A], which says:

Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

30. Thus, where the hiring lawyer reasonably expects a court appearance to involve a simple scheduling matter, the hiring lawyer need not obtain client consent. However, if the hiring lawyer knows (or reasonably should know) that a court appearance is likely to involve substantive or strategically significant issues or the sharing of client confidences, then the hiring lawyer ordinarily must obtain client consent to use a per diem lawyer. *See* Rule 1.1, Comment [7A] ("if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client"). Comment [7A] also provides that "whenever the retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a)." *See also* N.Y. State 715 (1999) (whether client consent is necessary before contracting to have work done by a temporary or contract lawyer depends on whether (i) the lawyer will receive confidential client information, (ii) whether the work to be done by the temporary lawyer will involve strategic decisions or other work that the client would expect of the senior lawyers working on the client's matters, and the work will not be supervised by the hiring lawyer); D.C. Op. 284 (1998) (lawyer should advise and obtain consent from client whenever proposed use of a temporary lawyer to work on client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations).

Billing the Cost of a Per Diem Lawyer.

31. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." If the law firm wishes to bill the client for the cost of the per diem lawyer, the lawyer should communicate this possibility to the client. The issues of whether the hiring lawyer may mark up the cost of a per diem lawyer or charge the cost of a per diem lawyer as an expense in a contingent fee matter are beyond the scope of this opinion. On the other hand, the fee paid to the Service may not be included in the legal fee charged by the law firm to its client. Rather, if the law firm wishes to pass it on to the client, it must separately bill it as a disbursement. *See* N.Y. City 1989-2.

Supervising the Per Diem Lawyer

32. In N.Y. State 715, we noted several different models for using temporary lawyers. In one model, the temporary lawyer is an independent contractor with discretion on how to accomplish the assigned task. In another, the hiring lawyer provides the same type of supervision he or she would provide to an employee. In that opinion, we noted, citing ABA 88-356, that if a temporary lawyer is performing independent work for a client involving substantive or strategic issues without the close supervision of a lawyer associated with the law firm, the hiring lawyer must inform the client. As noted above, in 2015, the comments to Rule 1.1 were amended to provide that “[c]lient consent to contract with a lawyer outside the lawyer’s own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm.”

33. Rule 5.1(b)(2) provides: “A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.” However, even if the work that the per diem lawyer will perform does not involve discretion and is not closely supervised by the hiring lawyer, we believe that the hiring lawyer must (i) determine that the per diem lawyer is competent to perform the assigned task, (ii) ensure that both the firm and the contract lawyer perform conflict checks before hiring the per diem lawyer to determine that the per diem lawyer has not formerly appeared for the opposing party in the same or a substantially-related matter, and (iii) confirm that the per diem’s assignment was performed satisfactorily by obtaining a report on the assignment from the per diem lawyer.

CONCLUSION

34. A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay flat fees for listing their availability in and having access to and hiring the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. The hiring lawyer has direct supervisory authority over the per diem lawyer and must make reasonable efforts to ensure that the per diem lawyer conforms to the Rules, including by maintaining a system by which the proposed engagements are checked for conflicts of interest.

(14-16)