NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1236 (01/13/2022)
Modifies N.Y. State 613 (1990)

Topic: Divorce mediation, limited scope legal services, non-resident lawyers, ghostwriting

Digest: A New York lawyer may perform divorce mediation services for New York clients from his office in another state, provided that he makes effective disclosure of the differences in his role as mediator/neutral and lawyer and explains that he is not representing either party when he serves as a mediator. Where the mediation is successful, the lawyer may thereafter represent one of the parties to prepare a settlement agreement or other papers for the client to file pro se in the divorce proceeding, provided the lawyer obtains informed written consent from the non-represented mediation party.

A New York lawyer may also, in a pending or contemplated divorce action, enter a limited scope retainer with New York clients undertaking to provide legal advice, negotiate a settlement, or prepare legal documents for filing by the client pro se with a court in New York, provided the lawyer informs the prospective client regarding the relative risks of limited representation and benefits of full-service representation. In connection with providing these legal services, the New York lawyer cannot call himself a "legal consultant" instead of a lawyer.

A New York lawyer who resides in Florida but represents New York divorce clients over the internet from his law office in Florida must comply with the physical office requirement of New York Judiciary Law § 470.

Rules: 1.2(c), 1.12(b), 2.4, 8.4(b)-(c)

FACTS:

1. The inquirer is a matrimonial attorney admitted in New York and Florida. He is closing his New York office and moving to Florida. He plans to open a Florida office to provide divorce mediation services for New York clients over the internet, and to serve as what he refers to as a "legal consultant" on issues of New York divorce law. His services as a legal consultant would include negotiating divorce settlements and drafting legal papers to be filed *pro se* by New York clients in New York courts.

2. The inquirer proposes to advise any New York client that wishes to retain him as a "legal consultant" of the risks associated with not having a full-service attorney representing the client, to make clear that he would not appear on the client's behalf in court, and to disclose that he would not be maintaining a physical law office in New York.

QUESTIONS:

3. The facts provided by the inquirer raise five related questions:

   a. If a mediation is successful, may the lawyer-mediator represent one of the parties in preparing a settlement agreement (or other papers) for the client to file *pro se* in the divorce proceeding?
   b. May a New York lawyer, in connection with a pending or contemplated divorce action, enter a limited scope retainer with a New York client undertaking to provide legal advice, negotiate a settlement, and/or prepare legal documents for the client to file *pro se* with a New York court?
   c. May a lawyer prepare legal papers on behalf of a *pro se* client for submission to court without disclosing his role in preparing those papers?
   d. May a New York lawyer providing limited legal services market himself as a "legal consultant" instead of a lawyer?
   e. Must a New York lawyer who resides outside New York but provides legal services to New York clients via the internet maintain a physical office in New York?

OPINION:

May a lawyer who has successfully handled a divorce mediation subsequently prepare papers for one of the mediation parties to file in a New York court to obtain a judgment of divorce?

4. The inquirer plans to offer mediation services over the internet to divorcing couples. If the parties to the mediation process reach a settlement agreement, the inquirer hopes to be retained by one of the mediation parties to prepare a marital settlement agreement and the other requisite pleadings and documents to be filed in a New York court to obtain a judgment of divorce.

5. When serving as a neutral, a lawyer is governed Rule 2.4 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.4(a) provides that a lawyer serves as a "third-party neutral" when the lawyer "assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." In N.Y. State 1178 (2019), we concluded that "lawyer-mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation." As a result, while Rule 2.4 expressly applies to lawyers acting as mediators, the Rules governing the representation of clients do not. See N.Y. State 1178.

6. However, when serving as a mediator, a lawyer-mediator must make certain disclosures. Rule 2.4(b) requires a lawyer-mediator to "inform unrepresented parties that the lawyer is not representing them." Rule 2.4(b) continues: "When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." The effort should be made even where the legal issues in the matrimonial mediation are subtle or complex, or the parties are unequal in their sophistication and bargaining power. See N.Y. State 1178 ¶ 8.

7. Rule 2.4 addresses a lawyer's duties during a mediation, but not after. For a lawyer's duties after a mediation, we must examine Rule 1.12(b), which addresses specific conflicts of interest of

mediators or other third-party neutrals. Rule 1.12(b)(1) says that in most circumstances, "unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as … (1) an arbitrator, mediator or other third-party neutral …." (Emphasis added.) In other words, Rule 1.12(b)(1) expressly permits a lawyer-mediator at the conclusion of the mediation to represent one of the parties to the mediation with the "informed consent" of all parties to the mediation.

8. What must the lawyer mediator disclose to obtain "informed consent" to representing one of the parties against the other after the mediation? We believe the lawyer mediator must make clear that (i) he is representing only one of the parties, and (ii) the unrepresented spouse should consult independent counsel. Thus, if the lawyer mediator makes such disclosure and obtains consent from all parties to the mediation, the lawyer mediator may draft a post-mediation settlement agreement or other legal document relevant to the divorce proceeding for only one of the parties. In so doing, as the lawyer has clearly crossed the line from providing mediation services to providing legal services, he becomes subject to the full panoply of legal and ethical rules applicable to the provision of those legal services. See N.Y. State 1178 (2019), citing N.Y. State 1026 (2014) (concluding that a lawyer performs legal services when the lawyer drafts and files divorce papers on behalf of the parties).

May a lawyer enter into a limited scope retainer agreement regarding a pending or potential New York divorce proceeding which provides that the lawyer is being retained to perform discrete out-of-court legal tasks?

9. Separate and apart from his mediation practice, the inquirer also proposes to perform a host of legal services for New York divorce clients pursuant to a limited scope retainer. The scope of his representation would be limited to providing legal advice, negotiating divorce settlements, and drafting legal papers pertinent to the divorce. The inquirer would not file court papers or appear in court.

10. Rule 1.2(c) expressly permits limited scope representation subject to certain conditions. It provides that 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 given to the tribunal and/or opposing counsel." See N.Y. State 856 (2011) (limited scope representations are permissible if the client gives informed consent, the scope of the representation is reasonable, and the limitation is not prejudicial to the administration of justice). Comments [6] – [8] to Rule 1.2 provide helpful guidance on limited scope representation.

11. In particular, Comment [6A] to Rule 1.2 provides that in obtaining consent from the client "the lawyer must adequately disclose the limitations on the scope of the engagement" as well as the "reasonably foreseeable consequences of the limitation." Comment [6A] also explains that such consequences could include "delay, additional expense and complications" if the lawyer or client later determines that additional services outside the limited scope specified "are necessary or advisable" to adequately represent the client. In that case, "the client may need to retain separate counsel."

12. Further, Comment [8] to Rule 1.2 provides that in a limited scope representation, as in all agreements concerning a lawyer's representation, a lawyer must act in accord with the Rules of Professional Conduct and other law. Thus, to the extent the inquirer seeks to continue to provide

legal services for a fee for New York clients despite the closure of his New York office, he may only do so if he complies with "other law." We do not opine on questions of law, so we offer no opinion on which particular "other law" applies to a lawyer who has closed his New York office but continues to practice in another jurisdiction where he is licensed, but the inquirer should consider the applicability of 22 NYCRR § 118.1(g) (governing retired lawyers), which may mandate continuing his biennial attorney registration, filing the required forms, paying the required fee, and completing the mandatory continuing legal education requirements. See N.Y. State 1172 ¶ 8 (2019). If the inquirer is closing his New York office but continuing to practice in New York remotely, then he should also consider the implications of New York Judiciary Law § 470 (discussed below).

13. We believe such limited scope can be reasonable provided the client understands the risks associated with not having a full-service legal representation at every stage of the proceeding inside and outside of the courtroom, the client gives informed consent, confirmed in writing, and the inquirer complies with other applicable ethics rules and law. In fact, such limited scope representation may be the only viable alternative for clients who cannot afford more extensive representation and, for both clients and the courts, is normally preferable to no legal representation at all. See N.Y. County 742 (2010) (noting that "limited scope legal arrangements with pro se litigants can provide equal access to justice for pro se litigants who do not qualify for or are without access to free legal services but who are nonetheless unable to afford prevailing legal fees,"). Nor does a limitation on the scope of the inquirer's services appear to be prejudicial to the administration of justice, because counsel's assistance can avoid delay and needless motion practice often caused by a pro se litigant's lack of familiarity with legal and procedural issues. Id.

May a lawyer prepare legal papers on behalf of a *pro se* client for submission to court without disclosing his role in preparing those papers?

14. The inquirer here does not intend to appear as counsel of record on any matter in which he has provided limited scope legal services. Rather, whether preparing an uncontested application for a divorce judgment following a successful mediation or preparing papers in a contested matter, the inquirer intends the clients to submit papers to the court pro se. Must the inquirer disclose his behind-the-scenes role as a "ghostwriter" of these applications? Rule 1.2(c) addresses this issue but does not answer it, stating: "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*." (Emphasis added.)

15. Based on the plain language of Rule 1.2(c), N.Y. County 742 (2010) concluded that disclosure of the fact that a pro se litigant's court submission was prepared by counsel is required only "where necessary," not in every case. Specifically, N.Y. County 742 said that disclosure was "necessary" where mandated by a procedural rule, a court rule, particular judge's rule, a judge's order in a particular case, or whenever the failure to disclose an attorney's assistance in ghostwriting would constitute a "misrepresentation." We relied on N.Y. County 742 in N.Y. State 856 ¶ 10 (2011) ("we think notice of the limited representation is 'necessary' under Rule 1.2(c) only if a court rule requires such notice, and we lack jurisdiction to interpret court rules"), and we still agree with N.Y. County 742 that disclosure of ghostwriting is not required unless any of those circumstances apply. To the extent we held in N.Y. State 613 (1990) that disclosure of the identity of the lawyer to the court and the opposing party is required whenever a lawyer ghostwrites pleadings for a *pro se* party, we overrule that opinion, because it was issued before New York

adopted Rule 1.2(c).

May the lawyer call himself a "legal consultant" and not a lawyer with respect to his intended limited scope of services?

16. The inquirer intends to use the term "legal consultant" in his retainers and in dealing with adverse counsel in negotiating divorce settlements. We do not approve, as the inquirer's use of the term "legal consultant" would have the potential to confuse or mislead clients or adverse counsel.

17. Although the Rules do not define the term "legal consultant," the "Rules of the Court of Appeals for the Licensing of Legal Consultants" (22 NYCRR Part 521) make clear that the term refers to a member in good standing of a recognized legal profession in a foreign country who intends to practice as a legal consultant in New York and maintain an office New York for that purpose. See 22 NYCRR § 521.1(a)(1) and (5). The inquirer does not qualify as a "legal consultant" under Part 521.

18. Apart from the problem of Part 521, the phrase "legal consultant" has no fixed meaning but seems to suggest that the person is something more than an ordinary layman but less than a lawyer. It thus seems as if the inquirer desires to use the term "legal consultant" in the hope that it will relieve him of some of the duties and obligations that are imposed upon lawyers. It does not. When the inquirer represents or advises clients or otherwise acts as a lawyer, he remains subject to all legal and ethical rules applicable to the provision of legal services. *See* N.Y. State 1178 (2019).

19. Thus, the use of the term "legal consultant" has the potential to mislead clients and others in violation of Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Must an attorney residing in Florida and practicing law in New York over the internet maintain a physical office in New York?

20. The inquiry raises a final question: may the inquirer practice law in New York via the internet if he resides in Florida and does not maintain a physical office in New York? While this Committee does not opine upon questions of law, we note that New York Judiciary Law § 470 provides that a non-resident attorney admitted in New York may practice law in New York only if that attorney maintains an office for the practice of law in New York, and this requirement has been upheld by the New York Court of Appeals and the Second Circuit Court of Appeals. *See Schoenefeld v. State of New York,* 25 N.Y. 3d 22 (2015) (holding that a New York attorney who resides outside New York must maintain a physical office in New York); *Schoenefeld v. State of New York,* 821 F.3d 273 (2d Cir. 2015) (rejecting a constitutional challenge to § 470's physical office requirement). As we noted in N.Y. State 1025 ¶ 21 (2014), a lawyer is "required to comply with applicable law," and a violation of Judiciary Law § 470 "may adversely reflect on the lawyer's honesty, trustworthiness or fitness," which would violate Rule 8.4(b). Therefore, to be entitled to practice law in New York, a non-resident member of the New York bar "must have an office that meets minimum requirements of Judiciary Law § 470 …." N.Y. State 1025 ¶ 22. But as in Opinion 1025, since this Committee does not decide issues of law, we offer no opinion as to what type of "physical office" Judiciary Law § 470 requires.

CONCLUSION:

21. A New York lawyer may perform divorce mediation services for New York clients from his office in another state, provided that he makes effective disclosure of the differences in his role as mediator/neutral and lawyer and explains that he is not representing either party when he serves as a mediator. Where the mediation is successful, the lawyer may thereafter represent one of the parties to prepare a settlement agreement or other papers for the client to file *pro se* in the divorce proceeding, provided the lawyer obtains informed written consent from the non-represented mediation party.

22. A New York lawyer may also, in a pending or contemplated divorce action, enter a limited scope retainer with New York clients undertaking to provide legal advice, negotiate a settlement, or prepare legal documents for filing by the client *pro se* with a court in New York, provided the lawyer informs the prospective client regarding the relative risks of limited representation and benefits of full-service representation. In connection with providing these legal services, the New York lawyer cannot call himself a "legal consultant" instead of a lawyer.

23. A New York lawyer who resides in Florida but represents New York divorce clients over the internet from his law office in Florida must comply with the physical office requirement of New York Judiciary Law § 470.

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