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 1199 (07/15/2020)

Topic: Attorney website to assist *pro se* litigants; marketing of legal services

Digest: An attorney may, under certain conditions, establish a separate business through a website to assist *pro se* litigants with filings through an automated system where the business will not be providing individualized legal advice or advertising a law firm's legal services. If an attorney reviews the filings generated by the automated system, or provides general representation on the legal matter, the entirety of the services are subject to all ethical rules governing lawyers.

Rules: 5.7, 7.1, 7.2, 7.3.

FACTS

1. The inquirer, an attorney admitted in New York, plans to create, with a former law firm colleague, an incorporated business to market the services of the former colleague's firm on a website. The inquirer envisions the website offering three different services.

2. The first service – we will call it Tier I – would be a "guided do-it-yourself" in which the website would provide users with generic templates and general legal guidance to assist them in making *pro se* filings in New York. This automated service, for which the user would pay, would entail no interaction between the user and a lawyer specific to the user's needs; the user would select from a preprogrammed menu of options. In the second service – Tier II – users would still be initially guided through the completion and assembly of their *pro se* filings by the automated system, but the final product would be reviewed by an attorney to check for compliance, completeness, and the potential efficacy of the submission, after which the service and filing of the papers would rest with the *pro se* litigant purchasing the service. A third service, Tier III, would provide the users with full representation by the law firm, in consideration of a legal fee to be paid by the user.

3. The inquirer wishes to avoid forming an attorney-client relationship with visitors to the website who pay for the services offered by Tiers I and II, and to form such a relationship only with those who avail themselves of Tier III by retaining the law firm to represent them. In the inquirer's words, the purpose of Tiers I and II is to provide affordable and accessible guidance to *pro se* litigants who would otherwise be left "completely to their own devices."

4. The website would feature the name of the newly-established corporation wholly owned by the inquirer and the erstwhile colleague, as well as the name of the latter's law firm.

QUESTION

5. The inquirer asks whether a corporation may offer the services proposed for Tiers I and II. We see other issues as well.

OPINION

General Principles

6. In N.Y. State 636 (1992), we wrote:

> There is … no ethical proscription against a lawyer engaging in a separate business not constituting the practice of law, N.Y. State 557 (1984), provided that the lawyer does not use the separate business as a means of soliciting legal practice in violation of any statute or court rule and the lawyer does not recommend to his or her clients the purchase of a product from the separate business, N.Y. State 536 (1981), and provided further that the lawyer does not violate any ethical or legal rules. N.Y. State 584 (1987); N.Y. State 307 (1973).

7. Consequently, we concluded that "a lawyer or law firm could establish a separate entity to prepare and engage in the general publication of standard form wills." *Id.* We opined that there is no *per se* ethical proscription against a law firm establishing a wholly separate business selling will forms operating under the trade name "The Will Store," provided that the phrase was not used in conjunction with the names of the attorney principals, the business did not constitute the practice of law, and the separate business is not used to solicit legal practice. *Id.*

8. Several years after we issued N.Y. State 636, the courts codified its conclusion, with conditions, by adopting the substantial equivalent of what is now Rule 5.7 of the N.Y. Rules of Professional Conduct ("Rules"), which contains requirements for lawyers and law firms providing non-legal services. Rule 5.7(c) defines non-legal services to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by" a non-lawyer. Rule 5.7(a) varies the requirements applicable to these non-legal services depending on whether the services are "distinct" or "not distinct" from the legal services the lawyer or law firm provides to the affected persons.

9. The Rules do not define the word "distinct." Our opinions have interpreted the word consistent with its customary usage to mean "not alike, different, not the same, separate, clearly marked off." N.Y. State 1135 ¶ 7 (2017) (citing *Webster's Unabridged Dictionary* 534 (2d ed. 1979)). The "most important factor in determining distinctness is the degree of integration of the services." N.Y. State 1155 ¶ 14 (2018). Applying this and other factors, we have concluded that some non-legal services are not distinct from legal services, *e.g.*, N.Y. State 1026 ¶ 10 (2014) (lawyer/mediator preparing settlement documents in domestic relations matters), while others are distinct, *e.g.*, N.Y. State 1157 ¶ 8 (2018) (lawyer offering engineering services unrelated to law practice).

10. This matters. Rule 5.7(a)(1) says that a lawyer or law firm providing non-legal services to clients or other persons is subject to the entirety of the Rules when the non-legal services are not distinct from legal services. When the services are distinct, the Rules nevertheless caution that a consumer's reasonable belief controls. By reason of Rule 5.7(a)(2) & (3), "if the person receiving the legal services could reasonably believe that" the non-legal services "are the subject of a client-lawyer relationship," then the lawyer owes a duty to clarify by rebutting the presumption that the Rules create. Rule 5.7(a)(4) presumes that the recipient of the non-legal services will believe that the services are subject to a lawyer-client relationship unless the lawyer or law firm has advised that person in writing "that the services are not legal services and that the protection of a lawyer-client relationship does not exist with respect to" the non-legal services, or if the interest of the lawyer or law firm in the entity providing the non-legal services is *de minimis*. This written notice

or disclaimer removes the rendition of non-legal services from the application of the Rules to those distinct non-legal services, provided that those non-legal services do not constitute the unauthorized practice of law and that the lawyer or law firm in fact supplies no legal services. When, as here, the lawyer and onetime colleague wholly own the entity, the issue of *de minimis* involvement is not implicated.

11. The inquirer acknowledges that the Tier III services – the establishment of a full representation on the matter – creates a lawyer-client relationship to which all the Rules apply. We focus, then, on the website's offering of Tier II and Tier I services. On our view, the inquirer must first determine whether the Tier I and Tier II services constitute the practice of law. This will depend in large part on whether the services provide generic forms or whether they purport to be giving individualized recommendations based on facts the user provides. This is a fact-based determination on which we do not opine: "Questions about services comprising the unauthorized practice of law are outside the orbit of this Committee's reach, and so we offer no opinion on that subject." N.Y. State 1135 ¶ 5; *see* Rule 5.7(c) (non-legal services permitted under Rule 5.7 "mean those services that … are not prohibited as an unauthorized practice of law"). For our purposes here, we assume without deciding that the provision of generic legal forms does not constitute the unauthorized practice of law.

An Interactive Internet Relationship between Lawyer and Client on a Specific Legal Matter

12. N.Y. State 832 (2009) is enlightening on the proposed Tier II service, in which visitors to the proposed website would be guided by the automated system to complete generic forms for *pro se* filings but then be advised by a lawyer about features of the forms. In N.Y. State 832, we addressed a sole practitioner's inquiry involving the sale of shelf corporations, which we noted was a non-legal service. We explored the scenario in which the lawyer would provide no legal advice to the purchasers of the shelf corporations as follows (at ¶ 5):

> For the assumption that the lawyer provides no legal advice to remain true, the lawyer could not answer the kinds of questions a prospective customer might ask that are likely to call for legal advice (*e.g.*, What are the tax consequences? How long may I leave the corporation on the shelf? Do I have to notify the state if I buy a shelf corporation? Is the corporation validly formed?). For example, if the shelf corporations were sold over the Internet, and the attorney was not identified anywhere on the web site as a lawyer, and any information about the corporations was provided only in writing (*e.g.*, via FAQs or links to articles), and purchasers never communicated with the lawyer directly and had no opportunity to ask for advice, then the lawyer would not be giving legal advice to purchasers. In that case the Rules would not generally apply to those sales.

13. On our view, the proposed Tier II services in which the final papers generated through the Tier I service would then be reviewed and critiqued by an attorney to check for compliance, completeness, and potential efficacy of the submission, crosses the line we drew in N.Y. State 832. Although the existence of a lawyer-client relationship is ultimately a legal - not an ethics question - Rules, Preamble ¶ 9, the rendition of legal advice on a specific matter seems to us to embrace the very essence of a lawyer-client relationship. Subject to the Rules, including Rules 7.1, 7.2, and 7.3, a lawyer may offer such services to the public on the Internet. But in our judgment, the lawyer, a law firm, or a lawyer-owned purportedly non-legal services entity may not escape the Rules in engaging in these activities, and no disclaimer or other notice may rescue them from this consequence.

14. Otherwise put, we do not consider the contemplated Tier II service to be a non-legal service but the rendition of legal services to specific persons on specific matters. The services are not distinct from legal services; they are legal services. The Rules fully apply.

A Lawyer's Offering of Forms on the Internet

15. The Rules do not necessarily fully apply to a do-it-yourself site contemplated by the inquirer's Tier I service, not an automated service. Nothing in the Rules prevents a lawyer from starting a separate business to operate a website (or engaging in other activities) that provides generic advice on legal issues to the public – that is, advice not tailored to facts and law unique to a specific identifiable consumer. Assuming, again, that no unauthorized practice of law occurs, we think a lawyer or a non-lawyer may create a website or other platform to offer the public such generic forms of basic documents as wills, trusts, template lawsuits, and the like. To that extent, we consider the practice akin to that blessed in N.Y. State 636's acceptance of The Will Store. But that blessing came with a condition that, if the operator is a member of the bar, then the lawyer may "not use the separate business as a means of soliciting legal practice in violation of any statute or court rule and the lawyer does not recommend to his or her clients the purchase of a product from the separate business." As presented to us, the inquirer's proposal does not comply with this condition. *Cf.* N.Y. State 951 ¶¶ 10-12 (2012) (lawyer may establish a web-based letter-writing service if, among other things, no legal services are rendered and the site prominently disclaims the existence of a lawyer-client relationship).

16. As we said in N.Y. State 832, when the attorney's status as a lawyer is visible to the public (*e.g.*, the attorney uses a law office name or letterhead, or advertises the sales on the lawyer's web site, or puts "Esq." or "J.D." after the lawyer's name), a substantial risk is present that the purchaser of the non-legal service "will be misled as to whether an attorney-client relationship exists." *Id.* ¶ 8. In this scenario, when an attorney or law firm's status is disclosed to a purchaser of the non-legal service, we concluded that "[t]he risk is great because the client may be confused about the nature of the attorney's role." *Id.* ¶ 10; *see* Rule 5.7, Cmt. 1 ("The recipient of the non-legal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of non-legal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and non-legal services with respect to the same matter."); N.Y. State 951 ¶ 6 ("It is likely that a client of the letter writing service, knowing that the writer is a lawyer, may expect legal advice.").

17. The concerns expressed in N.Y. State 832 and Comment [1] to Rule 5.7 are particularly heightened here, when the business is being formed to market a law firm's services and purchasers for Tier II and Tier III legal services on the very product sold as Tier I service. As a result, if the attorney's status as a lawyer is visible to the public on the website offering the Tier I services, as the inquirer anticipates, "then absent a disclaimer or other steps, the recipients of the non-legal services could reasonably believe there is an attorney-client relationship, and thus the Rules would apply." N.Y. State 832 ¶ 11.

18. If the attorney's status as a lawyer is visible, such as on the business's website or on a lawyer's website marketing the business, one way for a lawyer to avoid wholesale application of the Rules to the sale of non-legal services would be to give the purchaser in writing the Rule 5.7(a)(4) disclaimer stating that no legal services are being rendered and that the protection of an attorney-client relationship does not exist. Even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer is engaged in activities that constitute the

unauthorized practice of law or the lawyer or law firm actually provided legal advice or other legal services to the consumer of the non-legal service. N.Y. State 832 ¶ 11.

19. In short, a lawyer or law firm may operate a separate business that offers a user generic templates to the public, but may not do so as part of, or in connection with, the lawyer's or law firm's offering of legal services. Assuming, again, that such an offering does not amount to the unauthorized practice of law – that is, that a non-lawyer may engage in such activity without running afoul of the law against unauthorized practice – we think a lawyer or law firm may do the same if, but only if, the lawyer or law firm's status as such is not visible to the public, or if, visible, the lawyer or law firm makes the written disclaimer for which Rule 5.7(a)(4) provides to rebut the presumption that a lawyer-client relationship exists.

CONCLUSION

20. An attorney may, under certain conditions, establish a separate business through a website to assist *pro se* litigants with filings through an automated system where the business will not be providing individualized legal advice or advertising a law firm's legal services. If an attorney reviews the filings generated by the automated system, or provides general representation on the legal matter, the entirety of the services are subject to the ethical rules governing lawyers.

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