

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

I have owned and operated my own practice for the last 25 years. Last year, I hired a partner to help service my clients and to generate additional business so that the practice can live on long after my retirement. The partner I hired has an impressive background in computer programming and suggested that we create an online platform to assist *pro se* litigants with the filing of legal documents through an automated system called U-Dox. U-Dox would be owned and operated by a new entity that is separate and apart from my legal practice, although it would be advertised on my firm's website. The service would offer two options for assistance in filing *pro se* papers. The first and cheapest option gives users access to generic templates to be filled in with the general assistance of an automated program and provides

no direct access between the user and the lawyer specific to the user's needs. The second and more expensive option provides all of the features of option one, but the final product would be reviewed by an attorney to check for compliance, totality, etc. Of course, if users are happy with the automated system, they are always permitted to retain us for our full legal fee to obtain the entire gamut of our legal services.

Am I ethically permitted to offer such services to clients? If so, what are my ethical obligations with respect to advertising said services and retaining clients who have used these services?

**Very Truly Yours,
Allot A. Business**



DEAR ALLOT A. BUSINESS,

The short answer to your question is that under the Rules of Professional Conduct (RPC), attorneys are permitted, under certain circumstances, to establish a separate business through a website and assist *pro se* litigants. They may help with filings through an automated system that does not provide individualized legal advice. But, there is one complication. If the attorney reviews the filings generated by the automated system, or provides general representation on the matter that is specific to the facts and circumstances of that client's case, the entirety of the lawyer's legal services are subject to the entire universe of ethical rules governing lawyers. We now turn to the various rules that apply to your question.

not engaged in the representation of a client and are not providing legal services to the parties to the mediation. However, where the lawyer mediator goes a step further and prepares settlement documents, the non-legal services are no longer distinct from the legal services offered and the RPC applies. *Id.*

RPC 5.7(1)(3) adds that even when the non-legal services are distinct from the legal services provided, it is the consumer's reasonable belief that controls. In the language of RPC 5.7(1)(3), "a lawyer or law firm that is an owner [of] . . . or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiv-

While the RPC does not prevent a lawyer from starting a separate business that provides generic advice on legal issues to the public that is not tailored to facts and law, certain ethical issues arise when the attorney seeks to advertise such services to clients.

RPC 5.7 tells us that "a lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and non-legal services." Thus, to evaluate whether the ethical rules apply to your offering of U-Dox, you first will need to determine whether the non-legal services provided under option one are distinct from the legal services being provided in the other options. *See* RPC 5.7.

Notably, the RPC does not define the word "distinct." It is necessary to look at various ethics opinions to ascertain its meaning. The opinions have interpreted the word to be consistent with its customary usage meaning "not alike, different, not the same, separate, clearly marked off." New York State Bar Association (NYSBA) Committee on Professional Ethics (the "Committee"), Op. 1135 (2017) (citing Webster's Unabridged Dictionary 534 (2d ed. 1979)). The Committee has opined that the "most important factor in determining distinctness is the degree of integration of the services." NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). An illustrative example was addressed in a prior *Forum*, in which we discussed the RPC's impact on lawyers who serve as mediators. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelman & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., May 2020, Vol. 92, No. 4. There we expressed the view that lawyers acting as mediators are

ing the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship." Thus, if the individual using the service could reasonably believe that a client-lawyer relationship has been formed, the lawyer must then be able to rebut the presumption that the RPC creates.

RPC 5.7(a)(4) presumes that the recipient of the non-legal service will believe that the service being provided is subject to a lawyer-client relationship unless the lawyer has advised the consumer 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 in the entity is *de minimis*. *See* RPC 5.7(a)(4). Given that you have indicated that you and your new partner wholly own the entity offering the U-Dox services, the exception to the written disclaimer requirement under RPC 5.7(a)(4) of *de minimis* involvement does not apply. Thus, a written disclaimer would be necessary here.

We recommend taking the following steps on the law firm's webpage to rebut the presumption that a lawyer-client relationship has been formed. First, you should include the RPC 5.7(a)(4) disclaimer in fine print at the bottom of the webpage offering the U-Dox services. Second, we recommend including a pop-up disclaimer on the checkout page requiring the user to manually acknowledge that they understand that no attorney-client relationship has been formed.

The application of each particular rule to the various U-Dox options will turn on whether the services offered are viewed as the practice of law. *See* NYSBA Comm. on Prof'l Ethics, Op. 1199 (2020). The question to be considered is whether the services provide generic forms or offer individualized recommendations based on facts the user provides. *Id.* The Committee has said that the RPC generally does not apply to a do-it-yourself site such as the first option offered by U-Dox. *Id.* Where the purchasers of a particular service had no opportunity to communicate with the lawyer directly and ask for legal advice, then the lawyer would not be giving legal advice to the consumers and the RPC generally would not apply to such transactions. *Id.*

Conversely, the second option offered by the U-Dox system would likely amount to the practice of law such that all ethical rules will apply. The Committee has noted "the rendition of legal advice on a specific matter seems to embrace the very essence of a lawyer-client relationship . . . subject to the [RPC] . . . and no disclaimer or other notice may rescue them from this consequence." NYSBA Comm. on Prof'l Ethics, Op. 1199 (2020). In our view, option two, which requires a lawyer to review the form generated by U-Dox's option one to ensure the compliance, completeness and efficacy of the submission, rises to the level of rendering a legal service, as it provides pointed advice to specific individuals based on the relevant facts and circumstances of their filing. Such services are not distinct from legal services; they are legal services and the RPC will apply.

While the RPC does not prevent a lawyer from starting a separate business that provides generic advice on legal issues to the public that is not tailored to facts and law which are unique to the specific consumer, certain ethical issues arise when the attorney seeks to advertise such services to clients. *Id.* The ethical rules regarding attorney advertising are primarily set forth in Rule 7.1, an issue that we have addressed at length in several prior *Forums*. (*See* Vincent J. Syracuse, Carl F. Regelman & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January 2018, Vol. 90, No. 1; Vincent J. Syracuse, Carl F. Regelman, Richard W. Trotter & Amanda M. Leone, Attorney Professionalism Forum, N.Y. St. B.J., February 2018, Vol. 90, No. 2.) RPC 7.1(a) states that "a lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (a) contains statements or claims that are false, deceptive or misleading; or (b) violates a Rule."

In our view, your plan to advertise the U-Dox services on your firm's website will potentially trigger RPC 7.1, as violating RPC 5.7 because a consumer could reasonably assume that a lawyer-client relationship has been formed. For example, in Opinion 832, the Committee stated that

when an attorney's status is visible to the public in connection with the contribution of non-legal services, there is substantial risk that the purchaser of the non-legal service will be misled as to whether an attorney-client relationship exists. NYSBA Comm. on Prof'l Ethics, Op. 832 (2000). If consumers are confused as to whether an attorney-client relationship exists, they may reasonably assume that the protections of client confidences and prohibitions against representing clients with competing interests apply to the non-legal services being rendered. One way to avoid the application of the RPC to the sale of non-legal services would be to give the purchaser the written disclaimer provided in RPC 5.7(a)(4), which states that no legal services are being rendered and that the protection of an attorney-client relationship does not exist. *See* NYSBA Comm. on Prof'l Ethics, Op. 1199 (2020).

However, as a practical matter, even in the presence of a disclaimer stating that no legal services are being rendered, some consumers may still be confused as to the nature of the services offered since they are being advertised on the law firm's webpage. Therefore, to further ensure there is no consumer confusion, you may want to altogether create a separate tab on your webpage titled "non-legal services and forms" where the user can click to access the U-Dox services.

Separately, it is important to reiterate that as soon as the attorney provides any legal guidance under option 2 or other legal services to the consumer of the U-Dox, the disclaimer of RPC 5.7(a)(4) is no longer effective. *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 832 (2000).

Additionally, if your advertisement violates RPC 7.1(a), it may also run afoul of RPC 7.3, which governs the solicitation and recommendation of professional employment. RPC 7.3(a)(2)(i) states that a lawyer shall not engage in solicitation by any form of communication if the communication or contact violates Rule 7.1(a).

While not all attorney advertisements are necessarily solicitations, advertisements that appear to be an attorney's recommendation to a client to purchase a particular product from the lawyer's separate business would certainly cross this line. For example, the Committee has noted that if the operator of the website is a member of the bar, 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." NYSBA Comm. on Prof'l Ethics, Op. 636 (1992). Accordingly, in order to guarantee that your advertisement does not violate the ethical rules regarding attorney advertising and solicitation, our suggestion is that you make all reasonable efforts to ensure that the consumers of the non-legal services understand that the use of option one of the U-Dox system does not create

an attorney-client relationship with you and your firm. As previously discussed, this may be accomplished by creating a separate webpage tab titled “non-legal services” to access the U-Dox services. Additionally, we do not recommend advertising such services on the homepage of your firm’s website.

In summary, the RPC does not prevent you from operating a separate business that offers consumers generic legal templates. However, it is important to keep the non-legal services offered separate from the legal services proffered by the law firm so as not to create consumer confusion as to whether an attorney-client relationship has been formed. To that end, we recommend creating a distinct website tab for U-Dox on your law firm’s website. By choosing to advertise such non-legal services on your firm’s webpage, where your status as an attorney is visible to potential consumers, at a minimum we suggest that you make the written disclaimer required under RPC 5.7(a)(4) at the bottom of the U-Dox webpage to rebut the presumption that the lawyer-client relationship exists. Finally, keep in mind that if you opt to offer the services described in U-Dox’s option two and review the filings generated by the automated system, you will have to satisfy your obligations under the RPC.

Sincerely,

The Forum by

Vincent J. Syracuse, Esq.

(syracuse@thsh.com)

Maryann C. Stallone, Esq.

(stallone@thsh.com) and

Alyssa C. Goldrich, Esq.

(goldrich@thsh.com)

Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

TO THE FORUM:

I am a recent law school graduate, who passed the bar exam and am awaiting admission to the New York bar. I was lucky to land my dream job working as a law clerk while I await my admission. As I cannot practice law until after I am admitted, I have mostly been conducting research and shadowing the admitted attorneys.

Recently, Raoul Bender, a senior partner at my firm, asked me to cover a court appearance on his behalf, due to an unavoidable conflict for which he could not find coverage. When I reminded him that I am not yet admitted, he responded, “That’s okay. It’s just a conference. All you have to do is state your name and the law firm you work at, opposing counsel will cover the rest. It will be good experience for you.”

However, my gut instinct, and limited knowledge of the Rules of Professional Conduct, tell me that such an appearance is prohibited and could potentially compromise my admission to the bar. What’s more, the attorney representing the opposing party is the same attorney that I have my character and fitness interview with.

I am worried that if I tell Mr. Bender I am uncomfortable covering the conference, I will jeopardize my job. On the other hand, I am worried that if I do not speak up, I could jeopardize my entire career. Am I ethically permitted to appear on Mr. Bender’s behalf? If not, what are my ethical obligations with respect to his request?

Very Truly Yours,

Inn A. Pickle

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