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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DEAR FORUM:

I am a patent attorney at a large firm with a background in chemical engineering. Although I enjoy practicing law, I would prefer to spend more of my time on traditional engineering work. My firm, however, only wants me to focus on my legal work and they have no interest in me doing any nonlegal engineering work for clients. So I decided that I am going to leave the firm and start my own practice where I can advise clients not only on legal matters, but also provide engineering consulting services. Before opening my new practice, however, I realize there are some ethics issues that I need to iron out.

For instance, do I need to form separate business entities for my engineering work and legal work or can I have one business entity to operate both? If I am able to create a single entity, which I would prefer to do, can I reference my engineering services in the name of the company? When I am performing work for my clients, do I have to delineate which work is legal work and which work is solely nonlegal engineering work? Are there any other issues I should be wary of in operating this practice to ensure that I am complying with my ethical obligations as well as protecting my clients?

Sincerely,
Molly Cule

DEAR MOLLY CULE:

Lawyers often wear many hats when they represent clients. Indeed, it is not uncommon for lawyers to offer clients both legal and nonlegal services. But, that is far from the end of the story. Multiple roles create numerous potential ethical and professional challenges that must be addressed as part of planning your new business.

Creating and Naming Your Entity

You tell us in your question that you would like to form a single entity in order to perform legal and engineering services for your clients. The New York Rules of Professional Conduct (RPC) permit the formation of a single entity for the performance of legal and nonlegal services; put simply, lawyers are allowed to "serve a broad range of economic and other interests of clients." RPC 5.7 Comment [1]; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018). A lawyer or law firm may provide nonlegal services to clients in three ways: (1) a lawyer with a personal nonlegal skill, such as in your case where you are both a lawyer and a professional engineer; (2) law firms that employ non-lawyers to provide their clients with nonlegal services; or (3) law firms that provide nonlegal services through a separate third-party nonlegal entity of which the law firm is affiliated. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1524 (2016 ed.).

There is a catch. Although you are permitted to perform nonlegal services for clients in connection with your law practice, you are not permitted to reference those nonlegal services in your firm's name. RPC 7.5(b) offers instructions on what lawyers are permitted to do when they name their law firms. "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." RPC 7.5(b). The prohibition against trade names is broad and "little beyond the names of lawyers presently or previously associated with the firm" is allowed in a firm name. *See* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018), *quoting* NYSBA Comm. on Prof'l Ethics, Op. 869 (2011). Language that must ordinarily be excluded from firm names, such as trade names, may be permissible as a separate firm "motto" on letterhead or advertising materials written below the firm name. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1862. For example, the Court of Appeals in *In re von Wigen,* 63 N.Y. 2d 163 (1984) allowed an attorney named von Wigen to use the phrase "The Country Lawyer" below his name on advertising materials. *Id.* at 1862–63, *citing In re von Wigen,* 63 N.Y.2d 163 (1984). Interestingly, to the extent you ever intend to open a sep-

arate engineering business completely distinct from your legal services, the rules set forth in RPC 7.5(b) would not apply. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1861 (2016 ed.).

While you are not permitted to refer to engineering services in the firm name, you are free to reference your engineering qualifications and experience on your firm website and marketing materials as long as it is consistent with the advertising rules in the RPC including restrictions on attorney advertising in RPC 7.1. RPC 1.0(a) defines "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." RPC 7.1(a) prohibits any advertising that is false, deceptive, misleading or that violates any of the other RPC. "A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation." *See* RPC 7.1 Comment [3].

Providing Nonlegal and Legal Services to Your Clients

Since your plan is to perform nonlegal and legal services within the same practice, it is also necessary for you to identify whether the nonlegal services that you plan to provide to a particular client can be considered distinct from your legal services. This analysis is essential because it dictates whether the RPC apply to the provision of all your services, legal and nonlegal.

RPC 5.7(a)(1) addresses the application of the RPC to nonlegal services that are not "distinct" from legal ones. The RPC, however, does not define the term "distinct." In NYSBA Comm. on Prof'l Ethics, Op. 1135 (2017), the New York State Bar Association (NYSBA) Committee on Professional Ethics relied upon the "ordinary and customary" dictionary meaning of the word distinct, "not alike, different, not the same, separate, clearly marked off." NYSBA Comm. on P rof'l Ethics, Op. 1157 (2018), *citing* NYSBA Comm. on Prof'l Ethics, Op. 1135 (2017). "The 'most important factor in determining distinctness is the degree of integration of the services.'" *Id., quoting* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). If the legal and nonlegal services are not distinct, then the RPC always apply. *See* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). This means that all of the obligations that lawyers have in their traditional client relationships, including the protection of client information, prohibition against conflicts of interests, and requirement of professional independence, apply to all services rendered including the nonlegal services. *Id.*

RPC 5.7(a)(2) governs nonlegal services that are distinct from legal services. In this instance, even though the nonlegal services are distinct from the legal services, the RPC still apply to nonlegal services when a client could reasonably believe that an attorney-client relationship has been established. *See* RPC 5.7(a)(2). RPC 5.7(a)(4) cre-

ates the presumption of a reasonable belief in the creation of an attorney-client relationship, but permits a lawyer to overcome this presumption by advising the client in writing that the nonlegal services provided are not afforded the protection of the attorney-client relationship. *See* RPC 5.7(a)(4); NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018).

The NYSBA Committee on Professional Ethics recently opined that engineering and legal services may be considered distinct services within the meaning of RPC 5.7(a)(2). *See* NYSBA Comm. on Prof'l Ethics, Op. 1157 (2018). The Committee reasoned that "[a] clear demarcation exists between the scientific design and construction of tangible things and the use of legal knowledge and experience to advise a client on adherence to lawful behavior." *Id.* The Committee also specifically opined that other services, such as the provision of tax services, mediation in domestic relationships matters, and integrated real estate services, are not distinct from legal services. *See id.* If you intend to offer the same clients both legal and nonlegal services, however, steps should be taken so that clients are not confused as to when you are acting as their lawyer and when you are only acting in your capacity as an engineer. *See id.; See also* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). "Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship." RPC 5.7 Comment [1]. Based upon the foregoing, you should be diligent in consistently communicating with your clients regarding the capacity in which you are acting in order to avoid any possible confusion concerning your role. This is especially important if you begin acting solely as an engineer for a client where you had previously acted as patent lawyer for the client, utilizing your engineering skills, and the client may have a reasonable belief that attorney-client protections will still apply.

There is another layer to this onion. Even if the nonlegal services you are performing are distinct from your legal services, you still have to consider whether there are any conflicts of interest under RPC 1.7(a). RPC 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's own professional judgment on behalf of the client will be adversely affected by the lawyer's own business or financial interests (unless client consent is an option and the client provides such consent). *See* NYSBA Comm. on Prof'l Ethics, Op. 1155 (2018). The Committee has opined that when a lawyer seeks to provide both legal and nonlegal services the lawyer must determine whether there is a significant risk that the lawyer's professional judgment will be adversely affected. *See id.* The Committee noted that this "will depend on the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees." *See id.* In that instance, when there is a significant risk to the lawyer's professional judgment being adversely affected by the nonlegal financial interest, the lawyer must obtain informed consent in writing from the client. *See id.*

In the context of an attorney providing legal and nonlegal services, some conflicts are non-waivable. *See id.* Many of these situations involve a lawyer acting as both a lawyer and a real estate broker in the same transaction. *See id.* These types of conflicts are likely non-waivable because the broker/lawyer has a personal financial interest in obtaining the commissions, which would ultimately interfere with the lawyer's ability to provide independent advice concerning the transaction. *See id.* Similar conflicts exist with respect to brokers of financial products. *See id.* In a 1981 opinion, the NYSBA Committee on Professional Ethics addressed the issue of whether members of a law firm could conduct a financial planning business in the same office in which they practiced law and provide both financial planning and legal services to the same clients. *See id., citing* NYSBA Comm. on Prof'l Ethics, Op. 536 (1981). The Committee opined that this practice would not be unethical as long as the financial planning business did not offer any products for which they would receive a commission or other form of compensation for recommending such products. *See id.* In addition, the Committee noted that that it would also be unethical for the lawyers to act as legal counsel and broker in the same transaction. *See id.*

Good luck with your new career path. You can certainly provide separate engineering and legal services which will be beneficial to your clients while satisfying your personal interests. When charting a course through your ethical obligations as a lawyer we suggest that you think about the work you are providing for your clients from *their perspective* and what protections that they may reasonably believe are associated with your work.

Sincerely,

The Forum by
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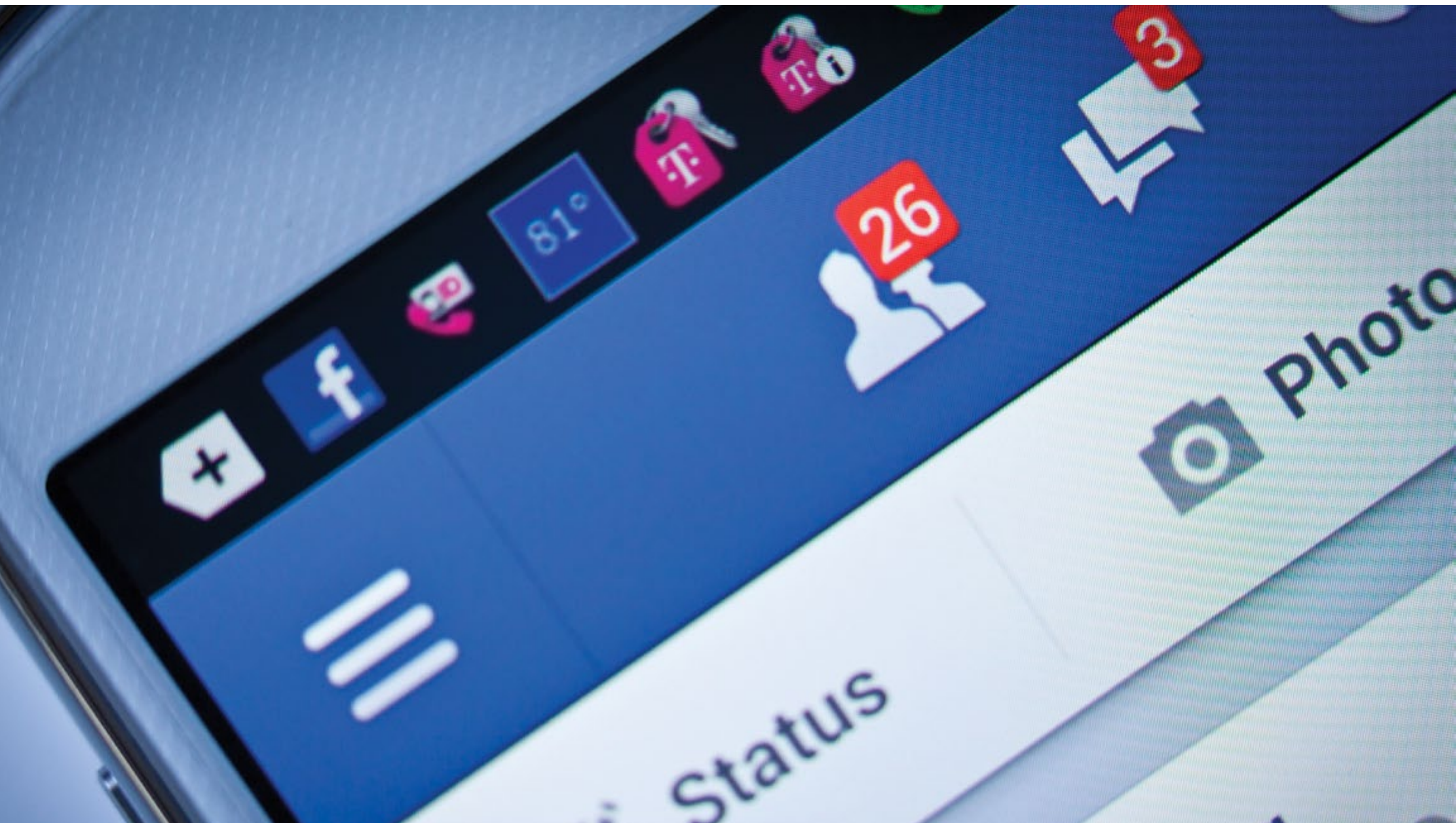
QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a judge who is old enough to remember practicing law without a computer. I have done a reasonable job of keeping abreast of recent technology, but it is a running joke in our house that my kids think I need help finding the power button on my laptop. I recently joined a social media site to keep up with photos of my grandchildren and have been connecting with some colleagues I have worked with over the years. I have been cautious with whom I connect, but as I connect with more friends in the legal community, I have been receiving more and more "friend" requests from people whose names I recognize from the courthouse or bar association events, but I am not sure I would consider them a "friend." One attorney I connected with asked me to subscribe to her blog on an area of law that she knows is of interest to me and asked if she could interview me for a podcast about my experiences as a practitioner and judge. At first I thought these "connections" were no different from any other attorney networking, but then I started to think about whether anyone could misconstrue this as inappropriate or as a violation of my ethical duties. Should I be concerned that by engaging in social media, I am violating any ethics rules, since I know that many of my online "friends" could appear before me in a case?



In one circumstance that I am particularly embarrassed about, I accidentally accepted a "friend" request and next thing I know, I am getting messages from a litigant in a case I was hearing. I quickly "unfriended" the person once I realized what happened, but I am worried that this could have a significant impact on the case. I know I need to disclose to the attorneys on the case that the communication occurred, but is this a situation where I should automatically recuse myself since I actively accepted the friend request?

There are so many new social media platforms that are showing up in court cases, it is hard to keep up with them all. I noticed recently that some attorneys appear to be using social media platforms as a means of gathering evidence for their cases while others appear to be advising their clients on how to restrict public access to their social media accounts during discovery. Do you have any advice for a social media newbie as to where to draw some lines in how attorneys use social media within the bounds of their ethical obligations?

Very truly yours,
Justice Online