



New York State Bar Association  
Committee on Professional Ethics

Opinion 1135 (10/10/17)

**Topic:** Limitations on solicitation by solo practitioner who is both a lawyer and certified public accountant.

**Digest:** Professional services that are not distinct from legal services are subject to the prohibition against in-person and telephonic solicitation.

**Rules:** 5.7(a), (c), 7.1, 7.3(a), (b), (c)

## FACTS

1. The inquiring attorney is licensed in New York as both a lawyer and a certified public accountant. The inquirer plans to open a solo practice offering a range of state and local tax services, and to offer these services, both legal and accounting, as an integrated operation.

2. According to the inquirer, the vast majority of the services to be offered are those that either a lawyer or an accountant may legally perform. Each of these professions, for instance, may handle a tax audit defense or certain administrative matters before tax authorities. Limits exist, however: For instance, an accountant may not represent a person in court proceedings, which only a lawyer may do, and a lawyer may not conduct an audit of a company's financial statements, which, we are told, only an accountant may do.

3. The inquirer wishes to communicate by telephone to offer, unsolicited, his accounting services to persons or entities lacking any prior personal or professional relationship with the inquirer. We accept for purposes here the inquirer's statement that the accounting profession does not forbid an accountant to call a stranger to offer accounting services. The inquirer is prepared to disclose on each call that the inquirer holds a law license but, for purpose of the call, is proposing to be retained solely as an accountant. Nevertheless, the inquirer acknowledges that, in many tax disputes, an early and not insignificant tactical decision is whether to address the tax controversy through administrative channels or instead through legal proceedings. The inquirer seeks guidance on whether the proposed telephone calls, even though apparently permitted by the accounting profession, conflicts with the New York Rules of Professional Conduct (the "Rules").

## QUESTION

4. May a lawyer who is also a certified public accountant make unsolicited calls to potential clients for matters that could be handled by either a lawyer or certified public accountant?

## OPINION

5. Rule 5.7 permits a lawyer to offer both legal and nonlegal services to the public. In N.Y. State 938 ¶ 5 (2012), we pointed out that Rule 5.7(c) defines “nonlegal services,” for purposes of Rule 5.7, to mean “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.” 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. To analyze the question presented, however, we accept without deciding that the aforementioned tax services do not constitute the unauthorized practice of law, and that a nonlawyer may lawfully provide these services.

6. Rule 5.7 distinguishes between two types of “nonlegal services.” Rule 5.7(a)(1) addresses “nonlegal services” that a lawyer offers “that are not distinct from legal services” the lawyer offers to clients; Rule 5.7(a)(2) addresses “nonlegal services” that a lawyer offers “that are distinct from legal services” the lawyer offers to clients. The applicability of the Rules turns on whether the services are “not distinct” or “distinct” from each other. If the former, then the Rules apply to everything the lawyer does in performing those “not distinct” nonlegal services; if the latter, then the Rules apply only in certain circumstances with the use of disclaimers. The threshold question, then, is whether the nonlegal tax services the inquirer proposes to offer here are “not distinct” or “distinct” from the legal services the lawyer offers to potential clients.

7. The Rules do not define the word “distinct” but the dictionary does. To be “distinct” is to be “not alike, different, not the same, separate, clearly marked off.” *Webster’s Unabridged Dictionary* 534 (2d ed. 1979). These are terms of comparison. Rule 5.7(a)(1) identifies the subjects to compare: the service provider (the lawyer), the substance of the service to be provided (legal or nonlegal), the proposed recipient of the service (the potential client), and, by necessary implication, the manner or means by which the lawyer offers the service (the degree of integration of the two services). Our prior opinions teach that, when a substantial congruence of these factors exists, then the Rules apply to everything the lawyer does. *See* N.Y. State 1026 (2014) (services are “not distinct” when a lawyer offered nonlegal mediation services in domestic relations matters in which the retainer agreement offered to “represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement”); N.Y. State 832 ¶ 6 (2009) (even though, in offering the sale of shelf corporations, a nonlawyer may be entitled to provide advice about them without engaging in the unauthorized practice of law, “when a lawyer provides such advice it becomes the provision of legal services,” in which event the Rules “would apply both to the legal advice and to the sale of the corporations”); *cf.* N.Y. State 992 ¶ 21 (2013) (a lawyer may not circumvent the Rules “and practice law by a designation that the attorney is employed in a ‘non-legal capacity’ even if a non attorney may perform the same legal services”).

8. Here, the identity of the service provider, the substance of the services to be provided, the prospective recipient of the services, and the manner or means in which the lawyer wants to offer the services substantially overlap. In such circumstances, we read Rule 5.7(a)(1) to mean that the lawyer’s accounting services are not distinct from those of the lawyer’s legal services. As Comment [1] under Rule 5.7 explains, “The recipient of the nonlegal 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 provisions of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter.” Accordingly, we believe that all the Rules apply to the inquirer’s conduct even when the inquirer is offering tax services that an accountant as well as a lawyer may properly perform.

9. This includes the Rules’ prohibition on the unsolicited in-person contact with potential clients. Rule 7.3(b) defines “solicitation” as “any advertisement of behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.” Rule 7.3(a)(1) prohibits any “solicitation” by “in-person or telephone contact,” with limited exceptions inapplicable here. Comment [9] to Rule 7.3 explains that, “in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients,” among them “the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration,” a risk equally present “in telephone contact or in real-time or interactive computer-accessed communication.”

10. On the facts before us, Rule 7.3(a)(1) prohibits the inquirer’s proposed offering of services that are not distinct from the inquirer’s legal services by way of unrequested in-person telephone communications to potential clients lacking any personal or professional relationship with the inquirer.

11. Rule 7.3 also contains in subdivision (c) several other restrictions on solicitations, which while not the subject of this inquiry, would apply to a lawyer in the inquirer’s position. Among these is the duty to file the solicitation with the relevant disciplinary authorities, Rule 7.3(c)(1), and to retain a list of the names and addresses of all recipients for at least three years, Rule 7.3(c)(3). The regulations of lawyer advertising, set out in Rule 7.1, would also apply, including the requirement of Rule 7.1(a)(1) against communications that are “false, deceptive or misleading,” and of Rule 7.1(f) that any written communication qualifying as a solicitation be labeled as “Attorney Advertising.”

## **CONCLUSION**

12. Rule 7.3 prohibits a lawyer who is also a certified public accountant from offering by telephone unsolicited tax-related services to persons with whom the lawyer lacks any pre-existing relationship when the tax-related services are not distinct from legal services and offered by the lawyer as part of the lawyer’s integrated practice.

(21-17)