

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-4**

ETHICAL ISSUES

I. WHETHER AN INACTIVE ATTORNEY'S NOTICE TO REAL ESTATE CLIENTS WHICH INFORMS THEM THAT THE ATTORNEY IS INACTIVE AND WILL NOT PROVIDE LEGAL SERVICES IN THE CONTEXT OF REAL ESTATE TRANSACTIONS IS SUFFICIENT SO AS TO NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP.

II. WHETHER SUCH NOTICE TO REAL ESTATE CLIENTS IS SUFFICIENT SO AS TO EXEMPT THE APPLICATION OF ETHICAL RULES TO THE LAW-RELATED SERVICES PROVIDED TO REAL ESTATE CLIENTS.

STATEMENT OF FACTS

An attorney is an inactive member of the Nebraska State Bar who has decided to pursue a career in real estate. At present, the attorney is employed by a real estate agency in Nebraska. The attorney wishes to disclose her education as an attorney, but wishes to inform clients that she is not serving in that capacity in her current profession. To that end, she wishes to provide potential clients with a "notice" that while she is an inactive attorney she will not serve in the capacity of legal counsel with regard to any real estate transaction.

RELEVANT RULES OF PROFESSIONAL CONDUCT

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

OTHER SOURCES

The Advisory Committee has not dealt directly with this issue in past opinions, and thus the Committee has looked to the comments of Rule 5.7 and to the ethics opinions of other states in order to determine how other states have responded to similar inquiries.

It is clear from both Nebraska Advisory Opinions, as well as the ethics opinions of other states, that the functions of a real estate broker or agent are "law-related services" under the Rules of Professional Conduct. See Nebraska Ethics Opinion 74-3 ("A real estate brokerage business is so closely related to the practice of law that, when engaged in by a lawyer, it constitutes the practice of law."); Utah Formal Ethics Opinion 01-05 (July 13, 2001) (same).

The Comments to Rule 5.7 of the Model Rules of Professional Conduct, do offer significant insight into the particular issues that may arise when a lawyer performs law-related functions in the context of another profession. Comment One states:

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

As such, a lawyer, whether that lawyer is on active or inactive status, must closely guard against the expectation of potential real estate clients that the real estate broker or agent would serve as a lawyer, as well.

The language of Rule 5.7 clearly indicates that a lawyer who is not providing legal services but is involved in the provision of law-related services is not subject to the Model Rules of Professional Conduct with respect to the provision of such law-related services when the lawyer takes "reasonable measures" to ensure that any recipient of the law-related services is aware that the services are not legal services, and that the protection of the client-lawyer relationship does not exist. Rule 5.7(a)(2).

New Hampshire seems to echo this Comment in its various Ethics Opinions regarding lawyers involved in the real estate profession. It has indicated that if a real estate agent or broker does happen to provide real estate services for former clients or anyone who is aware of the agent or broker's educational and professional background, the agent or broker must take steps to ensure that the client does not have any expectation of legal services being rendered. If any former clients or others who know of the inquirer's membership in the Bar are encountered by the salesperson in the course of his or her real estate business, it is incumbent upon the salesperson to fully explain that he or she is solely functioning as a real estate salesperson, not as a lawyer. A prophylactic warning to every prospective buyer or seller is not required. Moreover, such a warning to those unaware of the salesperson's legal background could engender the opposite effect. Nonetheless, the realtor must ensure that no misapprehension of the role he or she is fulfilling occurs. Otherwise, his or her actions may well be viewed as the practice of law with all the consequences which that entails.
New Hampshire Formal Opinion 1989-90/12 (March 8, 1990).

The Utah State Bar has found to the contrary. In one of its recent Formal Opinions, the Ethics Advisory Opinion Committee stated that when a lawyer who is inactive in Utah, but active in another state, is a real estate broker in Utah, he is still fully subject to the Utah Rules of Professional Conduct.

The lawyer, acting in his role as a real estate broker, is not marketing legal services that he will deliver as a lawyer, but is alerting prospective real estate clients that he is a lawyer-trained real estate broker and can deliver real estate professional services. The purpose of a factually correct claim in advertising his real estate services that he is a lawyer may be to gain the confidence of clients or gain an advantage over non-lawyer real estate agents or brokers on the indirectly promoted assumption that a lawyer-trained real estate broker would be able to exercise better professional judgment than a non-lawyer-trained broker with respect to issues that could come up in the marketing, sale or acquisition of real estate.

... When a lawyer markets himself as able to perform non-legal professional services for a client and lists his qualifications or experience as a lawyer in a communication for "law-related professional services," the use of such legal credentials is a "communication" within the meaning of the Rule 7.1, if a recipient of such materials could reasonably believe that the lawyer is offering

legal services or professional advice that involves his legal experience, judgment or considerations. An inactive member of the Bar may list a J.D. degree as a "credential," but may not hold himself out as a lawyer. The display of such credentials without more would not invoke the Rules of Professional Conduct even though the inactive member is engaged in a law-related profession.

Utah Formal Opinion No. 01-05 (July 13, 2001) (citations omitted). The Committee further states: As to the actively practicing lawyer, we have previously concluded that a lawyer who engages in a real estate, life insurance or title business is held to the ethical standards of a lawyer in both professions. We have also more recently determined that a lawyer who holds himself out as a lawyer in any context may not ethically form a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. Applying this standard to an inactive lawyer who holds himself out in advertising in a law-related profession as lawyer-trained, we affirm that he would be held to the ethical standards of the legal profession while acting in the law-related profession. Further, because the lawyer is not currently qualified to practice law in the State of Utah, he may be engaged in the unauthorized practice of law when engaged in the real estate profession if he advertises that he is a lawyer, albeit, inactive. However, it is not within the purview of this Committee to determine what constitutes the unauthorized practice of law.

... Once the broker-lawyer advertises or communicates his legal training or expertise in advertising for real estate services, whether an active or inactive lawyer, the restrictions of the Rules of Professional Conduct apply, including: Rule 1.5(a) (reasonable fees); Rules 1.7 through 1.11 (conflicts of interest); Rule 1.6 (confidentiality of information); and Rules 7.1 through 7.3 (advertising and solicitation). This list is far from exhaustive, and the application of the Rules of Professional Conduct could be very problematic in the case of a real estate broker whose professional obligations and limitations are different from those governing lawyers. Id. (citations omitted).

While the Utah opinion is important to note because of its practical discussion of potential dilemmas, it is not dispositive of the instant situation, as Utah has not adopted Rule 5.7. The comments to Rule 5.7, as adopted by Nebraska, provide that a lawyer who is performing law-related functions but is not acting as a lawyer can guard against expectations by prospective clients.

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

Comment 6.

DISCUSSION

It appears that so long as there is adequate disclosure of a lawyer's intent to provide law-related services, and only those services, and that provision of those services does not constitute the provision of legal services which only a lawyer can provide, an attorney-client relationship does not result. As many of the authorities above indicate, however, it is vitally important that a lawyer who does not intend to provide legal services specifically discloses that while he or she is a lawyer, the services are not meant to create an attorney-client relationship. It is advised that this disclosure be in writing.

The resolution of the issue of whether such a lawyer falls under the scope of the entirety of the Model Rules of Professional Conduct is also straightforward under Rule 5.7. There appears to be some difference between an active lawyer engaged in the practice of law, providing law-related services, and an inactive lawyer who is not engaged in the practice of law, providing law-related services, at least according to the sources cited above. It is clear that if a lawyer holds himself out

as a lawyer and as a real estate broker or agent, he or she would be subject to the entire scope of the Rules of Professional Conduct. As Rule 5.7(a) sets forth, however, a lawyer who takes “reasonable measures” to assure that the person receiving the law-related services knows that the services are not legal services, is not subject to all provisions of the Rules of Professional Conduct, and is subject only to those rules regarding misconduct, which are applicable to all lawyers, regardless of current profession.

Adequate disclosure should be contained in a document which informs the potential real estate client that while the broker/agent is professionally trained as a lawyer, he or she is now operating solely as a realtor, and that the services provided are in no way meant to constitute legal services or create an attorney-client relationship.

CONCLUSION

The Nebraska Advisory Committee believes that notice to potential real estate clients of the intent to provide real estate services only, and not to provide legal services, is sufficient in order to avoid the creation of the attorney-client relationship and to prevent the inactive attorney from being subjected to the entirety of the Nebraska Rules of Professional Conduct. It is suggested that such notice be in writing and submitted to potential clients prior to the provision of any real estate services. Providing this notice to real estate clients prior to the provision of real estate services will help to ensure that the scope of the services is understood by both parties at the beginning of the business relationship, and to prevent future problems and misunderstandings.

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