

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1989-90/12
Attorney/Realtor Related Questions
March 8, 1990

RULE REFERENCES:

*Rule 1.5	*Rule 4.3
*Rule 1.6	*Rule 5.4(a)
*Rule 1.6(a)	*Rule 7.2
*Rule 1.8	*Rule 7.3(c)
*Rule 1.9(b)	*Rule 8.3
*Rule 2.1	*Rule 8.4
*Rule 4.2	*Rule 8.4(c)

SUBJECTS:

- *Adverse Effect on Professional Judgment
- *Advertising and Solicitation
- *Confidentiality
- *Conflict of Interest
- *Division of Fees
- *Dual Practice
- *Fees
- *Independent Judgment
- *Real Estate/Realtors
- *Sharing Office Space

STATUTORY REFERENCES:

*RSA 331-A:2

ANNOTATIONS:

A member of the Bar who is non-practicing, whether on active or inactive status, and is engaged full-time and exclusively in the real estate business is not exposed to the ethical pitfalls set out in the NH Op 1987-8/2, entitled "*Dual Practice: Attorney as a Realtor.*"

A non-practicing Bar member is still fully subject to those Rules of Professional Conduct that apply at all times to attorneys in any capacity, *e.g.*, Rules 1.6 (a), 1.9 (b), 8.3, and 8.4, especially 8.4 (c).

A lawyer cannot conduct a real estate brokerage business, as commonly practiced, out of the lawyer's law office consistent with the Rules of Professional Conduct, but a non-practicing lawyer may engage full-time and exclusively in the active real estate business without violating the Rules. (Rule 1.5; 1.6; 1.6(a); 1.8; 1.9(b); 2.1; 4.2; 4.3; 5.4(a); 7.2; 7.3(c); 8.3; 8.4; and 8.4(c)).

I. QUESTIONS:

1. Does NH Op 1987-8/2, "Dual Practice: Attorney as a Realtor" (December 15, 1987), particularly Section B, apply to a member of the Bar (holding active status in order to be able to maintain section memberships and fully participate in Bar affairs) who is employed full-time and exclusively as a real estate salesperson?
2. To what extent do the Rules of Professional Conduct apply to a Bar member holding active status and engaged full-time and exclusively as a real estate salesperson?
3. Would holding inactive status affect the outcome in questions 1 and 2 above?

II. BRIEF RESPONSE:

A member of the Bar who is non-practicing, whether on active or inactive status, and engaged full-time and exclusively in the real estate business is not exposed to the ethical pitfalls set out in the Committee's 1987-8/2 Opinion entitled "*Dual Practice: Attorney as a Realtor.*" The non-practicing

Bar member is still fully subject to those Rules of Professional Conduct that apply at all times to attorneys in any capacity, e.g., Rules 1.6 (a), 1.9 (b), 8.3, and 8.4, especially 8.4 (c).

III. RESPONSE:

1. *Prior Decisions*

The Ethics Committee and the New Hampshire Bar Association's Professional Conduct Committee (1970), have grappled with the question of dual practice in law and real estate in 1970 (Informal Opinion 2), 1975 (Formal Opinion 5), 1982 (Advisory Opinion October 12, 1982), and 1987 (NH Op 1987-8/2).

The history of the prior New Hampshire decisions (1970, 1975, and 1982) is succinctly and thoroughly summarized in NH Op 1987-8/2, and will not be reproduced here. In NH Op 1987-8/2, the Committee concluded that "a lawyer cannot conduct a real estate brokerage business, as commonly practiced, out of the lawyer's law office consistent with the *Rules of Professional Conduct*." (Emphasis added.) The Committee found numerous "potential pitfalls" including co-brokering with a non-lawyer [5.4 (a) prohibiting fee splitting], certain types of solicitation [7.3 (c)], the amount charged for brokerage services [1.5], conflict of interest [1.8], independent judgment [2.1], certain advertising [7.2], confidentiality [1.6], dealing with buyers represented by attorneys [4.2], and dealing with unrepresented buyers [4.3]. See NH Op 1987-8/2.

The focus in all the foregoing opinions is dual practice. The 1970 opinion references lawyers "engaged in the active practice of law." Informal Op. 2 at 2. The 1975 opinion observes that permitting such a dual practice [with complaints on a case-by-case basis]...would not properly protect the public." FO 5 at 3. The 1987 opinion, as noted above, dealt with operating "a brokerage business out of the attorney's law office." NH Op 1987-8/2.

The rationale and analysis set forth in the 1970 opinion and its progeny prohibiting dual practice does not appear persuasive in the context of this inquiry. Indeed, in a still valid passage from the 1975 opinion, the Committee observed that it held "the opinion that no unprofessional conduct results from an attorney who holds an inactive membership in the New Hampshire Bar Association and who engages in an active brokerage business." The Committee also gave its blessing to "the holding of dual licenses so long as a practicing attorney in no way engages in a brokerage business." FO 5 at 2. (Emphasis added.)

2. *Discussion*

A.

The 1975 opinion is dispositive in providing a safe harbor for an attorney holding inactive Bar membership "who engages in an active brokerage business." FO 5 at 2. The Constitution of the New Hampshire Bar Association, Article II Membership. Section 3, reads in part:

The membership of this Association shall consist of two classes known respectively as "active" members and "inactive" members. Every member shall be an active member unless, upon request, that person is enrolled as an inactive member. No person shall be eligible for enrollment as an inactive member who is engaged in the practice of law in this State, either in his or her own behalf or as an associate or employee of an inactive member of the Association, or who occupies a position the duties of which require the giving of legal advice or service in this State. Any inactive member in good standing may change his classification to that of an active member by filing with the Secretary written application for transfer to the class of active members and by paying the dues required of active members. No inactive member shall be entitled to practice law in this State...

As defined, it appears that a lawyer who would qualify for inactive status could, if he or she so chose, maintain active status, even if not engaged in the active practice of law, given that "every person shall

be an active member unless, upon request, that person is enrolled as an inactive member." Bar Const. Art. II, Sect. 3. (Emphasis added.) In fact, judges "who are wholly prohibited by statute from engaging in the practice of law" are "considered active members unless they elect to become inactive members." Bar Const. Art. II, Sect. 3. (Emphasis added.)

While interpretation of the Bar's Constitution is beyond the purview of this body, this Committee sees no prohibition in the Rules of Professional Conduct that would require a non-practicing attorney actively engaged in the brokerage business to elect inactive over active status. Thus, if it is ethically permissible for a non-practicing attorney holding inactive Bar membership to engage in the real estate brokerage business, then it is ethically permissible for a non-practicing attorney holding active membership to engage in the real estate brokerage business.

It should be noted that although our earlier opinions reference real estate brokers, the above analysis applies with equal force and effect to real estate salespersons.

B.

Our 1987-8/2 opinion remains in effect, and, as noted supra, applies to the operation of a real estate business out of the attorney's law office. The ethical pitfalls which the opinion points out are based on the locus of the real estate business -- a lawyer's office. That opinion is not applicable to the present inquiry -- the ethical pitfalls arise because the real estate business in the lawyer's office is found to be the practice of law which is not the case here with a non-practicing attorney. See Section II, Part 2: C. infra. Neither our 1987 opinion nor the instant one address the situation of a practicing attorney running a real estate business in a separate setting from his or her law office.

C.

Although the specific ethical pitfalls discussed in the 1987 opinion do not apply to a non-practicing lawyer engaged in the real estate business, the Rules of Professional Conduct still apply.¹ Rule 1.9 (b) forbids a lawyer who has formerly represented a person from using information relating to the representation to the disadvantage of the former client. Rule 1.6 (a) imposes the duty of client confidentiality. Even if a lawyer is not actively practicing, these ethical duties still apply as regards the lawyer's former clients.

In addition, a non-practicing lawyer is still bound to report professional misconduct under Rule 8.3. Most importantly, Rule 8.4 governing misconduct applies at all times to a member of the Bar, active or inactive, practicing or non-practicing. Thus, 8.4 (c), which states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" would apply to a non-practicing lawyer engaged in the real estate business.

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.

The inquirer has clearly stated that he will "perform no work that only an attorney can perform." He planned to fill out forms like "anyone else in the office" and not modify them. In addition, he will not be dispensing legal advice, but rather will tell the buyer or seller to seek the advice of an attorney. In sum, the inquirer stipulates that he "will provide no service or help beyond what any other

salesperson working in the same office does." The Committee believes that if the foregoing is strictly adhered to, the inquirer will not expose himself to the ethical pitfalls set out in our 1987 opinion. We assume that the inquirer, when engaged full-time and exclusively in the real estate business, will not perform any function that would be deemed the practice of law.

RSA 331-A:2 provides an exemption from the real estate brokers and salesmen law for "an attorney at law in the performance of his duties as an attorney". Our 1987 opinion (NH Op 1987-8/2) quoted with approval from two American Bar Association (ABA) Formal Opinions:

The fact that a layman can lawfully render certain service does not necessarily mean that it would not be professional service when rendered by a lawyer. On the contrary, lawyers are frequently called upon to render such service for the very reason that it can be better rendered by a lawyer. Formal Opinion 57 (ABA 1932).

If the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law while conducting that occupation. Accordingly, he is held to the standards of the bar while conducting that second occupation from his law offices. Formal Opinion 328 at 65 (ABA 1972). (Emphasis added.)

The thrust of both of these ABA opinions is attorney/realtor dual practice:

When the lawyer conducts both occupations from the same office, "the public could not be expected to distinguish between his dual capacities and know when he is acting in the capacity of a lawyer and when in that of a layman." Formal Opinion 57 at 302 (A.B.A. 1932).

The mere partial intersection of roles between lawyers and realtors set out in the real estate brokers and salesmen law does not expose a non-practicing attorney working exclusively in the real estate business to all the ethical pitfalls set forth in our 1987 opinion on the theory that he or she is practicing law. We caution the inquirer, however, that we offer no opinion as to the standards applied in determining liability in tort.

Some jurisdictions actually permit dual practice itself. *See, e.g.*, Opinion 87-161 (Alabama January 29, 1988) (lawyer may refer law clients to his/her real estate brokerage business and close real estate contracts developed in his law practice so long as the attorney makes full disclosure of his/her interest in the real estate business); Opinion 86-43 (Alabama April 18, 1986) (law firm may join local board of realtors as an affiliate); Opinion 88-5 (Arizona October 27, 1988) (a lawyer/real estate broker may list broker's license on letterhead, solicit real estate business with that stationery, and state in body of solicitation letter that he/she is a lawyer); Opinion 89-112 (Pennsylvania undated) (attorney may serve as a real estate broker if the lawyer separately maintains his/her law office and does not use brokerage business to solicit legal work); Opinion 80-5 (Philadelphia Bar Association undated) (lawyer may act as broker after disclosure and may even represent the client in the same matter if it is the type of matter to which a client can consent after full disclosure); Opinion E-86-3 (Wisconsin May 1986) (attorney licensed as a real estate broker may accept a commission for referring a client to a realtor after full disclosure and client consent, both legal and brokerage fees permitted with informed client consent but the total fees must be reasonable); Opinion 82-4 (Massachusetts March 10, 1982) (dual practice permitted even if serving in both capacities simultaneously as long as a professional judgment not affected, lawyer permitted to advertise lawyer/broker arrangement); and *Dinis v. Hanrahan*, 12 Mass. App. Ct. 884, 421 NE 2d 1250 (1981) (realtor/attorney for administratrix could submit claim for commission for sale of estate land as well as attorney's fees, broker's fee determined not by market rate but reasonable value of lawyer's work). The Committee believes its series of opinions interpreting the rules reflect the appropriate balance: a lawyer cannot conduct a real estate brokerage business, as commonly practiced, out of the lawyer's law office consistent with the Rules of Professional Conduct, but a non-practicing lawyer may engage full-time and exclusively in the active real estate business without violating the Rules of Professional Conduct.

IV. CONCLUSION:

A member of the Bar who is non-practicing, whether on active or inactive status, and engaged full-time and exclusively in the real estate business is not exposed to the ethical pitfalls set out in the Committee's 1987-8/2 Opinion entitled "Dual Practice: Attorney as a Realtor." The non-practicing Bar member is still fully subject to those Rules of Professional Conduct that apply at all times to attorneys in any capacity, e.g., Rule 1.6(a), 1.9(b), 8.3 and 8.4, especially 8.4(c).

References:

New Hampshire Bar Association

1. Informal Opinion 2 (NH 1970): dated July 30, 1970 (available at Bar Center)
2. Formal Opinion 5 (NH 1975) dated December 5, 1975; 2 NHLW 205 (1976)
3. Advisory Opinion (NH 1982): dated October 12, 1982 (available at Bar center)
4. Formal Opinion 1987-8/2 "Dual Practice: Attorney as a Realtor" dated December 15, 1987 (available at Bar Center)

American Bar Association

1. Formal Opinion 57 (ABA 1932): Opinions of the Committee on Professional Ethics 300 (1967 ed.)
2. Formal Opinion 328 (ABA 1972) Formal and Informal Ethics Opinions 62 (1985)

Other Bar Associations

1. Opinion 87-161 (Alabama January 29, 1988) ABA/BNA Lawyers' Manual on Professional Conduct 901:1038 (Digest of opinion)
2. Opinion 86-43 (Alabama April 18, 1986) ABA/BNA Lawyers' Manual on Professional Conduct 901:1006 (Digest of opinion)
3. Opinion 88-5 (Arizona October 27, 1988) ABA/BNA Lawyers' Manual on Professional Conduct 901:1410 (Digest of opinion)
4. Opinion 89-112 (Pennsylvania undated) ABA/BNA Lawyers' Manual on Professional Conduct 901:7320 (Digest of opinion)
5. Opinion 80-5 (Philadelphia Bar Association undated) ABA/BNA Lawyers' Manual on Professional Conduct 801:7501 (Digest of opinion)
6. Opinion E-86-3 (Wisconsin May 1986) ABA/BNA Lawyers' Manual on Professional Conduct 901:9101 (Digest of opinion)
7. Opinion 82-4 (Massachusetts March 10, 1982) ABA/BNA Lawyers' Manual on Professional Conduct 801:4605 (Digest of opinion)

¹ If our 1987 opinion applied to the present inquiry, a real estate salesperson would be unable to function. Real estate salespersons share their commissions with the firm's broker--under the 1987 opinion such a practice with a non-lawyer broker would constitute unauthorized fee splitting (Rule 7.3 (a)), rendering the salesperson unemployable.