

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

February 9, 1993

Opinion No. 92-17

The Ethics Committee received a request for an opinion from [REDACTED]:

The issue presented is whether [REDACTED] may ethically establish a professional service corporation in which he would act as both a licensed real estate broker and a licensed attorney.

The relevant portion of Rule 1.7 of the North Dakota Rules of Professional Conduct provides as follows:

- (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.
- (c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

N.D.R.P.C. 1.7(b), (c).

There are no North Dakota cases interpreting this rule, however, the committee sought guidance from the case of Estate of Schuldt, 428 N.W.2d 251 (S.D. 1988). In Schuldt, the court interpreted the South Dakota Code of Professional Conduct, which was superseded on July 1, 1988, by the Rules of Professional Conduct, but the court discussed how the case would also have been decided under the Rules. Like North Dakota's Rules of Professional Conduct, South Dakota's Rules were taken from the ABA Model Rules of Professional Conduct.

Although the factual scenario in Schuldt is somewhat dissimilar, it is apposite to the discussion of the issues presented here. The holding of the Court in Schuldt provides sufficient insight into

the problems faced by the bar when involved in other disciplines. Interpreting Rule 1.7(b) of the South Dakota Rules of Professional Conduct, which is the substantial equivalent of North Dakota's Rule 1.7(c), the South Dakota Court held:

A lawyer shall not represent a client if that representation may be materially limited by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. (Rule 1.7(b)). In cases like this, where a lawyer functions in several capacities, his interests diverge from, and inherently conflict with, those of his client.

Id. at 260. (emphasis added). The Court concluded that:

By maintaining such dual employment, the lawyer puts his economic interest ahead of his promised loyalty to his client. Such an arrangement is not permitted by the rules of ethics.

Id. at 258-259.

The North Dakota Supreme Court has implied that it would find situations such as this in violation of the Rules of Ethics.

Consideration must also be given to Rule 5.4 which prohibits a lawyer or law firm from sharing legal fees with a nonlawyer and prohibits lawyers from being influenced, directed or controlled by nonlawyers. Important in this respect is the fact that, in 1987, the North Dakota Supreme Court refused to allow the inclusion of the following language into Rule 5.4:

Except as prohibited or restricted by law, a lawyer may provide legal services to a client in association with a nonlawyer if:

(a) The association does not permit any interference with lawyer's judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by these rules;

(c) The association does not result in communication about the lawyer, a person professionally associated with the lawyer or their services which violates these rules; and

(d) The association does not result in the client being charged a fee that violates these rules.

The North Dakota Supreme Court has, we believe, implied to the bar that it does not favor multi-disciplinary practice in this state.

Of similar consequence is the continuing controversy faced by the ABA House of Delegates concerning its addition, in 1991, of Rule 5.7, Provision of Ancillary Services, to the Model Rules of Professional Conduct. This rule provides as follows:

- (a) A lawyer shall not practice in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).
- (b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:
 - (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
 - (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
 - (3) The law firm makes appropriate disclosure in writing to its clients; and
 - (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule. . . .

It was brought to the attention of the committee that, by a close vote, the ABA has recently elected to delete this language. More so by way of implication than by any direct mandate, both the North Dakota Supreme Court and the ABA have indicated their dislike for such multi-disciplinary partnerships.

CONCLUSION

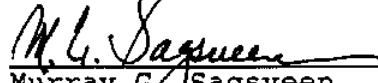
The committee has concern that the proposal as expressed in [REDACTED]'s letter may violative of the Rules of Ethics.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This Rule states:

A lawyer who acts in good faith and with reasonable reliance on a written opinion of advisory letter of the Ethic's Committee of the State Bar Association of North Dakota shall not be subject for sanction for violation of

the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Patricia R. Ellingson and was unanimously approved by the Ethics Committee on February 9, 1993.



Murray G. Sagsveen
Chairperson

November 25, 1992

Murray G. Sagsveen, Chairman
SBAND Ethics Committee
P.O. Box 1695
Bismarck, ND 58502-1695

Re: Request for Ethics Opinion

Dear Murray:

I was pleased to see your article in the last issue of the Gavel. I have been working on a business plan for a new service organization that brings some questions to mind and I am grateful for the invitation in your article to present these questions to the Ethics Committee for an opinion. Pursuant to my understanding of instructions from Sandi Tabor, I am addressing this request directly to you with a copy to her at the SBAND office.

Besides being licensed to practice law in North Dakota, I am also a licensed North Dakota Real Estate Broker. I have been involved in real estate for many years as an investor and as an attorney. I was licensed as a Broker in 1988, but I have not yet activated my license.

My goal is to set up a "Buyer Representative/Single Agency" real estate brokerage business as a professional service corporation to be known as [REDACTED]. Because of the strength of the connection between the services I can offer to clients in real estate transactions as a broker and as an attorney, I would like to offer both services under one umbrella. This way, real estate clients will finally have access to consistent, more complete representation from the time they decide to look for a property all the way through the purchase and closing.

The brokerage service would operate on an contracted agency basis with prospective buyers of real estate. No seller listings would be accepted in order to avoid the "dual agency" problem which is unfortunately prevalent in the real estate industry. The firm would enter into an exclusive "single agency" agreement with its buyer clients and assist them in locating property and negotiating its purchase. Sellers and/or their agents would always be made aware that the firm represents only the buyer. The legal services I would like to offer to the firm's "buyer" clients are

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drafting of purchase contracts, title opinions, deed preparation, closing services, and related services as would normally arise on the legal end of a real estate transaction.

If successful, future plans for the business include the hiring of licensed real estate agents to assist in services related to brokerage business, i.e., showing prospective properties to buyer clients. Legal services always would be provided only by me or by an attorney properly associated with me--with possible support from qualified legal assistants.

Fees for all services would be paid to the firm by its buyer clients only. Fees for brokerage services will be either hourly, flat fee, or based on a percentage as is usual and customary in the real estate industry. Legal services for work normally associated with real estate sales would be included in the above fee, but identified separately as fees for legal work. Any further legal work that may arise would be referred out or handled by me under a separate fee agreement as may be appropriate and consistent with the North Dakota Rules of Professional Conduct.

Aside from normal conflict considerations, my initial research only reveals applicability in Rule 5.4 NDRPC relating to the professional independence of a lawyer. Specifically, concerns referred to in 5.4(d) are addressed in that the professional corporation will have no non-lawyer stockholders, directors, or officers and no non-lawyers will have any control over the actions of any lawyer. I am hoping the several viewpoints of the committee members will help to ensure that I have not overlooked anything. I am also concerned about the question of advertising as I think advertisements should (or must?) identify me as an attorney. Does this fact need to be reflected in the business name?

Thank you in advance for the committee's time in considering this request. I would appreciate receiving word on how long this process usually takes so I will know when to expect an opinion. If there is no problem, I am hoping to incorporate and proceed with operations shortly after January 1, 1993.

Sincerely,

[REDACTED]

cc: Sandi Tabor