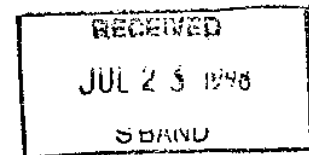


July 22, 1998

Sandi Tabor
Executive Director
SBAND
P.O. Box 2136
Bismarck, ND 58502-2136



RE: ETHICS OPINION REQUEST
OUR FILE: 98-272

Dear Sandi:

Please consider this letter a request for an Ethics Opinion regarding the following issue:

May a lawyer/insurance agent sell life insurance and other estate planning products to law clients or own interest in an entity that sells insurance to law clients provided that ethics rules regarding business transactions with clients, confidentiality, and conflicts of interest are observed. N.D.R.C. 1.7, 1.8 and 5.7.

The relevant rules are as follows:

NDRPC Rule 1.7 (b), (c)

(b) a lawyer shall not represent a client when the lawyer's own interest 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 to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and

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(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.

NDRPC Rule 1.8 (a)

(a) Except for standard commercial transactions involving products or services that the client generally markets to others, a lawyer shall not enter into a business, financial or property transaction with a client unless:

(1) The transaction is fair and reasonable to the client; and

(2) After consultation, including advice to seek independent counsel, the client consents to the transaction.

NDRPC Rule 5.7

(a) A lawyer is 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 lawyers provision of legal services to clients; or

(2) by a separate 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 of the separate entity 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 non lawyer.

There are no North Dakota cases interpreting these rules or similar situation. The states of Michigan and Illinois have determined that the sale of insurance is allowable under the

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rules. Those state's opinions are attached for your information

Michigan cites to MRPC 1.8(a), which is similar to the North Dakota rule, stating that the lawyer's recommendations to a law client with respect to the need for, the amount of and the cost for, insurance coverage must be fair and reasonable to the client.

The Michigan opinion notes that the lawyer must take particular care when a dispute arises between the insurer and the insured not to compromise any confidence belonging to the client/insured. Adequate procedures must be in place to guard against the inadvertent disclosure of confidences belonging to the lawyer's law clients. These should include keeping client files and other recordkeeping relating to the legal representation matters separate from the insurance business files.

In Illinois the board of governors approved an opinion stating that a lawyer who is also an insurance agent may perform legal services and provide insurance services for the same client. In doing so, the lawyer should disclose his interest in any insurance commission and obtain consent of the client to said arrangement. This disclosure and consent should be in writing. ISBA Opinion 89-14.

North Dakota issued an ethics opinion on title insurance and an attorney selling title insurance to a client. SBAND Op 93-08. The committee expressed reservations because of the conflicts that may arise in the event of subsequent title problems between the rights of the seller and buyer and/or the rights of the title insurer and buyer. The opinion does acknowledge that it would be necessary to obtain consent of the client to the transaction in writing wherever the dual representation occurs. The greatest concern of the committee regarding the conflicts of interest in title insurance most likely would not occur in the life insurance context.

The ABA has an informal ethics opinion that relates to law-related businesses. The ABA opinion recognizes that there is no provision in the Model Code which precludes a lawyer from engaging in a second profession or business at the same time. The nonlegal services being provided by the lawyer can become a separate financial and business interest which it is the continuing duty of the lawyer to disclose in a clear form to the client. "A lawyer who elects to engage in a law related business while providing legal advice to customers of that business will, as a practical matter, have the substantial burden of establishing that any legal advice given has been free of the taint of any bias created by the dual capacities in which the lawyer acted." ABA Informal Opinion 1482 (1982) A copy of that opinion is attached for your reference.

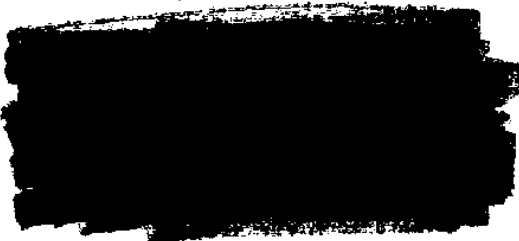
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N.D.R.P.C. 5.7 was just adopted in March 1997. 5.7 focuses on the applicability or lack thereof of the ethical rules to the provision of law related services. This rule does, however, recognize the provision of law-related services. Included in the comments as law-related services is title insurance and financial planning. It would also follow that other insurance would come under the law-related services definition. The comments note that a lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest and the requirements relating to disclosure of confidential information. However, by noting this, the rule specifically allows the practice of law-related businesses simultaneously with a law practice.

Rule 5.7(a)(2) provides that a lawyer is subject to the Rules of Professional Conduct if the law-related services are provided by a separate entity controlled by the lawyer if the lawyer fails to take reasonable measure to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client lawyer relationship do not exist. I would suggest that the lawyer: (1) provide written disclosure that the services of the separate entity are not legal services and that the protections of the client lawyer relationship do not exist and (2) obtain written consent of the client.

Based on the foregoing, it appears that if a lawyer carefully follows the rules, using written consent forms with full disclosure, it is allowable for a lawyer to sell insurance to a client. However, I would appreciate the ethics committee's opinion on this matter. Please forward this request to the SBAND ethics committee for their consideration. Thank you.

Sincerely,

A large, solid black rectangular redaction box covering the signature and name of the sender.

(encl.)

COPY

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

Opinion No. 98-07

September 9, 1998

SEP 14 1998

QUESTION

The Ethics Committee has been requested to issue an opinion answering the following question:

May a lawyer/insurance agent sell life insurance and other estate planning products to law clients or own interest in an entity that sells insurance to law clients provided that ethics rules regarding business transactions with clients, confidentiality, and conflicts of interest are observed?

No specific facts were provided to the committee, and there are no North Dakota cases interpreting these rules with respect to similar situations.

RELEVANT RULES

Rule 1.7, NDRPC Conflict of interest: General rule.

- (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
- (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 to 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.

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Rule 1.8, NDRPC Conflict of interest: Prohibited transactions.

- (a) Except for standard commercial transactions involving products or services that the client generally markets to others, a lawyer shall not enter into a business, financial or property transaction with a client unless:
 - (1) The transaction is fair and reasonable to the client; and
 - (2) After consultation, including advice to seek independent counsel, the client consents to the transaction.
- (b) Except as permitted or required in Rules 1.6 and 3.3, a lawyer shall not use information relating to representation of a client to the disadvantage of the client for purposes of furthering either the lawyer's or another person's interest unless after consultation, including advice to seek independent counsel, the client consents.

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- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
 - (2) Information relating to representation of a client is protected as required by Rule 1.6; and
 - (3) After consultation, the client consents.

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Rule 5.7 NDRPC Responsibilities regarding law-related services.

- (a) A lawyer is 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) By a separate 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 of the separate

entity 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.

(Rule 5.7 Adopted effective March 1, 1997)

In recent years, the Ethics Committee of the State Bar Association of North Dakota has issued two opinions on related questions.

In 1992, the issue presented was "whether [a lawyer] may ethically establish a professional service corporation in which he would act as both a licensed real estate broker and a licensed attorney." Using guidance from the South Dakota Supreme Court, Estate of Schuld 428 N.W. 2d 251 (S.D. 1988), the committee concluded that it "has concern that the proposal as expressed in [the lawyer's] letter may be violative of the Rules of Ethics." The committee stated "the North Dakota Supreme Court has, we believe, implied to the bar that it does not favor multi-disciplinary practice in this state." SBAND Ethics Committee Opinion No. 92-17.

In 1993, the issue presented was "whether there are any ethical problems with an attorney, as an agent for the title company, issuing title insurance policies when a client of the attorney is either a seller, buyer, mortgagor, or mortgagee." Although the committee did not flatly condemn such a practice, the committee concluded "While conflicts of interest among clients may be resolved under the provisions of Rules 1.7 and 1.8 . . . , the committee has concern that the conflicting property rights of a seller-client, a title insurer, and a buyer-client may place the attorney in violation of the Rules of Ethics." Citing Rule 1.8, the committee stated, "It would appear necessary for the attorney to obtain the consent of the client to the transaction in writing whenever this dual representation occurs." SBAND Ethics Committee Opinion No. 93-08.

North Dakota patterns its Rules of Professional Conduct after the American Bar Association's Model Rules of Professional Conduct. At the time the two previously cited North Dakota Ethics Committee Opinions were issued, there was sharp disagreement within the legal profession as to whether lawyers and law firms should be allowed to offer law-related services through ownership or operation of separate consulting entities - so-called "ancillary businesses." ABA/BNA Lawyer's Manual on Professional Conduct (1994) page 91:401. The authors of this manual commented, "unquestionably in the late 1980's and early 1990's, one of the most controversial issues regarding non-lawyers' involvement in the practice of law was law firms' operation of businesses that provided law related services -- so-called ancillary businesses. There was strong debate on the propriety of these operations, including the basic question of whether they facilitate the

practice of law, or undermine it." Id. page 91:410.

In 1991, the ABA adopted a Rule 5.7 that largely, but not entirely, shut off the option of using independent business organizations to provide law related ancillary services. The rule assumed the ancillary services must be delivered only by traditional law firms, only to clients of the firm in connection with legal matters currently being handled, and only by employees of the firm. Hazard & Hodes, The Law of Lawyering (1998 Supplement) p. 826.13.

However, in 1992, the ABA, by a narrow margin, rescinded the 1991 version of Rule 5.7. The issue was intertwined with the debate over "law as a profession" versus "law as a business," and the related fear that government regulation of ancillary services would lead to government regulation of lawyers generally. Id. p. 826.13.

In 1994, the ABA issued its current Rule 5.7. North Dakota adopted Rule 5.7 verbatim on March 1, 1997. Thus, it appears that a lawyer in North Dakota can now ethically provide law-related services either to the lawyer's own clients, or to non-clients, or through a separate entity controlled by the lawyer if there are reasonable measures taken to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services, and that the protections of the client-lawyer relationship do not exist.

The official comment to Rule 5.7, NDRPC, begins with the caution, "When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems." The comment then gives extensive guidance to those lawyers who choose to provide law-related services. A principal problem is the possibility that the recipient of the services may expect, for example, the protection of client confidences, prohibitions against representation of persons with conflicting interests, and the obligation to maintain professional independence. With respect to the law-related services that may not be the case.

The official comment to Rule 5.7 continues. A lawyer who offers clients these services either directly, or through an entity controlled by the lawyer, must be sure that the proposed transaction is fair and reasonable to the client, and that after consultation, including advice to seek independent counsel, the client consents. The lawyer should communicate to the person seeking these services that the relationship of the person to the business entity will not be a client-lawyer relationship. This communication preferably should be in writing. The lawyer providing these services should take special care to separate the legal services and non-legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. In some cases, the services are so intertwined that the requirements of Rule 1.8 (a)(2) cannot be met.

In cases where the lawyer provides both legal and non-legal services to the same person, the lawyer must take special care to heed the conflict of interest rules [Rule 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a),(b) and (f)], and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also, in all respects, comply with Rules 7.1 and 7.2, dealing with advertising and solicitation.

There are three other states who have issued ethics opinions on related issues and reached the same conclusion as we have today. The Michigan Ethics Committee approved the dual operation of a law practice and an insurance business, but cautioned very careful adherence to all of the ethical rules and extensively discussed the applicable rules. Michigan Ethics Committee Opinion RI-135, dated May 28, 1992. Most of these rules are described in the official comment to Rule 5.7 previously discussed in this opinion.

The Illinois Ethics Committee issued an opinion approving a dual profession, but with many of the same cautions as did Michigan, and as the official comment to Rule 5.7 describes. Illinois Ethics Committee Opinion 90-32, dated May, 1991.

The Kansas Ethics Committee opined that a lawyer who provides estate planning services may also sell life insurance that is used to fund the trust. The Committee required full disclosure of the insurance commissions, and an opportunity for the client to seek independent counsel. The lawyer must determine that the representation is not affected by the lawyer's other interests and the policy sold must be appropriate to the estate plan. Kansas Ethics Committee Opinion 95-17a, February 10, 1997.

On the other hand, the Rhode Island Ethics Committee opined that a lawyer who works mainly in estate planning and also is licensed to sell insurance may not sell insurance to the lawyer's law clients, and may not perform estate planning services for the lawyer's insurance clients. That opinion concluded that a client cannot consent to the conflict in a meaningful way where the lawyer has an interest in selling insurance. Rhode Island Ethics Committee Opinion 96-26, November 14, 1996.

CONCLUSION

A lawyer/agent may sell insurance and other estate planning products to law clients, or may sell insurance through a separate entity controlled by the lawyer individually or with others. However, whether an individual lawyer's conduct complies with the Rules of Professional Conduct is fact specific. Thus, a lawyer choosing to offer such law-related services must fully inform the clients and take special and careful steps to comply with the many Rules of Professional Conduct applicable to such dual activities.

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by David L. Petersen and was unanimously approved by the Ethics Committee on September 9, 1998.



Alice R. Senechal, Chair