

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 00-09**

DECEMBER 6, 2000

The Ethics Committee received a request dated October 27, 2000, for an opinion regarding potential ethical violations as to the sharing of fees with a nonlawyer and the unauthorized practice of law.

FACTS

Attorney A presently reviews abstracts, prepares title opinions, and drafts deeds and other title documents for a title company in North Dakota. Attorney A bills the title company for the work Attorney A performs for the title company. Attorney A understands that the title company then bills the buyers and sellers of the property for the services Attorney A performs.

Attorney A has recently been approached by the title company and offered a position with the title company. Attorney A would be a salaried employee of the title company. Attorney A would review abstracts, prepare title opinions and title insurance, and draft deeds and other title documents. The title company would bill the buyers and sellers a predetermined fee for each of these services.

Attorney A has inquired as to whether his employment by the title company, as outlined above, would violate any ethical rules in regard to the sharing of fees with nonlawyers and the prohibitions against the unauthorized practice of law.

DISCUSSION

Rule 5.4 of the North Dakota Rules of Professional Conduct provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with his firm, partners, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons;

(2) A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, under Rule 1.17, pay to the estate or other representatives of that lawyer the agreed-upon purchase price; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on the profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

N.D.R. Prof. Conduct 5.4. Attorney A does not specifically state whether any nonlawyers have any ownership interest in the title company. If only lawyers had ownership interests, then there could be no possible sharing of fees with nonlawyers.

As presented, the facts do not actually implicate the fee-sharing prohibition found in Rule 5.4(a). Id. 5.4(a). Attorney A is not, strictly speaking, sharing fees with any nonlawyer. Attorney A is being paid a salary amount to produce a work product, which is then sold by his employer. Rule 5.4 does come into play, however, in that the provisions of subsection (d) may be triggered. Id. 5.4(d).

Rule 5.4 does allow for lawyers to practice law in the form of professional corporations and associations. Id. § see also N.D. Cent. Code ch. 10-31 (providing for professional organizations in North Dakota). Rule 5.4 goes on to provide, however, that (with exceptions not relevant here) the professional organization cannot be organized so that a nonlawyer either owns an interest therein, is a director or officer thereof, or has a right to direct or control the professional judgment of a nonlawyer. N.D.R. Prof. Conduct

5.4(d)(1)-(3); accord N.D. Cent. Code § 10-31-01(6)-(8) (providing professional organizations may have as shareholders, members, or partners only individuals who are licensed professionals in their field).

Attorney A does not disclose if any nonlawyers own any interest in the title company, are directors or officers of the title company, or would have the right to direct or control Attorney A's professional judgment. If the title company was wholly owned by licensed attorneys,¹ had only licensed attorneys serving as directors and officers, and had only licensed attorneys in positions with the right to direct or control the professional judgment of Attorney A, then Attorney A's employment on a salary basis would not violate the rule. If, however, a nonlawyer owned any interest in the title company, was a director or officer of the title company, or was in a position with the right to direct or control Attorney A's professional judgment, then Attorney A's employment with the title company may be precluded, but only if the actions of the title company amount to the practice of law.

It is therefore necessary to examine whether the title company's activities (described by Attorney A as reviewing abstracts, preparing title opinions and title insurance, and drafting deeds and other title documents) constitute the practice of law. If they do, then Attorney A's employment will not only violate Rule 5.4(d), but also, as shown below, will violate Rule 5.5(b) of the North Dakota Rules of Professional Conduct. N.D.R. Prof. Conduct 5.5(b). Rule 5.5 of the Rules of Professional Conduct provides:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Id. Of course, if the activities of the title company do not amount to the practice of law, then Attorney A will neither have violated the provisions of Rules 5.4 or 5.5 of the North Dakota Rules of Professional Conduct in the prospective employment.

¹ The only exception to the ownership requirement by licensed attorneys, as spelled out by the rules, is that a fiduciary representative of the estate of a lawyer may hold the stock or interest for a reasonable time during administration of the estate. N.D.R. Prof. Conduct 5.4(d)(1).

The seminal case in North Dakota on what constitutes the practice of law is Cain v. Merchants Nat'l Bank & Trust Co., 268 N.W. 719 (N.D. 1936). In Cain an injunction was sought against Merchants National Bank & Trust Company (hereinafter Merchants) to prevent it from engaging in the unauthorized practice of law. Id. at 720. Part of the alleged activity of Merchants was the preparation of legal documents, such as chattel mortgages, bills of sale, and crop contracts, in some of which transactions Merchants was a party and in some of which transactions Merchants was not a party. Id. at 721. The Court in Cain held that the practice of law clearly includes more than just representation in Court. Id. at

722. Quoting the Supreme Judicial Court of Massachusetts, the North Dakota Supreme Court stated:

Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counselor at law' . . . bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as concerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the ground work for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counselors at law outside of courts. Decisions of the courts, some of which deal with statutes, are unanimous on these points, so far as we are aware.

Id., quoting In re Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935). The Court in Cain actually held that a person who is not a licensed attorney may draw instruments when the instruments are incidental to the transactions in which the layperson is interested, provided no charge is made therefor, without committing the unauthorized practice of law. Id. at 723. However, when Merchants drew instruments for

the accommodation of its customers in transactions in which Merchants had no interest, Merchants did improperly practice law without a license. Id. at 724.

The decision in Cain did not deal with a title company. Further, there are no decisions in North Dakota dealing with whether, and to what extent, the activities of a title company may constitute the practice of law. Resort to authority from other jurisdictions is, therefore, necessary.

The limited number of ethics committees which have examined this issue appear to have determined that the activities of a title company (as described by Attorney A) do constitute the practice of law. See S.C. Advisory Op. 98-03, 1984 W.L. 272916 (S.C. Bar Eth. Advisory Comm. 1984) (stating: “the drafting of deeds, bonds, mortgages and other legal instruments associated with the transfer and encumbrance of title to realty” and the “rendering of opinions on the validity of title” constitute the practice of law); Pa. Eth. Op. 93-149, 1994 W.L. 927997 (Pa. Bar Ass’n Comm. Legal Eth. & Prof. Responsibility 1994 (stating examination of information and rendering opinion as to title of property constitutes practice of law). Further, cases from other jurisdictions indicate the type of activities described by Attorney A would constitute the practice of law. See State Bar of Arizona v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961); Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946 (Tex. 1944).

In Hexter, for example, the Texas Supreme Court was squarely presented with the issue of whether the types of activities described by Attorney A constituted the unauthorized practice of law. The Court in Hexter specifically rejected the contention that these services were “incidental” to the business of a title company and therefore were not unauthorized practice. Hexter, 179 S.W.2d at 952. The Court in Hexter stated:

We are of the opinion, however, that the preparation of such papers is not the business of the insurance company. In this connection, it should be noted that this suit does not involve the right of the corporation to prepare the contract of insurance to which the insurance company would be a party, nor does it relate to documents prepared to cover the release or discharge of the company from obligations previously incurred by it. These transactions involve conveyances, releases, and mortgages from grantors to grantees, and to which the insurance company is not a party. They are executed for the purpose of placing good title

in the grantee, so that the insurance company may thereafter insure the title if it chooses. Such papers may relate to the rights of third parties in which the corporation has no present interest, but only a prospective one. They affect the rights of individuals apart from their interest in the title insurance policy. The work of preparing these papers is distinct from the searching and insuring of the title - the legitimate business for which the corporation is incorporated. It is not the business of the title insurance company to create a good title in an applicant for insurance by preparing the necessary conveyances, nor to cure defects in an existing title by securing releases or prosecuting suits to remove clouds from title, merely for the purpose of putting the title in condition to be insured. The title insurance company must accept the title and insure it as it is, or reject it. It may examine the title, point out the defects, and specify the requirements necessary to meet its demands, but it is the business of the applicant for the insurance to cure the defects.

Id.; accord, State Bar of Arizona, 366 P.2d at 11-12. The Court of Common Pleas of Ohio put it most succinctly, when it stated:

It is only when the legal opinions of captived, salaried lawyers become, in effect, the subject of barter on the market place by the corporate principals of such captive lawyers that we have the type of illegal, unauthorized practice of law by the corporations which has been so consistently condemned by the Supreme Court of Ohio in the past.

Steer v. Land Title Guar. Trust Co., 113 N.E.2d 763, 767 (Ohio Ct. Common Pleas 1953).

The facts as presented by Attorney A appear to fall within the practice of law. Attorney A will be preparing documents and examining title in transactions in which the title company is not a party. Further, the work of Attorney A will be provided at charge to the clients of the title company. Under existing North Dakota caselaw and persuasive authority from other jurisdictions, this would constitute the unauthorized practice of law by the title company.² If Attorney A were to go into the employ of the title company as he describes, he would be assisting the title company in the performance of activity that constitutes the unauthorized practice of law. See N.D.R. Prof. Conduct 5.5(b).

CONCLUSION

² The fact that the title company would employ Attorney A, a North Dakota licensed attorney, to actually perform the acts does not render the acts any less unauthorized practice. See In re Otterness, 232 N.W. 318, 319 (Minn. 1930), cited in Cain, 268 N.W. at 722 (holding corporation cannot evade prohibition against unauthorized practice of law merely by employing licensed attorney).

The Committee concludes that Attorney A would violate both Rule 5.4(d) and Rule 5.5(b) of the North Dakota Rules of Professional Conduct if Attorney A became a salaried employee of the title company and for that title company Attorney A reviewed abstracts, prepared title opinions and title insurance, and drafted deeds and other title documents (for which the buyers and sellers of the property would be charged predetermined fees) unless either: 1) the services performed by Attorney A related solely to transactions in which the title company was a party; or 2) the title company was wholly owned by licensed attorneys, all officers and directors of the title company were licensed attorneys, and the only persons with the right to control and direct Attorney A's professional judgment were licensed attorneys. This opinion is strictly limited to questions asked by Attorney A concerning prospective employment as a salaried employee. The Committee was not asked for, and does not express, any opinion as to the propriety of the present arrangement Attorney A has with the title company.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline.

N.D.R. Lawyer Discipline 1.2(B). This rule provides:

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.

Id.

This opinion was drafted by Steven E. McCullough and was unanimously approved by the Ethics Committee on December 6, 2000.

_____/S/_____
Mark R. Hanson, Chairman