

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 19-03**

THIS OPINION IS ADVISORY ONLY

FACTS

A lawyer licensed to practice law in multiple states, including North Dakota, would like to obtain a real estate salesperson license and may pursue a career as a real estate agent. *See* N.D.C.C. Ch. 43-23 (setting forth the framework and law for licensure of real estate salespersons in North Dakota). At present, the lawyer does not actively practice law; the lawyer is not a licensed real estate salesperson nor has the lawyer submitted an application for licensure.

The lawyer acknowledges hypothetical questions are presented. While the Committee seeks to provide guidance to lawyers, it cannot provide hypothetical answers to hypothetical questions. With that said, the Committee will generally address the broader question as to the application of the Rules to a lawyer providing law-related services.

QUESTION PRESENTED

1. Is a licensed active lawyer, who is not currently practicing law, and who is a licensed real estate salesperson actively working as a real estate agent, bound by the North Dakota Rules of Professional Responsibility?

OPINION

I. APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

North Dakota Rules of Professional Conduct, Rule 5.7 is most applicable in this request. This Committee has previously addressed application of Rule 5.7. *See, e.g.,* Opinion No. 01-03 (addressing a question of a lawyer performing tax services); Opinion No. 98-07 (addressing a question of a lawyer selling life insurance). The Rule provides:

(a) A lawyer is subject to these Rules 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.

N.D.R.PROF.CONDUCT Rule 5.7. Comment 7 to Rule 5.7 provides "real estate counseling" as an example of a law-related service. *Id.* It is clear that a lawyer working as a real estate salesperson would be providing a law-related service. *Id.*; *See, e.g.,* Nebraska Ethics Advisory Opinion for Lawyers, No. 06-4 (interpreting a nearly identical version of N.D.R.Prof.Conduct Rule 5.7 that "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"); Utah Ethics Opinion, No. 17-07 (same).

Rule 5.7 principally exists to protect members of the public from believing the engagement of a lawyer for a law-related service provides them "protections normally afforded as part of the client-lawyer relationship." N.D.R.PROF.CONDUCT Rule 5.7, at cmt. 1. A lawyer may avoid application of some of our Rules by adhering to Rule 5.7(a)(2) by taking "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." *Id.* The comments to the Rule provide some guidance as to what is meant by "reasonable measures": "communicat[ing] 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." *Id.* at cmt. 5. This communication should be in writing and done prior to entering an agreement to provide a law-related service. *Id.*

II. DISCUSSION

The Rules do not prohibit a lawyer from engaging in law-related services. Depending on the circumstances, if a lawyer engages in law-related services the lawyer may be bound by all of the Rules or may be excepted from some. *Id.* at cmt. 1 (citing Rule 8.4 and noting lawyer conduct, regardless of whether the lawyer is practicing law or providing only law-related services, would always apply to a lawyer). The lawyer requesting this opinion, however, has posed hypothetical scenarios to which this Committee cannot speculate upon.

An active North Dakota lawyer who does not practice law and engages in the law-related service as a real estate salesperson must comply with Rule 5.7. Such a lawyer will be bound by the Rules with respect to providing only real estate services unless the lawyer takes reasonable measures, under the circumstances, to assure a person obtaining the real estate services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. Rule 5.7(a)(2). A lawyer who is working as a real estate salesperson can take "reasonable measures" by taking special care to communicate, in writing and prior to the engagement of real estate related services, with the real estate client that no client-lawyer relationship will exist or be formed. A lawyer who is a real estate salesperson should also take special care to separate providing real estate services from providing legal services. For example, activities such as the drafting or editing of contracts; providing advice on, or interpreting, a contract or warranty provision; the application of environmental or zoning laws to a real estate transaction; and other

similar law-related services that are "closely entwined" with legal services, would constitute the practice of law and invoke the application of all of the Rules. *See* Rule 5.7, cmt. 6; Utah Ethics Opinion, No. 17-07.

CONCLUSION

The answer to the question presented depends on the circumstances and cannot be answered definitively because the lawyer requesting the opinion is not engaged in any law-related services and presents hypothetical scenarios. It is possible that a lawyer who is not practicing law and is solely providing real estate services, which are law-related services, may not be bound by all of Rules of Professional Conduct. A lawyer will always be bound to some aspects of our Rules. *See* N.D.R.PROF.CONDUCT Rule 5.7, cmt. 1, and Rule 8.4. A lawyer who is not practicing law and works solely as a real estate salesperson should provide a clear disclaimer, in writing, prior to being engaged by a real estate client, that an attorney-client relationship does not exist if the lawyer desires to limit application of the Rules when providing only real estate services. Such a lawyer must take special care to avoid closely entwining the provision of real estate services with the provision of legal services.

This opinion was drafted by Zachary Pelham and was approved by the Ethics Committee on the 11th day of December, 2019.

A handwritten signature in black ink, appearing to read "Wanda Johnson", is written over a horizontal line.

Ethics Committee Chairperson

This opinion is provided under 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.