

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 1902**

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

May an ("Attorney") who is employed in a non-attorney capacity by the North Dakota State Court system as a case officer also engage in the limited practice of law related to real property? Does this dual practice create any issues under the North Dakota Rules of Professional Conduct?

OPINION

The North Dakota Rules of Professional Conduct do not contain an express prohibition on dual practice or second occupations. *See* SBAND Op 98-07. Rule 5.7 provides a framework for attorneys to evaluate whether they are bound by the Rules when performing nonlegal services. To the extent Attorney's occupation as a North Dakota State Court system case officer is a "law-related service," the Rules apply to the law-related service unless Attorney takes 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. *See* SBAND Op 98-07.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 5.7 Responsibilities Regarding Law-Related Services

FACTS PRESENTED

Attorney is employed or seeks employment by the North Dakota State Court system in a non-attorney capacity as a case officer. Separate from this non-attorney position, Attorney would like to engage in the limited practice of real estate and property law. The scope of Attorney's work would include reviewing, updating, and/or drafting property abstracts, deeds, preliminary title opinions, and final title opinions at the request of Attorney's legal clients who would consist of lenders or real estate companies.

With respect to Attorney's limited legal practice, Attorney would not typically have contact with the buyers or sellers involved in the transactions and the request for title opinions or drafting of documents would be submitted by financial institutions or real estate companies. Attorney does not anticipate having to appear in court, engage in litigation with respect to legal services rendered to their lending and real estate clients, or take on an adversarial role between parties. Based on these general facts, Attorney questions whether the limited scope legal practice would create any issues under the Rules when considering employment as a case officer.

DISCUSSION

- I. Rule 5.7 permits attorneys to have dual occupations. If the dual occupation is considered a “law-related service,” the attorney is obligated to conduct the law-related service pursuant to the Model Rules of Professional Conduct unless various disclosures are made to the recipient of the “law-related service.”**

The North Dakota Rules of Professional Conduct do not contain a prohibition on dual practice. Although the subject matter of Attorney’s dual practice may be distinct from that of a case officer and the potential for conflicts of interest less likely, the Ethics Committee cannot opine or hypothesize to the various different factual situations that may trigger the applicability of particular Rules. In evaluating the applicability of the Rules to dual practice, Attorney is advised that the inquiry is focused on whether the nonlegal activities are a “law-related service.” “When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems.” N.D. R. Prof. Conduct Rule 5.7, c. 1. Rule 5.7 provides a framework for attorneys to evaluate whether they are bound by the Rules when performing nonlegal services. Specifically, Rule 5.7 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.

“Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity.” *Id.* at c. 1. The issue of whether Attorney’s employment or potential employment as a case officer is a “law-related service” is a fact intensive inquiry for which the Ethics Committee cannot opine. However, for purposes of this opinion, assuming Attorney’s dual occupation as a case officer *may* be considered a law-related service (*see, e.g.,* Rule 5.7, c. 7 classifying social work as an example of “law-related services”), the Attorney is obligated to afford the recipients of such services the protections of the Rules that would otherwise apply to the client-lawyer relationship. Rule 5.7, c. 7. The comments to Rule 5.7 caution that the lawyer must take “special care to heed the

proscriptions of the Rules addressing conflicts of interest [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.” As the Ethics Committee previously commented in SBAND Op 98-07, “[a] principal problem is the possibility that the recipient of the [law-related] 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.”

To the extent that Attorney’s employment as a case officer is considered a “law-related service,” “even when the law-related and legal services are provided in circumstances that are distinct from each other,” the Rules apply to the Attorney “unless the attorney takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the lawyer-client relationship do not apply.” Rule 5.7, c. 2. Similarly, if law-related services are provided through an entity that is distinct from that which the lawyer provides legal services, and the lawyer individually or with others has control of such an entity’s operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services, and that the Rules relating to the lawyer-client relationship do not apply. Rule 5.7, c.3. “A lawyer’s control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.” *Id.* The question of whether the Attorney has control over the entity, or the ability to direct its operation is a question of fact for which the Committee cannot opine. For purposes of this opinion, *assuming* that the Attorney does have control over the ability to direct the operation of the law-related services, the Rules apply unless the Attorney takes reasonable measures to inform the recipient of the law-related services otherwise.

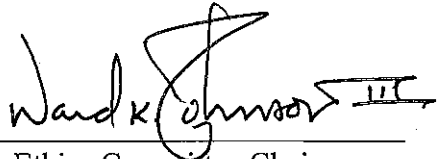
Under Rule 5.7, the lawyer bears the burden to make clear to the recipient of law-related services that the protections of a lawyer-client relationship do not apply to the provision of law-related services, and if the burden is not met, the Rules of Professional Conduct will apply to the provision of these services just as if the lawyer were providing legal services. Ellen J. Bennett, Helen W. Gunnarsson, *Responsibilities Regarding Law-Related Services* § 5.7, Ann. Mod. Rules Prof. Cond. (9th ed. 2019) (citing Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs--How Can They Ever Be “Non-Lawyers”?*, 30 Geo. J. Legal Ethics 45 (Winter 2017) (advising lawyers employed in law-related government jobs to follow procedures contemplated by Rule 5.7 to ensure those the lawyer serves understand they are not receiving legal services and are not entitled to protections of lawyer-client relationship)).

Comment 5 to Rule 5.7 provides guidance on the scope of reasonable measures to inform the recipient of the law-related services that the attorney-client relationship does not exist. The form and scope of the disclosure will vary depending on the nature and sophistication of the recipient however it is advised that the communication be made prior to providing law-related services and that the communication be made in writing. N.D. R. Prof. Conduct Rule 5.7, c. 5-6. Under some instances where the legal and the law-related services are so intertwined they cannot be distinguished from each other, the disclosure imposed by Rule 5.7(a)(2) cannot be met. N.D. R.

Prof. Conduct Rule 5.7, c. 6. Additionally, to the extent the full protections of the Rules do not apply to law-related services, other legal protections and duties may apply to the recipient. N.D. R. Prof. Conduct Rule 5.7, c. 8 (citing Rule 8.4 Misconduct).

CONCLUSION

This opinion was drafted by Casey A. Furey and was unanimously approved by the Ethics Commission on the 15th day of August, 2019.


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.