

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Advisory Opinion

June 15, 1982

Probate Practice Conflicts

This inquiry involves the following situation: One member of a firm is probate judge for the county. Another member is an associate judge of the district court. The question is whether or not and to what degree are members of the firm precluded from probate practice and from criminal practice at the district court level.

It seems obvious that no member of the firm may appear before the probate judge member of the firm in any proceeding. Likewise, no member of the firm may appear in the district court in which the associate judge member of the firm sits. DR5-105(D).

The more difficult question arises as to the propriety of appearances of members of the firm before other probate judges and/or other district courts.

There seems to be no Disciplinary Rule directly on point. Quoting from EC9-2: "when explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

Specifically, with regard to this inquiry, caution must be exercised in those situations where the district court judge may be called upon to appear before a probate judge of another county, where that probate judge may, on occasion, appear before the former's district court. Similar caution should be observed if the probate judge of this firm were to appear in district courts where the judges of those courts are likely to appear before him in probate proceedings.

Although this problem is inherent in our present part time judicial system, general public awareness may not take this into account.

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Advisory Opinion

June 15, 1982

Municipal Representation Conflicts - School District Moderator/Counsel for
Teachers' Union

The question has been asked whether it would be improper for an attorney to represent the New Hampshire Federation of Teachers and at the same time serve as moderator of a school district in which a local affiliate of the NHFT/AFT is the collective bargaining agent for the district's teachers.

The Committee is of the opinion that it would be improper to act as both Moderator for the Town A School District and at the same time represent the New Hampshire Federation of Teachers, which apparently is the umbrella organization for the Town A Federation of Teachers. The inquiring attorney's letter indicates that if there were ever a dispute between the Town A School District and the Town A teachers, he would act as legal counsel on behalf of the teachers.

The Committee is not aware of the inquiring attorney's specific functions as moderator for the Town A School District meetings, but we assume that he has an active role in school district affairs. On some occasions he may act as the representative for the school district, and on other occasions, he may be representing teachers in an adversary proceeding against the school district. For this reason, the dual roles would be viewed as an appearance of impropriety. (See DR5-101 (A) and New Hampshire Law Weekly February 10, 1982 and May 20, 1980 for similar opinions).

NEW HAMPSHIRE BAR ASSOCIATION

Advertising: Use of Firm Name Containing Out-of-State Partners in
In-State Advertising

Ethics Committee Advisory Opinion
10/12/82

FACTS:

The Ethics Committee has considered a request relating to the use of a certain law firm name in New Hampshire which contains names of some individuals who are members of the New Hampshire Bar and some individuals who are members only of other Bars. The Committee notes that the letterhead submitted does not indicate in every case the membership or lack thereof in the New Hampshire Bar.

For example, the letterhead indicates that Attorney G is not a member of the New Hampshire Bar but may be a member of the Maine or Massachusetts Bar. The Committee also notes that one of the partners is a professional corporation -- apparently not of New Hampshire.

RESPONSE:

Assuming that (1) all persons involved in the name heading are members of a single partnership; and (2) the name of each person listed below the firm name has after it an indication of the state in which that person is admitted to practice, whether practicing as a P.C. or otherwise, the Committee would answer the question in the affirmative as to the firm name itself. See the opinion of this Committee dated March 16, 1982 and published in 8 NHLW 404, April 28, 1982. The Committee also assumes any advertising will be in compliance in other respects with the New Hampshire "Code of Professional Responsibility."

The Committee has also considered the use of the words "A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION" immediately under the name of the firm. Under the circumstances, the quoted words should either be deleted or expanded to cover the practicing limits on the P.C. For example, they might be expanded by the addition of the words "PRACTICING IN _____." It would not be appropriate merely to add the state of organization in front of the word "PROFESSIONAL."

NEW HAMPSHIRE BAR ASSOCIATION

Obligation of Attorney to Report Possible Insurance Fraud

Ethics Committee Advisory Opinion
10/12/82

FACTS:

An attorney has inquired whether he has an obligation under the New Hampshire Code of Professional Responsibility to report certain information to criminal authorities. The particular facts have been described by the inquiring attorney as follows.

The attorney has been retained by an insurance company to represent a defendant in a "slip and fall case." The plaintiff in that case claims to have suffered injuries when he fell at the defendant's premises. An investigator for the defendant's insurance company has interviewed two individuals who have given statements which indicate that the plaintiff did not fall, but jumped in order to make an insurance claim.

RESPONSE:

In the Committee's opinion, nothing in the New Hampshire Code of Professional Responsibility requires the attorney to report the foregoing information to local law enforcement officials. The attorney may wish to review with the insurance company whether the insurance company itself should file a complaint. As a matter of information, the Committee further notes that it is aware of no statute which would require the insurance company to report the foregoing information to law enforcement officials. Compare RSA 153:13-a (Supp.1981), which requires an insurance company to notify the state fire marshal of fire losses of suspicious origin and provides immunity for civil liability, in the absence of fraud or malice in making such a report.

NEW HAMPSHIRE BAR ASSOCIATION

Representation of Clients in District Court
by a Retired Judge of That Court

Ethics Committee Advisory Opinion
10/12/82

FACTS:

The Committee has been asked if there is an ethical problem with a retired district court judge from a small rural community accepting criminal cases which will necessitate the judge's appearance in the same district court?

RESPONSE:

No, provided the provisions of Canon 9 are complied with. Under DR 9-101 (A) "A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Furthermore, under DR 9-101 (C) "A lawyer shall not state nor imply that he is able to influence improperly or upon irrelevant grounds any tribunal..." Also see EC 9-3, "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter which he has had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

In view of the small town situation and further in view of the recent association with the local court; whenever the attorney believes that a prospective client has contacted him in order to obtain an advantage in the Court, the attorney should state that his prior judicial capacity will not affect the disposition of the pending matter.

We note that the Code of Judicial Conduct provisions applicable to part-time judges apply to "retired judges eligible for recall to judicial service." Section C., Compliance with the Code of Judicial Conduct. Section A., Compliance with the Code of Judicial Conduct states that a part-time judge should not practice law in the court on which he serves.

NEW HAMPSHIRE BAR ASSOCIATION

Obligations of Attorney to Report Possible Welfare Fraud

Ethics Committee Formal Opinion
10/12/82

FACTS:

At a contested support hearing in a divorce action, the husband testified that he was unemployed but in the process of building a house for his mother who was paying all of the construction costs. The wife receives public assistance, but the amount of such assistance which she receives from the State is reduced by the amount of support received from her husband. After the hearing, the wife admitted to her attorney that, in fact, the house belonged to her husband and that he had transferred it and other assets to his mother so as to reduce his liability to pay support.

The wife's attorney believes that if the Court knew that the husband owned the house and other assets, the Court order for support payments would have been higher. The wife refuses to divulge any information concerning the concealed assets to either the Court or the State Division of Welfare because she wants to protect her child's future interests in the assets. We have been asked what duty the wife's attorney has to disclose the information concerning the concealed assets to the Division of Welfare.

RESPONSE:

An attorney has the duty to preserve the confidences and secrets of his clients. Canon 4; DR 4-101 (B). An attorney may reveal such confidences and secrets, however, "when permitted by the Disciplinary Rules or required by law or court order." DR 4-101 (C)(2). Under DR 4-101 (C)(3), an attorney may reveal his client's intention "to commit a crime and the information necessary to prevent the crime."

"A lawyer should represent a client zealously within the bounds of the law." Canon 7. However, DR 7-102 (B) provides that:

A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the

affected person or tribunal (except when the information is protected as a privileged communication).

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. (The present A.B.A. Code of Professional Responsibility includes the exception shown in parentheses above. The Ethics Committee has recommended adoption of the language in parentheses in New Hampshire.)

"The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information...given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B)." A.B.A. Formal Opinion 341 (1975); A.B.A. Formal Opinion 287 (1953). The wife's confirmation of the husband's failure to disclose assets was a confidential communication to her attorney. Even if the information provided to the attorney "clearly established" a "fraud" upon the court or other person, the duty of the attorney to preserve the confidential nature of this communication supercedes the attorney's obligation to reveal the husband's failure to disclose assets to the court or any person under DR 7-102(B)(1) or (2). A.B.A. Informal Opinion 1416 (1978); A.B.A. Formal Opinion 341 (1975). If the wife was a party to the "fraud" and will not voluntarily reveal the failure to disclose assets, her attorney must withdraw from further employment. A.B.A. Informal Opinion 1314 (1975); A.B.A. Informal Decision C-778 (1964). If the wife's actions constitute a future crime under RSA 167:17-c or any other law, her attorney additionally would be entitled, though not required, to disclose that fact to the appropriate authorities under DR 4-101 (C)(3) if the wife refuses to do so herself. A.B.A. Formal Opinion 287 (1953); A.B.A. Formal Opinions 155 and 156 (1936); A.B.A. Informal Opinion 1141 (1970); A.B.A. Formal Opinion 23 (1930).

NEW HAMPSHIRE BAR ASSOCIATION

Dual Representation of Personal Injury Plaintiff
and Conservator Spouse - Possible Conflicts

Ethics Committee Advisory Opinion
10/12/82

FACTS:

The attorney in this matter is contacted by the wife of a Maine resident, who is severely injured while employed by a New Hampshire employer, sustaining ninety (90%) percent brain damage. Workers Compensation benefits are obtained by the Attorney on behalf of the injured husband. The wife is appointed Conservator for the husband, through a Maine Probate Court. The attorney advises the wife to set up a financial plan, "which will provide for the future security of the family," and urges the wife "to consult with a financial adviser and follow careful accounting practices to meet her fiduciary obligations." Through the course of numerous dealings with the wife, the attorney feels that he has entered into an attorney/client relationship with her. As a result of his meetings with the wife, the attorney is not satisfied that she has established an adequate financial plan, pursuant to his recommendations.

ISSUES:

1. Does the attorney have a duty to act on behalf of the husband to require the wife to provide an accounting of the funds she has received and to establish an adequate financial plan if she has not already done, so?
2. If so, would such action constitute a breach of the attorney/client relationship with respect to the wife?

RESPONSE:

Under Canon 7 and DR 7-101, a lawyer has a duty to represent a client zealously within the bounds of the law. This is especially so where a client is not competent or able to enforce his own rights.

The wife, as Conservator, has a fiduciary duty to manage the husband's benefits in a responsible manner. Because of the husband's condition, the husband's attorney wishes to satisfy himself that this is being done.

However, the attorney has established an attorney/client relationship with the wife. Pursuant to DR 4-101, the attorney has a duty to preserve the confidences and secrets of his client. This rule extends to confidential communications between himself and the wife. Thus, while the attorney may wish to force the wife to account for her handling of the funds received on behalf of the husband, such action on the part of the attorney could very well lead to a breach of the attorney/client relationship which he has developed with the wife and would risk his having to use information obtained in confidence from the wife, against her.

The attorney in essence is representing two clients who may have differing interests. DR 5-105 (A) states: "A lawyer shall decline proffered employment...if it would be likely to involve him in representing different interests..." A lawyer may represent multiple clients only if it is obvious that he can adequately represent the interests of each, and if each "consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each."

Because of the husband's injury, this proviso cannot be met. Accordingly, he should withdraw from employment from both clients.
(EC 5-15)

NEW HAMPSHIRE BAR ASSOCIATION

New Hampshire Practicing Lawyer Operating A New Hampshire Real Estate
Brokerage - Request to Reconsider Committee on Professional Conduct
Informal Opinion No. 2 (7/30/70) and Formal Opinion No. 5 (12/5/75)

Ethics Committee Advisory Opinion
10/12/82

The Ethics Committee has, as requested, reconsidered Professional Conduct Committee Formal Opinion No. 5 (December 5, 1975) and Informal Opinion No. 2 (July 30, 1970) concerning the issue of one person practicing law and operating a real estate office at the same time in New Hampshire. The Committee assumes that while the inquiring attorney will "be employed full time in the practice of law," he will in fact operate his real estate office.

The Committee declines at this time to issue an Opinion contrary to the prior Opinion. In reaching the above conclusion the Committee recognizes that the conduct in question might not necessarily violate the DRs referred to in the 1970 Opinion. The final paragraph of the 1970 Opinion, however, appears still to be applicable and presents a serious problem under Canon 3. The rationale of the 1975 Opinion still appears sound.

New Hampshire Supreme Court
Committee on Professional Conduct

FORMAL OPINION

Adopted December 5, 1975

This Committee has been presented with the question as to whether it is ethically proper for a practicing attorney simultaneously to hold a broker's license and operate a real estate brokerage business. Any attorney in this state is exempted from the requirement of obtaining a real estate broker's license so long as he is acting "...in the performance of his duties as an attorney..." R.S.A. 331-A:2. However, approximately twenty active members of the New Hampshire Bar Association presently hold broker's licenses, some of whom are involved, in varying degrees, in the brokerage business. Following notice to the New Hampshire Bar, a full hearing was held on October 29, 1975, at the Supreme Court Chambers, Concord, N. H. Several attorneys presented oral argument and others submitted written memoranda.

The predecessor of this committee, the New Hampshire Bar Association's Professional Conduct Committee, considered this issue previously, and in Informal Opinion No. 2 (July 30, 1970) stated: "...it would be improper and unprofessional for a lawyer who is engaged in the active practice of law in the State of New Hampshire to be at the same time a licensed real estate broker or agent."

The Committee takes note of the fact that several attorneys have held broker's licenses without ever using them and wish to maintain the option of later concluding the active practice of law and entering the brokerage business without then being required to obtain a new license. The Committee is of the opinion that no unprofessional conduct results from the holding of dual licenses so long as a practicing attorney in no way engages in a brokerage business. Furthermore, the Committee is of the opinion that no unprofessional conduct results from an attorney who holds an inactive membership in the New Hampshire Bar Association and who engages in an active brokerage business. In all other respects, the Committee affirms Informal Opinion No. 2.

While it is undisputed that an attorney is not ethically precluded from operating a business entirely separate from his law business, experience has shown that grave problems inevitably arise when the attorney attempts simultaneously to operate a "law related" business, such as real estate brokerage. Several members of the Bar have urged the Committee to approve such a dual practice and to consider complaints only on a case-by-case basis. We find that this approval would not properly protect the public.

Permitting an attorney/broker dual practice would, under the Canons of the Code of Professional Responsibility, create, inter alia, the following problems: Conflict of interest, advertising, solicitation, "feeding", breach of the attorney/client relationship, public confusion, billing and sharing of fees. The Committee and

the courts have seen evidence of the real problems this situation produces. See Hines v. Donovan, 101 N. H. 239, 243. No matter how carefully an attorney/broker separates his dual practices, or how sensitive an attorney/broker is to the Canons of Ethics, it is likely that many members of the public will be unable to grasp the distinction between an attorney/broker practicing law and an attorney/broker engaging in a brokerage business. Thus, the Committee believes that the "appearance of impropriety" cannot be avoided.

When one voluntarily elects to become a member of the legal profession, he subjects all his actions to the highest standards of conduct and often must decline opportunities, however inviting or rewarding, that would be permissible for others. Such sacrifices are indispensable to the attainment of the trust and confidence of the public which are the sine qua non of the profession.

12-5-75



New Hampshire Bar Association

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COMMITTEE ON PROFESSIONAL CONDUCT

INFORMAL OPINION NO. 2 Adopted July 30, 1970

An informal opinion of the Committee on Professional Conduct has been requested by the New Hampshire Real Estate Commission as to whether or not a New Hampshire lawyer may also be a licensed real estate broker in New Hampshire.

There is no question that ethically, a New Hampshire lawyer may operate a business entirely separate from his law practice without violating any of the disciplinary rules under the Code of Professional Responsibility. The nature of the separate occupation, however, is most important as to whether or not a lawyer may ethically operate the separate business. The A.B.A. in 1932, issued an opinion with regard to a lawyer operating an insurance adjuster's bureau (See Opinion 57). It is stated there:

"It is not necessarily improper for an attorney to engage in a business; the impropriety arises when the business is of such a manner as to be inconsistent with a lawyer's duties as a member of the Bar. Such an inconsistency arises (1) when the business is one that will readily lend itself as a means for procuring professional employment for him, (2) is such that it can be used as a cloak for indirect solicitation on his behalf, (3) or is of a nature that if handled by a lawyer, would be regarded as the practice of law." Page 151

In this opinion, the A.B.A. Committee on Professional Ethics and Grievance states:

"It is difficult to conceive how a lawyer could conduct a claim adjustment bureau, a company for the organization of corporations, or a bureau for securing income tax refunds without practicing law."

Such matters, of course, would then be prohibited under the third guideline set forth above. It was thought in this opinion that:

"The investigation and adjustment of insurance claims must frequently lead to some litigation so that the solicitation of business by a bureau handling them must readily lend itself as a means of procuring professional employment for any lawyer in general practice who may be interested in or connected with it."

The opinion held that a lawyer in general practice cannot at the same time, manage an investigating and adjustment bureau which solicits business from insurance companies. Also, that the lawyer could not allow his name to appear on the stationery of such an adjustment bureau as its manager and lastly, that the lawyer could not practice law and conduct the adjustment bureau in one and the same office.

It is the opinion of the Committee that it would be improper and unprofessional for a lawyer who is engaged in the active practice of law in the State of New Hampshire to be at the same time a licensed real estate broker or agent.

The disciplinary rules involved directly or indirectly as to the propriety of a New Hampshire lawyer being a licensed real estate broker or agent are DR 2-102(E); DR 2-103(A) and DR 2-104(A).

It is the Committee's opinion that a New Hampshire lawyer who is also a licensed real estate broker or agent would be conducting a second business which would inevitably have the effect of feeding his law practice. If the lawyer was actively engaged on a day to day basis in the selling of real estate, it would have the tendency to be used as a possible cloak for indirect solicitation of business for the lawyer. Lastly, in discussions and negotiations between the lawyer acting as a real estate agent and a potential purchaser, there could very well be services rendered which, if handled by a lawyer, would be regarded as the practice of law. Thus it appears that there is a basic inconsistency between a lawyer practicing law and also working at the same time as a real estate agent or broker.

Opinion of the Committee - July 30, 1970