NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Opinion #2022-23/01

Ancillary Businesses Under Rule 5.7

ABSTRACT:

In 2007, New Hampshire adopted NHRPC Rule 5.7, which applies to the provision of 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. Prior to the adoption of Rule 5.7, a lawyer providing such services was considered to be practicing law when providing those services, and therefor subject to all the Rules of Professional Conduct.

After the adoption of Rule 5.7, lawyers are presumably exempt from some of the rules, if the lawyer provides law-related services exclusively under circumstances that are distinct from the lawyer's provision of legal services to clients, or if the lawyer 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. Rule 5.7 identifies some of the rules which remain applicable, giving Rule 8.4 as an example.

This opinion discusses four situations that troubled the Committee before the adoption of Rule 5.7, and which may linger after the adoption. The first situations concern conflict of interest. A lawyer providing law-related services to a customer might negotiate with a lawyer from the same firm providing legal services to a current client. The lawyer providing law-related services would appear to be exempt from Rule 1.7, but the lawyer providing the legal services would need to carefully examine Rule 1.7 to confirm compliance.

Another potential conflict of interest arises if the opposing party is a former client. Whether Rule 1.9 might apply depends in large part on whether the current matter is substantially related to previous matter handled on behalf of the former legal client. Even if Rule 1.9 does not block the current provision of law-related services, however, the lawyer may not use information learned from the prior representation to the disadvantage of the former legal client.

The other situations involve “feeding” of one business to the other. A law firm that refers its legal clients to its law-related business must carefully comply with the provisions of Rule 1.8. As this Committee has stated in earlier opinions, lawyers who enter into business transactions with their clients may expect a high level of scrutiny.

A law-related business that refers its law-related customers to its law firm may run afoul of Rule 7.3 which bans certain in-person solicitation.

ANNOTATIONS:

Cases and opinions prior to the adoption of Rule 5.7 consistently disfavored the provision of law-related services, unless those services were offered under the protection of all the ethical rules.

In some cases, such as those involving real estate brokerage, the Committee believed that it would be impossible to provide such services while complying with the ethical rules.

Rule 5.7, adopted in 2007, applies to the provision of law-related services – those 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.

Under Rule 5.7, a lawyer is subject to the Rules of Professional Conduct with respect to the provision of law-related services **unless** the services are provided in circumstances that are distinct from the lawyer's provision of legal services to clients; **or** the lawyer 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.

If the lawyer complies with the requirements of Rule 5.7, the lawyer may be relieved from compliance with some the Rules of Professional Conduct.

A lawyer who complies with Rule 5.7 and provides law-related services to a customer may not run afoul of the conflict-of-interest provisions of Rule 1.7, even if the lawyer's partner represents an opposing side. In such cases, however, the lawyer's partner would still need to comply with Rule 1.7.

A lawyer who complies with Rule 5.7 and provides law-related services to a customer may not run afoul of the conflict of interest provisions of Rule 1.9, even if the opposing side is a former client. In such cases, however, the lawyer may not use information learned in the prior representation to the detriment of the former client.

A lawyer may not refer a legal client to the law-related business unless the lawyer strictly complies with the provisions of Rule 1.8 dealing with business transactions with clients.

A lawyer who seeks to refer a law-related services customer to the lawyer's law firm for legal services should be cognizant of Rule 7.3 which controls certain types of solicitation.

The current (2022) version of New Hampshire's Rule 7.3 differs in certain material ways from the current (2019) version of ABA Model Rule 7.3.

ISSUE PRESENTED:

May a New Hampshire attorney actively engaged in the practice of law also conduct a law-related business under NHRPC Rule 5.7, without creating problems under other Rules?

DISCUSSION:

This issue as it relates specifically to real estate brokers has been addressed numerous times since it was first tackled by the Committee in 1970. Each time the Committee found a per se prohibition against a practicing lawyer from acting as a broker. These rulings consistently raise the same issues, so it will be useful to review the history before tackling the problem under the current Rules.

I. Pre-Code Case (1958)

Many of the early opinions cite Hines v. Donovan, 101 N.H. 239 (1958). Hines involved a New Hampshire lawyer (Hines) who represented a widow (Donovan) in settling her husband's estate. The estate included a restaurant, which needed to be sold. The lawyer, "who also deals in real estate, asked Mrs. Donovan … if he might list the property." Id. at 240. The lawyer, through one of his employees, contacted the operator of a local restaurant, who said he might be interested, "but if he did anything he would have to act through the defendant Bean Real Estate Agency." Id. at 241.

An attorney employed by defendant Bean prepared a draft purchase and sale agreement that said Donovan acknowledge that defendant Bean had brought about the sale, and would be paid a commission by Donovan. The Court found that defendant Bean connived with the buyers "for the express purpose of depriving the plaintiff of the commission to which he was entitled." Id. at 243.

Prior to the closing, the plaintiff did not notify the buyers or defendant Bean that he thought he was entitled to the commission, as he did not want to jeopardize the sale. "To his credit," the plaintiff advised Donovan to sign, as the sale was in her best interest, indicating that he would bring a bill in equity after the closing to vindicate his right to the commission. Id.

While ruling in large part in the plaintiff's favor, the Court was troubled with the lawyer's behavior.

> The circumstances which arose because of competition between Hines and Bean for the commission may be thought to have confronted Hines with the ethical problem of whether he could properly continue to represent his client with respect to the negotiations for the sale, and at the same time undertake to further his own conflicting interest as a broker.

Id. at 244 (emphasis added). The Court concluded that Donovan ended up in court as the stakeholder because of the lawyer's actions, and that her cost to hire another attorney to represent her should be paid out of the plaintiff's commission.

The case raises several interesting issues. First, there was no per se prohibition, at least in 1958, of a lawyer acting simultaneously as a real estate broker. The problem instead related to "the circumstances which arose." Second, the Court seemed to have no problem that the lawyer had suggested his client enter into a business transaction with him as broker.

II. Code of Professional Responsibility (1970-1984)

In 1970, the New Hampshire Real Estate Commission asked the New Hampshire Committee on Professional Conduct (NHCPC) to issue an opinion "as to whether or not a New Hampshire lawyer may also be a licensed real estate broker in New Hampshire." Advisory Opinion #2, Attorney Practicing as a Real Estate Broker (NHEC 1970). That advisory opinion cites a 1932 opinion of the ABA, which stated that it would be "improper for an attorney to engage in a business … (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." Opinion 57 (ABA 1932) (lawyer operating an insurance adjuster's bureau). With relatively little analysis, the Committee concluded that conducting a real estate brokerage business would violate all three concerns, and concluded "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." Advisory Opinion #2, supra.

In 1975, the Ethics Committee revisited the issue. After first concluding that holding a brokerage license and a law license at the same time did not result in unprofessional conduct "so long as a practicing attorney in no way engages in a brokerage business," the Committee concluded "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." Formal Opinion #5, Attorney Practicing as a Real Estate Broker (NHEC 12/5/1975). In other words, a lawyer could do one or the other, but not both. The Opinion cited the following issues: Conflict of interest, advertising, solicitation, "feeding", breach of the attorney/client relationship, public confusion, billing and sharing of fees. Id. (citing Hines v. Donovan, supra).

In 1982, the Ethics Committee was asked to reconsider its 1970 and 1975 opinions, and declined to issue an opinion contrary to those prior opinions, citing with approval the prior analysis. Advisory Opinion, 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) (NHEC 10/12/1982).

In 1984, the Ethics Committee again revisited the problem, this time under slightly different facts. A New Hampshire lawyer had "formed a New Hampshire corporation with a licensed realtor and another party experienced in the real estate business. The purpose of the corporation is to develop, manage, and sell real estate in the (small town) area." Advisory Opinion #1984-85/9, Dual Professions: Attorney-Realtor (NHEC 1984). The Ethics Committee again declined to approve the dual practice, unless the lawyer divested any ownership interest and acted solely as corporate counsel of the ancillary business, or become an inactive member of the New Hampshire Bar. Id. There was, however, a dissenting opinion: "The existing Ethics Opinions on this matter should be reexamined and reversed. The dissenters feel that the present rule acts as an unwarranted restraint of trade." Id.

III. Rules of Professional Conduct before Rule 5.7 (1986-2007)

In 1986, New Hampshire adopted the Rules of Professional Conduct. This required the Ethics Committee to revise its analysis, but not its conclusions. In 1987, the Committee considered an inquiring attorney who intended to "carry on the two occupations out of the same office."

> When the lawyer conducts both occupations from the same office, "the public could not be expected to distinguish between his dual capacities and know when he is acting in the capacity of a lawyer and when in that of a layman."

Formal Opinion #1987-88/2, Dual Practice: Attorney as a Realtor (NHEC 1987). The Committee also observed "that real estate brokerage involves many tasks, such as the proper drafting and execution of contracts, that lawyers are usually called on to perform." Id. The Committee concluded that "the lawyer engaged in the dual practice of law and real estate brokerage is considered to be engaged in the practice of law while conducting his or her real estate brokerage business." Id. See In the Matter of Unnamed Attorney and Unnamed Title Company, 138 N.H. 729 (1994) (financial records of a title company held subject to audit under Supreme Court Rules 50 and 50_A); Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000) ("lawyer selling insurance to her clients can expect that the Rules of Professional Conduct and the Supreme Court Rules will be applied to her insurance business").

By concluding that the lawyer is acting as a lawyer when acting as a broker, the Committee found several problems. These included Rule 5.4(a) (sharing of legal fees), Rule 7.3 (solicitation), Rule 1.5 (legal fees), Rule 7.2 (advertising), Rule 1.6 (confidentiality), Rule 4.2 (dealing with represented parties), Rule 4.3 (dealing with unrepresented individuals), Rule 1.8 (certain conflicts of interest), and Rule 2.1 (independent judgment). Id. The opinion observed that Hines v. Donovan, supra, "provides an example of a lawyer who faced the problem of continuing to represent a client while maintaining his own conflicting interest as a broker." Formal Opinion #1987-88/2, supra.

In 1989, the Ethics Committee was asked to revisit the issue for an attorney who held active status in the New Hampshire Bar Association, but who was "engaged full-time and exclusively as a real estate salesperson." Formal Opinion #1989-90/12, Attorney/Realtor Related Questions (NHEC 1990). After reviewing the prior decisions and Rules, the Committee concluded that it would be "ethically permissible for a non-practicing attorney … to engage in the real estate brokerage business," whether that attorney held active or inactive status. Id.

The Committee then looked at several Rules that could cause problems for even non-practicing attorneys, and reviewed opinions in other jurisdictions that appeared to allow dual practice. The Committee concluded by reminding the attorney/broker:

> The non-practicing Bar member is still fully subject to those Rules of Professional Conduct that apply at all times to attorneys in any capacity, e.g., Rule 1.6(a), 1.9(b), 8.3 and 8.4, especially 8.4(c).

Id.

IV. Rule 5.7 (2007-present)

In 2007, New Hampshire adopted NHRPC Rule 5.7. The rule applies to the provision of law-related services, which "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." NHRPC Rule 5.7(b). These include providing "real estate counseling." 2004 ABA Model Rule 5.7 Comment 9.

Rule 5.7(a) provides as follows.

> A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services … 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.

In large part, this rule falls in line with the prior New Hampshire decisions. Thus, if the lawyer is handling the brokerage business out of her law office, in circumstances that are not distinct from her law practice, then Rule 5.7(a)(1) makes the lawyer subject to the Rules of Professional Conduct. As the earlier decisions indicated, it would be virtually impossible to conduct real estate brokerage business in the way it is usually performed, consistent with the Rules of Professional Conduct. At the other end, if a lawyer is not actively practicing law, he easily escapes both parts of Rule 5.7(a).

It gets murky, however, where the lawyer is actively engaged in the practice of law, but offers law-related services distinct from the legal services, "for example through separate entities or different support staff within the law firm." 2004 ABA Model Rule 5.7 Comment 3. Such a circumstance was explicitly not addressed in our later opinions. "Neither our 1987 opinion nor the instant one address the situation of a practicing attorney running a real estate business in a separate setting from his or her law office." Formal Opinion #1989-90/12, supra.

A. Taking Reasonable Measures

Even if the lawyer can offer brokerage services under circumstances that are distinct from her provision of legal services, Rule 5.7(a)(1), she must also "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." Rule 5.7(a)(2). In doing so, …

> … the lawyer should communicate 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. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

2004 ABA Model Rule 5.7 Comment 6. Indeed, the burden will be on the lawyer to show that she has taken reasonable measures under the circumstances to communicate the desired understanding. Id. at comment 7.

B. Parsing Rule 5.7

The wording of Rule 5.7 creates some logical ambiguity. The Rule contains a standard IF-THEN statement. IF a lawyer does NOT do x, y, z, THEN all the Rules apply. For the lawyer considering operating an ancillary business, however, the question becomes IF I DO x, y, z, THEN what happens? In logical terms, the lawyer wants to look at the "inverse" of the original rule – If I DO x, y, z, THEN NOT all the Rules apply. Unfortunately, the inverse does not always follow logically from the original conditional statement.[1] Rule 5.7 would be pointless, however, unless the lawyer who complied was relieved of at least some of the Rules that would apply to a lawyer-client relationship.

The comments are somewhat coy about declaring what happens if a lawyer does comply with Rules 5.7(a)(1) and 5.7(a)(2).

> The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

2004 ABA Model Rule 5.7 Comment 2 (emphasis added).

> When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

2004 ABA Model Rule 5.7 Comment 11 (emphasis added).

That leaves open the question of what rules remain applicable when the lawyer follows the requirements of Rule 5.7(a). Undoubtedly, Rule 8.4 still applies. See 2004 ABA Model Rule

[1] The inverse of a conditional cannot be inferred from the conditional itself. Consider a teacher explaining a harsh reality to a marginal student: "**If** you do **not** take the final exam, **then** you **will** fail the course." But that does not necessarily mean that the inverse is true: "**If** you **do** take the final exam, then you will **not** fail the course." Why? The student might fail the exam. The converse, however, is always true: "If you did **not** fail the course, then you **did** take the final exam."

5.7 Comments 2 and 11.[2] Likewise, the lawyer may not reveal information relating to the representation of past or current law clients under Rule 1.6. The lawyer cannot use information relating to the representation to the disadvantage of a former client under Rule 1.9(c)(1). See also Rule 1.11(c) (government lawyers); Rule 1.18(b) (prospective clients).

This opinion cannot possibly address how every rule may, or may not, affect the provision of law-related services. We will address, however, two concerns that drove earlier opinions – conflict of interest and feeding – to determine what rules still apply.

C. Conflict of Interest – Current Client (Rule 1.7)

Suppose a New Hampshire attorney who holds a real estate broker's license (the broker) represents a seller of real estate and her law partner represents the buyer. We will assume in this and future hypotheticals that the broker has taken 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 NHRPC Rule 5.7(a)(2).

If the broker were acting as an attorney for the seller in the transaction, the partner could not simultaneously represent the buyer. This would constitute a concurrent conflict of interest as the representation of each client would be directly adverse to the other. See NHRPC Rule 1.7(a)(1); 2004 ABA Model Rule 1.7 Comment 7. See also REBA Ethical Standard No. 4, Attorney Acting in Dual Capacity as Attorney and Real Estate (Mass. Real Est. Bar Ass. 2012). The fact that it is the attorney's partner would not solve the conflict, since such conflict would be imputed to the partner under NHRPC Rule 1.10(a).

Our broker, however, has complied with the requirements or Rule 5.7(a)(2), so we next need to determine whether Rule 1.7 still applies. By its terms, Rule 1.7 applies when representing "a client." The word "client" is not a defined term under Rule 1.0, but the Committee interprets that to mean a client in the context of an attorney-client relationship. Since the fair implication of Rule 5.7(a) is that this broker does not have an attorney client relationship with the seller, then Rule 1.7 does not apply **to the broker.**

There are, however, two attorneys in the hypothetical. A concurrent conflict of interest can still exist if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to … a third person or by a personal interest of the lawyer." NHRPC Rule 1.7(a)(2). Since the broker/attorney and partner/attorney are law partners, there would seem to be a significant risk that the partner's representation of the client will be limited by the partnership relationship.

If a concurrent conflict does exist, the partner may be able to seek a waiver under Rule 1.7(b):

[2] Some parts of Rule 8.4 may not arise when the lawyer is not providing legal services. As an example, Rule 8.4(g) applies only "while acting as a lawyer in any context." This opinion does not address the question of whether the provision of law-related services falls under the protection of Rule 8.4(g).

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

NHRPC Rule 1.7(b). The affected client would be the partner's client. In seeking consent, however, the cautious lawyer will carefully consider whether she reasonably believes that she will be able to provide competent and diligent representation to the buyer. Expect a certain amount of pushback if things go south.

> In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Restatement (Third) Of the Law Governing Lawyers, §122 comment g(iv) (ALI-ABA 2008).

The broker's client would not need to give consent under the Rules of Professional Conduct, as there is no attorney-client relationship. There may, however, be obligations outside the Rules, such as the rules governing real estate brokers, which might need to be addressed.

This situation is analogous to the issue faced by this Committee in Formal Opinion #1992-93/12, Conflict of Interest: Lawyer and Real Estate Broker Who Are Spouses Participating in the same Real Estate Transaction (NHEC 1993). That opinion involved an attorney representing the buyer and the attorney's spouse (a non-lawyer) representing the seller. The Committee concluded that the lawyer could represent the buyer provided the lawyer received consent. The 1993 opinion can be distinguished since the lawyer stood to gain indirectly from the spouse's successful sale, but the analysis uniformly supports the necessity of consent.

D. Conflict of Interest – Former Client (Rule 1.9)

Suppose the broker represents the seller and the buyer is a former client of broker-lawyer. Suppose that during the earlier representation, the broker-lawyer learned from the former client that the property had extra value to that former client. Perhaps the land has oil and gas reserves, or mineral deposits, or sand and gravel, or old-growth timber. Perhaps the land has sentimental value to the former client, who is now a potential buyer. We will assume that the information is not generally known.

If the broker were providing legal services to the seller instead of brokerage services, this would require an interesting analysis under Rule 1.9.

> A lawyer who has formerly represented a client [the buyer in this case] in a matter shall not thereafter represent another person [the seller in this case] in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

NHRPC Rule 1.9(a). This in turn requires a determination of whether the sale was a "substantially related matter" to the earlier representation.

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

2004 ABA Model Rule 1.9 Comment 3. Since we have assumed in our hypothetical that the information learned would be useful, Rule 1.9 would bar the representation without Rule 5.7.

As with the previous analysis involving Rule 1.7, the Committee interprets the word "client" in Rule 1.9 to refer to a legal client. Accordingly, the fair interpretation of Rule 5.7 is that Rule 1.9(a) does not apply to the broker.

Even with the help of Rule 5.7, however, several rules will still apply in this situation. First, the information learned by the lawyer related to the representation of the client is protected from disclosure by Rule 1.6. Accordingly, the broker could not tell the seller. See also Rule 1.9(c)(2).

Even without actual disclosure, however, the information itself could be valuable. It could help determine a higher market value for the seller. For example, the broker could simply advise the seller to reject an offer as too low, without giving a reason.

Rule 1.9(c)(1) forbids a lawyer to "**use** information relating to the representation to the disadvantage of the former client." If the seller gets a better price for the property than would appear reasonable without the "confidential factual information," the lawyer may be hard pressed to persuade a disciplinary body, or a court, that such information was not **used**.

E. "Feeding" – Law Firm to Law-Related Business

Suppose a divorce client needs to sell off real estate as part of a settlement. Can the lawyer representing the client suggest using the law-related brokerage business to accomplish the sale?

This would constitute "enter[ing] into a business transaction with a client." Such transactions are governed by Rule 1.8(a). See Rule 5.7, Comment 5. Rule 1.8(a) requires several things, including informed consent, in a writing signed by the client. See generally Opinion #2017-18/01, Providing Legal Services in Exchange for a Client's Goods and Services (NHEC 2017).

Accordingly, while an attorney may refer a law client to her real estate business, she must comply with the provisions of Rule 1.8. See Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000); Opinion 02-8 (Fla. Bar Ass. 2004); Opinion 05-01 (AZ

2005) (lawyer faces a "substantial burden" in showing that the requirements of Rule 1.8(a) are met).

Meeting this "substantial burden" may prove difficult. The Restatement suggests that the burdens will always rest on the attorney in any dispute with a client dissatisfied with the business arrangement.

> In any civil proceeding between a lawyer and a client or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied. … In a discipline case, once proof has been introduced that the lawyer entered into a business transaction with a client, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.

Restatement, supra, § 126, com. a.

F. "Feeding" – Law-Related Business to Law Firm

Suppose a legal issue arises during the sale of a property. Can the broker recommend the lawyer's firm to handle the issue?

This is the prototypical feeding situation feared by earlier opinions. One can imagine it arising with almost any law-related business – title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting. 2004 ABA Model Rule 5.7 Comment 9. The law-related client gets law-related services, but the lawyer recognizes that the brokerage client also needs legal services.

Before discussing the need for legal services in connection with brokerage issue, the broker-lawyer should ascertain whether the brokerage client is represented by another attorney in other matters. The broker-lawyer may not technically be "representing a client" within the meaning of Rule 4.2, and Comment 4 confirms that the Rule does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. Comment 9, however, makes it clear that if Rule 4.2 does not apply, Rule 4.3 might.

When providing brokerage services to the brokerage client, the broker-lawyer is not "dealing on behalf of [another] client" so Rule 4.3 may not technically apply. It would nevertheless be prudent to refrain from giving legal advice to the brokerage client, other than the advice to secure legal counsel. See Rule 4.3.

The broker-lawyer, however, should refrain from suggesting that the broker-client engage the lawyer's firm to handle the legal work. The CURRENT (as of this writing) version of Rule 7.3(a) prohibits in-person contact "for the purpose of obtaining **professional** employment," unless (among other exceptions) the person contacted has a "prior **professional** relationship with the lawyer." The issue then becomes whether the business relationship between the brokerage

customer and the broker-lawyer, who is acting in an avowedly non-attorney capacity, is such a relationship.

Rule 7.3 uses the word "professional" initially to describe "professional employment," referring to the establishment of an attorney-client relationship. Accordingly, the Committee interprets the second use of the word "professional" in the phrase "prior professional relationship" to refer to a prior attorney-client relationship. See Wisc. Inf. Ethics Op. IE-16-01 (the term "professional relationship" does not include the relationships from a lawyer's nonlaw business). Accordingly, the Committee concludes that a referral to the law firm would violate Rule 7.3. See Informal Opinion 18-03 (Conn. 2018) (due to the risk of abuse, harassment, and overreaching).

The issue becomes a bit more complicated as we look at possible ways the conversation could play out. Suppose, for example, when the broker-lawyer points out that the situation requires a lawyer, the client simply asks if the broker's law firm handles that sort of issue. If the law firm does handle those matters, the Committee believes that the broker can truthfully respond in the affirmative, without violating Rule 7.3(a). In that case, the broker-lawyer has not **initiated** contact with a prospective legal client; it is the client initiating the contact.

On the other hand, suppose the brokerage client simply asks if the broker-lawyer knows anybody who does the type of legal work required. May the broker-lawyer provide, for example, a list of four or five law firms that do that type of work, and include the broker-lawyer's firm on that list? A plurality on the Committee concluded that such a list would be a truthful response to a legitimate question, and that the broker-lawyer was not initiating contact in violation of Rule 7.3(a).

Most on the Committee felt that the length of the list might bear on the issue. For example, if the list only included the broker-lawyer's firm, that could be problematic.

The Committee also notes that the current version of NHRPC Rule 7.3 differs from the current version of the ABA Model Rule. The current Model Rule allows a lawyer to have contact with a "person who has a … prior **business** or professional relationship with the lawyer or law firm." ABA Model Rule 7.3(b)(2) (2019) (emphasis added). Accordingly, under the newer version, the whole solicitation problem would go away. The careful attorney should always check the current version of the New Hampshire Rules to verify that the rules have not changed since the writing of any of our opinions.

CONCLUSION:

The ABA proposed the current version of Model Rule 5.7 – the version adopted by New Hampshire – in February 1994 and amended it in 2002. Ironically, the first version of Model Rule 5.7, adopted in 1991, prohibited ancillary businesses. Law firms (and lawyers generally) could offer law-related services only to their legal clients, and then only by the law firms

themselves under the Rules. Law firms were prohibited from owning or operating a separate entity that offered law-related services.[3]

Lawyers seeking to establish law-related businesses in accordance with Rule 5.7 should exercise great caution. Such businesses have historically been viewed with hostility. Even after the adoption of Rule 5.7, many presumptions remain against the lawyer.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.0	Rule 1.9(c)	Rule 5.7
Rule 1.5	Rule 1.10	Rule 5.7(a)
Rule 1.6	Rule 1.10(a)	Rule 5.7(b)
Rule 1.6(a)	Rule 1.11	Rule 7.2
Rule 1.7	Rule 1.11(c)	Rule 7.3
Rule 1.7(a)	Rule 1.18	Rule 7.3(a)
Rule 1.7(b)	Rule 1.18(b)	Rule 7.3(b)
Rule 1.8	Rule 2.1	Rule 8.3
Rule 1.8(a)	Rule 4.2	Rule 8.4
Rule 1.9	Rule 4.3	Rule 8.4(c)
Rule 1.9(a)	Rule 5.4	Rule 8.4(g)
Rule 1.9(b)	Rule 5.4(a)	

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Advisory Opinion #2, Attorney Practicing as a Real Estate Broker (NHEC 1970)

Formal Opinion #5, Attorney Practicing as a Real Estate Broker (NHEC 12/5/1975)

Advisory Opinion, 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) (NHEC 10/12/1982)

Advisory Opinion #1984-85/9, Dual Professions: Attorney-Realtor (NHEC 1984)

[3] This limitation on the entrepreneurial activities in the prior version of Model Rule 5.7 may have been felt necessary to forestall regulation by governmental and prevent ethical and professional harm to clients. See Block, Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 Geo. J. Legal Ethics 739 (1992). The ABA, however, rescinded the earlier version of Model Rule 5.7 a year after its proposal before any state had adopted it.

Formal Opinion #1987-88/2, Dual Practice: Attorney as a Realtor (NHEC 1987)

Formal Opinion #1989-90/12, Attorney/Realtor Related Questions (NHEC 1990)

Formal Opinion #1992-93/12, Conflict of Interest: Lawyer and Real Estate Broker Who Are Spouses Participating in the same Real Estate Transaction (NHEC 1993)

Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000)

Opinion #2017-18/01, Providing Legal Services in Exchange for a Client's Goods and Services (NHEC 2017)

SUBJECTS:

Business Transactions with Clients

Competent and Diligent Representation

Concurrent Conflicts of Interest

Confidentiality

Confidentiality of Information

Conflict of Interest

Disinterested Lawyer

Dual Practice

Duties to Former Clients

Independent Judgment

Informed Consent

Law-Related Services

Lawyer Advertising

Professional Relationship

Solicitation

Substantially Related

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors at its November 17, 2022 meeting.