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## DUAL PRACTICE

Adopted December 14, 1996.

### *Introduction and Scope*

The Ethics Committee of the Colorado Bar Association has received a number of inquiries from lawyers concerning the ethical propriety of lawyers practicing law and being actively involved in one or more separate professions or businesses. It is not possible to write an ethics opinion covering every conceivable separate business in which lawyers may become involved in addition to their law practice. Therefore, this opinion will provide general principles intended to assist lawyers in determining whether and how they may conduct these separate businesses without violating the Colorado Rules of Professional Conduct (“Rules”). Then, by way of example, this opinion will discuss specific ethical considerations applicable to lawyers acting as agents of title insurance companies.

Lawyers engaged in a second occupation are well advised to consult any statutes, rules or standards applicable to the second occupations, which of course are not discussed in this opinion. Also, this opinion will not attempt to discuss the similar but not coextensive ethical issues arising from the acquisition and possession of passive ownership interests in separate businesses by lawyers and law firms.<sup>1</sup>

### *Syllabus*

There is no *per se* prohibition in the Rules against lawyers engaging in a second occupation or business, provided that the second occupation does not constitute a vehicle for improper solicitation, otherwise known as a “feeder operation,” in violation of Rules 7.2(c) and 7.3(a). The ethical danger of dual occupations increases if the separate business involves any of the following elements: (a) the second occupation is conducted from the law office premises, (b) the second occupation is related to the practice of law, and (c) the lawyer provides both legal and nonlegal services in the same transaction.

As to the last criterion, the CBA Ethics Committee strongly discourages lawyers from ever acting as lawyer and in another professional or business capacity in the same transaction. Some dual occupation transactions are so fraught with ethical risk that the CBA Ethics Committee discourages them even with the informed consent of the client, such as transactions in which a lawyer acts both as lawyer and real estate broker. Lawyers must be extremely careful in other dual occupation transactions to observe the Rules relating to conflicts of interest, business transactions with a client, and permissible fee arrangements, as is illustrated below in the context of a lawyer who represents one of the parties and acts as the agent of a title insurance company in the same real estate transaction.

### *Analysis*

Several formal CBA Ethics Committee opinions have addressed ethical issues applicable to lawyers who wish to practice law and conduct separate businesses or occupations. [See CBA Ethics Committee Opinion No. 7 (April 11, 1959) (lawyer/collection agent), No. 36 (June 19, 1965) (lawyer/title insurance agent), No. 39 (July 15, 1967) (lawyer/real estate broker), and No. 41 (February 3, 1968) (lawyer/accountant); see also Informal Opinion H (collection of real estate commission from transaction originating as legal matter).] These opinions disapprove of dual practice based primarily, if not exclusively, on Canon 27 of the Canons of Professional Ethics dealing with lawyer advertising and solicitation. The Canons have been inapplicable in this state since 1970, when they were replaced by the Colorado Code of Professional Responsibility, which was replaced by the Colorado Rules of Professional Conduct on January 1, 1993. Furthermore, the ethics of lawyer advertising changed dramatically with the decision of the U.S. Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Therefore, the Ethics Committee hereby withdraws these prior opinions, refers the bar to CBA Ethics Committee Opinion 83 (Revised July 24, 1993) [See 19 Colo. Law. 25 (Jan. 1990)] for a general discussion of ethics in lawyer advertising, and starts anew to guide lawyers through the many ethical hurdles involved in dual occupations.

There is nothing in the Rules that *per se* prohibits lawyers from simultaneously engaging in other businesses or occupations. It is when the distinction between the two occupations blurs that there is ethical danger in dual practice. The common thread in the legal authority on this subject is a concern that lawyers avoid creating — to borrow a phrase from intellectual property law — a likelihood of confusion in the mind of the client about whether services are being performed within the lawyer’s role as a lawyer or within the lawyer’s role in the second occupation.<sup>2</sup> Generally speaking, it is easier to avoid that confusion when the separate business is (a) conducted away from the law office premises, (b) unrelated to the practice of law, and (c) not involved in the same transaction in which the lawyer is acting as a lawyer.

## I. General Ethical Principles Applicable to Dual Practice

### A. Same Office

The operation of a second business from the law office is not, by itself, prohibited. There are several ethical risks, however, that increase when lawyers conduct second occupations from the law office. To be sure, these risks may apply even if the second occupation is not conducted from the law office.

First, the second occupation may not be used as a vehicle for improper solicitation of legal work, otherwise known as a “feeder” operation, in violation of Rules 7.2(c) and 7.3(a).<sup>3</sup> Rule 7.2(c) prohibits a lawyer from “giving anything of value to a person for recommending the lawyer’s services,” except for the reasonable cost of advertisements and other communications authorized under Rule 7.2 and the “usual charges of a not-for-profit lawyer referral service or other legal service organization.” Rule 7.3(a) prohibits in-person or telephone solicitation of professional employment when a “significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”

There are two exceptions to Rule 7.3(a). One is when the lawyer has a family relationship with the prospective client and the other is when the lawyer has a “prior professional relationship” with the prospective client. “Prior professional relationship” has been construed as limited to a prior lawyer-client relationship.<sup>4</sup> Thus, only if the lawyer has performed legal or law-related services in the past for the prospective client is the lawyer allowed to engage in in-person or telephone solicitation of a non-family member under Rule 7.3(a). *But see* note 16, *infra* [lawyers may not solicit law-related business in violation of Rule 7.3(a)]. In addition, although solicitation of non-legal employment may not constitute a “feeder” operation covered by Rules 7.2(c) and 7.3, lawyers must make full disclosure of their interest in the non-law business when soliciting non-legal employment from a law client.<sup>5</sup>

Second, lawyers with second occupations may advertise both professions, provided such advertising is not false or misleading.<sup>6</sup> Thus, a lawyer may, consistent with the Rules, reflect the lawyer’s affiliation with the second occupation on the lawyer’s letterhead and use such letterhead in a mailed solicitation so long as it complies fully with Rules 7.1, 7.3 and 7.5. Nonlawyers employed in the second occupation may also be listed on law firm letterhead provided their nonlawyer status is clearly indicated.<sup>7</sup> *See generally* CBA Ethics Committee Opinion No. 83 (Revised July 24, 1993)[19 Colo. Law. 25 (Jan. 1990)].

Third, Rule 5.4(b) prohibits the formation of a partnership with a nonlawyer that includes the practice of law.<sup>8</sup> If it is the nonlawyer-employees of the second occupation who are providing such legal services, the lawyer may also violate Rule 5.5(b), which prohibits assisting a nonlawyer in the unauthorized practice of law. Also, Rule 5.4(a) generally prohibits, with some exceptions, the sharing of legal fees with a nonlawyer.

Whether or not a lawyer has formed a partnership with a nonlawyer in violation of Rule 5.4(b) generally should be determined under principles of law pertaining to the formation of partnerships.<sup>9</sup> Sharing office space with a nonlawyer does not automatically result in a violation of Rule 5.4(b). Lawyers must take care, however, to keep the law practice and the non-law business separate, including maintaining the confidentiality of law client files pursuant to Rule 1.6 and ensuring, pursuant to Rules 5.1 and 5.3, that their lawyer and nonlawyer employees of the law practice do the same.<sup>10</sup>

### B. Relationship to the Practice of Law

“There is little ethical difficulty with the operation of an unrelated occupation from the same location as a lawyer’s law office” so long as the lawyer complies with restrictions on advertising and solicitation applicable when the lawyer promotes both occupations simultaneously.<sup>11</sup> Examples of unrelated second occupations are operating a retail store, shopping center or manufacturing enterprise.<sup>12</sup> Furthermore, although lawyers are bound by the Rules whether or not they are acting in a professional capacity, “[m]any, if not most, disciplinary rules by their nature relate only to conduct of a lawyer acting in his professional capacity.”<sup>13</sup> Therefore, lawyers engaged in a second occupation unrelated to the lawyer’s law practice are nevertheless required to follow the Rules, except those Rules applicable only to lawyers acting as lawyers.

For example, lawyers who practice architecture are not required to follow Rule 7.2 concerning attorney advertising when soliciting business exclusively as architects without mention of their legal services or degrees.<sup>14</sup> That is not to say that attorneys who commit dishonest acts as architects might not violate, for example, Rule 8.4(c) prohibiting “conduct involving dishonesty, fraud, deceit, or misrepresentation.” Conduct of lawyers in a second occupation unrelated to the practice of law may violate general Rules such as Rule 8.4(c), which are applicable to all lawyers at all times, but not ethical rules specific to professional conduct, such as Rule 1.7 relating to conflicts of interest in “client” representation, as applied clearly to non-professional conduct.

The ethical danger increases if the second occupation is law-related. The concern behind the relationship of the second occupation to the practice of law is that

[i]t may be impossible to know whether the lawyer’s work for another person is performed as part of the practice of law or as part of his other occupation or profession.

...

In carrying on law-related occupations and professions the lawyer almost inevitably will engage to some extent in the practice of law, even though the activities are such that a layman can engage in them without being engaged in the unauthorized practice of law.

...

If the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law while conducting that occupation. Accordingly, he is held to the standards of the bar while conducting that second occupation from his law offices.<sup>15</sup>

In other words, lawyers who engage in such a law-related occupation are required to conform to the Rules in so doing, including Rule 1.5 regarding the reasonableness of fees charged in the second occupation; Rules 7.1 through 7.5 regarding advertising and solicitation as they relate to the second occupation;<sup>16</sup> Rules 5.3, 5.4(c) and 5.5(b), which respectively require supervision of nonlawyer assistants, independence of the lawyer’s professional judgment, and no assistance in the unauthorized practice of law;<sup>17</sup> and Rule 1.6 regarding the confidentiality of client information acquired in engaging in the second occupation.<sup>18</sup> To be sure, the Rules apply in such circumstances even where statutes, rules or standards applicable to the second occupations are in conflict with, or less stringent than, requirements under the Rules.

Rule 1.6 is important for two additional reasons. First, customers, nonlawyers and even lawyers associated with the second occupation may assume erroneously that the attorney-client privilege attaches to their communications with one another or inadvertently waive the privilege if it does apply in the first instance.<sup>19</sup> Second, lawyers with second occupations that are related to the practice of law must be careful not to use information against a client or former client that is learned in performing the services related to the second occupation. *See* Rules 1.8(b) and Rule 1.9(c). While these Rules prohibit the use of information “relating to the representation,” as a practical matter it may be difficult or impossible to distinguish between information learned in the lawyer’s capacity as an attorney and in operating a law-related business from the same office. This information is not limited to client confidences or secrets but applies to “all information relating to the representation, whatever its source.” Comment, Confidentiality, Rule 1.6.

Examples of occupations related to the practice of law are those of “accountant, collection agency, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax service, loan or mortgage broker or any other business where the lawyer participant’s activity would be likely to involve frequent solution of problems that are essentially legal in nature. . . .”<sup>20</sup> The examples given in the Comment to ABA Model Rule of Professional Responsibility 5.7 for “law-related services” subjecting the lawyer to compliance with all of the Rules are “title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis social work, psychological counseling, tax return preparation, and patent, medical or environmental counseling.”<sup>21</sup> A great number of non-Colorado ethics opinions dealing with the ethics of dual practice concern lawyers as real estate brokers and as agents of title insurance companies, which without doubt are occupations related to the practice of law.<sup>22</sup>

### C. Same Transaction

Lawyers who engage in their second occupation in the same transaction in which they represent a client as a lawyer run the greatest ethical risk of all, particularly if the second occupation is law-related and conducted from the law office. Of particular concern here — but by no means the only ethical concerns — are Rules 1.7 and 1.8, which deal, respectively, with conflicts of interest and entering into business transactions with a client.

With respect to Rule 1.7, lawyers must first determine whether they have “another client” in the second occupation within the meaning of Rule 1.7. For example, is the real estate brokerage agency of which the lawyer is an agent a “client” of the lawyer? This is a legal determination that requires the lawyer to assess whether the services provided by the lawyer in the second occupation for the benefit of a third party constitute the practice of law. *See Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467, 471-72 (1964). If the conclusion is that there is “another client,” the lawyer must determine whether the original representation will be “directly adverse” to the other client, under Rule 1.7(a), or whether that representation “may be materially limited” by the lawyer’s responsibilities to the other client, under Rule 1.7(b). The remainder of Rule 1.7 does not come into play if these questions are answered in the negative. If either question is answered in the positive, however, the lawyer must follow the applicable remaining requirements of either subsection (a) or (b) of Rule 1.7, both of which require an objective assessment of whether the original representation will be adversely affected by the representation of the other client and informed client consent. *See also* Rule 1.7(c) (client consent cannot be validly obtained where disinterested lawyer would conclude that client should not agree to representation under the circumstances).

If the lawyer determines that “another client” is not involved, the lawyer must then determine whether under Rule 1.7(b) the representation of the client may be materially limited by the lawyer’s responsibilities to a “third person” or by the “lawyer’s own interests.” Again, the remainder of Rule 1.7(b) does not come into play if this question is answered in the negative. If this question is answered in the positive, however, the lawyer must comply with the remainder of the requirements under Rule 1.7(b). *See, e.g., People v. Silver*, 924 P.2d 159 (Colo. 1996) (lawyer suspended for one year and one day for, among other things, failing to advise borrower-clients about conflicts of interest arising from lawyer’s multiple roles as attorney for borrowers and lender and principal of lender).

For example, the prevailing view among non-Colorado ethics opinions is that even with the informed consent of the client, lawyers may not act as both lawyer and real estate broker in the same transaction due to an inherent and irreconcilable conflict between a broker’s personal interest in receiving a commission upon sale and a lawyer’s interest in protecting a client even if it means advising against the consummation of the sale.<sup>23</sup> On the other hand, a substantial majority of non-CBA ethics opinions holds that a lawyer may, with appropriate precautions, act as a title insurance agent and represent one of the parties in the same real estate transaction.<sup>24</sup> *See* discussion, *infra*.

With respect to Rule 1.8, lawyers engaging in a second occupation in the same transaction in which they act as counsel to one of the parties must determine whether they are about to “enter into a

business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client. . . .” Rule 1.8(a). If so, the “transaction and terms on which the lawyer acquires the interest” must be “fair and reasonable to the client” and “fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client”; the client must be “informed that use of independent counsel may be advisable” and “given a reasonable opportunity to seek the advice of such independent counsel in the transaction”; and the client must “consent in writing thereto.” Unlike the disclosure and client consent required under Rule 1.7, that required under Rule 1.8(a) must be in writing. *See, e.g., People v. Silver, supra* [lawyer suspended for one year and one day for conflicts of interest and entering into loan transactions with client, as principal of lender, in violation of Rule 1.8(a)]. Rule 1.8(a) does not apply to “standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities’ services.”

Comment, Transactions Between Client and Lawyer, Rule 1.8.

The CBA Ethics Committee strongly discourages lawyers from ever wearing two hats in the same transaction, for example serving both as lawyer and real estate broker.<sup>25</sup> It is beyond the scope of this opinion to analyze whether and how lawyers might engage in the infinite variety of second occupations both related and unrelated to the practice of law. By way of analogy, however, the Committee offers the following ethical guidance concerning lawyers who act as agents of title insurance companies in the same transaction.

## II. Lawyers as Title Insurance Agents

Before title insurance became prevalent in the 1960s, lawyers in this state typically provided an opinion of counsel in real estate transactions regarding the nature and quality of title to the real property in question. That practice eventually gave way to title insurance. With the support of the organized bar, however, some Colorado lawyers remained involved in title issues by acting as agents of title insurance companies as an ancillary part of their law practice.

In acting as a title insurance agent, lawyer/title agents often prepare title commitments and policies based on title documents and abstracts provided by the title insurance company. They also may prepare some of the legal documents signed at the closing, including deeds, deeds of trust and promissory notes, in their agent capacity. Lawyer/title agents are entitled to compensation from the title insurance company on a commission basis if and when the transaction is consummated.

For many years, it also has been commonplace for lawyers to act both as title insurance agent and counsel to one of the parties in the same transaction, most often the seller but sometimes the buyer, lender or borrower.<sup>26</sup> There is inherent ethical tension in this dual role, particularly in the form of conflicts of interest. Conflicts of interest exist on a continuum of severity, however; some are waivable and some are not. In addition, not every possible conflict of interest precludes a representation under Rule 1.7(b). Rule 1.7, Comment, Loyalty to a Client. With the proper precautions, the dual role of a lawyer/title agent may be to the advantage of the client, the title insurance company and the lawyer. The following is a navigational guide through some of the more problematic issues under the Rules for lawyers who represent a party to a real estate transaction and simultaneously act as agent for a title insurance company.

### A. Conflicts of Interests

There is a basic divergence of interests among the buyer, seller and lender in a real estate transaction, on one hand, and the interests of the title insurance company, on the other. As a practical matter, conflicts of interest under Rule 1.7 generally exist when an attorney simultaneously represents one of the parties to the transaction and acts as the agent of the title company. A continuing tension exists between the title insurance company’s desire to limit exposure and the client’s desire to maximize coverage.

A variety of potential conflicts of interest, however, are inherent in the lawyer/title agent’s dual role. These potential conflicts arise under Rule 1.7(b) because the lawyer/ title agent’s duty of loyalty to the client may be materially limited by the lawyer/title agent’s (a) fiduciary responsibilities as the agent of

the title company (a “third person”), and (b) pecuniary interests in receiving a commission and further business from the title company (the “lawyer’s own interests”).<sup>27</sup> For example, it is generally in the interest of the title company to limit the coverage available under the title insurance policy. Yet it is generally in the buyer’s and lender’s interests to obtain the maximum amount of insurance coverage at the lowest reasonable cost. The seller may share that interest in order to satisfy the buyer and consummate the transaction, and avoid recourse to the seller’s title warranties.

One specific concern of the Committee is that a lawyer/title agent might fail to seek the removal of, or endorsement over, certain title exceptions listed by the title company as zealously as a lawyer acting only as counsel. It is also not difficult to imagine the competing pressures on the lawyer/title agent over problems with the legal documents prepared by him or her, whether as title agent or attorney, and over claims that may later arise (or are claimed to arise) under the title insurance policy. Even recommending that a client purchase title insurance might be said to create a conflict of interest for the lawyer/title agent, who stands to gain financially if the client follows that recommendation, although it might be legal malpractice not to make that recommendation.

The lawyer/title agent must therefore carefully follow the steps prescribed by Rule 1.7(b) and (c) before agreeing to represent or continuing to represent a client who is a party to a transaction in which the lawyer is also the title agent. These steps begin with full disclosure of the lawyer’s status as agent; the nature of the lawyer’s services as agent and the amount of compensation the lawyer expects to receive; the pros and cons of obtaining title insurance and of obtaining it through the lawyer, including its availability and cost elsewhere; the ways in which the client and the title company may become adversaries in the matter; and the client’s opportunity to seek other counsel whether or not there arises an actual conflict of interest. There may be other disclosures required under state and federal laws and regulations, including but not limited to the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601, *et seq.* (“RESPA”) and regulations promulgated thereunder, and C.R.S. § 10-11-108(2)(a) (requiring attorney’s disclosure to client that “attorney may be compensated for the issuance of such title insurance commitment”).

The client and the title insurance company must then consent to the lawyer/title agent’s dual role. Lawyer/title agents must also be satisfied that (a) their representation of the client will not be affected by their status as title agent, and (b) a disinterested lawyer would not conclude that the client should not agree to the representation under the circumstances. Rule 1.7(b)(1) and (c).<sup>28</sup> If the lawyer/ title agent’s dual role cannot pass this test, the lawyer must withdraw from the legal representation, withdraw as agent, or — the safest course — do both. *See* Rule 1.16; *see also* CBA Ethics Committee Opinion No. 68 (April 20, 1985) [*see* 14 Colo. Law. 1017 (April 1985)] (attorney’s role in resolving conflicts of interest). The lawyer/title agent would need to repeat this conflict analysis if there later arises an actual conflict. In that case, the lawyer/title agent likewise must withdraw from one or both roles in the matter unless the conflict can be resolved, for example by an agreement between the client and the title company over the matter which the lawyer/title agent believes is objectively fair to the client, or by the client obtaining title insurance elsewhere.

#### B. Business Transactions

Although a client’s purchase of title insurance may, under contract and agency law, constitute an agreement between the client and the title insurance company, the Committee believes that Rule 1.8(a) is applicable because of the lawyer/title agent’s pecuniary interests in the transaction.<sup>29</sup> Rule 1.8(a) requires the terms of the transaction to be objectively fair and reasonable to the client and fully disclosed in writing, the client must be informed that independent counsel is advisable and given a reasonable opportunity to seek such independent advice; and client consent must be in writing. Lawyer/title agents may be able to provide the disclosure and consent information required under both Rule 1.7 and Rule 1.8 in standard written disclosure and consent forms.

### C. Fees

A lawyer/title agent who charges the client for legal services for which the lawyer/title agent is also compensated in the title insurance commission may be in violation of Rule 1.5(a), which prohibits the charging of unreasonable fees. To the same effect is C.R.S. § 10-11-108(2)(a), which states that “[c]ompensation of the attorney for services actually rendered shall not include the payment of an hourly fee paid by the client combined with a payment from the title insurance company for the same service. . . .” The Committee cautions against construing this legislative enactment as comprehensive of a lawyer/title agent’s rights and obligations with respect to charging fees in such transactions, because it is the Colorado Supreme Court that has exclusive authority to regulate the practice of law. *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986).

Rule 1.5(a) is applicable regardless of who pays the lawyer/title agent’s legal fee, such as when a borrower does so in a loan transaction. The lawyer/agent’s independent judgment on behalf of the client must not be impaired by what may be considered the receipt of compensation for legal services by one other than the client (the title company). See Rules 1.8(f) (lawyer may receive payment from one other than client only if there is client consent after consultation and no interference with lawyer’s professional judgment) and 5.4(c) (lawyer shall not permit person who recommends, employs or pays lawyer to direct or regulate lawyer’s professional judgment).<sup>30</sup> Of course, these fee issues are in addition to any fee-splitting and other fee restrictions stated in the Rules and elsewhere. See, e.g., Rule 1.5(e) (prohibiting referral fees); Rule 5.4(a) (prohibiting the sharing of legal fees with a nonlawyer); Rule 7.2(c) (prohibiting the giving of “anything of value to a person for recommending the lawyer’s services”); see also C.R.Civ.P. Chapter 23.3 (Rules Governing Contingent Fees).

### Conclusion

Lawyers often engage in second occupations in addition to the practice of law. There is nothing in the Rules that prohibits it. There are, however, several ethical concerns that arise if there exists any combination of the following factors: (1) the second occupation is conducted from the law office; (2) the second occupation is related to the lawyer’s legal practice; and (3) the lawyer engages in the second occupation in the same transaction in which the lawyer provides legal services for a client. Lawyers should avoid these dual occupation transactions entirely and some, including real estate transactions in which the lawyer is acting as a broker as well, are unethical in the view of the CBA Ethics Committee even with the informed consent of the client. Other dual occupation transactions, such as real estate transactions in which the lawyer represents a party and acts as agent of a title insurance company, are not *per se* prohibited but involve several significant ethical considerations, including those relating to conflicts of interest, business transactions with a client and fees.

## NOTES

1. For a comprehensive discussion of these and other dual practice issues, see Block, Irwin and Meierhofer, Jr., “Model Rule of Professional Conduct 5.7: Its Origin and Interpretation,” 5 *Georgetown Journal of Legal Ethics* 739 (1991).

2. E.g., *id.* at 743 (every ABA study of dual practice cited confusion by clients and nonclient customers as a significant ethical concern); ABA Formal Opinion No. 328 (June 1972) (relatedness of nonlaw occupation may make it impossible to know whether lawyer is acting as lawyer or as member of nonlaw profession); New York State Bar Ass’n Committee on Professional Ethics Opinion No. 206 (November 22, 1971) (relatedness of occupations may lead clients to believe the law and nonlaw practices are related); Wisconsin State Bar Committee on Professional Ethics Memorandum Opinion No. 4/77A (June 1984) (permitting dual practice from same building so long as clear to public that law office and separate business are separate and independent); Comment, Model Rule of Professional Conduct 5.7 (principal problem of law-related services performed by

lawyer is possibility that person for whom non-law-related services are performed may not understand that such services do not carry protections of attorney-client relationship).

3. ABA Formal Opinion No. 328 (June 1972); Block, *supra*, note 1 at 761.

4. Utah State Bar Ethics Advisory Opinion Committee Opinion No. 146A (April 28, 1995); Michigan Standing Comm. on Professional and Judicial Ethics Opinion No. RI-135.

5. *E.g.*, L.A. County Bar Assoc. Professional Responsibility and Ethics Committee Formal Opinion No. 477 (June 20, 1994) (attorney/physician's referral of law clients to medical facility in which he holds ownership interest and practices medicine on limited basis requires compliance with California counterpart of Rule 1.8 regarding entering into business transaction with client, even though the attorney/physician does not personally treat such clients).

6. *Ibanez v. Florida Dep't of Business & Prof. Regulation*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994).

7. Florida State Bar Professional Ethics Committee Opinion 94-6 (April 30, 1995).

8. *E.g.*, Arizona Opinion No. 93-01 (Feb. 18, 1993) (attorney associated with nonlawyers in business providing "complete eviction service" violates Rule 5.4(b) if association constitutes partnership whose activities include practice of law); New York State Bar Ethics Opinion No. 633 (May 3, 1992) (even where services could be performed by nonlawyer, arrangement whereby lawyer and nonlawyer jointly provide services including debt consolidation and financial planning constitutes improper partnership with nonlawyer if it "enables the non-lawyer to hold himself or herself out as offering legal services"); Pennsylvania Informal Ethics Opinion No. 92-45 (1992) (lawyer's association with nonlawyer to provide "financial advisory and brokerage services" permissible so long as none of lawyer's activities constitutes practice of law); Wisconsin Ethics Opinion No. E-84-21 (lawyer's association with accountant, securities broker and life insurance agents to provide "interdisciplinary approach to financial planning" improper if any of lawyer's activities as partner consist of practice of law).

9. *But see* Arizona Opinion No. 93-01 (Feb. 18, 1993) (term "partnership" construed broadly); South Carolina Advisory Opinion No. 93-05 (May 1993) ("Rule 5.4(b) applies not only to partnerships, but also to other organizations that lawyers are involved in managing.").

10. *See also* Rule 265(I)(A)(2), C.R.Civ.P. (professional service corporations "shall be established solely for the purpose of conducting the practice of law"); *Network Affiliates, Inc. v. Robert E. Schack*, 682 P.2d 1244, 1246 (Colo. App. 1984) (interpreting same).

11. *Cf.* ABA Formal Opinions 328 (June 1972) and 336 (June 1974).

12. ABA Formal Opinion No. 328 (June 1972); New York State Bar Ass'n Committee on Professional Ethics Opinion No. 206 (November 22, 1971).

13. ABA Formal Opinion No. 336 (June 1974). This Opinion cites DR 7-106 regulating the trial conduct of a lawyer as an example of a disciplinary rule that by its nature relates only to the conduct of a lawyer acting in a professional capacity. The analogue to DR 7-106 is scattered throughout Rules 3.3, 3.4, 3.5 and 3.9. Other Rules that seem to apply only to lawyers acting in their professional capacity are those relating to conflicts of interests, Rules 1.7 and 1.9.

14. *But see* ABA Formal Opinion No. 328 (June 1972) (concluding that a lawyer engaged in *law-related* occupations is "held to the standards of the bar while conducting that second occupation from his law offices").

15. ABA Formal Opinion No. 328 (June 1972). *See also* Comment, ABA Model Rule of Professional Conduct 5.7 (lawyer is subject to Rules of Professional Conduct when providing "law-related services"). To date, only one state, Pennsylvania, has adopted a version of Model Rule of Professional Conduct 5.7 in its current form.

16. *See* ABA Formal Opinion No. 328 (attorney engaging in law-related second occupation must comply with ethical rules governing "[p]ublicity given to the second occupation and methods of seeking business"). *But see* Oregon State Bar Ass'n Informal Opinion No. 90-40 (lawyer solicitation rules do not apply to lawyers soliciting business as mortgage brokers). For example, lawyers may not solicit law-related services in violation of Rule 7.3(a) and may not operate law-related second occupations using a trade name under Rule 7.5(b). *Cf.* Florida State Bar Professional Ethics Committee Opinion 94-6 (April 30, 1995) (notwithstanding Florida rule permitting law firms to use non-misleading trade names, mediation department of law firm may not operate under trade names because rule requires use of trade name in all aspects of firm's practice).

17. Block, *supra*, note 1 at 762-67.

18. ABA Formal Opinion No. 328 (June 1972). *Accord* Arizona State Bar Ethics Opinion No. 88-5 (Oct. 27, 1988); Florida State Bar Professional Ethics Committee Opinion 94-6 (April 30, 1995); New Hampshire Bar



Ass'n Ethics Committee Formal Opinion No. 1987-88/2 (Dec. 15, 1987) (also identifying Rules 4.2 and 4.3). *Contra* [Ohio] Board of Commissioners on Grievances and Discipline Informal Opinion No. 90-09 (June 15, 1990) (files of lawyer/realtor not subject to lawyer confidentiality rules if no attorney-client relationship is formed).

19. Block, *supra*, note 1 at 760-61.

20. New York State Bar Ass'n Committee on Professional Ethics Opinion No. 206 (Nov. 22, 1971).

21. Comment, ABA Model Rule of Professional Responsibility 5.7(b).

22. A survey of lawyers' nonlegal business activities revealed that lawyers frequently act as agents for title insurance companies; trustees in probate matters; personal representatives for decedents, minors or incompetents; trustees or conservators in bankruptcy or other insolvency proceedings; marriage counselors or mediators; and private investigators in criminal matters. Block, *supra*, note 1 at 745-46.

23. *In re Roth*, 577 A.2d 490 (N.J. 1990); Nassau County Opinion No. 84-3 (March 14, 1984); New Hampshire Bar Ass'n Ethics Committee Formal Opinion No. 1987-88/2 (Dec. 15, 1987); New York State Bar Ass'n Opinion No. 208 (Nov. 22, 1971); New York County Lawyers Ass'n Committee on Professional Ethics Question No. 685 (July 10, 1991); Suffolk County Bar Ass'n Professional Ethics Committee Opinion No. 93-3; West Virginia State Bar Legal Ethics Opinion Nos. 76-1 (Summer 1976) and 89-01. The New Hampshire opinion also concludes that when a nonlawyer co-broker is involved in such a real estate transaction, the lawyer/broker sharing in the sale commission would be sharing a legal fee with a nonlawyer in violation of Rule 5.4(a). New Hampshire Bar Ass'n Ethics Committee Formal Opinion No. 1987-88/2 (Dec. 15, 1987); *see also* Nassau County Opinion No. 89-33 (Oct. 25, 1989) (attorney may not act as associate of mortgage broker and represent client in same transaction). *But see* Oregon State Bar Ass'n Informal Opinion No. 90-40 (with informed consent of client, attorney may represent seller in land sales contract and subsequently broker to third party seller's interest in contract or in related mortgages or trust deeds, notwithstanding variety of potential conflicts of interest); Wisconsin State Bar Committee on Professional Ethics Opinion E-86-3 (nothing in ethics rules precludes lawyer from representing client in same matter as lawyer and realtor, and with informed consent of client lawyer may receive both legal and brokerage fees in same transaction provided total compensation is reasonable).

24. ABA Informal Ethics Opinion 331 (Dec. 15, 1972); Illinois State Bar Ass'n Advisory Opinion on Professional Conduct Revised Opinion No. 93-1 (Jan. 21, 1994); Kansas Bar Ass'n Ethics Opinion No. 92-04 (July 30, 1992); New York State Bar Ass'n Committee on Professional Ethics Opinion No. 576 (June 5, 1988); North Dakota State Bar Ass'n Ethics Committee Opinion No. 93-08 (June 4, 1993); Ohio State Bar Ass'n Committee on Legal Ethics and Professional Conduct Formal Opinion No. 37 (July 3, 1989); Pennsylvania Bar Ass'n Committee on Legal Ethics and Professional Responsibility Informal Ethics Opinions 93-69 (April 13, 1993) and 93-149 (Jan. 5, 1994); South Carolina Bar Advisory Opinion No. 92-03 (May 1992); Vermont Opinion No. 87-3. *But see* New Jersey Advisory Committee on Professional Ethics Opinion 682 (Feb. 5, 1996) ("attorneys who are holders of substantive beneficial interests in a title insurance company, such as commissions, rebates or profit sharing, may not purchase title insurance from that company on behalf of their real estate purchasing clients," citing conflicts of interest); Oklahoma Bar Ass'n Legal Ethics Opinion No. 281 (Sept. 21, 1974) (attorney may not act as agent for title insurance company in placement of insurance covering title to property purchased by attorney's client, citing conflicts of interest). The disparate treatment of real estate brokerage and title insurance in dual practice (even by the same ethics committee, *e.g.*, New York State Bar Association) appears to reflect the historical ties between title insurance and law and, perhaps, the smaller commissions that tend to be earned for title insurance work. If anything, title insurance is even more law related than real estate brokerage, which is reflected in the fact that some legal malpractice insurance policies specifically include services as a title insurance agent within the scope of coverage.

25. The disclosure obligations of real estate brokers under Colorado law, C.R.S. §§ 12-61-801, *et seq.*, also may conflict with lawyers' duties under Rule 1.6 to preserve client confidences, especially the obligations of transaction-brokers under C.R.S. § 12-61-807(2)(b)(VI) and (VII).

26. This appears to be a common practice nationwide. *See* Block, *supra*, note 1 at 745; New York State Bar Ass'n Committee on Professional Ethics Opinion No. 576 (June 5, 1986).

27. The services provided by a lawyer/title agent for the title insurance company are so law-related that they effectively constitute the practice of law, subjecting the lawyer to compliance with the Rules and creating a fiduciary obligation in the lawyer/title agent owed to the title insurance company. ABA Formal Opinion 328 (June 1972). Whether the title insurance company is, therefore, "another client" of the lawyer, within the meaning of Rules 1.7(a) and (b), involves a legal determination that is beyond the scope of this Opinion. If the

lawyer/title agent determines that the title insurance company is “another client,” he or she must comply with the provisions of Rule 1.7 dealing with multiple clients. For purposes of this Opinion, it will be assumed that the title insurance company is not considered a “client” of the lawyer/title agent. *But see* Kansas Bar Ass’n Ethics Opinion No. 92-04 (July 30, 1992) (lawyer performs legal services for both title company and client, implicating duty of loyalty); Vermont Bar Ass’n Opinion No. 87-3 (because attorney “represents” both title insurance company and prospective purchaser of title insurance, rules relating to representation of multiple clients apply).

28. The comment to Rule 1.7 sheds further light on this test, stating that the “critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” Comment, Rule 1.7.

29. *Accord* Restatement (Third) of the Law, The Law Governing Lawyers, § 207 comment c (Proposed Final Draft No. 1, March 29, 1996) (Section 207 governing business transactions between lawyer and client is applicable to services ancillary to the practice of law, *e.g.*, sale of title insurance); Illinois State Bar Ass’n Opinion No. 93-1 (Jan. 21, 1994); North Dakota State Bar Ass’n Opinion No. 93-08 (June 4, 1993); South Carolina Bar Advisory Opinion No. 92-03 (May 1992).

30. *See also* New York State Bar Ass’n Committee on Professional Ethics Opinion No. 626 (March 19, 1992) (counsel for lender in real estate transaction must disclose to borrower, who pays lawyer’s legal fee, that lawyer will receive additional payment from title insurance company).