

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-05

Issued July 13, 2001

¶1. **Issue:** What are the ethical implications for a real estate broker who includes in his promotional material that he is also a lawyer?

¶2. **Opinion:** A lawyer functioning in a law-related profession, such as real estate brokerage, who holds out as either an active or inactive lawyer will be subject to the Utah Rules of Professional Conduct while engaged in that law-related profession.

¶3. **Background:** An individual who is currently licensed to practice law in State A and is an inactive member of the Utah State Bar intends to engage in providing real estate agent or real estate brokerage services in Utah. He has asked the Committee about the ethical consequences of stating in advertising for his Utah real estate services that he is a licensed and active lawyer in State A and an inactive Utah lawyer.

¶4. **Analysis:** The lawyer, acting in his role as a real estate broker, (fn1) is not marketing legal services that he will deliver as a lawyer, but is alerting prospective real estate clients that he is a lawyer-trained real estate broker and can deliver real estate professional services. The purpose of a factually correct claim in advertising his real estate services that he is a lawyer may be to gain the confidence of clients or gain an advantage over non-lawyer real estate agents or brokers on the indirectly promoted assumption that a lawyer-trained real estate broker would be able to exercise better professional judgment than a non-lawyer-trained broker with respect to issues that could come up in the marketing, sale or acquisition of real estate.

¶5. When a lawyer markets himself as able to perform non-legal professional services for a client and lists his qualifications or experience as a lawyer in a communication for "law-related professional services," the use of such legal credentials is a "communication" within the meaning of the Rule 7.1, if a recipient of such materials could reasonably believe that the lawyer is offering legal services or professional advice that involves his legal experience,

judgment or considerations. (fn2) An inactive member of the Bar may list a J.D. degree as a "credential," but may not hold himself out as a lawyer. (fn3) The display of such credentials without more would not invoke the Rules of Professional Conduct even though the inactive member is engaged in a law-related profession.

¶6. The real estate broker profession is law-related, (fn4) and it may not be possible to know whether the lawyer's work for the client is performed as part of a practice of law or part of the lawyer's other occupation: "If the second occupation (such as a real estate brokerage business) is so law-related that the work of the lawyer in such an 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." (fn5)

¶7. As to the actively practicing lawyer, we have previously concluded that a lawyer who engages in a real estate, life insurance or title business is held to the ethical standards of a lawyer in both profession. (fn6) We have also more recently determined that a lawyer who holds himself out as a lawyer in any context may not ethically form a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. (fn7) Applying this standard to an inactive lawyer who holds himself out in advertising in a law-related profession as lawyer-trained, we affirm that he would be held to the ethical standards of the legal profession while acting in the law-related profession. Further, because the lawyer is not currently qualified to practice law in the State of Utah, he may be engaged in the unauthorized practice of law when engaged in the real estate profession if he advertises that he is a lawyer, albeit, inactive. However, it is not within the purview of this Committee to determine what constitutes the unauthorized practice of law.

¶8. Once the broker-lawyer advertises or communicates his legal training or expertise in advertising for real estate services, whether an active or inactive lawyer, the restrictions of the Rules of Professional Conduct apply, including: Rule 1.5(a) (reasonable fees); Rules 1.7 through 1.11 (conflicts of interest); Rule 1.6 (confidentiality of information); and Rules 7.1 through 7.3 (advertising and solicitation). This list is far from exhaustive, and the application of the Rules of Professional Conduct could be very problematic in the case of a real estate broker whose professional obligations and limitations are different from those governing lawyers. (fn8)

¶9. In the absence of any attorney-client relationship, and arguably without any mention of the fact that the broker is

lawyer-trained, a member of the Bar (active or inactive) is required to conform to the Rules of Professional Conduct when rendering non-legal professional services that involve a *fiduciary* relationship. It is noted that some aspects of the brokerage business involve such fiduciary relationships such as handling funds, closing transactions or acting as an escrow agent.

¶10. It is unlikely that an express disclaimer in any advertising by the agent or broker that he is not and does not intend to provide legal services or legal advice would be sufficient. We have previously held that a lawyer may solicit insurance business from clients of his law practice if he complies with the disclaimer and consent required in Rule 1.8. (fn9) A real estate broker who subjects himself to the Rules of Professional Conduct by indicating his status as a lawyer in real estate advertising has the same right to use the disclaimer and consent provisions of the Rule 1.8 or other Rules where waiver and consent are possible. However, to avoid the application of the Rules of Professional Conduct, the lawyer must avoid advertising he is a lawyer in his law-related profession. (fn10)

Footnotes

1. We refer throughout this opinion to a lawyer who provides services as a real estate "broker" rather than real estate "agent." Although there are functional and legal differences between the two, the ethical analysis is the same, and we do not mean to distinguish between them in the analysis and conclusion in this opinion.

2. Cal. State Bar Formal Op. 1999-154, at 2.

3. ABA/BNA Lawyers Manual on Professional Conduct § 81:3012.

4. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972), cited in Cal. State Bar Formal Op. 1982-69, at 2 ("activities of a real estate broker are clearly 'law related' as contemplated by [ABA Op. 328] and an attorney who is acting as a real estate broker in the same transaction must conform to the standards of the bar and the Rules of Professional Conduct in all aspects of such activities").

5. ABA Formal Op. 328; ABA Committee on Ethics and Professional Responsibility, Informal Op. 709; Neb. State Bar Assn. Op. 74-3; Mont. State Bar Assn. Op. 17; Colo. Bar Assn. Ethics Comm., Formal Op. 98 (Dec. 14, 1996).

6. Utah Ethics Advisory Op. 30 (Utah State Bar, Oct. 14, 1976) (title business); Utah Ethics Advisory Op. 17 (Utah State Bar, Nov. 28, 1973) (real estate business); Utah Ethics Advisory Op. 5 (Utah State Bar, Jan. 13, 1972) (insurance business); The American Bar Association's Model Rule of Professional Conduct 5.7, "Responsibilities Regarding

Law-Related Services" (not adopted in Utah), is consistent with these opinions.

7. Utah Ethics Advisory Op. 00-03, 2001 WL 314288 (Utah St. Bar).

8. For example, confidentially obligations in representing and being paid by more than one side of a transaction are different for real estate brokers and lawyers. "An attorney-broker thus can be caught between conflicting professional obligations, viz., disclosure versus revealing client confidences. Honoring the duty of confidentiality may jeopardize the broker's license, harm the client and expose the lawyer to civil liability." Cal. State Bar, Formal Op. No. 1982-69, at 3; Ore. State Bar, Op. 75-5.

9. Utah Ethics Advisory Op. 146A, 1995 WL 283828 (Utah State Bar).

10. We have previously held that the Rules of Professional Conduct will not apply if a lawyer withdraws from the practice of law and pursues another profession. Utah Ethics Advisory Op. 00-03, 2001 WL 314288 (Utah State Bar).

Rule Cited:

7.1