

## **ETHICAL CONSIDERATIONS RAISED AS LAW FIRMS EXPAND INTO LAW-RELATED BUSINESSES (Part Two)**

NOVEMBER 14, 2005

In our last Advisory issued on October 21, 2005, we provided an overview of the ABA's approach to law-related businesses in Model Rule of Professional Conduct 5.7. If you do not have the prior Advisory, you can click this link <http://www.dmb.com/news-and-events/newsletter.asp?id=131>.

This Advisory will cover the New Hampshire Ethics Opinions that have addressed this issue over the years. Readers should, however, keep in mind that New Hampshire's professional rules are currently undergoing major revisions; and that the Bar's Ethics Committee is recommending the adoption of a rule based on ABA Model Rule 5.7. If the Supreme Court follows this recommendation, the new rule will provide the framework for analysis in the future.

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### **New Hampshire Ethics Opinions on the Pursuit of Ancillary Businesses**

In states such as New Hampshire, which do not have Rule 5.7 as part of their rules, ethics committees have been left first to determine whether a practicing attorney or firm can pursue any ancillary business. If such activity is allowed, the committees have typically placed limits on these ancillary businesses, often based on prior opinions that involve an older notion of the "practice of law."

In 1975, the New Hampshire Ethics Committee opined that a lawyer could not run a real estate brokerage firm out of the

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attorney's law office. N.H. Comm. on Prof'l Conduct, Formal Op. 5 (1975). The Committee felt that the public would be "unable to grasp the distinction between attorney/broker practicing law and attorney/broker engaging in a brokerage business... [and that therefore] the 'appearance of impropriety' cannot be avoided." *Id.* at 2-3.

The Committee considered this situation once more after the 1986 adoption of the rules of professional conduct, which did not retain the "appearance of impropriety" language. The Committee altered, but did not abandon, its approach. In N.H. Ethics Comm., Formal Op. 1987-88/2 (1987) ("Dual Practice: Attorney as a Realtor"), the Committee ruled that although a lawyer was not absolutely barred from the simultaneous pursuit of a law practice and a non-legal business, "the lawyer would be held to the Bar's ethical standards when engaged in a second occupation from the lawyer's law office." *Id.* at 3. There was no discussion of the possibility of avoiding the rules by separating the law-related service from the law practice - - the focus of the analysis under ABA Model Rule 5.7. (See previous Advisory.)

Having ruled that a lawyer could provide law-related services in some instances, the Committee has applied the rules to various occupations. In Formal Op. 1987-88/2 (1987), supra, it held in that the practice of real estate sales could not be conducted without running afoul of rules such as those relating to fee splitting, confidentiality, and solicitation. It thus established a prophylactic rule against the sale of real estate by practicing lawyers out of their law office. *Id.*

The Committee subsequently approved the pursuit of law-related businesses in other situations. It held that an inactive or non-practicing lawyer could engage in full-time real estate sales without having to comply with all the Rules. Rather the lawyer need only comply with the rules that apply at all times to attorneys in any capacity, such as Rules 1.6(a), 1.9(b), 8.3 and 8.4. See N.H. Ethics Comm., Formal Op. 1989-90/12 (1990).

In N.H. Ethics Comm., Formal Op. 1993-94/4 (1993), the Committee permitted a lawyer to join with a non-lawyer in a separate marital mediation business. The opinion is far from clear, since it distinguishes the realtor cases based on the involvement of the judiciary in the divorce process. However, it suggests that as long as the attorney "takes all steps necessary to separate the legal

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practice from the marital mediation practice”; and insures that the parties know that he or she is not acting as a lawyer; most rules of professional conduct would not apply to the mediation service. The opinion goes on to state:

This separation can be accomplished through the utilization of a separate business with its own stationery and separate office. If the mediation services are provided in the same office from which the legal services are provided, a practicing attorney/marital mediator must take any additional steps necessary to ensure that the couple understands that the services provided are mediation services and not legal services. *Id.* at 3.

This opinion provides support for the notion that attorneys can engage in law-related activities, and not be bound by most professional conduct rules, as long as the law-related business is truly distinct from their law practice. This would be consistent with ABA Model Rule 5.7.

The N.H. Supreme Court has also weighed in somewhat on this issue. As noted in the first Advisory on this topic, the Court held in *In re Unnamed Attorney and Unnamed Title Company*, 138 N.H. 729 (1994), that the Professional Conduct Committee had the power under the Court’s rules and the professional conduct rules to audit the trust accounts of an attorney-controlled title insurance company operated out of the lawyer’s office. *Id.* at 733. However, the Court did not reach the issue of whether this was dual practice subjecting the lawyer in his title insurance business to all the ethical rules. Rather, it based its opinion on Supreme Court Rule 50-A(4), holding that the title company’s financial records were subject to audit if, among other things:

1. “[T]here exists financial records maintained by an entity performing [services customarily performed by a lawyer]”; and
2. “[T]here is a substantial nexus between the New Hampshire lawyer and the entity in question so that it is reasonable that the committee be permitted to audit the entity’s records.”

The N.H. Rule of Professional Conduct in question does nothing more than require lawyers to comply with the Supreme Court’s rules on trust funds.

In summary, the status of the issue in New Hampshire lacks the clarity of a state with a Court-adopted version of Rule 5.7. There is, however, support in historic Ethics Committee opinions, and in the current practice of a number of highly-regarded firms, for the pursuit of law-related businesses under circumstances that would be permitted under Rule 5.7.

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The two Advisories we have now issued on the topic of “law-related businesses” provide only an overview of a complex topic, and we have not covered some of the other issues law firms must consider, such as insurance coverage implications, the confidentiality of communications with customers of law-related businesses, or the legal malpractice implications in the employment of nonlawyers or for lawyers acting in a nonlegal capacity. These and other issues must also be considered by attorneys and law firms that are considering expansion into law-related fields.

**The “Advisories on the Law of Lawyering in New Hampshire” issued by Devine Millimet’s Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this Advisory, or if you know of anyone who may be interested in receiving these alerts, please send us an e-mail at [AC&LPG@devinemillimet.com](mailto:AC&LPG@devinemillimet.com).**