

Nebraska Ethics Advisory Opinion for Lawyers
No. 74-3

A LAWYER MAY SIMULTANEOUSLY HOLD HIMSELF OUT AS A REAL ESTATE BROKER OR SERVE AS A CLERK AT THE AUCTION OF REAL ESTATE. WHILE IT IS NOT IMPROPER PER SE FOR A LAWYER TO ENGAGE IN A SECOND OCCUPATION, EVEN THOUGH CLOSELY RELATED TO THE PRACTICE OF LAW, NEVERTHELESS, A HEAVY BURDEN MUST BE ASSUMED BY HIM TO ENSURE COMPLIANCE ON HIS PART, OF ALL OF THE PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY. HIS ACTIONS, WHILE SO ENGAGED, ARE DEEMED TO BE THOSE, NOT OF A LAYMAN, BUT OF A LAWYER.

QUESTIONS PRESENTED

1. May an attorney agree to clerk a sale of real estate at public auction, with his client's broker, and perform the services outlined, for a fee of 1% of the sales price, if he does so in his capacity as the seller's attorney which is fully disclosed to all interested parties?
2. If an attorney is prohibited from acting as such a clerk under Real Estate commission rules and regulations, may he act as such a clerk if he were to further qualify and become licensed as a broker?
3. May attorney engage in real estate business while in open practice and, if so, what principles should be followed?

DISCUSSION

These questions raise the propriety of engaging in so-called "dual occupations". The Code of Professional Responsibility seems to eliminate the original complaint that such practice resulted in "indirect solicitation of law business" or a "feeder to a law practice", or, at least, they have little relevance under the Code. See Informal Opinion 1248 (11/7/72). Formal Opinion 328, issued in

August, 1972, involved a situation closely related to the instant one. That opinion was based principally upon the applicability of DR 2-102(E).

From the foregoing, it seems that it is not per se improper for a lawyer simultaneously to hold himself out as a lawyer and as a real estate broker. However, his office sign may not so indicate; at least, it would be improper under DR 2 102(E). This applies not only to the office sign but to the letterhead and the professional card of the lawyer. It appears further that, if the lawyer would completely separate the practice of law from his real estate brokerage business AND would comply with DR 2-102(E), the two professions could be engaged in simultaneously, even though he holds himself out publicly as a lawyer and as a real estate broker.

Reference is made to two situations, viz: (1) where the second occupation is NOT "law related"; and (2) Where the second occupation IS "law related". The previous situation hardly ever presents any ethical questions but the second one does. Informal opinion 709 (1964) stated:

"A real estate brokerage business is so closely related to the practice of law that, when engaged in by a lawyer, it constitutes the practice of law."

In Opinion 272 (1946), it was stated that "in every case where a lawyer performs services for a client which could be performed by one not a member of the bar, nevertheless, in performing them in the course of his legal services, he is acting as a lawyer and subject to the Canons". In said Formal opinion 328 (1972), it is stated: "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. With this qualification, he may carry on a law-related occupation, ***, from the same office." However, it appears further that this

qualification is a substantial one. Carrying on such second occupation, simultaneously, requires conformity with DR 2-106. Publicity in seeking such business must conform with DR 2-101, DR 2-103 and DR 2-104. Under DR 4-101, he has the duty to preserve confidences. He may also owe a duty as a fiduciary, pursuant to DR 5-101, 104, and 105. He, therefore, may carry on the second occupation, provided that he complies with DR 2-102(E) as well as all of the provisions of the Code of Professional Responsibility, and he cannot avoid this obligation simply by dividing this activity physically into two separate offices.

This is the cautionary language found in Informal Opinion 775 (1965) which states:

"While ... the Committee does not consider it to be necessarily unethical to practice law and concurrently, but in different transactions, engage in the real estate business, the Committee is of the opinion that, to do so in accordance with the Canons, is so difficult that suspicions of unethical conduct are almost inevitable. For that reason alone, it is our opinion that only a very few lawyers will expose themselves to such suspicions on the part of their brother lawyers and the public. The lawyer, who does so, must be willing to undertake the tremendous burdens of conducting his real estate business ethically under the Canons ."

Applying the foregoing principle to the queries at hand, it would appear that there would be no prohibition per se against the lawyer serving as a clerk of the sale of the real estate of his client, provided, however, that:

1. His employment as clerk of the sale came solely and absolutely from the client and in no manner whatsoever from the broker.
2. He scrupulously complied with all of the provisions of the Code of Professional Responsibility

since, while so serving, he is performing services as a lawyer and not as a mere layman.

3. Payment for his services must come from the employer; there must be no division of fees with the layman auctioneer. Also, it must be emphasized that, no longer, is there a "minimum fee schedule" in Nebraska and there must be no reference made to it in making the charges for his services as clerk of the sale.

4. The layman auctioneer shall have no authority over the lawyer clerk in these situations.

5. There must be no evidence of continued reciprocity between the auctioneer and the lawyer in future dealings.

CONCLUSION

The answer to Question No. 1, is "Yes" with the qualifications above set forth.

The answer to Question No. 2, is "Yes" with the proviso that, when serving as a real estate broker, his actions must be considered those as a lawyer subject to all of the provisions of the Code of Professional Responsibility.

The answer to Question No. 3, is "Yes", provided that there be compliance with all of the provisions of the Code of Professional Responsibility.