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Title Insurance Conflicts

July 15, 1981

ETHICS OPINION

Question: Would any conflict or ethical violation arise in either or all of the following situations: (1) An attorney or firm is retained by a private title company to render to the company an opinion on a title so that the company may issue title insurance to the company's customer. (2) An attorney is retained by a client to search the title to property in which the client is interested and the attorney as an additional service arranges for title insurance through a private title company. (3) An attorney is appointed by a private title insurance company as an agent for that company and authorized to issue policies on behalf of that company.

Response: The American Bar Association, Formal Opinion 311 (December 15, 1972) states that "there is nothing necessarily unethical in an attorney's recommending title insurance and acting as Title Examiner and agent for the title insurance company in a real estate transaction or a loan transaction so long as the attorney makes full disclosure to his client and does not violate any of the disciplinary rules of the Canons of Professional Responsibility." However, specific consideration should be given to DR5-101 (A); 5-105; and 5-107 (A) and (B). The above cited Disciplinary Rules would have general application to the dual role of an attorney and title agent.

1. In the situation where an attorney or firm is retained by a private title company to render to the company an opinion of title so that the company may issue insurance to the company's customer, no ethical problems are apparent. This is because there is no attorney-client relationship between the attorney and the insured. Rather, the attorney is retained by the title insurance company; acts for the title insurance company; and is solely compensated by the title insurance company.

2. In the case where an attorney arranges for title insurance as an approved attorney, or otherwise as an additional legal service, and receives no outside compensation, no ethical problems arise. The attorney is serving a single client and solely the interests of that client are being served by the purchase of title insurance. A more problematic situation arises in the case where an attorney, as part of his representation for a private client, also arranges for title insurance through a title company as an agent of the company. In this particular setting, the attorney is representing an individual client while at the same time receiving additional compensation from the title insurance company. Thus, the attorney has a dual attorney-client relationship. These relationships must be judged on a case-by-case basis with careful attention being given to the question of the attorney's ability to render an independent judgment on behalf of the client. Again, consideration must be given to Disciplinary Rules 5-101 (A); 5-105; and 5-107 (A) and (B). Moreover, full disclosure of the compensation being received by the attorney from the title insurance company is mandated by Disciplinary Rule 5-107 (A) (1) and (2), which provides as follows:

"Except with the consent of his client after full disclosure, a lawyer shall not:

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(1) Accept compensation for his legal services from one other than his client. (2) Accept from one other than his client anything of value related to his representation of, or his employment by his client."

The disclosure required by the Code of Professional Responsibility is full and complete. See Ethical Consideration 2-21. The disclosure should include the amount of compensation received; the relationship of the attorney and the title insurance company; the ownership interest, if any, which the attorney has in the title insurance company; and the possibility of conflicts between the client, attorney and title insurance company as a result of claims. Similar disclosure should also be made to the title insurance company as the client/principal of the attorney. The disclosure requirement discussed above is relative and must be painstakingly examined on a case-by-case basis, because of the complexity of title insurance policies, coverage questions, and the inherent conflict should a claim arise under the policy. Careful consideration must be given to the sophistication of the client, as well as the nature of the real estate transaction involved, to determine if independent judgment can be rendered by the attorney and if the client's consent to the dual attorney-client relationship is knowingly and intelligently given. Disciplinary Rule 5-105 (A) (B) and (C); 5-107 (A) (1) and (2); Ethical Consideration 5-19.

3. The last situation which the committee has been asked to address is the general question of the propriety of an attorney acting as an agent for a title insurance company. Historically, the title examination and title opinion have been considered a proper function of the attorney at law. However, modern and complex real estate transactions have led to the involvement of title insurance companies in this area of the law. In this regard, it has generally become accepted practice for attorneys, in the performance of their traditional function, to serve as agents for title insurance companies. Subject to the considerations discussed above, there is no inherent ethical violation involved where an attorney acts as an agent for a title insurance company. The attorney's conduct as a title agent is still governed by the Code of Professional Responsibility, as well as his contract of employment and any applicable rules and regulations of the New Hampshire Insurance Department.