New York State Bar Association
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REAL PROPERTY LAW SECTION

RPLS #1 January 20, 2017

To: Celeste Koeleveld, Joy Feigenbaum, Ellen R. Buxbaum, Paul Zuckerman, Joana Lucashuk, D. Monica Marsh

From: Task Force on Title Agent Licensing Regulations of the Real Property Law Section of the New York State Bar Association

Re: Title Agent Licensing Regulations

Thank you again for meeting with us to discuss the issues surrounding the promulgation of regulations pursuant to the title agent licensing legislation. At our meeting we discussed four primary concepts. They were:

1. The intent of the legislation;
2. The interplay of 6409(d) and ethical opinions regarding discounting of fees where an attorney offers title insurance to his or her client;
3. Cases decided by the various Appellate Divisions wherein an attorney acted as title agent and as attorney in the same transaction; and
4. What core services should be provided in order to earn all or a portion of a fee as title agent.

With respect to the intent of the legislation, we have enclosed a Memorandum issued by NYSLTA the day after the statutory language was agreed upon between the New York State Land Title Association (NYSLTA), the Real Property Law Section (RPLS) and representatives from the Governor's Office. As you can see, the Memorandum is dated March 26, 2014, and refers to our meeting on the previous day. Specifically, we direct your attention to the top of page "2" of that Memorandum, which provides context for the amendatory clause "subject to applicable law". While we don't necessarily agree with the entirety of the Memorandum, it makes clear that NYSLTA's understanding was the same as that which we articulated in our meeting (i.e. to maintain the status quo prior to legislation with respect to attorneys providing title insurance).

We indicated that we would provide you with the ethics opinion regarding attorneys not being required to reduce fees when writing title insurance for a client. That is Opinion 974 which we have included with this letter and which is also addressed in the NYSLTA Memorandum referred to above.

What is also clear from the NYSLTA Memorandum is that the clause "subject to applicable law" does not and cannot codify attorney ethics opinions as they are simply that – opinions which are provided as guidance to practicing attorneys by bar associations (including the NYSBA). These opinions do not have the force and effect of law. Thus,

while Courts may look to ethics opinions as guidance, they are not bound by ethics opinions in determining whether a particular attorney has violated the Rules of Professional Conduct.

With this memorandum we have included for your review three disciplinary cases in Appellate Divisions. All address fact patterns where an attorney acted as counsel and such attorney or such attorney's affiliated corporate or LLC title agency wrote title insurance for clients in the same transaction. Some NYSBA ethics opinions can be interpreted to mean that while writing title insurance for a client is permissible, doing it through a separate corporation or LLC that the attorney owns or is affiliated with is not appropriate. The NYSBA Opinions stand for the proposition that the title agent should be the attorney or law firm – rather than a separate legal entity - so that there is no question of disclosure to the client.

However, as the enclosed cases demonstrate, the Appellate Divisions see it differently. In none of the cases did they sanction the attorneys simply because the attorney was providing title insurance through an affiliated business entity in the same transaction where the attorney acted as transaction counsel for a client. The Court clearly disagreed with the opinions of the Ethics Committee by not disciplining attorneys for that particular conduct. (We recognize that other conduct discussed in these opinions is obviously improper and that the attorneys in question were correctly censured for such improper conduct) The main point here is that these cases demonstrate that what is ethically required by NYSBA ethics opinions (or other bar association opinions) may be more stringent than what is required by "applicable law". For this reason, it is inappropriate to try to codify attorney ethics opinions as law, whether by statute or regulation. Accordingly, it is clear that the phrase "subject to applicable law" cannot be construed as requiring codification of any bar association ethics opinions.

The last of your requests, i.e. to define or identify which core title services must be rendered or how many of them must be rendered in order to earn a fee, is a much more difficult undertaking. The answers to the first three issues already existed and need not be interpreted by us. Where to draw the line between doing no work and doing all work as a title agent is a difficult proposition at best.

We are holding our annual meeting at the end of January and we are going to discuss this issue with the Executive Committee, as well as in our Title and Transfer Committee, so that we may possibly come to some consensus. However, I do not believe that we as a task force, although we have our own individual thoughts, can speak for the entire Section on such an important topic without first consulting our members. If new regulations have not already been issued, we will certainly report back to you after our annual meeting the last week of January.