NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion — 576 — 6/5/86 (41-85)

Amplifies N.Y. State 351 (1974)

Topic: Real Estate Attorney: Agent for title insurer; multiple representation

Digest: Proper for real estate attorney to act also as title insurance agent provided such conduct is legal, no prohibited conflict exists, consent is obtained from all parties after full disclosure, legal fee reduced by remuneration from title company absent express consent to the contrary from client and legal fee not excessive.

Code: DR 1-102; DR 2-106(A); DR 5-105; DR 5-105(C); DR 5-107; DR 6-102(A); DR 7-102; EC 2-17.

QUESTION

May an attorney who represents a seller, buyer or mortgagee in a real estate transaction also serve as agent for the title insurance company that issues a policy in connection with the transaction? If so, may the attorney receive or retain as compensation from the title insurance company a portion of the premium paid for the policy?

OPINION

In N.Y. State 351 (1974), this Committee held that, consistent with DR 5-107 and DR 5-105:

> An attorney may act as a title examiner, "Approved Attorney", or agent for a title company in a real estate transaction where he represents a party, provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the attorney makes full disclosure to both, and his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee.

To the same effect, see ABA 331 (1972).

In light of subsequent legislative enactments, both federal and state, and the recent development of practices in certain areas of the State whereby attorneys have become agents for title insurance companies and split premiums with the companies on policies placed by the agent-attorneys, our Committee has been requested to address once again the propriety of such a practice.

For the facts discussed herein, we rely upon a report dated March 28, 1986 of the Real Estate Development Committee of the NYSBA Real Property Section, entitled "Report on the Practice of Splitting Title Insurance Premiums Between Title Insurance Companies and Attorneys in the State of New York."[1]

I.
The Practice

The practice in New York State of title insurance companies paying a portion of a title insurance premium to a lawyer acting in some respect on behalf of the company is apparently fairly widespread and takes a variety of forms. We

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1. The Committee is indebted to the many individuals and organizations in addition to the Real Estate Development Committee who have communicated with the Committee to share their points of view on this issue and owes a particular vote of thanks to the Ethics Committee of the Monroe County Bar Association, which has recently issued an opinion on the subject.

deal here only with situations where the lawyer is also the lawyer for the buyer, seller or mortgagee of the insured property. The following arrangements are typical of practices followed in at least some areas of the state (as described in the above-referenced report, substantially verbatim):

A. *Attorney Closer.* The title company provides all of the services involved in issuing the policy except attending closing, marking up the policy, and collecting the premium, which services are performed by an attorney. The title company receives the full premium and pays the attorney for his services at an agreed flat rate. The attorney-closer may be the lawyer for the buyer, seller or mortgagee or a lawyer unrelated to the transaction.

B. *Approved Attorney.* Designated by a title company, an approved attorney examines title, attends the closing, collects the premium, certifies title to the title company, and remits the premium to the title company. Based upon the lawyer's certification, the title company issues its title insurance policy. The rate for the policy ranges from 39% to 64% less than the full rate (depending upon the amount of the insurance) and averages generally 45% of the full rate.

The premium paid at the approved attorney rate is determined by reference to the rate manual, where the rate is approved by the State Insurance Department. The difference in amounts between the approved attorney rate and the full rate is not paid by anyone. The title company receives less premium, presumably because it performs less work. The lawyer is paid by his client or, where the lawyer represents a lending institution, by the mortgagor. Compensation to the lawyer for acting as approved attorney is included in the fee charged his client, with the result that the client receives full credit for the amount by which the premium is reduced.

C. *Examining Counsel.* Designated by a title company, an examining counsel performs basically the same services for the title company as an approved attorney. In some cases, though, the title company may perform some of the title opinion work and provide that work product to the examining counsel. The main difference between the two arrangements, however, is that the client pays the full insurance rate determined by reference to the rate manual as if the title company had performed all of the services incident to the issuance of the title insurance policy. The

title company then pays an agreed amount (typically 55% of the premium — the reciprocal of the 45% average of the approved attorney rate as described above) to the examining counsel for his services. The attorney's fees paid separately to the lawyer by his client may or may not reflect the amount paid to the attorney by the title insurance company.

Unlike the approved attorney practice, the rate structure for an examining counsel does not appear in the rate manual nor is it approved by the State Insurance Department.

D. *Agent.* A title company and a lawyer enter into an agreement whereby the lawyer is appointed the agent of the title insurance company to perform the services necessary for the issuance of a title insurance policy and to issue the policy itself. The client pays the full premium and the title company pays the lawyer an agreed percentage of the premium (typically ranging from 60% to 90%). The attorney's fee paid separately to the lawyer by the client may or may not reflect the amount paid to the lawyer by the title insurance company.

E. *Variations.* Other types of arrangements between title companies and attorneys are possible and some are apparently in existence. They appear to involve the same general kinds of considerations as those described above: payment of a part of the title insurance premium to a lawyer in connection with the issuance of a title insurance policy.

Thus a title insurance company might charge a percentage of the full premium (say 20%) but the lawyer would keep for himself only an amount equal to what he would have charged if he were examining counsel and not the amount due if he were an agent (say 55% of the full rate and not 80%). The difference in amounts between 20% and the full rate retained by the title insurance company and 55% of the full rate paid to the agent (as if he were examining counsel) is not paid by anyone.

Example

The following chart illustrates the variations in the cost of legal fees and title insurance to a mortgagor and total compensation to the mortgagee's lawyer under various typical arrangements between the lawyer and the title insurance company. In each instance, the chart assumes a $50,000 mortgage loan in connection with which the mortgagor is required to pay the lender's lawyer's fee (which is further assumed to be $250.00) and to secure a mortgagee title insurance policy with a normal full premium of $346.00. In each instance, the chart also assumes that the amount of the premium received or retained by the lender's lawyer as compensation from the title insurer is not in any way reflected in the amount the mortgagor is charged for legal services. As appears, the arrangements differ very substantially both in what the client pays and what the lawyer receives.

Arrangement Between Lender's Lawyer And Title Insurer	Amount Paid By Mortgagor (Lender's Lawyer's Fee Plus Insurance Premium)	Lender's Lawyer's Total Compensation (Including $250 Fee And Share Of Premium, If Any)	Title Insurer's Net Premium
No connection between Lender's Lawyer and Title Insurer	$596.00	$250.00	$346.00
Attorney Closer	596.00	325.00	271.00
Approved Attorney	436.00	250.00	186.00
Examining Counsel	596.00	440.30	155.70
Agent	596.00	526.80	69.20
Variation on Agent	509.50	440.30	69.20

From the foregoing chart, it is apparent that what the mortgagor pays, and what the lawyer and the title insurer receive as their own, vary substantially in accordance with the relationship between the lawyer and the title insurer. It also seems apparent that at least some of the differences constitute an inducement to "get the business" and not a real and substantial difference in legal services provided.

II.
Legal Constraints

After the publication of N.Y. State 351, Congress enacted the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Sec. 2601 *et seq.* ("RESPA"), which proscribes kickbacks and unearned fees for the referral of business incident to a real estate settlement service involving a federally related mortgage loan. Shortly thereafter, the New York State Legislature enacted section 6409(d) of the Insurance Law, which prohibits rebates of insurance premiums as an inducement or compensation for the referral of title insurance business.

Legislative history makes clear that the principal objective of both statutes was to reduce the cost of title insurance. Pointedly, the New York statute mandated a reduction of premium rates to reflect the anticipated savings resulting from the prohibition against rebates or commissions.[2] Senate Report No. 83-866 concerning amendments to RESPA noted:

> Subsection 7(c) specifically sets forth the types of legitimate payments that would not be proscribed by the section. For example, commissions paid by a title insurance company to a duly appointed agent for services actually performed in the issuance of a policy of title insurance would not be proscribed. Such agents, who in many areas of the country may also be attorneys, typically perform substantial services for and on behalf of a title insurance company. These services may include a title search, an evaluation of the title search to determine the insurability of the title (title examination), the actual issuance of the policy on behalf of the title insurance company, and the maintenance of records relating to the policy and policy-holder. In essence, the agent does all of the work that a branch office of the title insurance company would otherwise have to to perform.

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2. The memorandum of Senator John R. Dunne accompanying the introduction of the bill made reference to the view of the Insurance Department that the bill was "necessary to eliminate unscrupulous practices of some lawyers, real estate brokers and title insurance agents (which) have forced the unfavored consumer into subsidizing those parties who have received rebate (sic) commissions and kickbacks." The insurance Department's supporting memorandum did not refer to "unscrupulous practices," but the Department had itself proposed licensure of title insurance agents and did note in its memorandum in support of the enacted bill that its penalty provisions bill "appear to provide sufficient control and opportunity for surveillance to obviate the need for costly and cumbersome licensing requirements."

Where an attorney-agent performs no significant additional services in return for his portion of the premium, the violation of law seems clear and it is almost superfluous to note that when a practice is illegal, it is, of course, unethical. As the Committee does not opine on questions of law, however, it expresses no opinion on whether the division of premiums with an attorney acting as agent for the title insurer is in whole or in part an impermissible subterfuge or whether such a division otherwise violates either or both statutes.

Accordingly, we turn to the ethical issues on the assumption that the lawyer actually renders services to the title insurer and receives payment from the title insurer solely for such services and on the further assumption that this avoids the statutory proscriptions.

III.
Ethical Constraints

As noted at the outset of this opinion, this Committee held in N.Y. State 351 that, consistent with DR 5-107 and DR 5-105:

> An attorney may act as a title examiner, "Approved Attorney", or agent for a title company in a real estate transaction where he represents a party, provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the attorney makes full disclosure to both, and his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee.

This Committee believes that N.Y. State 351 was correctly decided.[3] In view of the renewed interest in the questions discussed in that opinion, arising from the variety of new practices described above and their disparate effects on what the client pays, however, the Committee believes that a further, more detailed analysis is appropriate.

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3. We also reaffirm and invite attention to this Committee's holding in N.Y. State 556 (1984) that a lawyer may maintain a dual practice, *e.g.*, as a lawyer and an authorized title insurance representative, "provided that he does not solicit employment in violation of any statute or court rule or accept employment resulting from unsolicited advice to a prospective client to seek counsel." *See also* N.Y. State 494 (1978); N.Y. State 493 (1978).

FIRST: We believe that every lawyer has an underlying duty not to allow his interest in receiving a fee to override the basic interest of a client in not incurring unnecessary fees and expenses. In the present context, if a lawyer has a relationship with one or more title insurance companies that enables the lawyer to achieve a reduction in total cost to the client for the appropriate legal services and any title insurance requested, while providing a reasonable fee to the lawyer and doing so without violating any legal or ethical constraint, we believe that the lawyer has a duty to afford the client the opportunity to realize the savings. *Cf.* N.Y. State 572 (1985); N.Y. State 569 (1985).

SECOND: As stated above, we adhere to the conclusion reached in N.Y. State 351 that disclosure to the client is required. We amplify this to make clear that the disclosure must in all events be a full disclosure that includes the amount the lawyer receives from the title company (or out of the title insurance premium) and the possible availability of such insurance at a lower cost to the client. Without such full disclosure, there clearly can be no informed consent.

THIRD: Again, as concluded in N.Y. State 351, informed consent of the client is clearly required before a lawyer can perform any services for, DR 5-105(C), or receive any payment from, DR 5-107, the title company. Further, N.Y. State 351 required that the lawyer credit the client with any amount received from the title company unless the client otherwise consents. If and to the extent that the client is asked to consent to an arrangement that clearly costs the client and benefits the lawyer, the obtaining of such consent by a trained advocate from an unsophisticated client presents substantial ethical difficulty. That combination of circumstances requires that the disclosure be particularly clear and complete, that the lawyer fully and fairly advise the client of the alternatives available to the client and the right of the client not to consent, and that the client have a reasonable time thereafter to consider the matter.

Moreover, even with client consent, the lawyer is not entitled to receive amounts from the transaction that would in the aggregate constitute an excessive fee. DR 2-106(A). To the extent that the services for which the title company is paying are duplicative of services the lawyer would render to the client in any event, we believe that compensation to the lawyer from both for those same services would constitute an excessive fee.[4]

FOURTH: Even with client consent after full disclosure, a lawyer may not represent multiple clients unless it is obvious that he can adequately represent the interest of each. DR 5-105(C).

Every purchase, sale or mortgage situation would appear to have the potential for conflict between the client and the title company since the interests of the client, whether seller, buyer or mortgagee, and the underwriting interest of the title company inherently conflict on the question of what risks will be insured. The report of the Real Estate Development Committee suggests, however, that, in most cases, actual conflicts do not arise or can be readily resolved by adequate communication between the attorney and the title company; the likelihood that a substantial conflict will arise will vary with the type of insurance being obtained (fee or mortgage), the size of the policy and the nature (residential or commercial) and location (rural or urban) of the property. We accept all of that as fact for purposes of this opinion. Because the potential for conflict is so clear, however, a lawyer should be particularly alert to any actual conflict and must withdraw from employment by *both* parties should a true conflict arise, unless the conflict can be obviated by seeking insurance from another title insurer.[5]

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4. We here use "services" to include responsibility assumed. Thus, if the lawyer assumes a risk of liability to the title company that the lawyer otherwise would not have, that is here considered to be additional service. At the same time, the added risk, if any, must be real and not merely theoretical. If there is a non-recourse opinion or an understanding, explicit or implicit, that the title company will not sue the lawyer, then, assuming such an arrangement is not itself unethical (*See* DR 6-102(A)), the added risk does not appear to be real.

5. Where exceptions to title might be negotiable or where questions otherwise arise as to whether the principal represented by the attorney-agent should accept certain exceptions to title or insist on their omission as a condition to title closing, DR 5-105 and the corollary ethical considerations proscribe multiple representation irrespective of disclosure and client consent.

FIFTH: As stated in Part II above, the Committee assumes for purposes of this opinion that it is unlawful and, therefore, unethical for the lawyer to receive any compensation from the title insurer except for services rendered. The Committee is aware that this conclusion leaves open two major quetions: (1) If the compensation does include more, and if the attorney credits the client for that excess, is it lawful for the lawyer simply to receive and be the conduit for this excess amount? In other words, if the lawyer, by being an agent, can obtain a rebate of 80% of the premium, but if some substantial portion of the rebate is not for services rendered, may the lawyer nevertheless receive the full rebate as long as he or she credits the client for that portion? This question is one of law upon which the Committee does not opine. (2) Can the lawyer simply say that, since it is illegal for the lawyer to receive payment except for services rendered, the lawyer has the benefit of a presumption that whatever he or she receives is for services rendered? Whatever may be the answer to that question in applying the statutory prohibitions, we do not think any such presumption applies from an ethical standpoint. We understand that title insurance companies do utilize true agents who perform the full services of an agent. Presumably, a part of their compensation is for originating business — for which the lawyer who also represents the purchaser or seller, mortgagor or mortgagee, owner or lessee, may not be compensated. We believe that there may well be means by which the objectively reasonable or customary cost of the various elements of service are determinable in the marketplace. The lawyer then must divide the compensation he otherwise would receive from the title company into three categories: (i) compensation for services that simply duplicate services performed for the client,(ii) compensation for originating the business, and (iii) compensation for services to the title company not included in (i) and (ii). We have assumed above that (ii) is illegal, and we have opined above that (i) must be credited against the lawyer's fee to the client. That then leaves the disposition of (iii) to the informed consent (or non-consent) of the client.

In general, however, we cannot escape the figures represented by the example in Part I. If the representation is one in which the client pays more under one arrangement than under another for the same services and the same title insurance, it is difficult to escape the conclusion that the difference is for originating business.

SIXTH: We understand that the question has been raised as to how the ethical constraints discussed above—grounded as they are on a duty to the client—

could apply to a lawyer employed by the lender-mortgagee under terms that require the borrower mortgagor to pay the lender's attorney's fees. DR 2-106(A), prohibiting the lawyer from charging or collecting a clearly excessive fee, and EC 2-17 limiting a lawyer's fee to a "reasonable fee," are not limited to situations where it is the client that pays the fee (even assuming the agreement of the borrower with the lender does not require that the fee be reasonable). If the fee is one the lender would not agree to pay in the same transaction were the lender not passing the fee on to the borrower, the fee will be viewed with great suspicion as exceeding a reasonable fee.

Again, we note that the Committee does not pass on questions of law. Accordingly, we do not examine what legal duties and restrictions are imposed upon the lender *vis-a-vis* the borrower in the circumstances with respect to lender's attorney's fees. To the extent there are such duties or restrictions, the lawyer may not ethically assist the client in evading or concealing an evasion of them. DR 1-102; DR 7-102.

CONCLUSION

We recognize that the subject is a complex one. Doubtless this opinion does not deal with all the problems presented or reach conclusions that constitute a final solution. We return, however, to our first point made in Part III, i.e., if the lawyer does not adopt the ethically and legally acceptable course available to him that results in the least cost to the client while procuring a reasonable fee for the lawyer in an amount fully known to the client, the lawyer has a heavy burden, indeed, in justifying his or her conduct from an ethical standpoint.

Subject to all the qualifications stated above, the questions are answered in the affirmative.