NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Modifies N.Y. State 576 (1986)

Opinion 974 (7/19/13)

Topic: Lawyers as title insurance agents; reduction of legal fees; illegal fee arrangements; excessive fees

Digest: When the circumstances make it ethically permissible for a lawyer to represent a party in a real estate transaction and also receive payment to act as agent of a title abstract company, the lawyer must consider any relevant legal restrictions before reducing the legal fee to the transaction party. Reasonableness of legal fees must be determined under Rule 1.5(a) in light of all the facts and circumstances, and overlap in the services provided to the transaction party and the company does not automatically render fees excessive.

Rules: Rule 1.5(a)

FACTS

1. The inquirer represents parties in real estate transactions. He sometimes has occasion to act also as a title insurance agent in those transactions, performing services for, and receiving payment from, a title abstract company.

2. There have been numerous ethics opinions relating to attorneys who also act as title insurance agents in real estate transactions, and the inquirer asks about the continuing validity of those opinions. He says that "a more recent Insurance Department Opinion, as well as the promulgation of a Model Title Insurance Disclosure Form by the Real Property Section of the New York State Bar Association has reintroduced confusion to the issue…."

3. The inquirer, claiming a conflict between our prior opinions and the opinion of the Insurance Department, asks that we clarify the matter generally, and asks two questions in particular.

QUESTIONS

4. May a lawyer who represents a party in a real estate transaction, and also acts as a title insurance agent, reduce the legal fee when the client uses that attorney's title agency to obtain insurance?

5. If not, will disclosure and the use of the Model Title Insurance Disclosure Form cure the problem?

OPINION

6. This Committee has issued several opinions discussing circumstances in which lawyers connected to a title abstract company in a real estate transaction – by serving as its agent or having an ownership interest in the company – may also represent a party in the transaction.

7. In N.Y. State 351 (1974), we concluded that when the lawyer serves as agent for the title abstract company, the lawyer may also represent a party to the transaction,

> "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 analysis was amplified in N.Y. State 576 (1986), which among other things indicated that particular conflicts between representing a party and acting as agent for the title abstract company may or may not be consentable, *id*. n.5; *see* N.Y. State 631 (1992). We have reached a more restrictive result when the lawyer has an ownership interest in the abstract company.[1] The current inquiry, however, does not present the circumstance of ownership.

8. Two other aspects of N.Y. State 576 are relevant here. First, we reaffirmed our view that, absent client consent, the lawyer should credit the client with any savings realized from the title company:

> "[I]f 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."

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[1] In particular, we have found that an ownership interest makes certain conflicts nonconsentable:

> "With respect to abstract title companies, in N.Y. State 595 (1988), N.Y. State 621 (1991) [with four members of the Committee dissenting], and N.Y. State 738 (2001), we held that a lawyer could, with consent after disclosure, refer real estate clients to a title abstract company in which the lawyer or his or her spouse had an ownership interest 'for purely ministerial abstract work,' but not where the abstract company provided the additional service of preparing a title report or serving as an agent for the title underwriter. The central rationale was that if the abstract company prepared a report showing exceptions in title and recommending whether a title insurance policy should be issued, the law firm for the party would be required 'to negotiate these issues ... with itself.' N.Y. State 738 (2001). *See also* N.Y. State 731 (2000) (lawyer cannot pay employees to refer clients to lawyer-owned title company for non-ministerial tasks)."

N.Y. State 753 (2002). Those opinions were decided under the Code of Professional Responsibility, but we have reached the same conclusion under the Rules of Professional Conduct. *See* N.Y. State 891 (2011).

N.Y. State 576 (1986) (citations omitted).

9. Second, N.Y. State 576 went beyond the principle that a lawyer may not receive fees from the title abstract company unless there is disclosure and client consent. It held that overlap of services to the client and the title abstract company would result in an excessive and therefore impermissible fee:

> "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 insurance company is paying are duplicative of services the lawyer would render the client in any event, we believe that compensation to the lawyer from both for those same services would constitute an excessive fee."

We have since reiterated this principle. *See* N.Y. State 626 n.1 (1992).

10. We were clear in prior opinions that our analyses addressed only ethical considerations, and not whether any legal rules would prohibit the various fee arrangements discussed.[2] Indeed, we recognized that actual fact patterns might well raise substantial legal issues.[3]

11. As noted by the inquirer, the Real Property Law Section of the New York State Bar Association has published an article including a "Model Title Insurance Disclosure Form." *See* NYSBA, "Title Insurance: Disclosure to and Consent by Client," 37 N.Y. Real Prop. L.J. 42 (Winter 2009). The model form was intended to "represent a good-faith effort on the part of [an ad hoc subcommittee] to draft a form that complies with the various ethics opinions issued by the Committee on Ethics of the New York State Bar Association." The article cited ten relevant opinions of this Committee and urged attorneys to be familiar with them. *Id*. at 42-43.

12. The Model Title Insurance Disclosure Form contains various disclosures relating to the cost of title insurance and to the attorney's relationship to the title insurance company. The form then states:

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[2] *See*, *e.g.*, N.Y. State 667 (1994) (declining to opine whether proposed arrangement would violate any law such as RESPA prohibition on "kickbacks" and "unearned fees"); N.Y. State 626 n.1 (1992) (noting that "the Committee does not pass upon questions of law, and therefore we do not address any issues that might be raised by such circumstances under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., the New York Insurance Law, § 6409(d), or any other legal provision"); N.Y. State 595 (1998); N.Y. State 576 (1986) (expressing "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" of RESPA and Insurance Law §6409(d)).

[3] For example, we assumed for purposes of one opinion that it is unlawful "for the lawyer to receive any compensation from the title insurer except for services rendered." In the same opinion, we considered various fee arrangements and said it seemed "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. ….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." N.Y. State 576.

> "Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company. This reduction will be reflected as a credit on your statement for legal services rendered."

37 N.Y. Real Property L.J. at 43. This language was seemingly included to reflect what we have said in some of our prior opinions as cited above.

13. The article containing the model form included two caveats. First, it made clear that the model form may need to be revised "as may be appropriate for each transaction," *id*. at 42, which is an important caution given the variety of permutations, and resulting ethical implications, that can arise.[4] Second, the article and the model form – like our opinions – were addressed to ethical issues rather than legal ones.[5]

14. As noted by the inquirer, one such legal issue was addressed by a New York State agency with responsibility for this area. In July 2009, the Office of the General Counsel of the New York State Insurance Department (which has since been incorporated into the newer Department of Financial Services) issued an opinion to the effect that "[a]n attorney who is also a title agent may not lawfully charge an applicant for title insurance a reduced legal fee as an inducement to use the attorney's title agency to obtain insurance, because such an inducement would violate N.Y. Ins. Law § 6409(d) …." After quoting from the relevant statute, the opinion concludes:

> "Providing reduced legal fees to title insurance applicants who use the attorney's title agency to obtain insurance constitutes the giving by the agent/attorney of 'consideration or valuable thing as an inducement for … title insurance business,' in violation of Insurance Law § 6409(d). In addition, such fee reduction constitutes a special benefit not afforded to other applicants who choose not to obtain title insurance from that attorney's title agency. See Circular Letter No. 9 (2009)."

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[4] For example, the same section of the form refers both to ministerial services (*e.g.*, "examining the title") and those that require the exercise of professional judgment (*e.g.*, "clearing underwriting objections"), a distinction that is significant under our prior opinions. *See*, *e.g.*, N.Y. State 753 (2002) (quoted in n.1 *supra*). Similarly, while the form does not distinguish between agencies that are owned by lawyers and those that are not, we have previously determined that, regardless of the client's informed consent, "[a] lawyer who owns a title abstract company and a mortgage brokerage is barred from acting as a lawyer in a transaction in which one or both of those companies is also acting in a variety of situations in which the lawyer's personal interest in a fee (or dividend) from the ancillary businesses compromises the independence of the lawyer's legal advice." *Id.*

[5] "We note, however, that we do not examine what legal duties and restrictions are imposed upon an attorney/title agent. An attorney/agent should well consider the statutory restrictions and limitations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq . and Section 6409 of the New York Insurance Law before undertaking an attorney/agency relationship with a client." 37 N.Y. Real Prop. L.J. at 43.

OGC Op. No. 09-07-08 (available at http://www.dfs.ny.gov/insurance/ogco2009/rg090708.htm).

15. The Committee, as noted above, opines as to ethical issues but not legal ones. We do not address the legal issues raised in Opinion 09-07-08, nor do we opine as to the opinion's soundness. But that is not to say that the opinion would be irrelevant to a lawyer considering ethical responsibilities in this area.

16. A lawyer considering payment arrangements in this area must take into account Insurance Law § 6409(d) and other relevant statutes, not only because they determine legal obligations, but also because they provide a backdrop against which ethical obligations must be assessed. *See* N.Y. State 576 (1986) (asserting duty to offer savings to client if lawyer can do so "without violating any legal or ethical constraint"); Rule 1.2(d) of the New York Rules of Professional Conduct (the "Rules") (prohibition of counseling or assisting a client to engage in conduct that the lawyer knows is illegal or fraudulent); Rule 8.4 (b) (prohibition of engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). In assessing the import of such statutes, a lawyer should, of course, consider all relevant materials, including agency materials such as Opinion 09-07-08. If that opinion is sound, it states a significant legal constraint for the lawyer to take into account.

17. If a lawyer determines that a particular fee arrangement is permitted by Insurance Law §6409(d) and other relevant statutes, there is still a question whether further restrictions may be imposed by the rules of legal ethics. We now turn to that topic. We will set forth reasons leading us to reexamine our earlier assumptions and reasoning with regard to excessiveness of aggregate fees in this situation. Based on that reexamination, we reach a conclusion on this point different from that of N.Y. State 576.

18.Although the ethics opinions previously cited were decided under the former Code of Professional Responsibility, its replacement by the Rules of Professional Conduct in April 2009 did not change the operative principles applied in those opinions. *Compare* DRs 1-106 (responsibility for non-legal services), 2-106 (fees), 5-101(A) (personal conflicts) and 5-105 (conflicts in multiple representation) *with* Rules 5.7, 1.5(a) and 1.7. Thus it is not the change from the Code to the Rules that leads us to reconsider N.Y. State 576.

19. We are mindful of the extent to which conditions in the residential real estate market, as well as the practices of those serving that market, have changed since Opinion 576 was issued. Looking back 25 years, we recall a time when many attorneys, particularly in upstate New York, did their own title searching and certified the property's title for their clients. Then, the use of title insurance was quite unusual. Today, nearly every transaction involves the use of title insurance. As the use of title insurance has become the norm, the respective responsibilities of the lawyer, examiner and insurer have become more pronounced even while the potential for duplication of effort has increased. Thus, the same time and effort may be expended from quite different perspectives to satisfy manifestly distinct responsibilities and professional obligations.

20. Further, fee structures for residential closings have changed. In years past, it was fairly common to see residential closings billed as a percentage of the purchase price or on the basis of the time expended. Today, lawyers are far more likely to bill as a flat fee, and it would seem

difficult if not impossible to identify which part of a flat legal fee should be attributed to arguably duplicative work.

21. With these changes in mind, we consider Rule 1.5(a), which sets forth the ethical standard governing the size of legal fees:

"A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
"(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
"(3) the fee customarily charged in the locality for similar legal services;
"(4) the amount involved and the results obtained;
"(5) the time limitations imposed by the client or by circumstances;
"(6) the nature and length of the professional relationship with the client;
"(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
"(8) whether the fee is fixed or contingent."

22. We understand the facts of the inquiry to be that the lawyer performs services for both the transaction party and the title abstract company, and that the payment from the title abstract company is for services provided to it.[6] The Rule 1.5(a) standard is to be applied to the legal fee from the transaction party, and that legal fee does not include the amounts earned by the lawyer for services to the title abstract company.[7]

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[6] Our prior opinions have assumed as much. One stated that there would be a clear violation of law (and ethics) when an attorney-agent "performs no significant additional services in return for his portion of the premium," and accordingly analyzed 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." N.Y. State 576, *supra.*

[7] N.Y. State 576 said that in the context of overlapping work for the transaction party and the title company, the lawyer may not receive amounts "from the transaction" that would "in the aggregate" constitute an excessive fee. In other words, the lawyer would add the amounts received from the transaction party and the title abstract company in determining whether the total fees were excessive. *See also* N.Y. State 667 (1994). However, the differing responsibilities and professional obligations undertaken lead us to analyze the reasonableness of the fee from the transaction party on its own, rather than as aggregated with the payment from the title abstract company. Of course if the lawyer serving as title insurance agent also provides legal services to the company, then the fee for those services would also be subject to Rule 1.5(a). *See* N.Y. State 576 (reviewing various bundles of services that lawyers sometimes provide to title companies). And if the lawyer's "nonlegal services" to the company were "not distinct" from the legal services, then the nonlegal services would be subject to Rule 5.7(a)(1) and the Rules generally, and the lawyer's total compensation from the company would be subject to Rule 1.5(a). *See* N.Y. State 958 ¶14 (2013).

23. As noted, one of our conclusions in N.Y. State 576 was that the fee to the transaction party is excessive to the extent that the services for which the title abstract company is paying are duplicative of services the lawyer would render the transaction party client in any event. We now modify that conclusion. We do not see anything in Rule 1.5 to suggest that the receipt of a payment from the title abstract company, and some overlap in the work, *necessarily* renders excessive the fee charged to the transaction party.

24. Although there may be some overlap, we have already noted that the work for the two parties may be done to satisfy distinct responsibilities and professional obligations. Moreover, the listed factors listed in Rule 1.5(a) do not seem to rule out the legitimate possibility of payment from both parties despite overlapping services. Indeed, in certain circumstances, some of them could support that possibility. For example, if the fee to the transaction party were small when judged by the time spent on the matter by the attorney, and when judged by the customary charge in the locality, then that fee may well not be excessive even though the attorney also receives a payment from the title abstract company. *See* Rule 1.5(a)(1), (a)(3).

25. To be sure, overlap in the work for two parties can be relevant. The reasonableness of a fee depends in part on the time and labor required. When services to be provided to two parties require some of the same work, the time and labor required to provide services to one or both may be reduced. But that factor would be taken into account on a case-by-case basis under Rule 1.5(a), rather than standing as an irrebuttable presumption of excessiveness.

26. In one circumstance there will be a brighter line. When the lawyer and client have agreed that legal work will be charged on an hourly basis, then the lawyer may charge only for the hours actually expended, and charging for hours separately billed to another party is impermissible. *See* ABA 93-379. Even in the context of hourly rates, however, it may be permissible to receive payment from each despite some overlap in the work, as long as the same hours are not billed to two different parties.

27. Thus, when the proper standard is applied, it is not impermissible *per se* for the lawyer to be paid by the transaction party and the title abstract company for partially duplicative services. Unless a reasonable lawyer, having reviewed the degree of overlap, the billing arrangements, locally customary fees and other relevant facts, would be left with a definite and firm conviction that any legal fees to the transaction party are excessive, then those fees may be charged consistently with Rule 1.5(a).[8]

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[8] We leave for another day the question of the extent to which the lawyer must offer the client a credit for the amounts received from the title insurer. *See* N.Y. State 351 (1974) (identifying a requirement that when the attorney is paid by both parties, "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"). As noted above, in N.Y. State 576, we treated this requirement as an aspect of the lawyer's fiduciary obligation to obtain the best deal possible for the client. But the conclusion that the lawyer is taking on additional responsibility in performing services for the title company suggests that that lawyer might be entitled to keep some or all of what he or she earns from the title insurer, because it compensates the lawyer for that undertaking. Our prior opinions state that the lawyer must obtain informed consent in all

CONCLUSION

28. A lawyer who represents a party in a real estate transaction and also receives payment to act as an agent of the title abstract company in that transaction may not receive an excessive legal fee from the transaction party. Overlap between work performed for the transaction party and the company does not automatically render that fee excessive, and the lawyer should apply the standards of Rule 1.5(a) to determine the fee's reasonableness. Depending on all the circumstances, the lawyer's fee may be reasonable even if there is some duplication in the services provided.

29. A lawyer receiving payment for acting as agent to a title abstract company should consider any relevant legal restrictions before determining that it is permissible to make corresponding reductions in legal fees to the party to the transaction who is represented by that lawyer, with or without disclosures such as those reflected in the "Model Title Insurance Form." The Committee does not opine as to such legal questions, but their resolution may inform the lawyer's ethical obligations.

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such cases, and Rule 1.8(f) requires a lawyer to obtain the client's informed consent in order to "accept ... anything of value related to the lawyer's representation of the client." We do not today address the precise scope of that consent or what must be disclosed to obtain it. The current opinion is about whether, upon whatever informed consent is needed, it can ever be ethically permissible for the lawyer to retain payment from a title insurance company for overlapping services.