

You have presented a hypothetical situation in which real estate settlement attorneys rely on title insurance agencies to search the title of the subject property. You state that real estate agents and buyers are routinely unaware that the title examination is not being provided by the attorney. You state also that this practice has resulted in an additional, undisclosed fee which is charged by the title agency.

You further indicate that many title insurance agencies provide a "run up" and recording service for an additional fee. You advise that, apparently, most buyers are never made aware that the search fee and/or recording fee is being charged to them as part of their title insurance cost. You state that the majority of attorneys using the services of title agencies simply lump all of the costs into one blanket fee, despite the fact that the HUD closing statement provides for a disclosure that the cost includes other services.

Finally, you indicate that even those attorneys who disclose that the title insurance agency provided the title examination for a fee only notify the client of that fact at the time of closing.

You have asked the Committee to opine, under the facts of the inquiry, (1) whether and when the closing attorney relying on a title company search must advise the buyer that the attorney is not certifying, title; and (2) whether and when the attorney must disclose to buyer that the fee paid to the title insurance agency includes not only the title insurance premium but also search and recordation fees. We shall assume that the closing attorney represents the buyer in the transaction.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; DR:2-105(A) which provides that a lawyer's fee shall be reasonable and adequately explained to the client; DR:6-101(D) which states that a lawyer shall inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter; and DR:9-102(B)(3) which requires that a lawyer shall maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render appropriate accounts to his client regarding them.

As to whether and when the closing attorney must advise the buyer that the attorney is not certifying title, the Committee opines that disclosure prior to closing is mandated under DR:6-101(D) and DR:1-102(A)(4).

As to whether and when the attorney must disclose to buyer that the fee paid to the title insurance agency includes search and recordation fees, the Committee directs your attention to LE Op. 1220 in which the Committee opined that the masking of legal fees in the title insurance premium was improper and violative of DR:1-102(A)(4), DR:2-105(A), and DR:9-102(B)(3). Thus, in the facts you present, the Committee therefore believes that the failure to disclose the search and recordation fees in the title insurance premium would be violative of the above-mentioned disciplinary rules. The Committee believes that such actions would be deceptive and misleading practices that would not

accurately reflect the charges made to the client. Thus, the Committee opines that the attorney must disclose to the buyer, prior to closing, the inclusion of the search and recordation fees in the title insurance premium.

Committee Opinion
February 9, 1993