

LEGAL ETHICS OPINION 1329

AIDING A NON-LAWYER IN THE
UNAUTHORIZED PRACTICE OF LAW –
REAL ESTATE/TITLE SERVICES:
ATTORNEY RETAINED BY
CLIENT/TITLE AGENCY TO ASSIST IT
IN PREPARATION OF DOCUMENTS
INCIDENT TO CONDUCTING A REAL
ESTATE CLOSING.

You have asked the Committee to consider the propriety of an attorney being retained by a client/title agency to assist it in preparing legal documents incident to the title agency conducting a real estate closing. You have presented in the inquiry the following factual situations which describe the proposed activities of the lawyer engaged in the relationship with the client/title agency.

In situations where the title agency represents the buyer, the attorney will review the preliminary title report, will advise the buyer as to possible tenancies, and will order and review the completed deeds submitted by the seller's attorney. Prior to closing, the attorney will review the note and deed of trust prepared for buyer and will assist the title agency with the preparation of these documents.

In situations where the title agency represents the seller, the attorney will review the request for a deed and will supervise the preparation of the deeds, assumedly by the title agency, as well as other documents such as the 1099-B and mechanics' lien waivers. You have further indicated that no separate fee will be charged by either the law firm or the agency and, instead, the agency will charge the buyer or seller customer a flat rate for the combined closing services provided by the agency and attorney which would be listed as a "settlement fee" or "document preparation fee" on the settlement statement.

You wish to know whether any of the activities contemplated in the proposed relationship between attorney and client/title agency constitute a violation of the Code of Professional Responsibility. You have also inquired if a nonlawyer or lay entity may dictate the amount of fees to be charged another nonlawyer for services provided by an attorney.

In the Committee's view, the obvious controlling Disciplinary Rules relative to your inquiry are DR:3-101(A) and DR:3-102(A)(3). The rules provide, respectively, that a lawyer shall not aid a nonlawyer in the unauthorized practice of law, nor shall a lawyer or law firm share legal fees with a nonlawyer except that nonlawyer employees may be included in a compensation or retirement plan, which is based in whole or in part on a profit-sharing arrangement, if it does not circumvent another Disciplinary Rule. In addition, the Committee believes that both DR:2-103(D) regarding compensation to others for securing a lawyer's employment by a client and DR:5-101(A) regarding a lawyer's own financial, business, property, or personal interests in conflict with the interests of his client are pertinent to the issues you have raised.

The Committee previously opined in LE Op. 1003 that an arrangement between a financial advisor and an attorney may constitute the unauthorized practice of law even where there is no sharing of fees between attorney and nonlawyer, but where the attorney reviews forms prepared by the financial advisor to ascertain the client's debt position, recommend a course of action, file the forms and appear at the court proceedings. The Committee cautioned that unless the forms were being filled out by the nonlawyer personnel under the supervision of the lawyer, a Canon 3 problem could arise. (See DR:3-101(A), DR:3-104(A)) Therefore, where the nonlawyer is not an employee under the direct supervision of a lawyer, there is a greater likelihood for the attorney who is assisting the non-employee layperson to be operating in violation of Canon 3. (See also LE Op. 513 and LE Op. 1044)

The determination of whether the client/title agency's engaging in the instant proposed activities constitutes the unauthorized practice of law is beyond the purview of this Committee's authority. (But see UPL Ops. 57, 76, 86, 91) The Committee has previously opined that it is improper for an attorney to render legal advice to others at the request or direction of a corporation, not a professional corporation of attorneys, when the corporation is comprised of individuals not authorized to practice law and when charges for legal services will actually be made by the corporation, assuming that the corporation is deemed to be conducting the unauthorized practice of law. (See LE Op. 503. See also LE Op. 627)

In addition, the Committee directs your attention to LE Op. 539 in which the Committee opined that it was not per se unethical for a real estate attorney to participate in settlements where a real estate firm, operating a "settlement service," has recommended to its customers that a specific attorney handle the closing. However, the Opinion cautions that communications pertaining to the lawyer's services and legal fees must be truthful; the customer must have complete freedom in choosing an attorney for the legal services; the attorney must not receive any direct or indirect reward or other premium from the real estate firm as a result of his relationship with the firm; and full disclosure must be made as to all of the understandings and relationships between the two professional organizations which might influence the attorney's independent judgment. (DR:2-103(A)(1), (2), DR:2-103(D) and DR:5-101(A))

The attorney's relationship with client/title agency as described in your inquiry does not address issues concerning recommendations or communications made on behalf of the attorney to prospective clients, or the disclosure of the personal interests of the lawyer which may affect his independent judgment on behalf of his client. The Committee strongly believes that the instant relationship may be violative of DR:2-103(D) if title agency's customers' files are systematically forwarded to the attorney and the customers are not given an opportunity to freely choose an attorney to prepare the documents for closing. Furthermore, since the title agency is not a lawyer referral service or issuer of qualified legal services plans to which a lawyer may pay the reasonable dues charged by each, the lawyer may not give anything of value or as a reward to the

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title agency for recommending or securing his employment by a client. (See also LE Op. 1035) Finally, the Committee cautions that failure to receive consent from the buyer/seller after adequately disclosing the relationship and financial, business or personal interests between the lawyer and title agency prior to accepting the representation is violative of DR:5-101(A). Ethical Consideration 5-1 [EC:5-1] also provides:

The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

With regard to your indication that the client/title agency will charge a "settlement fee" or "document preparation fee" to its customers, which fee would be inclusive of legal services, the Committee believes that such an arrangement is improper because of the obvious sharing of legal fees between a lawyer and non-lawyer which is proscribed by DR:3-102(A). If it is the intention of the attorney and client/title agency to mask attorney's legal fees under the guise of a "settlement fee" or "document preparation fee," the Committee directs your attention to its prior LE Op. 1220 which found that such conduct is deceptive and misleading and may rise to the level of misconduct. (See DR:1-102(A)(4), DR:2-105(A), DR:9-103(B)(3). See also LE Op. 503)

Therefore, the relationship as you have described it, between a lawyer and client/lay-entity may result in an ethical violation of Canon 3 by the attorney because it may result in the lawyer's aiding a non-lawyer in the unauthorized practice of law, if the activities of the lay-title agency are deemed to be the unauthorized practice of law. The Committee is of the opinion that since the arrangement you describe would be violative of DR:3-102(A), DR:2-103(D) and DR:5-101(A), the relationship as described in the inquiry would be improper.

Finally, the Committee directs your attention to LE Op. 911 which has been revised based upon an amendment to the Internal Revenue Code. The amendment to the section and thus the revised Opinion makes unlawful any separate charge made to a customer by a real estate reporting person (which definition includes any attorney to title company) for complying with the requirement to file a Form 1099-B return and statement relative to a transaction.

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