Committee Opinion
November 20, 1992

LEGAL ETHICS OPINION 1491

AIDING UNAUTHORIZED PRACTICE OF LAW: EMPLOYMENT OF SUSPENDED ATTORNEY BY REAL ESTATE SETTLEMENT SERVICE OWNED BY ATTORNEYS FROM WHOM SUSPENDED ATTORNEY SUBLET OFFICE SPACE.

You have presented a hypothetical situation in which Law Firm A is in the process of establishing a title company to perform real estate closings. The company will be owned directly, or indirectly through an entity owned directly, solely by shareholders and associates in Law Firm A. The title company plans to have a separate staff from Law Firm A, which will, when requested, draft title documents for those who are using the title company and prepare legal opinions. The relationship between Law Firm A and the title company will be fully disclosed to customers, who will be allowed full freedom to choose other lawyers to perform such services.

Law Firm A has entered into discussions with Lawyer B concerning hiring Lawyer B to perform non-legal functions for the title company. Lawyer B is currently the subject of a disciplinary investigation by the Virginia State Bar. You indicate that, should any of the charges be sustained, it is possible that Lawyer B's license to practice law will be suspended or revoked. The events which gave rise to the disciplinary investigation took place approximately one year prior to the present facts.

You indicate that it is proposed that Lawyer B would perform routine day-to-day functions for the title company, including communications with sellers, buyers, and lenders, and would solicit business for the title company. He would also conduct actual closings, but would not produce title documents nor opine upon their validity or effect. Lawyer B would be subject to supervision by the president of the title company, also a nonlawyer. Lawyer B would not provide legal advice to those making use of the title company.

Lawyer B would be compensated solely from the revenues generated by the title company and there would be no payments to Lawyer B from Law Firm A or its shareholders and associates, nor any guarantees of salary or income. You advise that the shareholders of Law Firm A would make capital contributions to the title company sufficient to enable it to begin normal operations.

You indicate that Lawyer B currently owns a title company which would be dissolved at or near the time of [any] suspension or disbarment. No shareholder or associate of Law Firm A has any interest in Lawyer B's title company, nor has Law Firm A performed any legal work in connection with any closing conducted by Lawyer B's title company.

Lawyer B has sublet space in a suite from Law Firm A for the past year and one-half. The lease, which has been subject to review and approval by the building owner pursuant to a clause in the law firm's lease, calls for constant payments of rent without regard to

receipts by Lawyer B. You indicate that Law Firm A has also sublet space in its suite to three other lawyers during this period.

You advise that Lawyer B has practiced as a sole practitioner during the past year and one-half. His letterhead contains no indication of any affiliations with Law Firm A or any other lawyers; he has maintained his own staff, who are paid by him and not subject to any control or supervision by Law Firm A; there are signs outside the office suite for Law Firm A, Lawyer B, and Lawyer B's title company; and Lawyer B retains his own telephone number, which is not the same or related to that of Law Firm A.

You further advise that Lawyer B has maintained a completely separate financial structure from Law Firm A. He has his own checking and escrow accounts, over which Law Firm A has no control and to which Law Firm A has no access. Similarly, Law Firm A's financial structure is completely separate from Lawyer B. Lawyer B and Law Firm A have not engaged in any joint business ventures or shared fees.

During the past four years (the time since the founding of Law Firm A), Lawyer B has referred approximately five clients to Law Firm A for litigation services. These individuals have been billed by Law Firm A at its customary rates. None of those fees have been shared with Lawyer B, nor has any payment been made to Lawyer B on account of the referrals.

During the same period of time, Law Firm A has referred approximately five of its clients to Lawyer B or his title company for real estate services. These individuals have been billed by Lawyer B or his title company at their customary rates. None of the payments have been shared with Law Firm A, nor has any payment been made to Law Firm A on account of the Legal referrals. During this period, Law Firm A has also performed a small amount of real estate work and closings but has primarily maintained a litigation practice.

Finally, you indicate that Law Firm A has also represented Lawyer B on several matters over the past four years but that there is no other relationship between Law Firm A and Lawyer B and that no other relationship has existed in the past.

You have raised several questions related to the propriety of Law Firm A's potential employment of Lawyer B.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:3-101(B) which mandates that a lawyer, law firm, or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the acts which resulted in suspension or revocations; and DR:3-101(C) which provides that a lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk or legal assistant when that lawyer's license

is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

The Committee responds to your inquiries relative to the facts you have presented as follows:

1. As to whether Law Firm A is "associated" with Lawyer B under DR:3-101(B), the Committee is of the opinion that the sporadic referrals, together with the sublease arrangement, do not represent an "association". Throughout the Code of Professional Responsibility, the term "associate" is used either in the context of "associates" in a law office or as to lawyers from two different firms "associating" and dividing fees on a case. See, e.g., EC:2-14, EC:2-24. Since the relationship between Law Firm A and Lawyer B in the facts you present is neither of the above, the Committee opines that the firm and the lawyer are not deemed " associated" under DR:3-101(B).

2. Since the Committee finds that Law Firm A and Lawyer B are not now " associated" , the Committee opines that the firm would not be in violation of DR:3-101(B) if the proposed title company hires Lawyer B after he has been disbarred or suspended.

3. You indicate that Lawyer B would be paid for the provision of non-legal services solely from revenues generated by the title company and not by Law Firm A. Thus, the Committee opines that Law Firm A and Lawyer B would not be "associated" under DR:3-101(B) if the proposed title company were to hire Lawyer B before his disbarment or suspension. The Committee also opines that the variation you present on your inquiry, i.e., voluntary resignation by Lawyer B while disciplinary proceedings were continuing and before being hired by the proposed title company, is immaterial to the conclusion reached.

4. Since the Committee finds that Law Firm A and Lawyer B would not be "associated" under the scenario described in inquiry #3, the Committee opines that the firm would not be in violation of DR:3-101(B) at the time of, or subsequent to, Lawyer B's disbarment or suspension if the proposed title company were to hire Lawyer B before such discipline.

5. You have asked the Committee to assume that Lawyer B has been suspended or disbarred. Under those circumstances, the Committee opines that, since there was no association between Law Firm A and Lawyer B prior to Lawyer B's suspension or disbarment, there would be no impropriety under DR:3-101(C) if Law Firm A performed legal work for any former client of Lawyer B while Lawyer B is an employee of the proposed title company.

6. Again, it is assumed that Lawyer B has been disbarred or suspended. Additionally, the Committee points out that, since the proposed title company is a lay

entity not engaged in the practice of law, no attorney-client relationships arise between the proposed title company and those for whom it performs real estate closings. Thus, the Committee believes that Law Firm A would not be in violation of DR:3-101(C) if the proposed title company performed closings for any former client of Lawyer B while Lawyer B was serving in the capacity of an employee of the title company.

7. The Committee opines that parties to closings conducted by Lawyer B's title company, i.e., buyers, sellers, and lenders, would not be considered "clients" of Lawyer B.

Not addressed by your request, but of concern to the Committee, is the requirement of DR:3-104(E) directing Lawyer B to disclose his nonlawyer status in communicating with parties to closings.