

Committee Opinion
December 8, 1994
Revised February 15, 1995

LEGAL ETHICS OPINION 1564

ATTORNEY RELATIONSHIPS WITH
TITLE INSURANCE AGENCIES
(COMPENDIUM OPINION).

Background: The Committee is cognizant that a number of Virginia attorneys are associated with or have a relationship with a title insurance agency in some capacity. Since 1972 the Committee has issued a number of Opinions relative to that association or relationship. Upon its own initiative, the Committee has reviewed those Opinions to determine whether they should remain in effect, be overruled, or clarified.

This Opinion sets forth the ethical requirements in situations where an attorney is associated with or has a relationship with the title insurance agency and receives compensation from the title insurance agency, but also wishes to represent a party to a real estate transaction where title insurance or related products or services are to be provided by that title insurance agency. This is a compendium Opinion in the sense that it incorporates in one opinion those existing Legal Ethics Opinions which deal with the subject described above. To the extent that prior Opinions hold to the contrary or are inconsistent with this Opinion, they are hereby overruled.

Inquiry: The issues which the Committee addresses in this Opinion relate to an attorney's association with a title insurance agency, company, or other entity [herein referred to collectively as "agency"] in an ownership or other financial or business relationship. Specifically, those issues include: (1) the propriety of an attorney having an ownership or other financial interest in a title insurance agency; (2) allowable methods of compensation paid to an attorney having an ownership or other financial or business relationship in a title insurance agency; (3) attorney representation of parties to a real estate transaction involving a title insurance agency in which the attorney has an ownership or other financial or business interest relationship; and (4) disclosure requirements an attorney must make and consent an attorney must obtain prior to using a title insurance agency in which the lawyer has such an interest.

Applicable Disciplinary Rules: The appropriate and controlling disciplinary rules relevant to the questions raised are:

DR:5-101(A) which prohibits an attorney from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own *financial, business, property, or personal interests*, except with the consent of his client after full and adequate disclosure under the circumstances [emphasis added];

DR:5-104(A) which prohibits an attorney from entering into a business transaction with a client if they have differing interests therein and if the client expects the attorney to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure under the

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circumstances and provided that the transaction was not unconscionable, unfair or inequitable when made;

DR:5-105(A, B and C) which preclude an attorney from accepting or continuing employment by multiple clients if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except where it is obvious that the attorney can adequately represent the interest of each and if each consents to the representation after full disclosure; and

DR:3-101(A) which prohibits an attorney from aiding a non-lawyer in the unauthorized practice of law.

Relevant Statutory Provisions:

Virginia Code § 38.2-4601, as amended

Virginia Code § 38.2-4601.1, as amended

Virginia Code § 38.2-4614, as amended

12 U.S.C. §§ 2601-2617, Real Estate Settlement Procedures Act

Prior Legal Ethics Opinions: The following Opinions have dealt with the issue of attorney relationships with title insurance agencies: LE Op. 187, LE Op. 392, LE Op. 545, LE Op. 591, LE Op. 603, LE Op. 690, LE Op. 712, LE Op. 754, LE Op. 831, LE Op. 886, LE Op. 939, LE Op. 1072, LE Op. 1097, LE Op. 1152, LE Op. 1170, LE Op. 1198, LE Op. 1311, LE Op. 1318, LE Op. 1345, LE Op. 1402, LE Op. 1405, LE Op. 1469, LE Op. 1515.

Opinion: 1. Definitions. For purposes of this Opinion, the following terms shall have the indicated meanings:

Associated Attorney shall mean a partner, associate, attorney who is of counsel or any other attorney who is in any way involved in a profit or overhead sharing arrangement with another attorney in the practice of law.

Attorney Agency shall mean a title insurance agency or title insurance company, both as defined in the Code of Virginia, which is directly or indirectly owned by an attorney or an Associated Attorney, or a member of the family of the attorney or the Associated Attorney, or in which the attorney has any other financial, property, business or personal interest, from which the attorney or the Associated Attorney proposes to obtain title insurance or related products or services for his client or a lender of his client.

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Managerial Role shall mean the functioning as an officer of a corporation, member of a limited liability company, partner of a partnership or in another supervisory position on behalf of the Attorney Agency.

Title Insurance Agent shall be an individual licensed by the Commonwealth of Virginia as such and shall have the functions as set forth in the Code of Virginia.

2. Attorney Ownership of Title Insurance Agencies. While consistently opining that an attorney's activities which simultaneously constitute the practice of law and related business endeavors are not *per se* improper, the Committee has cautioned that such activities must comport with the applicable requirements of DR:5-101(A) when clients of the attorney's law practice are also users of the service offered through the business activity. *See, e.g.*, LE Op. 1198 (ownership of court reporting service), LE Op. 1311 (sale of insurance products), LE Op. 1318 (offering management consulting services), LE Op. 1345 (wife's ownership of court reporting service). Thus, the Committee is of the Opinion that it is not improper for an attorney to (i) acquire an ownership or other financial interest in an Attorney Agency or (ii) have a Managerial Role in the Attorney Agency, provided that the attorney complies with the requirements set forth in this opinion.

When an attorney has an ownership or other financial interest in an Attorney Agency, other title agency or any other business other than his or her law practice, and conducts a law practice on the same premises, the Committee believes that it is incumbent upon the attorney to maintain separate signage and telephone listings, separate and secure client files, and separated office space. *See* LE Op. 754. Furthermore, when the two entities employ the same individuals, great caution should be taken to avoid any inadvertent disclosure of client confidences and secrets. *See* DR:3-104 and DR:4-101.

Although the Committee is not authorized to interpret statutes, attention is also directed to Va. Code § 38.2-4614 which sets forth a statutory prohibition against payment or receipt of title insurance kickbacks, rebates, commissions, and other payments, but provides also that “no person shall be in violation of this section solely by reason of ownership in a bona fide title agency”; and also 12 U.S.C. §§ 2601-2617, Real Estate Settlement Procedures Act which, among other things, includes prohibitions against kickbacks and unearned fees. The Committee cautions that an attorney must comply with the requirements of all applicable state and federal laws which, in some respects, may be more stringent than those articulated in this Opinion.

The Committee also cautions that title insurance agencies, as lay entities, are without authority to practice law, and their activities are, of course, subject to the constraints of the Unauthorized Practice Rules generally and to Unauthorized Practice Rule 6 regarding Real Estate Practice specifically. Part Six: Section I: UPR-6, Rules of Virginia Supreme Court. *See also* LE Op. 1469.

3. Compensation of Attorney by Title Insurance Agency. The Committee has previously opined that it would be *per se* improper for an attorney to be compensated by

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a title insurance agency in which the attorney has an ownership or other financial interest in a manner which is directly related to the volume of business or the number of referrals the attorney has generated for the agency or is based on premiums paid for specific policies. *See* LE Op. 545, LE Op. 591. Similarly, the Committee is of the belief that the attorney may not receive a fixed salary from the agency unless it is substantially related to the services rendered or work performed for the agency. *See* LE Op. 591; *see also* LE Op. 1402 (vacating LE Op. 1138; thus concluding that no operative LEO permits an attorney who is a shareholder in a title insurance company to receive consulting fees tied to the number of policies obtained for his clients). Thus, the Committee finds that an attorney may receive reasonable compensation from an Attorney Agency or other title insurance agency in the form of: (i) periodic dividends on stock or similar distributions as a result of ownership of the Attorney Agency; (ii) legitimate fees based upon the attorney's having rendered services for the Attorney Agency or other agency; or (iii) reimbursement of reasonable expenses actually incurred on behalf of the Attorney Agency or other agency. *See* LE Op. 545, LE Op. 591. *See also* Va. Code § 38.2-4614, *supra*.

Indirect remuneration to the attorney through the receipt of interest earned on funds deposited in the agency's escrow account has also been deemed improper and violative of DR:1-102(A)(2) if the attorney has specifically steered a client to the separate lay agency owned by the attorney for the purpose of circumventing the absolute prohibition against an attorney earning interest on a client's funds. *See* LE Op. 392, LE Op. 831, LE Op. 1170.

Finally, the Committee has also found that it would be improper for the attorney to accept indirect remuneration in the form of payments by the title insurance company for law firm employees' salaries, and goods, services, and advertisements rendered to the law firm. *See* LE Op. 1405.

4. Representation of Parties to a Real Estate Transaction Involving the Attorney Agency. The Committee is of the Opinion that the following activities in and of themselves, when engaged in by an attorney or any Associated Attorney, do not *per se* create a conflict under DR:5-105(A) which would prohibit an attorney from representing a party to a real estate transaction where title insurance or related products or services are obtained from the Attorney Agency for the client of the attorney or lender of the client.

- (i) providing legal advice or acting as general counsel to the Attorney Agency;
- (ii) representing the Attorney Agency before any tribunal, administrative agency or court;
- (iii) holding oneself out to the public as being an attorney for the Attorney Agency (i.e. the representation of any attorney status on any business card, stationery, advertisement, brochure or announcement of the Attorney Agency);

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- (iv) serving as a director of the Attorney Agency;
- (v) serving in a Managerial Role in the Attorney Agency; or
- (vi) serving as a registered agent of the Attorney Agency.

The Committee cautions, however, that during the course of representing a party to a real estate transaction where title insurance or related products or services are obtained from the Attorney Agency for the client of the attorney or the lender of the client, the activities described in (i) through (vi) above may create a conflict under DR:5-105 in which event the attorney may continue to represent the party only if it is obvious that adequate representation can be provided that party and the Attorney Agency, and both consent to the representation. DR:5-105(B) and (C).

However, the Committee is further of the Opinion that, under DR:5-105(A), it is improper for an attorney to represent a party to a real estate transaction if title insurance or related products or services are to be provided by the Attorney Agency to the client of the attorney or the lender of the client and (i) the attorney or any Associated Attorney holds a license associated with the Attorney Agency as a Title Insurance Agent and acts as a Title Insurance Agent in the transaction or (ii) the attorney or Associated Attorney, if not holding a license with the Attorney Agency as a Title Insurance Agent, directly or indirectly performs the function of a Title Insurance Agent for the Attorney Agency in the transaction. The Committee further opines that the impropriety is not curable with disclosure to and consent of the client since it is not obvious that the attorney can adequately represent the interest of each. DR:5-105(A) and (C).

5. Full Disclosure and Client Consent. The Committee is of the Opinion, in circumstances where it would not be improper for the attorney to represent a party to a real estate transaction wherein the Attorney Agency provides title insurance or related products or services, that, prior to using such Attorney Agency, the attorney is required to make a full and adequate disclosure to the client. *See* DR:5-101(A) and LE Op. 886, LE Op. 939, LE Op. 1152. Furthermore, since the transaction will create a business relationship between the attorney and client, DR:5-104(A) requires that the transaction must not be unconscionable, unfair or inequitable when made. *See* LE Op. 603, LE Op. 712.

The Committee has consistently quantified adequate disclosure as that which will enable the client to make an informed decision. Furthermore, the Committee is of the view that all doubts regarding the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney, since it is the attorney who seeks to profit in advising his client to utilize the services of a business in which the attorney has a pecuniary interest. *See* LE Op. 187. In the circumstances under consideration, the Committee opines that a sufficient disclosure would include title insurance costs, including the title insurance premium, binder fees, title examination fees, closing fees, and any other charges which the Attorney Agency would make and a suggestion of the

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availability of securing title insurance and related services from alternative title insurance agencies. *See* LE Op. 1515.

The Committee is of the further Opinion that it is advisable that the disclosure be made in writing and accepted by the client in writing. *Id.*

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Editor's Note. – The opinion set out above is the revision of LE Op. No. 1564.

Accounting to the Committee, the revision is intended to clarify the conclusions of the original opinion. The three changes made can be found in the definition of “Associated Attorney” in section 1; the last sentence of the first paragraph of section 2; and the last paragraph of section 4.