Committee Opinion
December 15, 1995

LEGAL ETHICS OPINION 1647

ATTORNEY-OWNED TITLE INSURANCE AGENCY WITH ISSUANCE OF STOCK BASED ON SIZE OF ATTORNEY'S REAL ESTATE PRACTICE.

You have presented a hypothetical situation in which several attorneys form a stock corporation to serve as a title insurance agency, with stock being issued to each attorney based upon the size of their real estate law practice. Those attorneys with larger practices have the opportunity to buy more stock than attorneys with smaller practices. The current stockholders desire to sell shares to new stockholders and only issue shares in amounts based upon the new stockholders' projected title insurance premiums. In one year, all stockholders will buy and sell among themselves the outstanding stock based upon their performance for the past year. This will result in a distribution of future dividends based upon past premiums paid by clients of each stockholder.

You have asked the Committee to opine whether this allocation of stock for future dividends based on the past premiums paid is the type of financial arrangement which the Committee concluded was proper in prior legal ethics opinions numbered LE Op. 1564, LE Op. 545 and LE Op. 591.

The controlling disciplinary rules are DR:1-102(A)(3) and DR:5-101(A). DR:1-102(A)(3) states that a lawyer shall not commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law. DR:5-101(A) 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.

In LE Op. 545 and LE Op. 591 the Committee opined that it is not improper for an attorney to participate in a title agency as a shareholder and thereby receive agency profits as a result of timely distributions, as opposed to direct commissions, salaries or payments with respect to specific policies at closings. However, written disclosure of the relationship between the attorneys and the title agency must be made to the real estate clients for whom the title agency is performing services. In both opinions the Committee declined to offer an opinion as to the application of the "kickback" statute, then Va. Code § 38.1-733.1 [now § 38.2-4614], to such financial interests. The Committee cited in both opinions DR:5-101 (A) as the controlling rule.

In LE Op. 1564, the Committee issued a compendium opinion concerning attorney relationships with title insurance companies and addressed, in the abstract, a number of ethical issues arising out of an attorney having an ownership interest in a title insurance agency. The Committee did not consider any specific facts or hypothetical situation in LE Op. 1564. In LE Op. 1564, the Committee reaffirmed its conclusions reached in prior LE Op. 545 and LE Op. 591, 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.

In addressing this compensation issue, the Committee is mindful of the prohibitions against receiving title insurance kickbacks, rebates, commissions and other payments set forth under § 38.2-4614(A) of the Code of Virginia of 1950, as amended, which states:

> No person selling real property, or performing services as a real estate agent, attorney, or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property that
> is a part of such sale or settlement; and no title insurance company, title insurance agency or agent shall make any such payment. This section shall not prevent any federally insured lenders, or holding companies to which they belong, or subsidiaries of such lenders or holding companies from being licensed by the Commission as title insurance agents or agencies and receiving commissions from the sale of title insurance policies in their capacities as title insurance agents or agencies.
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> However, § (C) of this statute states:
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> No person shall be in violation of this section solely by reason of ownership in a title insurance company, title insurance agency or agent as defined in this chapter.

The Committee stated in LE Op. 1564 that it would be per se improper for an attorney to be compensated by a title 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 number of referrals. Statutory law prohibits an attorney, in his role as a supporting entity to the title insurance industry, from receiving or paying kickbacks, rebates, commissions or other payments in connection with the issuance of title insurance for any real estate settlement or sale. See, Virginia Code § 38.2-4614(A). In addition, federal law (RESPA) has been interpreted to prohibit a "controlled business relationship" where payments made to a person who refers settlement service business to an agency is based upon the volume of referrals rather than a return on ownership interest.

The manner of compensation proposed in your hypothetical is a variation of what the Committee contemplated in LE Op. 1564. Whether your proposed dividend distribution is legal under state or federal law is an issue beyond the purview of this Committee. If your proposed dividend distribution is illegal under state or federal law, then it would be improper under DR:1-102(A)(3) for the attorneys in your hypothetical to adjust their stock ownership in the agency based upon the performance or volume of business referred by each attorney. However, assuming there is no underlying violation of Virginia

or federal law, this conduct would not otherwise be considered unethical in the eyes of the Committee.