

LEGAL ETHICS OPINION 187

CONDUCTING OF TITLE SEARCH AND  
OBTAINING OF TITLE INSURANCE  
FOR CLIENT THROUGH AGENCY OR  
COMPANY IN WHICH ATTORNEY HAS  
OWNERSHIP INTEREST OR FROM  
COMPANY FOR WHICH ATTORNEY IS  
AGENT.

*Subject:* Attorney conducting a title search on behalf of a client and obtaining title insurance for the client through an agency or company in which the attorney has an ownership interest, or from a title insurance company for which the attorney is a licensed agent.

*Inquiry.* May an attorney conduct a real estate title search for a client and procure for that client title insurance through an agency or company in which the attorney has an ownership interest?

May an attorney conduct a real estate title search for a client and procure for that client title insurance from a company for which the attorney is a licensed agent?

*Opinion:* Earlier legal ethics opinions have concluded that an attorney may place his clients' title insurance business with an agency or company in which the attorney had an ownership interest in limited circumstances only. LE Op. 174 (4/24/72) concluded that an attorney could not ethically serve as a compensated agent for a title insurance company and place his clients' real estate title insurance business with the company, even with full disclosure. This opinion was modified somewhat by LE Op. 174-A (1/25/74) which concluded:

(1) If an attorney examining title for a client has the authority to issue title insurance or policies over his own signature for the title insurance company and is paid a fee for each policy he issues, an unreconcilable conflict of interest exists which cannot be cured by disclosure and consent;

(2) An attorney who examines title for a client cannot ethically submit an application for title insurance to a title insurance company or title insurance agency which the attorney owns completely. Again disclosure and consent cannot resolve the fundamental conflict which exists between the lawyer's allegiance to his client and his own proprietary interests;

(3) An attorney who examines title for a client can ethically submit an application to a title insurance company or agency in which the attorney serves as a shareholder, director and/or officer, if

(a) the attorney's participation in the company or agency relates to the general management of the company or agency;

(b) the authority to determine whether to issue or decline to issue a policy and to determine what exceptions and exclusions to include in the policy rests with an individual who is not under the substantial control of the attorney examining title; and

(c) the attorney has made full disclosure of his participation in the company or agency to his client, and his client consents to the dual representation.

A renewed interest in the area of attorney's participation in title insurance agencies and companies has been expressed by many members of the Virginia State Bar, presumably spawned by recent litigation in the title insurance area and activities of the Bar's UPL Committee.<sup>1</sup> This causes the Legal Ethics Committee to review the earlier opinions of the Committee to determine if developments since the adoption of LE Op. 174-A in any way affect the conclusions expressed therein.

It is axiomatic that an attorney who participates in a business endeavor, the financial success of which depends upon the legal advice given his client, has a conflict of interest. The Code of Professional Responsibility, codified as Rules of the Supreme Court of Virginia, recognizes, however, that even where an attorney's personal interests may affect the advice given the client, the attorney may nevertheless undertake representation of the client if proper safeguards are taken.

Ethically and legally, an attorney cannot undertake representation of a client when the attorney has personal interests which are not compatible with those of the client, unless the attorney fully discloses those interests to his client and the client consents to the representation. As stated in *Byars v. Stone*, 186 Va. 518, 529, 42 S.E.2d 847, 852 (1947),

“An attorney occupies toward his client a high position of trust and confidence, and in his relations with his client it is his duty to exercise and maintain the utmost good faith, integrity, fairness and fidelity. This relationship precludes the attorney from having any personal interest antagonistic to those of his client or from obtaining any personal advantage out of the relationship, without the knowledge or consent of his client.”

This principle may also be found in the Rules of Court, Part 6: §II: DR:5-101(A) [216 Va. 941, 1101 (1976)], which states

“Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.”

The question of whether an attorney can ethically serve as a compensated agent for title insurance issued in connection with a real estate settlement conducted by the attorney is answered by § 38.1-733.1, Va. Code. This statute provides in part that

“A. No person . . . performing services as a real estate . . . attorney . . . , 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 which is a part of such sale or settlement.”

Since an attorney is clearly prohibited by statute from receiving any sort of remuneration for title insurance issued with regard to a real estate settlement handled by the attorney, it follows that receipt of such payment by the attorney is unethical. All attorneys are exhorted to avoid even minor violations of law.<sup>2</sup> Thus, the Committee would reaffirm its holding in LE Op. 174.

With regard to the second question addressed by this opinion, the Committee would reverse that part of LE Op. 174-A which prohibits an attorney from placing his clients' title insurance business with an agency or company owned solely by the attorney. The Committee believes that the crucial factor is not the degree of the attorney's ownership of the title insurance company or agency; rather, the crucial factor is the adequacy of the attorney's disclosure of his ownership interest in the title insurance company or agency to his client.

The attorney who participates in a title insurance company or agency naturally hopes that the company or agency will prosper, so that profits may ultimately be distributed to the attorney. Thus, it may be argued that the attorney's obligation to serve his client will be compromised if the attorney's title insurance company or agency is permitted to issue title insurance policies to the attorney's real estate clients. In LE Op. 174-A, this Committee accepted this argument and concluded that no amount of disclosure could overcome the conflict that existed between the client's interest and the attorney's interest. As a result, the Committee ruled that in those situations where an attorney solely owned the title insurance company or a agency, the attorney could not place his client's title insurance business with the company or agency.

This earlier conclusion was reached in the absence of an absolute prohibition in the Code of Professional Responsibility. Since DR:5-101(A) sets forth a qualified prohibition rather than an absolute one, the Committee now thinks that the attorney's conduct must be measured in light of the disclosure the attorney gives his client. DR:5-101(A) does not absolutely bar an attorney from undertaking employment when the attorney has a personal or financial interest in the subject matter of the representation. The attorney cannot undertake the representation unless the client consents to the employment of the attorney, after the attorney explains fully the attorney's interests in the representation. Absent an absolute prohibition against such conduct by the Code of Professional Responsibility, the Committee does not believe it can bar through an ethics opinion that which appears to be permitted by DR:5-101(A) upon proper disclosure. In the Committee's opinion, if the attorney's disclosure is such that his client is able to make an informed decision, then the disclosure is adequate. The Committee is of the opinion that all doubts regarding the sufficiency of the disclosure must be resolved in favor of the

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client, and against the attorney, since it is the attorney who seeks to profit from the advice given his client.

This conclusion presumes that the attorney's participation in the title insurance company or agency is not prohibited by § 38.1-733.1, Va. Code, *supra*. Subsection C of that statute provides that

“No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies or binders and endorsements.”

To the extent it is inconsistent with this opinion, we would overrule LE Op. 174-A.

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FOOTNOTES

<sup>1</sup> *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), judgment vacated, 571 F.2d 205 (4th Cir.), cert. denied, 436 U.S. 941 (1978).

Unauthorized Practice of Law Opinions 6 & 7, *Virginia Bar News*, Vol. 29, No. 10 — April, 1981 pp. 35-42, inc.

<sup>2</sup> Rules of Court, Part 6, § 1-5 [216 Va. 941, 1065 (1976)] states

“A Lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.”