

WCBA Ethics Opinion On Multiple Representation
Of Title Company and A Party To Real Estate Transaction

Questions:

1. May a lawyer who represents a seller or buyer in a real estate transaction also serve as agent for a title insurance company that issues a policy in connection with that transaction?
2. May a lawyer have a contractual relationship with a title insurance company in connection with offering such insurance coverage or representation?

Opinion:

1. A lawyer may represent a buyer and act as agent for a title insurance company that issues a policy on that transaction, provided that there are additional services of a legal nature provided, that full written disclosure is given to the clients and informed consent in writing is obtained, the transaction results in the least cost to the buyer and the amount paid to the lawyer for acting as the title insurance agent is both reasonably related to the legal services rendered and is disclosed in writing to the buyer. The lawyer should avoid acting as agent for both a seller and a title insurance company.
2. A lawyer cannot have a financial interest in the title insurance or abstract company involved in the transaction, and cannot enter into or maintain a contractual relationship with a title insurance or abstract company for the purposes of offering to clients on a systematic and continuing basis title insurance coverage or representation.

Discussion: Rule 1.7 of the New York Rules of Professional Conduct (2009) (22 NYCRR §1200.7) prohibits the concurrent representation by a lawyer of differing interests unless:

- (1) the lawyer reasonably believes that that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim [in a litigation]; and
- (4) each affected client gives informed consent confirmed in writing.

Rule 1.7 of the Rules of Professional Conduct, made effective April 1, 2009, does not change or alter the substance of the ethical conflict rules under Disciplinary Rule 5 of the former Code of Professional Responsibility, except that the new rule mandates that conflict waivers and informed consents must be in writing.

A lawyer may not represent both a buyer and seller of real estate where there is a clear instance of conflicting interests. *See* New York State Bar Association (“NYSBA”) Ethics Opinion 38 (N.Y. State 38 (1966)) Although NYSBA Ethics Opinion 162 acknowledged that the former Code of Professional Responsibility did not make it *per se* improper for dual

representation of buyer and seller in a real estate contract, it repeated the warning in N.Y. State 38 (1966) that “dual representation should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage.” N.Y. State 162 (1970)

N.Y. State 351 (1974) permitted a lawyer to represent one party to a real estate transaction and also act as title examiner and agent for the title insurance company issuing a policy with respect to that transaction; “provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the lawyer makes full disclosure to both, and his client is given either credit for the amount of any fees paid to the lawyer by the title company or the client expressly consents to the retention of such fee.”

N.Y. State 351 (1974) was expanded in N.Y. State 576 (1986), which discussed in depth the role of a lawyer representing a client to a real estate transaction and also acting as attorney or agent for a title insurer. The latter opinion refers to the Real Estate Settlement Procedure Act of 1974 (RESPA) and NY Ins. L. § 6409(d), both of which prohibit rebates of insurance premiums as an inducement or compensation for the referral of title insurance. Compensation paid to the lawyer by the title company would be divided into three categories: (i) compensation that is duplicative of work done for the client, (ii) compensation for the origination of business, and (iii) compensation for services to the title company that is different than (i) and (ii). Since compensation to the lawyer under (ii) would be illegal, and under (i) would have to be credited to the client, only (iii) was permitted provided informed consent was obtained from the client. The opinion also noted that “in most cases, while actual conflicts do not arise or can be readily resolved by adequate communication between the lawyer and title company, ... a lawyer should be particularly alert to any actual conflict and withdraw from employment by *both* parties should a true conflict arise” that cannot be obviated by obtaining coverage from another title insurer.

We believe that N.Y. State 576 (1986) is correct in that a lawyer could only obtain compensation from the title insurance company provided that it was reasonable in amount, directly related to legal services performed by the lawyer and either credited or disclosed to the other client, as the case may be. Moreover, we believe that particular danger is presented by the dual representation of a seller and title insurer. A title company insures all or part of the value of the title purchased by the buyer. It appears that both the buyer and the title insurance company have an overall interest in assuring that the title is good and that the conveyance to the buyer is properly effectuated and documented. Situations arise where title exceptions need to be negotiated. If the attorney is not directly involved in underwriting decisions, most of these exceptions are ministerial and can be resolved through communication. But the attorney must be aware of the potential conflict of interest inherent in such dual representation and will need to refer the matter to other attorneys, or withdraw from one or both representations if a material title exception cannot be resolved.

The seller and title company share no similar common interest in the title conveyed. Although NYSBA ethics opinions do not differentiate between buyer and seller when considering representation of the title insurer, the potential conflict between title insurer and seller is more apparent. For example, believing that a discussion with his or her lawyer is confidential, a seller may inform the lawyer of facts that do not render the conveyance fraudulent, but may adversely affect the insurability of the title to be conveyed. Although such a

situation may be rare, the lawyer could not in such a case withdraw without likely causing the prejudice to the seller that is to be avoided pursuant to Rule 1.16 (e). Thus, since the interest of the seller and the title company are generally contrary, and there is no reasonably appropriate way to withdraw from such dual representation without prejudicing the seller's interests, we believe that dual representation of seller and title company should be avoided.

We have also been asked to consider whether the lawyer may enter into a systematic and continuous relationship with a title insurance company to refer real estate transactions to it in exchange for representing the title insurance company in connection with the real estate transaction at issue. Under Rule 5.8 of the Rules of Professional Conduct, a lawyer may not "enter into and maintain with a ... nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services," ... unless, among other things, the non-legal professional services are identified on a list published in Section 1205. That list does not include title or other insurance.

In NYSBA Ethics Opinions 595, 621, 738 and 753, it was determined that a lawyer could not refer real estate clients to a title abstract company in which the lawyer had an ownership interest and that would be hired to provide title insurance or perform other than ministerial tasks. N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2002) and N.Y. State 753 (2002) Significantly, a *per se* conflict was found under DR 5-101(A) and could not be cured by informed consent, because the lawyer's personal interest in a fee (or dividend) from the title insurance company compromises the independence of the lawyer's legal advice.

Although the above-mentioned NYSBA Ethics Opinions were issued prior to the 2009 adoption of the Rule of Professional Conduct, the application of current Rules 5.7 and 5.8 would have likely led to the same outcome, with the additional requirement that consents and conflict waivers be written. Accordingly, we are of the opinion that a lawyer cannot have a financial interest in the title insurance or abstract company involved in the transaction, and cannot enter into or maintain a contractual relationship with a title insurance or abstract company for the purposes of offering to clients on a systematic and continuing basis title insurance coverage or representation.

Dated: White Plains, New York
December 14, 2009

Westchester County Bar Association
Committee on Ethics*

Charles L. Rosenzweig
Edward Mevec

Paul Marx, chair of the Committee recused himself from this opinion.

We gratefully acknowledge the able assistance of Professor Jay Carlisle and Timothy Brennan.