ADVISORY ETHICS OPINION 79-16

SYNOPSIS:

Subject to certain disclosure requirements, it is not improper for a lawyer to serve as an agent for the sale of title insurance.

OPINION:

In view of the increasingly common use of title insurance in Vermont, the committee has been asked to comment upon ethical issues which may arise when a lawyer serves as an agent for a title insurance company. Interestingly, the subject has been raised with the committee by two lawyers, one of whom indicates that he expects to have an agency relationship with a title insurance company, and another who asserts, in his request, that such an agency relationship leads inevitably to an impermissible conflict of interest.

It is the committee's view that an agency relationship with a title insurance company is not, in and of itself, objectionable.

There is no general prohibition against a lawyer's having outside business interests. However, because of the usually close relationship between the practice of law and the selling of title insurance, there are some particular strictures which need to be observed with care.

First, the committee calls attention to DR 2-102 (E), which provides:

> A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

It is the opinion of the committee that serving as a title insurance agent is a different business from the practice of law, and that, therefore, the provisions of DR 2-102 (E) apply.

The Committee believes that it is clear that no ethical problems exist where the lawyer provides title insurance as agent to an individual who is not his client. The situation may, however, be more complicated where the lawyer provides title insurance to a person who is the lawyers' client. The committee does not believe this to be improper, or to create any conflict of interest. See, for example, ABA informal opinion No. 883 (October 2, 1965), which so indicates.

It is essential that the client be fully informed of the lawyer's relationship with the title insurance company, and the fact that the lawyer will receive a commission from the sale of title insurance. DR 5-107 (A) provides:

> Except with the consent of his client after full disclosure, a lawyer shall not:
> (1) accept compensation for his legal services from one other than his client.
> (2) accept from one other than his client anything of value related to his representation of or his employment by his client.

Since the sale of title insurance to a client is clearly "related to" the lawyer's representation of his client, the disclosure and consent requirement must be adhered to scrupulously. While the rule does not require the disclosure and consent to be in writing, the committee would caution lawyers who have an agency relationship with a title insurance company that disclosure and consent may be extremely difficult to demonstrate after the fact in the absence of a written record.

The Committee cautions lawyers who sell title insurance that, in this dual relationship with clients, the lawyer must be careful to remember that the lawyer's duty is to adhere to the ethics of the Bar rather than to the ethics of the marketplace. For example, the committee believes that a lawyer probably violates the ethical responsibility of client loyalty by selling title insurance to a client where the lawyer knows that similar coverage is available at a lower rate, or that better coverage is available. The committee recommends that any lawyer who has an agency relationship with a title insurance company should be fully informed as to the products available in the marketplace, and discuss competing products, to the extent there are significant differences, with clients.

The committee also believes that lawyers who sell title insurance must keep in mind, and probably should advise clients of potential conflicts of interest. Although technically it may be argued that the lawyer does not "represent" the title insurance company when serving as its sales agent, the committee believes that such an argument would be improper. In the event of a

dispute between the lawyer's client and the lawyer's title insurance company, the committee believes that the lawyer would almost certainly be disqualified from representing either side.

The committee's attention has been directed in particular to the question of whether a lawyer who acts as an agent for a title insurance company is obligated to credit the client's bill for the amount of the commission. The committee believes that there is no such specific requirement. See, for example, ABA Opinion 304 (1962) (requiring either disclosure or full credit). However, the committee has no doubt that the fact that a lawyer has received a commission as payment for a portion of his services in connection with a real estate transaction would be a relevant consideration in determining whether the attorney's fee is reasonable within the meaning of the general provisions of the Code which prohibit excessive fees. Thus, while the committee does not believe that a direct credit against the client's bill is required, the committee does believe that a lawyer who has an agency relationship with a title insurance company must, in determining the client's bill, take into consideration the fact that a portion of the work performed by the attorney is paid for through the title insurance commission.