ADVISORY ETHICS OPINION 87-03

SYNOPSIS:

Because the attorney "represents" both the title insurance company and the prospective purchaser of insurance the rules relating to representation of multiple clients determine when and if such representation is permissible.

FACTS:

An attorney has requested our advice as to a number of issues arising when a lawyer represents a client in a real estate transaction in obtaining title insurance and simultaneously serves as the agent of a title insurance company selling that insurance to his client.

The attorney relates that his firm originally took the position that such simultaneous involvement was inherently unethical. He relates further that in light of this Committee's Opinion No. 79-16 and the "practical realities" of Vermont real estate practice, his firm now serves as agent for a title insurance company. He also states that his firm advises clients of the availability of insurance through other companies, but that their clients almost always purchase insurance from the company his firm represents.

We have been requested to first reconsider the position taken by this Committee in Opinion No. 79-16, that it is ethically permissible for an attorney to simultaneously represent a client purchasing title insurance and a company selling it. Additionally, we have been asked to pass on a variety of practical questions that arise if such simultaneous representation is permitted.

ANALYSIS:

1. Inherent Conflict.

In Opinion No. 79-16, this Committee concluded, with respect to the question of an attorney's simultaneous involvement as agent for a title insurance company and lawyer for his client, that it "does not believe this to be improper or to create any conflict of interest." Opinion No. 79-16, however, noted that the issue was “complicated” and went on to impose several obligations on attorneys relating to disclosure, self-education concerning competing products and reasonableness of fees.

We have fully reconsidered the ethical concerns addressed in Opinion No. 79-16 and raised again for our consideration in this request. We generally adhere to the views expressed in Opinion No. 79-16.

We depart from Opinion No. 79-16 only in that Opinion's broad statement that simultaneous service as a title insurance agent and attorney for a client in a real estate transaction creates no “conflict of interest.” .A conflict in such circumstances seems unavoidable, on two levels.

First, to the extent that the lawyer, in his or her capacity as agent for a title insurance company, will receive financial remuneration if the client chooses the insurance he or she sells and then loses that remuneration if the client chooses to go elsewhere, any advice about such insurance will result in personal economic gain or loss. A conflict of interest is apparent. The conflict can be cured, however, with a client’s informed consent, as DR 50-101 (A) makes clear:

> Except with the consent of hiss 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.

A second conflict arises out of an attorney's respective obligations to his client purchasing the title insurance and the Company selling that insurance. In Opinion No. 79-16, we expressed doubt about the argument that an attorney does not "represent" as an attorney the title insurance company he serves as an agent. We reaffirm that doubt.

EC 3-5 describes the practice of law as “the rendition of services for others that call for the professional judgment of a lawyer”. Clearly, some of the services a lawyer provides as an agent for a title insurance company, such as assessment of risk based on evaluation of title, come squarely within this definition. Because an attorney is, at least in part, practicing law on behalf of a title insurance company, an attorney/client relationship arises.

Because the attorney "represents" both the title insurance company and the prospective purchaser of insurance, the rules relating to representation of multiple clients determine when and if such representation is permissible. In particular, DR 5-105 provides:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment 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, or it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation of the exercise of his independent professional judgment on behalf of each.

Unlike DR 5-105(A) which merely requires informed consent. DR 5-1-5(C) requires both informed consent and a judgment that it is "obvious" that the attorney can adequately represent the interest of each. What is "obvious", of course, is not always obvious, and as EC 5-15 cautions, a lawyer should "resolve all doubts against the propriety of representation."

This Committee has concluded for instance, that it is not obvious that an attorney can adequately represent both the buyer and seller in an arms-length real estate transaction and accordingly has concluded that such multiple representation is not permitted under the Code.[1]

Unlike a real estate transaction, where a certain amount of bargaining between the parties is the norm, giving rise to unavoidable conflicts for the attorney attempting to represent both, the usual process of procuring title insurance will not involve bargaining between the parties over disputed issues. While the possibility of such dispute is not inconceivable (and in such instances may bar continued representation of either party) we believe that it is obvious that in the normal title insurance context conscientious counsel will be able to represent both clients adequately, provided the considerations set forth below are observed.

2. Practical Responses.

In Opinion No. 79-16 we set forth several requirements for counsel wishing to serve as an agent for a title insurance company and to represent a client. These were:

> (1) The attorney must make full prior disclosure of his of her representation of the title insurance company, advise the client of the potential conflict arising from such representation, and obtain the informed consent of the client.
>
> (2) The attorney should not sell insurance to a client where he or she knows that similar coverage is available at lower rates, or that better coverage is available.
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> (3) The attorney should be fully informed as to products available in the market place and to the extent of significant differences, discuss competing products with clients.
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> (4) In determining what to do with his or her commission from the title insurance company, the attorney should not violate the prohibition against excessive fees.

The inquiring attorney requests clarification of a number of the requirements set forth in Opinion No. 79-16. Before turning these questions, we would point out initially that the Code of Professional Responsibility sets out a minimum standard for ethical conduct, without prescribing a formula for ethical compliance. What actions are necessary to meet the standard set out in the Code may vary at times based on the facts and circumstances involved. Accordingly, in the absence of a specific factual situation, we cannot provide specific answers to many of the questions raised.

[1] Opinion No. 78-4.

(A) Competing Products.

In Opinion No. 79-16, we opined that an attorney should be fully informed as to competing products available in the market and should discuss such products with his client to the extent of significant differences. We are asked bow a lawyer should go about determining what constitutes better coverage, the best deal or more competitive rates. We are also asked whether mere comparison of policy forms and published rates is sufficient and whether an insurer's claim practices should be investigated.

Clearly, if an attorney is to be in a position to offer meaningful guidance to a client concerning choice of title insurance, he must first inform himself as to the available products. As a fiduciary, an attorney who advises his client concerning choice of title insurance is bound to make reasonable inquiries as to what is available, the reputation of companies he is recommending and any other factors he deems necessary in order to competently advise his client. The Code embodies a standard of care, not a formula for ethical compliance.

B) Evaluation of the "Soundness" of the Title Insurer.

Our advice is similarly requested as to how an attorney should evaluate the "soundness" of a given insurance company, and whether he or she can simply rely on the fact that an insurer is licensed by the Department of Banking and Insurance.

Again, a road map for compliance with one's ethical obligations is not possible. An attorney is held to a standard of competence and adequate preparation under DR 6-101(A). If an attorney, for instance knew or had reason to know that a company licensed by the Department was in financial distress, it obviously would not suffice to rest solely on the fact of licensure. The attorney who undertakes to provide advice to a client is ethically obligated to "prepare adequately and give appropriate attention to" his work.[2] If he or she undertakes to advise a client as to the choice of a title insurance company, that advice should be treated as any other work performed by the attorney.

(C) Representation of Multiple Insurers.

We also are asked whether an attorney should represent more than one insurer in order to be better able to discuss competitive rates and products. We are asked, on the other hand, whether representation of more than one insurer would cause a conflict due to the lawyer's relationships with more than one company.

First, there is no question that representation of more than one title insurance company is one means for an attorney to better inform himself of available products and rates. We do not believe that representation of multiple companies is the only permissible means of self-education, nor do we believe that it is mandated under the Code.

We are asked whether an attorney's ability to "control the quality of business directed to a specific insurer" would lend to unavoidable conflicts of interest should the attorney represent more than one insurer. In response, we would strongly emphasize that the attorney has no authority to control the business directed to an insurer. The choice of an insurer belongs alone to the client purchasing insurance. Once the client makes that choice, only one insurer is involved. We do not believe that by merely agreeing to represent more than one insurer, the attorney becomes involved in an impermissible multiple representation under DR 5-105.

(D) Number of Products Offered.

We next are asked the exact number of insurers' products an attorney must offer his client to avoid unethical practice. While we do believe it is incumbent upon an attorney to inform himself or herself: as well as his or her client, as to the products available on the market, we do not believe that the Code mandates that the attorney carry a minimum number of insurance products.

(E) Disclosure and Consent Form.

The attorney has submitted for our review a Title Insurance Premium Disclosure and Consent form, and has asked whether this form "satisfies" a lawyer's ethical obligation to his client. The form, a copy of which is appended to this opinion, discloses the cost of title insurance, the amount of the attorney's commission, who will get that commission and premiums charged by competing companies for similar coverage. The form further specifies that the attorney will be performing a dual service to the client and the title insurance company. A space is provided for the client's signature.

[2] EC 6-4.

In Opinion No. 79-16, we stated that disclosure and consent need not be in writing, but recommended that some written record be made. A form such as has been submitted to us is one useful means of informing the client of the options open to it. We do not necessarily endorse the forms submitted to us, nor do we believe that use of this type of form, alone, will automatically absolve an attorney of his or her disclosure obligations. As EC 7-11 emphasizes, "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. . . ." If a form such as this is to be used, the lawyer must ensure that it is fully understood by his or her client.

(F) Rebating and Crediting Commissions.

In Opinion No. 79-16 we discussed excessive fee issues arising when an attorney receives a commission on the sale of title insurance to his client. At that time we opined that while a direct credit of such a commission against a client's bill is not required, the attorney should take such a commission into consideration in determining a client's bill. We are now asked several questions concerning rebating or crediting title insurance commissions.

We are asked whether direct credit of insurance commissions would, as a practical matter, always resu1t in the client choosing to obtain title insurance through his attorney (presumably at less cost). We are asked what should happen when a contemplated credit actually exceeds the legal fees to be charged: should the lawyer rebate the difference. Finally, we are asked whether it is "lawful" to rebate title insurance commissions in the first instance, in light of the Department of Banking and Insurance's regulation of title insurance rates.

We find no ethical prohibition against providing a credit of title insurance commissions to a client's bill. If this procedure results in less overall cost to the client and the client, after full disclosure, decides to go this route, no ethical concerns are implicated – even if the end result in most cases is to encourage the client to purchase insurance through his or her lawyer.

As far as crediting the client with commission amounts that actually exceed the legal fees charged by the attorney, we find no ethical prohibition against such a practice, nor do we find such a practice to be ethically compelled. The Code of Professional Responsibility does not set forth a fee schedule for attorneys. DR 2-106 does, however, set forth eight factors to be considered in assessing when a fee is "clearly excessive," and therefore prohibited.

Specifically, DR 2-106(B) states:

> A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged for the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.

EC 2-18 makes clear that these factors are not exhaustive and that the determination of the reasonableness of a fee "requires consideration of all relevant factors."[3]

Provided that the ultimate fee charged to the client is not clearly excessive under all relevant factors, including those set out in DR 2-106, the utilization or amount of a credit of title insurance commissions are matters of judgment for an attorney. Notwithstanding this broad discretion, under some circumstances it would seem difficult to remain within ethical bounds without providing a credit or some other reduction in the bill for legal services. If an attorney performs identical work for the title insurance company and the client and then charges each "full freight," that fee might well be "clearly excessive." Similarly, some credit of the commission might be required if the attorney performs and is paid for title work for a purchaser of property-and then at some subsequent time is asked to procure title insurance.

While each situation must be determined on its facts, as a general rule, if an attorney's dual role as lawyer and title insurance agent results in a "windfall," the benefit should run to the client, not his or her attorney.

[3] *See, generally, Parker, Lamb & Ankuda, P.C. v. Krupinsky,* 146 Vt. 304. 306-07 (1985).

With these ethical considerations in mind, we turn finally to the most troublesome issue posed, of whether it is "lawful" to credit or rebate title insurance commissions to a client, in light of the regulation of title insurance rates by the Department of Banking and Insurance. Ordinarily, since this issue involves a matter of law rather than ethics, we would decline to address it. *See* Rules of the Committee on Professional Responsibility, Rule 7. However, we cannot avoid the issue here, due to an apparent collision here between the ethical requirements of the Code and the legal requirements of Vermont Statutes.

The difficulty derives from the broad language of 8 V.S.A. §4724(8), which includes rebating within its definition of unfair method of competition and unfair or deceptive acts or practices in the business of insurance. Specifically, that Section prohibits:

> Except as otherwise expressly provided by 1aw, knowingly permitting or offering to make or making any contract of insurance or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or *paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, any rebate or premiums payable on the contract. or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract . . .*[4] (emphasis added).

Violations are punishable by license revocations and fines of up to $500. 8 V.S.A. §4726(b).

While the reach of this language is open to debate, our intent is not to lead attorneys into personal legal exposure in the quest for ethical propriety. Accordingly, and to make explicit what may be implicit in Section 4724(8), this Committee has requested the Legislature to specifically exempt attorney rebates of the insurance commissions from the definition of proscribed insurance practices. Unless and until the Legislature acts, the attorney who acts as a title insurance agent may face contradictory demands from the Code of Professional Responsibility and the Vermont Statutes.

[4] 8 V.S.A. §4724(8) (1984)

TITLE INSURANCE PREMIUM DISCLOSURE AND CONSENT

[Client's name and address] File No.

We are licensed agents of _____ Title Insurance Company. We can offer you owner's title insurance coverage in the amount of your purchase price ($_____) for a single premium due at closing in the amount of $_____.

Your mortgage lender, if any, may require mortgagee's title insurance coverage in an amount equal to the amount of your mortgage loan ($_____). We can offer you mortgagee's coverage through _____ Title Insurance Company for a single premium due at closing in the amount of $_____.

If you wish both owner's and mortgagee's coverage issued simultaneously through _____ Title Insurance Company, the cost will be a single premium due at closing in the amount of $_____.

NOTE: As agents for _____ Title Insurance Company we receive a commission equal to 657 of your premium. Your statement of fees for legal services rendered by us will be credited in an amount equal to our commission.

Title insurance may be obtained from a number of other title insurance companies; among those companies are those below for which we have shown premiums for similar limits of coverage. We receive no commission on premiums to any company other than _____ Title Insurance Company.

[company name] [owner's premium] [mortgagee's premium] [simultaneous issue]

If you want us to issue mortgagee's title insurance through the _____ Title Insurance Company, knowing that we are agents for that company and recognizing that we will be performing a dual service to you and _____ Title Insurance Company, sign here:

_____
signature date

If you want us to issue owner's title insurance through the _____ Title Insurance Company, knowing that we are agents for that company and recognizing that we will be performing a dual service to you and _____ Title Insurance Company, sign here:

_____
signature date

If you want us to obtain mortgagee's title insurance coverage for you through another company, please insert the name of the company and sign here:

_____ _____
Name of company signature date

If you want us to obtain owner's title insurance coverage for you through another company, please insert the name of the company and sign here:

_____ _____
Name of company signature date