



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5, 1.7, 1.8(a), 5.4, 7.3, and 8.4(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion 93-01
January 21, 1994**

Topic: Dual professions; Attorney conducting business as title insurance agent.

Digest: Attorney may provide legal services and conduct title insurance business as agent so long as legal services are conducted in compliance with the Illinois Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct, Rules 1.5, 1.7(b), 1.8(a), 5.4, 7.3, 8.4(a)
ISBA Opinions on Professional Conduct, Nos. 84-1, 85-3, 89-14, 90-16, 90-32

FACTS

Inquiry I.

An attorney is a title insurance agent of a title insurance underwriter. After being retained by clients to represent them in the sale or purchase of real estate, the attorney orders title insurance commitments as the underwriter's agent. The attorney/agent receives a transparent template containing a list of standardized exceptions (LSE) and copies of documents affecting title and taxes. The attorney assembles the template and the LSE and copies them, which, when copied together, constitutes the title insurance commitment. The inquiry alleges on "information and belief" that the attorney may, but is not required to, make modifications to that commitment. The attorney attends the closing but performs no other title insurance services. He receives a fee of approximately \$200

to \$250 for "title services" in addition to attorney fees. The inquiry further states "on information and belief" that the underwriter tacitly agreed that attorneys do not have liability for errors and omissions in title insurance commitments, superseding a written agreement to the contrary.

QUESTIONS

1. Does the arrangement violation Rule 1.5 requiring that an attorney's fee be reasonable and in determining reasonableness the factors to be considered include the time and labor required and the skill requisite to perform the legal service?
2. Is collecting the \$200 to \$250 fee for legal work performed a violation of Rule 1.5(a) which considers "responsibility assumed" as a basis for determining the reasonableness of a fee?
3. Does violation of the Real Estate Procedures Act or the Illinois Title Insurance Act which prohibit giving or receiving referral fees for placing title insurance orders and provide for criminal penalties constitute misconduct as defined in Rule 8.4(a)(2), (3) and (4)?

INQUIRY II.

A title insurance company (A) has developed an "Attorney Agent Program" whereby the attorney enters into an agency agreement with A and a support service agreement with a separate corporation (B). The agency agreement appoints the attorney as A's non-exclusive agent to solicit and issue title insurance policies in accordance with the conditions and procedures specified by A in detail in the contract. The attorney is to retain a portion of each premium as commission.

The support services agreement with B specifies that the attorney is a title insurance agent for A, is to exclusively use B's services to conduct title searches for which B is to be compensated by the attorney in accordance with B's schedule of charges for title searches and other "support" services such as an escrow closing service.

The Illinois Title Insurance Act requires that title insurance agents be registered with the Director of the Department of Financial Institutions which regulates the title insurance industry in Illinois. The Department defines a title insurance agent as a person who "determines insurability of title in accordance with generally acceptable underwriting rules and standards in reliance upon public records or a 'search package' from a title plant or both," and may perform other functions.

QUESTIONS

1. Does the arrangement violate Rule 5.4 of the Illinois Rules of Professional Conduct?
2. May an attorney act as agent of a "non-bar related" title insurance company?
3. Does this arrangement violate Rule 1.5 of the Rules?
4. Assuming that the support services provider does all or substantially all the title examining work and the attorney simply "marks up" the price of the product, does the retention of fees, absent the provision of actual services, violate the Rules of Professional Conduct?

OPINION

Rule 1.5 mandates that an attorney's fee be reasonable and lists factors to be considered in determining reasonableness, including time and labor required, difficulty of questions, requisite skill, etc.

Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after disclosure.

Rule 1.8(a) states:

- (a) Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if:
 - (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or
 - (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

Rule 5.4, in relevant part, states:

- (a) A lawyer or law firm shall not share legal fees with a non-lawyer.... (Except under circumstances not applicable here.)

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Rule 7.3 prohibits the solicitation of legal employment for pecuniary gain directly by an attorney or through a representative except under circumstances not generally applicable to the facts presented in the inquiry.

Rule 8.4(a) states that an attorney shall not:

- (2) induce another to engage in conduct, or give assistance to another's conduct, when the lawyer knows that conduct will violate these rules....
- (3) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation....

The Illinois Title Insurance Act requires that title insurance agents be registered and defines a title insurance agent as a person authorized to determine insurability of title in accordance with generally acceptable underwriting rules and standards in reliance on either public records or a search package or both and may perform other functions. The regulatory body for the title insurance industry is the Department of Financial Institutions, not the Department of Insurance. Violations of the Act are business offenses which carry penalties. The Act prohibits the payment of a referral fee or other consideration as an inducement or for the referral of any escrow or other service from the title

insurance company or agent. Violation of this section is a Class A Misdemeanor.

The business of issuing title insurance policies is further regulated as to certain real estate transactions involving federally related mortgage loans by the Department of Housing and Urban Development (HUD). HUD has issued regulations implementing the Real Estate Settlement Procedures Act (RESPA). Where applicable, those regulations supersede the Illinois Title Insurance Act. The HUD regulations mandate that an attorney perform certain "core" title agent services separate from attorney services to receive compensation as a title insurance agent. Violation of RESPA carries criminal penalties.

ISBA Opinion No. 85-3 recognized the repeal of former Code provisions prohibiting or restricting the practice of dual professions and approved the practice of law and the provisions of accountant's services from the same office.

ISBA Opinion No. 89-14 approved an attorney's performance of legal services and life insurance services in separate locations. Moreover, that Opinion approved the acceptance of attorney fees and a portion of a life insurance premium from a referral to a third party life insurance agent involving the same client, subject to consent after full disclosure under former Rule 5-101(a), which was similar to current Rule 1.7(a).

ISBA Opinion No. 90-16 approved the operation of a law office and the business of providing economic analyses from the same office with precautionary language to conduct the law practice in conformance with the Rules, particularly those concerning confidentiality, conflicts, professional independence, and advertising and solicitation.

ISBA Opinion No. 84-1 concerned an agreed arrangement between a bank and attorney whereby the bank's employees scheduled appointments for its customers who presumed that the bank provided legal services with the attorney who occupied an office provided by the bank as an improper solicitation of legal employment under former Rule 2-103(a) (now embodied in Rule 7.3).

ISBA Opinion No. 90-32 involved an attorney who was also an insurance and investment professional for which he conducted a marketing program. Compensation for insurance and investment services was entirely from commissions and no legal work would be performed for insurance/investment customers. However, the attorney proposed selling insurance services to his law clients with consent of the clients, a "waiver of the inherent conflict of interest," and an acknowledgement that investment/insurance advice would not be considered legal advice. In that Opinion, the Committee reiterated that concern that "dual profession" attorneys take special care to insure that the interests of their legal clients are not compromised. While the conduct of insurance business with existing consenting clients was approved, the advance agreement that advice given was not legal advice was condemned as an attempt to prospectively limit the attorney's liability. The Opinion made it clear that, once an insurance customer became a legal client, irrespective of the source of referral, the relationship is governed by the rules applicable to the attorney-client relationship.

Both inquiries presented here pose questions about the applicability of Rule 1.5 requiring that attorney fees be reasonable and Rule 5.4 prohibiting the share of legal fees with a non-attorney.

The answers to those questions are addressed in Opinion No. 90-32. AS long as the attorney is functioning only as a title insurance agent conducting title insurance business, the Rules of Professional Conduct, including Rules 1.5 and 5.4, do not apply to the fixing or division of the title insurance payments. Similarly, the payment of title search support service charges is not prohibited or restricted by Rule 5.4 even though the attorney was also providing legal services. It is irrelevant whether the title insurance company is "bar-related" or not. An attorney is no longer prohibited or restricted by the Rules from engaging in another profession or business, even from the same office.

However, the inquiries raise the other usual concerns with an attorney conducts business transactions with clients. As discussed in the Opinions cited, while the Rules permit "dual profession" attorneys to conduct business with their legal clients and accept legal employment from business customers, those attorneys are required to conduct business with all legal clients in compliance with the Rules of Professional Conduct, including the above quoted Rule 1.7(b), Rule 1.8(a), and the Rules concerning confidentiality, conflicts, professional independence, advertising, and direct solicitation. If the attorney does title insurance business with a client, the consent of the client after full disclosure of the attorney's title insurance agreements is required by Rule 1.7 and 1.8. Extreme care must also be taken by the attorney and the title company to avoid the prohibitions against solicitation stated in Rule 7.3 as interpreted in Opinion 84-1.

Both inquiries appear to assume that title insurance services performed by an agent who is also an attorney constitute legal services governed by the Rules of Professional Conduct. The provision of title insurance services are not necessarily legal services and are not governed by the Rules unless and until the insurance customer is or becomes a legal client.

Both inquiries also raise issues concerning the propriety of the attorney as title insurance agent accepting fees from the title insurance company when the title services are less than commensurate with the amount of the fee. The Rules concerning the reasonableness of attorney fees, including Rule 1.5, apply to all moneys received regardless of source when the attorney is acting as both attorney and title insurance agent. An attorney who also performs services as a title insurance agent must comply with all state and federal laws regulating the title insurance industry, including those involving payments from title insurance companies specifically referred to in this Opinion. Failure to do so may also involve violations of the Rules of Professional Conduct as where a statutory violation constituting the commission of a crime could violate Section 8.4(a)(2), (3) or (4) of the Rules of Professional Conduct.

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