Title Insurance and You: Let the Lawyer Beware

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In a case involving the Sherman Act, the anti-trust plaintiffs alleged, among other things, that:

Because of [the] unique nature of title insurance, “the title insurance industry operates . . . [in a manner that] fuel[s] . . . conspiracy.” . . . Title insurers generate business “most effective[ly] . . . [by] encourag[ing] the real estate middlemen—the lawyers, brokers, lenders, and title agents—to steer business to [them].” . . . Title insurers provide this encouragement “through kickbacks in the form of finder’s fees, gifts, and other financial enticements.” . . . To pay for these “inducement[s] to steer business their way,” title insurers need “to inflate their revenues” beyond the costs “related to the issuance of title insurance,” i.e. the risk involved in insuring the property against title defects.¹

Title insurance has become a sine qua non in real estate transactions. An individual purchases “[t]itle insurance . . . primarily through title agents, many of whom” both operate under the ownership or control, or both, of title insurers and provide the searches of public records so vital to the decision “to underwrite a particular property.”² Lawyers develop relationships with title companies and rely on the services they provide. But that relationship and reliance can hide the ethical issues lurking in the background. These issues can arise when a lawyer does no more than recommend a title insurer and are exacerbated when the lawyer acts as agent for the title insurer or, indeed, receives a payment or rebate to reward his or her selection. Proper disclosure and, when appropriate, conflict of interest waivers can benefit all involved—both the underwriters and the lawyers who help their clients purchase title insurance services. In their absence, disciplinary action and malpractice exposure may result. And underwriters may, by reason of the relationships they have with lawyers, assume duties well beyond insuring title.

A. The Basic Rule

The basic rule that applies to all lawyers, regardless of which side of a potential conflict they sit, is captured in ABA Model Code of Professional Responsibility 1.7³:

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² Id.

³ This rule or something very much like it has nearly uniform application throughout the United States.
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

   (1) the representation of one client will be directly adverse to another client; or

   (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

   (1) the lawyer reasonably believes 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 by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

   (4) each affected client gives informed consent, confirmed in writing.\(^\text{4}\)

Client confidences are also protected under ABA Model Code of Professional Responsibility 1.6,\(^\text{5}\) which provides in relevant part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [the six circumstances set forth in] paragraph (b).

The fees a lawyer may charge are governed by Rule 1.5,\(^\text{6}\) Importantly:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

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\(^{4}\) See M. Rooney, “Ethics and the Attorney/Title Agent,” 96 Ill. Bar J #3, at 2 (March 2008) (“Some lawyers have been retained by title insurance companies to examine title. That attorney-client relationship is typically memorialized by a written contract. Where those lawyers also represent principals in real estate transactions, the provisions of Rule 1.7 on ‘Conflict of Interest’ come into play.”).

\(^{5}\) This rule or something very much like it also has nearly uniform application throughout the United States.

\(^{6}\) Id.
Rule 1.8, which pertains to business relationships between a lawyer and a client, provides in relevant part:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction.

In a lengthy and well-reasoned opinion, the Ethics Committee of the Colorado Bar Association addressed each of these rules in the context of a lawyer’s providing ancillary services, such as those pertaining to title services, and said:

Lawyers must take care, however, to keep the law practice and the non-law business separate, including maintaining the confidentiality of law client files pursuant to Rule 1.6.

Rule 1.6 is important for two additional reasons. First, customers, nonlawyers and even lawyers associated with the second occupation may assume erroneously that the attorney-client privilege attaches to their communications with one another or inadvertently waive the privilege if it does apply in the first instance. Second, lawyers with second occupations that are related to the practice of law must be careful not to use information against a client or former client that is learned in performing the services related to the second occupation.

With respect to Rule 1.8, lawyers engaging in a second occupation in the same transaction in which they act as counsel to one of the parties must determine whether they are about to “enter into a

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7 This rule or something very much like it also has nearly uniform application throughout the United States.
8 See M. Rooney, “Ethics and the Attorney/Title Agent,” 96 Ill. Bar J #3, at 2 (March 2008), which also addresses the Rule 1.8 concerns that can arise in circumstances when a lawyer has a financial interest in providing title insurance.
business transaction with a client or knowingly acquire an
ownership, possessory, security or other pecuniary interest adverse
to a client. . . .” Rule 1.8(a).

A variety of potential conflicts of interest, however, are inherent in
the lawyer/title agent’s dual role. These potential conflicts arise
under Rule 1.7(b) because the lawyer/title agent’s duty of loyalty to
the client may be materially limited by the lawyer/title agent’s (a)
fiduciary responsibilities as the agent of the title company (a “third
person”), and (b) pecuniary interests in receiving a commission and
further business from the title company (the “lawyer’s own
interests”). For example, it is generally in the interest of the title
company to limit the coverage available under the title insurance
policy. Yet it is generally in the buyer’s and lender’s interests to
obtain the maximum amount of insurance coverage at the lowest
reasonable cost. The seller may share that interest in order to satisfy
the buyer and consummate the transaction, and avoid recourse to the
seller’s title warranties.

One specific concern of the Committee is that a lawyer/title agent
might fail to seek the removal of, or endorsement over, certain title
exceptions listed by the title company as zealously as a lawyer acting
only as counsel. It is also not difficult to imagine the competing
pressures on the lawyer/title agent over problems with the legal
documents prepared by him or her, whether as title agent or attorney,
and over claims that may later arise (or are claimed to arise) under
the title insurance policy. Even recommending that a client purchase
title insurance might be said to create a conflict of interest for the
lawyer/title agent, who stands to gain financially if the client follows
that recommendation, although it might be legal malpractice not to
make that recommendation. The lawyer/title agent must therefore
carefully follow the steps prescribed by Rule 1.7(b) and (c) before
agreeing to represent or continuing to represent a client who is a
party to a transaction in which the lawyer is also the title agent.
These steps begin with full disclosure of the lawyer’s status as
agent; the nature of the lawyer’s services as agent and the amount of
compensation the lawyer expects to receive; the pros and cons of
obtaining title insurance and of obtaining it through the lawyer,
including its availability and cost elsewhere; the ways in which the
client and the title company may become adversaries in the matter;
and the client’s opportunity to seek other counsel whether or not
there arises an actual conflict of interest. There may be other
disclosures required under state and federal laws and regulations,
including but not limited to the Real Estate Settlement Procedures
promulgated thereunder, and C.R.S. § 10-11-108(2)(a) (requiring
attorney’s disclosure to client that “attorney may be compensated for the issuance of such title insurance commitment”).

A lawyer/title agent who charges the client for legal services for which the lawyer/title agent is also compensated in the title insurance commission may be in violation of Rule 1.5(a), which prohibits the charging of unreasonable fees. To the same effect is C.R.S. § 10-11-108(2)(a), which states that “[c]ompensation of the attorney for services actually rendered shall not include the payment of an hourly fee paid by the client combined with a payment from the title insurance company for the same service.

Lawyers should avoid these dual-occupation transactions entirely and some, including real estate transactions in which the lawyer is acting as a broker as well, are unethical in the view of the [Colorado Bar Association] Ethics Committee even with the informed consent of the client. Other dual-occupation transactions, such as real estate transactions in which the lawyer represents a party and acts as agent of a title insurance company, are not per se prohibited but involve several significant ethical considerations, including those relating to conflicts of interest, business transactions with a client and fees.9

B. How Do Conflicts Arise?

Three decisions illustrate the point:

In one interesting case,10 a lawyer acted as counsel for the buyer and the seller of property, rendered an opinion letter for the benefit of the mortgage company, owned the title agency which negotiated the title insurance coverage and acted as the closing agent on behalf of the underwriting title insurance company.11

The lawyer argued that the court must separately compartmentalize his duty as an attorney from his duty as principal for the agency and title agent for the underwriter. But the court concluded doing so would be contrary to the New Jersey Supreme Court’s conflicts of interest jurisprudence.12

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9 Opinion 98, 1996 CO Legal Ethics Ops. LEXIS 1 * (footnotes, which refer to various decisions and opinions from other jurisdictions, omitted).
11 The lawyer’s multi-level representations in the Home Federal mortgage closing went well beyond the “limited ministerial activities” permitted by Rule 1.7 of the New Jersey Rules of Professional Conduct. In re Opinion 682, 147 N.J. at 371, 687 A.2d 1000 (stating that an attorney, representing parties to a real estate transaction, may only engage in limited ministerial activities as a title agent, “such as applying purchase moneys to satisfy and cancel an existing mortgage, securing clear title for the purchaser, and obtaining from the carrier a title-insurance policy . . . ”) (citing Sears Mortgage Corp. v. Rose, 134 N.J. 326, 337, 342, 634 A.2d 74 (1993)).
12 In In re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360, 687 A.2d 1000 (1997), the New Jersey Supreme Court held that, under Rule 1.7 of the New Jersey Rules of Professional Conduct, an attorney
The court went on to hold that the lawyer’s clear violation of Rule 1.7 of the Rules of Professional Conduct “can be considered evidence of [his] malpractice,” citing Sommers v. McKinney, 287 N.J.Super. 1, 13, 670 A.2d 99; and Baxt v. Liloia, 281 N.J.Super. 50, 57, 656 A.2d 835 (App.Div.1995). It concluded that as a matter of law, the lawyer breached his duty to the mortgage lender by failing to prepare his opinion letter with the requisite degree of care. In addition, because the court found that the lawyer’s conduct during the mortgage transaction violated Rule 1.7 of the New Jersey Rules of Professional Conduct, the judge referred the matter to the New Jersey Supreme Court’s Office of Attorney Ethics, for whatever action it deemed appropriate.

In another case, the court said, “it would be difficult to find a case better than the present one illustrating the potential conflicts of interest an attorney involved in securing title insurance may face.” Attorney William M. Ables, Jr., a defendant, was initially retained by plaintiff Collins to examine title and to draft the closing documents. He was asked by Collins to secure a policy of title insurance as part of the closing, and he secured a policy of title insurance as part of his attorney-client relationship with Collins. For whatever reason, Ables obliged his client Collins by obtaining a policy for him without an exception for a lawsuit by failing to mention a second buyer’s claim in the attorney’s documents on title which he sent to the underwriter. Ables also obliged another client, the sellers, by obtaining a policy of title insurance acceptable to Collins so that he would release the money held in escrow to them. Meanwhile, Ables was also an “approved attorney” for the underwriter.

Another New Jersey court addressed the need for full disclosure and said: “We do not find that the putative conflict of interest . . . precludes the existence of an agency relationship between the title insurer and the closing attorney. Dual representation and the possibility of conflicts of interest are not fatal to a finding that an agency relationship exists. Dual representation has been permitted in the insurance context. . . . In almost all cases involving the completion of a real-estate-title closing, the interests of the title insurer are not in conflict with those of the purchaser. As was pointed out by the experts who testified at trial, nothing invidious infects a situation in which the attorney seeks to effectuate the interests of the buyer and the title insurer in completing real-estate closings. Indeed, in most title closings, a third-party lender is involved. Hence, in New Jersey, the buyer’s attorney often “wears three hats”—the attorney represents the interests of the buyer, the title-insurance company, and the buyer’s lender, in effect, serving the interests of three principals. Thus, the possibility of a conflict of interest engenders a duty of full disclosure and disqualification if an actual conflict occurs. It does not, however, preclude the creation of an agency relationship between the attorney and the principals he or she serves.”

may not own a stake in or manage a title company interested in a real estate transaction while that same attorney is representing parties to the transaction, because of the irremediable conflicts of interest inherent in these dual roles.

13 Stating that it is well established in New Jersey that “the Rules of Professional Conduct set forth an appropriate standard of care by which to measure an attorney’s conduct”.


18 Id. at 343, 634 A.2d at 82.
C. Particular Issues

1. **Inducements.** As noted, lawyers often, indeed regularly, help their clients select a title insurer by recommending the services of one or more underwriters. This implicates the question of rebates, favors or rewards. The issues here involve both ethical considerations and federal law under the Real Estate Settlement Procedures Act of 1974 (“RESPA”). Rebates and rewards can take the form of money. These can be particularly pernicious. Favors may include gifts, tickets to entertainment or sporting events, or “networking” referrals.

   a. **Ethics Issues**

   In *Moll v. US Life Title Ins. Co. of New York*, the court considered circumstances where buyers’ attorneys ordered title insurance and received a rebate of the premium paid by their clients. These attorneys informed the purchasers that in order to obtain federally related mortgage loans, the buyers needed to secure title insurance. The lawyers then ordered title insurance from US Life. US Life purportedly agreed with these attorneys to rebate a portion of the premium for title insurance paid by the purchasers in return for the referral of title insurance business. The title company did not disclose the rebate nor did they inform the purchasers that the rebate was built into the cost of the title insurance. The purchasers were unaware of the rebate, did not consent, and were not credited any amount of the rebate.

   The court decided that the attorneys and purchasers had a fiduciary relationship and that attorneys “who receive money from title insurance companies, without the express consent of their clients, are acting unethically and illegally.”

   It cannot be disputed that examining attorneys, in the course of their representation of home purchasers are ethically prohibited from accepting any money or thing of value from title insurance companies without first obtaining the express consent of their clients. See *In re Equitable Office Bldg. Corp.*, 83 F.Supp. 531 (S.D.N.Y.1949) (Chief Judge Knox), rev’d on other grounds, 175 F.2d 218 (2d Cir.1949); New York State Opinion 351 (1974); New York State Opinion 320 (1973); ABA Comm. on Ethics and Professional Responsibility, Opinion 394 (1962); The Lawyer’s Code of Professional Responsibility, New York Judiciary Law (Appendix) DR 1-102(A)(4), EC 5-16, DR 5-101(A), DR 5-107(A) and EC 6-1 (McKinney 1975). Such circumstances have recently been analyzed by the Committee on Professional Ethics of the New York State Bar Association. This opinion clearly states that examining counsel who receive money from title insurance companies, without the express consent of their clients, are acting unethically and illegally. See New York State Opinion 576, pp. 8, 9

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19 12 USC 2601 et. seq.
21 However, the court examined the relationship between the title insurance company and the purchasers and decided that the title insurance company had no fiduciary duty to the purchasers. The Moll court rejected RICO, misrepresentation, and aiding and abetting claims against the underwriter.
Florida ethics officials long ago held that a lawyer “should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.”

N.Y. Ins. Law § 6409(d) (McKinney 2000) prohibits a title insurance company or anyone acting for or on its behalf from giving, among other things, any rebate or other consideration as an inducement or compensation for any title insurance business. Thus, a title insurance company may not give discounts, in the form of rebates or other price incentives, to an applicant for insurance.

b. RESPA

Plaintiffs have attempted to sue title insurance companies under RESPA, which states that “[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” These prohibitions include “splitting charges.”

“Title insurance is one of the various ‘settlement services’ that fall within the reach of RESPA.” A violation of § 8(a) of RESPA involves three elements: (1) a payment or thing of value; (2) given and received pursuant to an agreement to refer settlement business; and (3) an actual referral.

The Ninth Circuit explains that the only reasonable interpretation of section 2607(b) of RESPA is that it prohibits fee-splitting with a party where no services are provided in return for the fee, which is consistent with RESPA’s underlying purpose of preventing the abusive practice of paying a party merely for the referral of business. The Eleventh Circuit notes that a section 2607(b) violation requires that no services were provided in return for the settlement fee. Consequently, the relevant inquiry is whether any service was performed by the attorney agent in return for the fee paid by the title company so that the compensation paid to the attorney agent was not unearned or merely a kickback.

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22 654 F. Supp.2d at 1030.
24 See NY General Counsel Opinion No. 9–5-2003, 2003 WL 24312605. However, a lawyer is not prohibited from owning a title insurance company. Id.
28 Martinez v. Wells Fargo Home Mortgage, Inc., 598 F.3d 549, 553 (9th Cir.2009) (section 2607(b) “prohibits only the practice of giving or accepting money where no service whatsoever is performed in exchange for that money”).
29 Hazewood v. Foundation Financial Group, LLC, 551 F.3d 1223, 1226 (11th Cir.2008).
In *Chultem v. Ticor Title Ins. Co.*, the title companies offered evidence supporting a finding that the attorney agents performed actual title settlement services:

The record reveals that after attorney agents received a search package and contemporaneously with or shortly thereafter [sic] . . . a Preliminary Commitment, the attorney agents still performed services, some of which included: (1) clearing any cloud to the real property’s title, i.e., any liens; (2) providing instructions on what to include on title commitments; (3) recommending the waiver of exceptions to title; (4) making changes to the A–Exam or Preliminary Commitment; and (5) attending closings. The record further reveals that a non-attorney agent does not perform the same clearing and waiver services at closing nor is he or she exposed to potential liability associated with the waiver of exceptions. Importantly, the clearing and waiver of exceptions are necessary functions to determine final insurability. Moreover, the plaintiffs did not contend that the attorney agents under the programs provided no services in exchange for their compensation.

The court in *Galiano v. Fid. Nat. Title Ins. Co.* said that RESPA claims have often failed because plaintiffs plead that there is an industry-wide practice of awarding kickback fees. In addition, plaintiffs often claim that the referral fees make up 85% of the title insurance cost, but do not provide adequate proof to support their claims. In one case, the court concluded, “[f]inally, without specific facts as to the alleged kickback scheme, plaintiffs’ § 8(a) RESPA claim effectively becomes a claim of overcharge. Because RESPA is not a price-control statute, federal courts cannot review the reasonableness or validity of title insurance rates for actual services performed.”

The *Galiano* court recited the following allegations from the plaintiffs’ complaint: While title agents do provide actual services to defendants, the commissions they are paid exceed the value of the services. In short, title insurers, including “[d]efendants[,] paid illegal kickbacks to title agents [, lawyers, brokers, and lenders] for referrals and gave fees and other things of value to others for unearned settlement services and settlement services not provided” to plaintiffs and other purchasers of title insurance. The “vast majority” of agency commissions and “roughly 85 percent of total title insurance premiums” consist of kickbacks and other illegitimate costs. . . . Thus, “[t]itle insurers get business by encouraging those making the purchasing decisions . . . to direct business to that insurer. The best way to encourage [such business] is . . . [through] financial inducements.”

The court declined to find a RESPA violation. It concluded that without specific facts as to an alleged kickback scheme, plaintiffs’ § 8(a) RESPA claim effectively becomes a claim of

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31 The court affirmed the trial court’s ruling that the title companies’ payments to attorney agents were not prohibited under section 2607 where attorney agents provided settlement services in return for the payment, and the reasonableness of the monetary amount of those payments was irrelevant. 46 N.E.2d at 357. Any work such as clearing a cloud on title and providing instructions for the title commitment would defeat a RESPA claim. 46 N.E.2d at 351.
32 684 F.3d 309, 315 (2d Cir. 2012).
33 684 F.3d at 312.
overcharge. It said that because RESPA is not a price-control statute, federal courts cannot review the reasonableness or validity of title insurance rates for actual services performed.\textsuperscript{34}

c. Negligent Referral

Relationships are important in the title industry. While not rising to the level of kickbacks or other improper inducements, arrangements involving tickets to sporting events, the theatre, and other social occasions can lead to business relationships. A lawyer referring work to a title insurer should be careful to vet the insurer’s reputation for accuracy in its work and responsiveness to claims. One who fails to do so may be liable for the tort of negligent misrepresentation if a transaction goes awry and the recommended title insurer is at fault. No cases involving negligent referral of title services have been discovered. However, the tort of negligent referral is alive and well.

Lawyers often make referrals after work is declined. Staff may make them in response to cold calls or to clients who need a service that the firm doesn’t provide. Referrals are sometimes made during dinner conversations, at social events, or after a presentation made to the general public. We may pass along a name to a family member, a friend, a colleague, and especially good clients. After all, we do want to make sure our good clients are well taken care of. Too often, however, referrals seem to be made without any thought of the potential malpractice exposure. Is such casualness justifiable? Unfortunately, the answer may be no.\textsuperscript{35}

2. Agency Relationships.\textsuperscript{36} Matters become yet more complicated when the lawyer acts as agent for the underwriter while representing a client purchasing title insurance from the

\textsuperscript{34} Id. at 315.
\textsuperscript{36} Courts are split on the issue of whether the relationship between an approved attorney and the title insurance company constitutes agency. \textit{Compare} Nappen v. Blanchard, 510 A.2d 324, 328 (N.J. Super. Ct. Law Div. 1986) (holding that the “potential conflict an attorney may face in representing the interests of the insurer and, at the same time, remaining loyal to the attorney-client relationship and the confidences revealed therein militates against a finding of dual agency on the part of an ‘approved attorney’ or any attorney who seeks to procure insurance on behalf of a client.”) \textit{with} Sears Mortg. Corp. v. Rose, 634 A.2d 74, 82 (N.J. 1993) (holding that the approved attorney was an agent of the title company and that the putative conflict of interest does not preclude “the existence of an agency relationship between the title insurer and the closing attorney.”). In addition to the agency analysis, \textit{Nappen} is helpful because the attorney’s actions display the potential problems with serving as an “approved attorney” and being the closing agent. \textit{See generally} P. Bintinger, “Conflict of Interest: Attorney as Title Insurance Agent,” 4 Geo. J. Legal Ethics 687 (Winter, 1991).
underwriter. Perhaps surprisingly, though, the conflicts inherent in these situations are permitted with proper disclosure.  

The ABA has advised attorneys in a formal opinion on attorneys and title insurance in 1972:

When a buyer’s attorney issues a title insurance commitment upon a company for whom he is title agent, that attorney, in essence, has a fiduciary duty to serve both masters. Any exception or requirement in the policy decreases protection to the client, the buyer, and the failure to include those exceptions or requirements injures the title company, for whom the attorney also serves as agent. In creating the title insurance policy, the same attorney is representing both the purchaser and the seller of a contract of indemnity. Clearly, the interest of the insured is to get the most coverage for the least amount of money. On the other hand, it is the interest of the insurer to get the least exposure for the most amount of money. Unsettlingly, if the buyer makes a claim under the title insurance policy that the buyer purchased through his attorney, it places the attorney between two adverse principals.

It is apparent that if the lawyer is financially interested in a title company which will supply title insurance to his client, he must obtain consent of his client after making full disclosure to the client of the circumstances. If, however, the lawyer is performing legal services for both the title company and the client, the lawyer may represent both only if, first, it is obvious that he can adequately represent the interest of each, and, secondly, both the title company and the client consent to the representation after the lawyer has fully disclosed the possible effect of such dual representation on the exercise of his independent professional judgment on behalf of each. He must not, of course, violate any other Code provision in his handling of the transaction.

Arguing for the system to be changed, Barlow Burke wrote the following:

Notwithstanding the possibility of a conflict of interest, the American Bar Association has on two occasions refused to prohibit attorneys from acting as title insurance agents. Formal Opinions 3048 and 3339 both date from the 1960s and 1970s—and should be rethought today.

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37 Despite the controversy, the American Bar Association has refused to prohibit attorneys from acting as title insurance agents in Formal Opinions 3048 and 3339. Both of these opinions were written in the 1960s or 1970s. See Barlow Burke, “Law of Title Insurance” §1.02 (3d ed. supp. 2003).
There are four reasons why this rethinking should occur. First, the American Bar Association has since adopted a new set of standards for attorneys’ professional conduct. This is the Model Code of Professional Responsibility, adopted in 1980, and the Model Rules of Professional Conduct, adopted in 1983. The opinions of earlier decades should be reevaluated in light of the provisions of the Code and the Rules. Second, a few state bar associations have issued opinions disagreeing with the American Bar Association. Third, a few states have moved to prohibit attorneys acting as title insurance agents by statute. Fourth, the present conflict of interest is intensified by holding an attorney acting as title agent to an attorney’s standard of care, even though the actions occur in a more limited, agency context. For the attorney, it is the conflict of interest itself that violates a client’s right to representation; parsing the attorney’s actions to separate the agency and attorney role just exemplifies the conflict without eliminating it.39

While some courts have held that an attorney cannot represent parties in transactions where they own a stake in or manage the title company,40 that is not the rule in Florida. Historically, in Florida, all that was required was disclosure and consent of the client. In fact, in 1966, the Florida Bar wrote an ethics opinion approving a lawsuit by an attorney who represented a buyer against a title company in which that same attorney had an interest, as all parties had received disclosures and had consented. This was governed by Canon 6 of the Canons of Professional Ethics and Code of Professional Responsibility.41

In 1987, the Florida Bar modified the Rules of Professional Conduct and held that disclosure and consent alone are not enough, and that the attorney “must reasonably believe that the representation will not adversely affect the attorney’s responsibilities to and relationship with the other client. Only after that test is honestly evaluated by the attorney does disclosure of conflict and consent apply.”42

Under Florida law, an attorney may properly own and operate a title agency and may properly charge his or her clients a reasonable fee for title services; such a fee is not an attorney’s fee but is instead a title search fee subject to regulation under Florida law as such.43

Florida is not the only state to have addressed the agency issue. The Oklahoma Bar Association Legal Ethics Committee has opined that an attorney may recommend to a client the purchase of title insurance, and thereafter act as both title examiner and agent for the title insurer in a real estate transaction or loan transaction, so long as the attorney makes full disclosure to the client of the details of the transaction, including financial remuneration to be received by the

attorney from the title insurer and restrictions on his or her ability to represent either of the parties should a claim arise.\footnote{Ok. Adv. Op. 290, 1976 WL 41678.}

Likewise, the South Carolina Bar Ethics Advisory Committee has noted that an attorney who practices real estate law may recommend that a client obtain title insurance through the attorney as agent of a title insurance company in which the attorney holds an interest, but only after full disclosure to all parties, including the effects of dual representation and the attorney’s financial interest in the title company.\footnote{S.C. Adv. Op. 89–17, 1989 WL 608455.}

3. Financial Interests Short of Agency

In \textit{In re Evans},\footnote{902 A.2d 56 (D.C. App. 2006).} the District of Columbia Court of Appeals found that an ethical violation arose from a lawyer’s dual roles in a single transaction. The lawyer had a conflict of interest resulting from his dual roles as the owner of a title company that handled real estate closings and as a lawyer whose practice included both probate and real estate matters. The lawyer could have attempted to secure a waiver of the conflict, but did not. The court concluded that the non-disclosed conflict of interest created by the lawyer’s personal financial interest, through his ownership of the title business, and facilitating the closing of the loan without the client’s informed consent violated the applicable ethics rules. The attorney was suspended from the practice of law for a period of six months.

Virginia has approved an attorney’s representing a builder when the title company in which the attorney has an ownership interest serves as mechanic’s lien agent for the builder.\footnote{Va. Legal Eth. Op. 1521, 1993 WL 13682497.} And the Illinois State Bar Association Committee on Professional Responsibility concluded that no conflict of interest exists requiring disclosure to and consent from a buyer of property where a lawyer representing the seller has an interest in a title insurance company and on behalf of the seller, following full disclosure, proposes to issue title insurance in favor of the purchaser from the seller.\footnote{Ill. Adv. Op. 841 (July 15, 1983). \textit{See also} 2008 Ill. Atty. Reg. Disc., LEXIS 384 (attorney censored on account of undisclosed financial interest in title agency).}

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility considered a situation wherein one of a lawyer’s partners was a shareholder in and counsel to an abstracting company. The concern was whether there is an ethical conflict when any lawyer in the firm referred a title search/title insurance order to the abstracting company. The Committee concluded that there should not be any conflict so long as the businesses are separate, and that careful attention is paid to Rule 1.7 dealing with conflicts of interest. “For example opinion 87–131 states that a law firm can become a title insurance agent and operate from the law office so long as the activities are kept separate…. The title examination itself is in everyone’s interest to be done properly. The biggest potential conflict [is] with the opposing desires of the buyer and
lender with regards to exceptions. It is obviously critical that the buyer understand all exceptions in the title policy."

In *Northwest Life Ins. Co. v. Rogers*, the court failed to find that an attorney breached his duty to provide competent legal services so as to establish any cognizable legal malpractice claim where the alleged conflict of interest of the attorney who represented the claimants during their closing was also a principal in a title insurance company involved in the transaction. The alleged conflict of interest did not cause any injury.

4. **What duty does a title insurer owe to its customers?**

Florida law allows for the creation of a fiduciary relationship between a “title insurance company acting as a closing agent or escrow agent and the buyer and seller.”

A fiduciary duty exists when there is a relationship of trust and confidence between the parties. In *Wall St. Mortg. Bankers, Ltd. v. Attorneys Title Ins. Fund, Inc.*, the plaintiff claimed that defendant National Title Services, Inc. (“NTS”), owed a fiduciary duty to the plaintiff as the title agent. The court noted that despite the defendant’s contrary argument, courts have interpreted Florida law to allow for the creation of a fiduciary relationship between a title insurance company acting as a closing agent or escrow agent and the buyer and seller. In that capacity, NTS allegedly breached its duty when it disbursed the plaintiff’s money that it had held in escrow without first obtaining a deed or HUD-1 settlement statement. As a result of this alleged breach, plaintiff contended that it was damaged. These allegations stated a claim for breach of fiduciary duty.

In *The Florida Bar v. Hines*, Hines’ role in the transaction was as a title attorney, a closing agent, and an escrow agent. She was providing legal services and, as closing and escrow agent, owed a fiduciary duty to all of the principal parties involved. The Florida court of appeals has stated that absent an express agreement, the law implies from the circumstances that an escrow agent undertakes “a legal obligation (1) to know the provisions and conditions of the principal agreement concerning the escrowed property, and (2) to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property (i.e., to disburse the escrowed funds) in strict accordance with the principals’ agreement.” Additionally, a closing agent has a duty to supervise the closing in a “reasonably prudent manner.” Hines is not alone.

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51 And, hence, what duty does a lawyer for a title insurer have to be sure that his or her employer honors the company’s obligations to its customers?
53 08-21648-CIV, 2008 WL 5378126, at *3 (S.D. Fla. 2008).
54 39 So. 3d 1196, 1200 (Fla. 2010).
56 Id.
57 *Askew v. Allstate Title & Abstract Co.*, 603 So.2d 29, 31 (Fla. 2d DCA 1992) (quoting *Fla. S. Abstract & Title Co. v. Bjellos*, 346 So.2d 635, 636 (Fla. 2d DCA 1977)) (stating that a title insurance company acting as a closing agent has a duty to supervise a closing in a reasonably prudent manner).
Other Florida decisions hold that a closing agent has a fiduciary duty to all of the principals in a transaction. 58

Under Florida law, “the liability of a principal for the acts of its agent is not limited to what is expressly authorized. A principal also may be responsible for the acts of its agent if these acts lie within the apparent authority of the agent.” 59

There are, however, limits to the obligations of a title insurer to third parties. In Krehling v. Baron, 60 defendant Brugger prepared clean title insurance policies for the third-party purchasers of units in the various developments on behalf of title insurer-defendants Fund and Commonwealth. The plaintiff, who held an unrecorded mortgage, maintained these policies were fraudulent in that defendant Brugger was aware of the various unrecorded mortgages on the units, yet issued clean policies which made no mention of these mortgages. The plaintiff alleged that defendants Commonwealth and Fund owed plaintiff a duty of reasonable care to supervise and take steps reasonably necessary to prevent their agent, defendant Brugger, from writing fraudulent title insurance policies and commitments. Defendants Fund and Commonwealth were alleged to have breached their duty by failing to supervise agents in a reasonable manner, failing to (i) provide agents with sufficient and up-to-date instruction and guidance as to the issuance of title insurance commitments and policies, and (ii) take steps reasonably necessary to prevent defendant Brugger from (a) writing fraudulent title insurance policies, and (b) using their title insurance agency to defraud plaintiff. The court held to the contrary, noting that plaintiff was not a party to any of the closings and had no relationship with the title insurers. The title insurers owed a duty only to their insureds.

Even though a title insurer may make no specific charge for its services in supervising the closing, there is no doubt that these services are provided as an inducement to the purchase of title insurance. Hence, a title insurance company acting as a closing agent has the duty to supervise a closing in a “reasonably prudent manner.” 61 However, unless there is an allegation that the title insurer was acting as closing agent, the title insurer is not liable for defects in the closing that are unrelated to defects in title. 62

5. Defense/Prosecution of Claims

What if the lawyer does not initially represent the title insurer, but is retained to defend, jointly on behalf of the insurer and the insured, a claim against the insured’s title or to prosecute an action to remove an offending title claim? Such circumstances are often preceded by a claim against the title insurer. To whom does the lawyer owe a duty?

58 For example, see Daniel v. Coastal Bonded Title Co., 539 So.2d 567 (Fla. 5th DCA 1989) (holding that causes of action existed for both intentional and negligent breaches of fiduciary duty against non-lawyer title company); Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A., 671 So.2d 805 (Fla. 3rd DCA 1996) (reinstating action by non-clients against law firm escrow agent for fraud and breach of fiduciary duty); and Askew v. Allstate Title & Abstract Co., Inc., 603 So.2d 29 (Fla. 2nd DCA 1992) (holding that “title agent has a fiduciary duty to both the buyer and the seller, two potentially conflicting parties.” Askew at 31.).

59 See Union Title Ins. Co. v. Citibank, Fla., 715 So. 2d 973, 974 (Fla. 1st DCA 1998).


61 Fla. S. Abstract & Title Co. v. Bjellos, 346 So. 2d 635, 636 (Fla. 2d DCA 1977).

This question was considered by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility.\textsuperscript{63} It noted that while the insurer and the insured share the goal of resolving the offending title issue, a conflict of interest was nevertheless present under Rule 1.7, since the insured had a claim against the insurer. The Committee concluded that continuing representation of the title company and the insured would indeed constitute a conflict of interest under Rule 1.7. The Committee noted that, for example, the lawyer for the insured might seek relief from the title company other than a curing of the title defect—damages, for example, and if there were a joint engagement, doing so would be adverse to the interests of the other client—the title insurer.

In 69th Street and 2nd Avenue Garage Associates, LP v. Ticor Title Guarantee Company,\textsuperscript{64} the Appellate Division held that where a conflict of interest is probable, selection of attorneys to represent the insured should be made by the insured rather than the insurer, but the insurer should remain liable for reasonable fees. In that case, the insurer’s right under a title policy to maintain and defend any action or proceeding relating to title was overridden by the insured’s right to counsel of own choosing in the case of a conflict of interest.

The court noted that in practically all, if not in all, cases, the insured and the insurer will have a common interest in defeating the claim made against the insured. What changes the rights of the insurer and the insured in those cases is where conflicts arise from their divergent interests and how they would prefer to go about defeating such claims. The interests of Garage Associates and Ticor diverged seriously, though each wanted to defeat the claim. Ticor having insured the title of a heavily mortgaged property could proceed leisurely, but Garage Associates needed a quicker resolution to keep open the possibility of refinancing, to retain customers and employees, and to stay in business. There was a crucial conflict of interest, and Garage Associates had the right to its own attorneys.

D. Conclusions

At least three states have adopted statutes governing the provision of title insurance by lawyers or others who hold an interest in the underwriting insurance company.\textsuperscript{65}

When faced with potential conflict situations involving the title industry, lawyers should consider the following questions:

- Does another lawyer in my firm represent the underwriter—not in the transaction at hand, but in one or more other matters?
- Should I disclose the relationship to my client and allow the client to pursue alternatives?
- May I disclose the nature of my relationship with the title insurer, or is that a client confidence?

\textsuperscript{64} 207A.D.2d 225, 622 N.Y.S.2d 13 (1995).
\textsuperscript{65} E.g., Tennessee Code Annotated § 56–3401, 56–3 5–110 and 56–3 5–121; Colorado Revised Statutes § 10 – 11–108 (2)(a); 215 ILCS 155/2) (from Ch. 73, par. 1402).
• If I can’t disclose the existence/nature of my relationship with the title insurer, can I ethically represent both my buyer or lender client at the same time I represent the title insurer?

• What if special endorsements are required? May I ethically require them when doing so is adverse to the interests of one of my firm’s other clients—the title insurer?

• Might the client might be disappointed if, when it becomes time to assert a claim on account of a title defect, I must explain that I cannot do it because of the conflict of interest?

Transparency and sunlight will solve many of these issues. Disclosure and client consent may ward off any problems. Both the Illinois State Bar Association and the New York State Bar Association have promulgated sample disclosure and waiver forms. They may be found at: M. Rooney, “Ethics and the Attorney/Title Agent,” 96 Ill. Bar J #3, at 2 (March 2008), and Form 55.5 New York State Bar Association, Real Property Law Section, Model Form: Title Insurance Disclosure and Consent, LexisNexis® Forms FORM 140-55.5.