

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-08

JUNE 4, 1993

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED], North Dakota, which requests an advisory opinion on whether there are any ethical problems with an attorney, as an agent for a title company, issuing title insurance policies where a client of the attorney is either a seller, buyer, mortgagor, or mortgagee.

The relevant portion of Rule 1.7 of the North Dakota Rules of Professional Conduct provides as follows:

- (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.
- (c) A lawyer shall not represent a client if the representation of that client might be adversely affected 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 consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

NDRC, Rule 1.7(b), (c)

The relevant portion of Rule 1.8 of the North Dakota Rules of Professional Conduct provides as follows:

- (a) Except for standard commercial transactions involving products or services that the client generally markets to others, a lawyer shall not enter into a business, financial or property transaction with a client unless:
 - (1) The transaction is fair and reasonable to the client; and
 - (2) After consultation, including advice to seek independent counsel, the client consents to the transaction.

NDRC, Rule 1.8(a)

There are no North Dakota cases interpreting these rules, however, the committee has previously cited the case of Estate of Schuldt, 428 NW2d 251 (SD 1988), in relation to conflict of interest problems. In Estate of Schuldt, the court interpreted the South Dakota Code of Professional Conduct, which was superseded on July 1, 1988, by the Rules of Professional Conduct, but the court discussed how the case would also have been decided under the rules. Like North Dakota's Rules of Professional Conduct, South Dakota's Rules were taken from the ABA Model Rules of Professional Conduct.

The facts in the Schuldt case are dissimilar from this case, but the reasoning of the court provides sufficient insight into the problem faced in this fact situation when members of the bar are involved with other occupations or professions.

Interpreting Rule 1.7(b) of the South Dakota Rules of Professional Conduct, which is the substantially equivalent of the North Dakota Rule 1.7(c), the South Dakota court held:

A lawyer shall not represent a client if that representation may be materially limited by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. (Rule 1.7(b))
In cases like this, where a lawyer functions in several capacities, his interests diverge from, and inherently conflict with, those of his client. (emphasis added)

The court goes on to conclude that:

By maintaining such dual employment, the lawyer puts his economic interest ahead of his promised loyalty to his client. Such an arrangement is not permitted by the Rules of Ethics.

It appears that a conflict may arise in the event of subsequent title problems between the rights of the seller and buyer and/or the rights of the title insurer and buyer and among the rights of the insurer, buyer and mortgagor.

The expanded request for opinion cites Section 26.1-20-05, NDCC, which requires a title insurer to obtain a title opinion from an attorney evaluating the record title evidence of the title to be insured. The request for an opinion does not reference the attorney's role as the preparer of the title opinion in addition to acting as the insurer's agent. The recommendation to the client/buyer that title insurance is or is not needed while acting as agent for the insurer, with the expectation of obtaining a portion of the commission, appears to create an inherent conflict of interest. Also, the preparation of legal documents as attorney for the seller while passing upon the adequacy of those documents on behalf of the insurer as agent or attorney, and/or as attorney for the buyer, appears to create an inherent conflict of interest.

Selling the buyer-client title insurance as agent for the insurer invokes the impropriety suggested by Rule 1.8 which provides that a lawyer shall not enter into a business or a financial transaction with a client unless the transaction is fair and reasonable to the client and then only after consultation, including advice to seek independent counsel. It would appear necessary for the attorney to obtain the consent of the client to the transaction in writing wherever this dual representation occurs.

Conceivably, a lawyer could resolve these conflicts of interest by reaching a reasonable belief that the representation of his clients will not be adversely affected and by obtaining the client's consent, after consultation, which should include explanation of the implications of the common representation and the advantages and risks involved as suggested in Rules 1.7(c)(1) and (2) and Rule 1.8(a). It should be noted that after this opinion was drafted for review by the committee they became aware of several ABA informal ethics opinions issued on this subject in the past twenty years. The essence of those opinions are totally consistent with this opinion in every respect. It might be said that greater emphasis is placed by the ABA opinions on the use of consents to the transaction by the various clients with conflicting interests.

It should also be noted that this opinion does not attempt to comment upon the legal liabilities that the attorney might incur

with respect to representation of conflicting interests with or without written consent from the clients.

CONCLUSION

While conflicts of interest among clients may be resolved under the provisions of Rules 1.7 and 1.8 as cited above, the committee has concern that the conflicting property rights of a seller-client, a title insurer, and a buyer-client may place the attorney in violation of the Rules of Ethics.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Albert A. Wolf, and was unanimously approved by the Ethics Committee on June 28, 1993.


Michael J. Maus
Chair

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[REDACTED]

April 26, 1993

State Bar Association of North Dakota
PO Box 2136
Grand Forks, North Dakota 58502

We wonder if you would be so kind as to submit to the Ethics Committee the following question

Are there any ethical problems with an attorney, as an agent for a title insurance company, issuing title insurance policies where a client of the attorney is either a seller, buyer, mortgagor, or mortgagee?

Respectfully,

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

May 12, 1993

Albert A. Wolf
Wheeler & Wolf
Attorneys
PO Box 2056
Bismarck, ND 58502-2056

Re: Ethics Committee Opinion Request

Dear Al:

Yours of May 10th requesting some additional facts is at hand, and as of this time all seems to be well in Grand Forks.

The factual situations that give rise to my request for an opinion include

- (1) An attorney or law firm is under an agency contract with a title insurer with authority as agent of the insurer to issue title insurance policies for the title insurer.

The same attorney or law firm represents a seller or a developer and draws all the deeds and contracts for the sale of real property, and then as agent for the title insurer issues a title insurance policy insuring a marketable title in the buyer, charging the seller or developer for legal services and possibly also all or part of the charges for the title insurance, and keeping a portion of the title insurance charges as an agent of the title insurer.

It would appear that the attorney or law firm represents at least two (2) of the three (3) parties involved in the sale of the property and the issuance of a title insurance policy, and conceivably could be collecting legal fees and insurance commissions.

A similar situation arises where an attorney represents a personal representative of the estate of a deceased person and drafts all of the papers for a distribution or sale of the property and then as agent for the title insurer issues a title insurance policy to the distributee or buyer, insuring the marketability of the title being insured.

- (2) There is another situation.

Sec. 26.1-20-05, NDCC provides

"A domestic corporation organized for the purpose of insuring title to real property in this state or of insuring against loss by reason of defective titles to real property, or encumbrances on real property, or a foreign corporation authorized to do business in this state, may not issue any policy, binder, or certificate unless it has secured from a person, firm, or corporation holding a certificate of authority under chapter 43-01 the record title evidence of the title to be insured, and the title evidence has been examined by a person duly admitted to the practice of law as provided by chapter 27-11. The certificate of authority of any corporation violating this section must be revoked as as provided by chapter 26.1-02 or 26.1-11."

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May 12, 1993

Are there any ethical questions if the attorney or law firm, as the agent for the title insurer, violates the provisions of said Sec. 26.1-20-05, NDCC ?

- (3) As an offshoot of (1) above suppose the attorney or law firm represents the buyer and then issues a title insurance policy, as the agent of the title insurer, to the buyer-client insuring the marketability of the title.

Trust that you and your partners are out of jail.

[REDACTED]

[REDACTED]