

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-295
Issued: September 1984

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: May an attorney recommend title insurance and act as title examiner and agent for the title insurance company in a real estate transaction or a loan transaction?

Answer 1: Qualified yes.

Question 2: May the attorney nominate other attorneys as “authorized title examiners” and split insurance commissions with them if they recommend that title insurance be purchased through him?

Answer 2: No.

References: DR 5-101(A); DR 5-105(A)(B)(C); DR 5-107(A)(1)(2); ABA Op. 331(1972); S.C. Op. 82-20 (n.d.); Tenn. Op. 80-F02(1980); N.H. Op. 3(1981); Comm. Op. 34(1982); Maine Ops. 18(1981) and 40(1983); DR 2-103(B)(C).

OPINION

A lawyer may recommend title insurance and act as a title examiner and agent for the title insurance company in a real estate transaction or a loan transaction. All persons involved, including the purchaser or seller, borrower or lender, as well as the title insurance company, should be fully apprised of any multiple representation or the potential for conflicts of interest resulting therefrom, and of the fact that the lawyer will receive a fee or commission for writing the title policy. The individual clients must consent to any multiple representation. DR 5-101(A); DR 5-105(A) (B)(C); DR 5-107(A)(1)(2); ABA Op. 331 (Maru doc. 7326, 1972); S.C. Op. 82-20 (n.d.); Tenn. Op. 80-F-2(1980); N.H. Op. 3(1981); Conn. Op.34 (1982). But compare N.C. Op. 302 (1981) and N.J. Op. 495 (1982) (not even disclosure will cure the potential or actual conflict if the lawyer owns a beneficial interest in the title company or property involved).

On the other hand, while it is proper to charge the client both a legal fee for a title search and a premium charge, if consent has been obtained after full disclosure made prior to the undertaking of the employment, the lawyer should credit the client’s account for that portion of the premium that represents compensation for legal work/title work already billed. This is necessary to avoid a double payment for the same work. Maine Ops. 18 (1981) and 40 (1983).

With regard to Question 2, we must make reference to DR 2-103(B) (C) which provide that:

- (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a regard for having made a recommendation resulting in his employment by a client.
- (C) A lawyer shall not request a person or organization to recommend employment, of himself, his partner, or associate....

The committee believes that the attorney/agent's proposed course of conduct would encourage prohibited solicitation (of legal/title or by the naming of "authorized (attorney) title examiners" in return for their efforts to encourage the purchase of the agent's product. The splitting of insurance commissions as a further inducement to this mutual referral further solidifies this view.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.