

RE: Advisory Opinion 2000-01
Arkansas Bar Association

DATE: February 21, 2000

SUBJECT: Attorney Involvement with Land Title Company

Background: A group of non-attorneys plan to establish a land title company. A non-attorney will be a full time manager. The plan envisions a law office to be physically located in the title company's office. The office would prepare deeds, contracts and other legal documents to be used by the title company in real estate closing. The office would be staffed by a licensed Arkansas attorney, who has a full time practice in another county and would be present in the law office approximately one day per week.

Analysis: In Advisory Opinion 98-01 this committee analyzed the proposal of several attorneys to create a title insurance company. We examined the conflicts of interest between the attorneys' professional practice and ownership of a related or ancillary business, and the resulting necessary disclosure and consent. In contrast, no lawyer will own any part of this proposed company. However, this proposal presents three ethical issues of its own.

1) Unauthorized Practice of Law: Corporations are not permitted to practice law. Ark. Code Ann. § 16-22-211(a). Title companies are not permitted to draft legal documents, provide them to individuals in real estate transactions, and charge for their services. Beach Abstract & Guarantee Co. v. Ark. Bar Assn., 230 Ark. 494, 326 S.W.2d 900 (1959). Admittedly in some instances real estate brokers, and by extension others in the real estate profession, may complete standardized legal documents in connection with a particular transaction. See Pope County Bar Association v. Suggs, 274 Ark. 250, 624 S.W.2d 828 (1981). But that opinion expressly bars brokers and others from giving legal advice or charging for their services.

If a title company cannot engage in the unauthorized practice of law directly, neither can it do so indirectly. See Arkansas Bar Association v. Union National Bank of Little Rock, 224 Ark. 48, 273 S.W.2d 408 (1954). Regardless of whether the title company has an attorney serving as an officer or employee, whether the title company has a lawyer physically in the building, or whether the company has an attorney on retainer, the title company cannot engage in those activities that are traditionally restricted to licensed lawyers.

2) Location of the attorney. No ethical rules restrict the office of an attorney. An attorney may rent space for a law office in a bank, a shopping mall, a courthouse annex, or a real estate office. Nothing prevents the attorney from entering into a landlord-tenant relationship and having an office in the same facility as the land title company. But in addition to adherence to the ethical standards, including those of reasonable fees, confidentiality, and conflicts of interest, the attorney must be particularly sensitive to two dangers.

Arkansas Rule of Professional Conduct 5.4(a) prohibits sharing legal fees with non-

lawyers. Accordingly, it would be improper for the rent to be based on a percentage of the legal fees received. The rent should be established in a manner that does not violate this rule. Likewise the fees paid for legal services must be paid to attorneys and retained by them.

In addition Rule 5.4(c) mandates that the attorney exercise independent professional judgment, free of any interference from the third party (such as the land title company) who recommends the attorney to individuals. The relationship between the title company and the law office must assure professional independence.

3) Supervision of non-lawyers: Without running afoul of the unauthorized practice of law, an attorney may use law clerks, paralegals, accountants, investigators and other skilled individuals to assist in the rendition of legal services. Comment to Rule 5.5. A real estate lawyer can rely on others to research titles, prepare deeds and handle closings.

However, we offer three caveats:

a) The attorney must have control and authority over the assistants. In this proposed plan, the attorney cannot delegate the research and drafting to employees of the land title company. The attorney lacks ultimate control over them. The attorney would be delegating legal services to individuals controlled by non lawyers. Unless the relationship between the attorney and the paraprofessionals is that of employer-employee (or a comparable relationship), the attorney may lack sufficient control to assure professional standards.

b) The attorney must actually exercise control. The attorney is to give appropriate instruction to assistants concerning their responsibilities and supervise, as well, the ethical aspects of their employment. Comment to Rule 5.3. The attorney is responsible from both a malpractice and a discipline perspective for the failure to exercise control. In addition, the failure to properly exercise oversight subjects the attorney to a possible unauthorized practice of law violation under Rule 5.5(b). The assistants have no authority to give legal advice or provide other legal services. We note, for instance, that the Supreme Court and its Committee on Professional Conduct have disciplined attorneys for the lax control and supervision of employees. For example, Mays v. Neal, 327 Ark. 302, 938 S.W.2d 830 (1997) (attorney disciplined for permitting office personnel to practice law).

c) No rule requires the attorney to be physically present in the office a prescribed number of hours. No rule expressly prohibits an employee from signing, with clear permission, the name of the attorney. But the risks are great. No competent lawyer in the real estate setting would approve a document without having seen it, and any careful lawyer will insist on personally approving, if not signing, the document.

NOTICE

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of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____

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