

RE: Advisory Opinion 96-01

DATE: October 9, 1996

SUBJECT: Confidentiality and Title Insurance Companies

This committee has been asked to evaluate the request of a title insurance company directed to an attorney in private practice. To approve the attorney as a closing attorney for the title insurance company, the company wishes authority to examine any files on real estate closings handled by the attorney (or any other attorney in the office). This review would be conducted at regular intervals. The examination would include three types of files: 1) closings in which the title insurance company issued a policy and the firm represented the company; 2) closings in which the company issued a policy through the firm or through another agency, and the firm represented one of the participants; and 3) closings in which the company was not involved in any way, but the firm represented a participant. The examination would include an audit of both the real estate file and the attorney's trust account.

Rules: The governing standard on confidentiality is found in Ark. Rule of Professional Conduct 1.6 (a) : "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraph (b). "

The scope of the rule of confidentiality is intentionally broad. The rule encourages people to seek legal assistance and facilitates the complete development of facts. Clients have a reasonable expectation that information relating to the client will not be disclosed by the attorney. See Scope, Ark. R. Prod. Cond.

The duty of confidentiality extends to both written and oral information. The duty extends to all information relating to the representation, regardless of its source or its degree of confidentiality. The duty protects innocent or neutral information, as well as potentially damaging or embarrassing information. The financial transactions of a client may not be embarrassing, but they are certainly private.

Nothing in Rule 1.6 or the accompanying comments permits an attorney or firm to disclose information about clients to third parties. Nothing permits disclosure to title insurance companies merely because they may have issued a policy on the real property in issue. Nothing in Rule 1.6 or Rule 1.15 permits a third party to audit the attorney's trust account.

Application: In light of the lack of the specific guidelines in the rules, these general principles must be applied to the three factual situations posed above:

1) The relationship between the title insurance company and an attorney writing title insurance for that company may be viewed as a principal and agent relationship. When an attorney is acting as closing or escrow agent in an insured closing, there is only the principal/agent relationship between the attorney and the title insurance company. Records and information involved in underwriting title insurance will be disclosed by the attorney to the title insurance company because of the principal/agent relationship between them. There is no

attorney/client relationship with other parties that would give rise to a duty of confidentiality between the attorney and other parties to the transaction.

2) If the law firm is representing one of the participants to the transaction, and the title insurance is issued by the attorney or another agency, the attorney faces a conflict of interest under Rule 1.7(b). Even if the attorney is not writing the insurance policy for the transaction, the attorney still has an on-going relationship with the title insurance company. This relationship must be disclosed to the client before the title insurance is issued, and the client must consent to this relationship.

In a real estate transaction, many disclosures of information are "impliedly authorized" under Rule 1.6. Many of the documents become a matter of public record. For example, the deed and mortgage are filed for record, and the purchase price is disclosed by the amount of revenue stamps on the deed. Other documents, such as the offer and acceptance and the closing statement, are disclosed to parties who are not within the attorney/client relationship. The other parties to the transaction (the closing agent, the title insurance company, the real estate agents and, sometimes, the insurance carrier) receive information about the transaction that is "impliedly authorized" by the client. When a client permits the attorney to issue title insurance, he consents (either impliedly or expressly under Rule 1.6 (a)) to disclosure of the information needed to secure the insurance.

Once consent is given, the documents relating to the underwriting of the title insurance are subject to disclosure to the title insurance company. Other documents, including the attorney's work product, that come within the scope of the attorney's agency relationship with the title insurance company are also subject to disclosure.

3) Communications between the attorney and client when the title insurance company is not involved in any manner are clearly not subject to disclosure. Unlike the second scenario, in transactions in which the title insurance company has no involvement it is particularly inappropriate for the attorney to seek client consent to disclosure of records to a third party when the purpose benefits only the attorney and not the client.

Trust Account: In all three scenarios, the proposed audit of the trust account raises other problems. The trust account most likely will include funds from clients who have sought legal assistance in family law matters, criminal defense trials, personal injury claims and other non-real estate matters. An audit of a trust account would invade their expectations of privacy also.

To audit or examine the trust account, not only would client consent be required, but the trust account itself would have to be limited to clients who have consented. Perhaps a separate trust account could be established for closings in which the title insurance company is participating, and in which the clients have consented.

In conclusion: The attorney may disclose information to the title insurance company in two situations: (1) the attorney is acting only as escrow agent in an insured closing; and (2) in an insured closing the client consents to the conflict of interest and the disclosure is limited to underwriting information necessary to evaluate title and issue the title insurance commitment and policy. In the absence of such consent and safeguards, this committee concludes that

permitting the title insurance company to examine files and trust accounts violates both the letter and spirit of Rule 1.6.

NOTICE

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ARKANSAS BAR ASSOCIATION

By: _____
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and Grievances Committee