

RE: Advisory Opinion 98-01  
ARKANSAS BAR ASSOCIATION

DATE: June 8, 1998

SUBJECT: Ownership of Land Title Company

Facts: Several attorneys in different firms and one non-lawyer propose to set up and own a Title Insurance Plant, Escrow and Closing Company. Pursuant to a written agreement, the owners will have an interest in the fixed assets and will be compensated based on the business referred to the company. The proposed company will maintain a computer base of property records, compile title histories and provide loan closing services. In addition, as an agent of a national title insurance company, the proposed company will issue title insurance policies. The proposed company will not issue title opinions or title certificates to lenders or other interested parties. The issues presented to this committee are:

1. Whether a lawyer in private practice may own a land title research and escrow company;
2. Whether lawyers in different firms may jointly own such a company;
3. Whether the presence of a non-lawyer as a part owner bars or restricts the participation of attorneys;
4. What restrictions, if any, are placed on the attorneys.

The Rules: The applicable rules are: Rule 1.7(b) of the Arkansas Rules of Professional Conduct:

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited 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."

Also relevant is Comment 6:

"The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be

difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest."

Rule 1.8(a) governs business relations between attorneys and clients:

"(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 to the client in a matter which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto."

Comment 1 provides:

"As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable."

Discussion: 1) The protection of a client's title to land has historically been the practice of law and has been accomplished through a title opinion. American Bar Association Formal Opinion 331 (1972). However, the development and growth of title insurance companies and similar entities have raised questions as to the attorney's participation in them.

A minority of jurisdictions have concluded that the conflict between an attorney representing a client and simultaneously having a financial interest in a participating title insurance company is so great that the conflict cannot be waived. (In re Qginion 682 of the Advisory Committee on Professional Ethics, 687 A.2d 1000 (New Jersey 1997)) ("The purchaser of title insurance seeks the maximum possible protection, while the title company strives to limit liability in the event of a claim under the policy. Where exceptions are negotiable, consent, no matter how well informed, will not remedy the conflict of interest.")

However, the consensus has been that an attorney, while still protecting the interests of a

clients, may be an agent for a title company and be compensated in connection with the insurance of a policy. The opinions are clear that an attorney may not receive a fee or commission (delayed or not) for recommending or selling title insurance without fully disclosing to the client the attorney's financial interest in the transaction. American Bar Association Formal Opinion 331 (December 15, 1972) ; American Bar Association Formal Opinion 304 (February 16, 1962) . The potential conflict of interest arising from the attorney's financial interest and the resulting effect on the independent professional judgment of the attorney mandates disclosure to, and consent from the client. Ark. R. Prof. Conduct 1.7 (b).

2) No rule of professional conduct bars attorneys in different firms from owning and operating a separate business. Whether it be a restaurant or a title insurance company, these attorneys are permitted to jointly enter into such an enterprise.

3) Attorney and non-lawyers are permitted to engage in commercial enterprises, provided the business does not engage in the practice of law. Ark. R. Prof. Conduct 5.4(b) . A corporation cannot practice law, cannot furnish legal services or advice, and cannot render legal services of any kind. Ark. Code Ann. § 16-22-211(a) . But subsection (d) does permit a corporation to engage in the "examination and insuring of titles to real property."

The issuance of title opinions by non-lawyers has long been held to be the unauthorized practice of law. Beach Abstract & Guarantee Co. V. Ark. Bar Assn., 230 Ark. 494, 326 S.W. 2d 900, (1959) . No advisory opinions from the Supreme Court Committee on the Unauthorized Practice of Law have varied from the rule in Beach Abstract. Unlike a title opinion, which is all inclusive and gives an opinion as to the status of the land going back to the original patent, the title certificate covers the land, but does not certify title to the severable aspects of the land (mineral, timber, oil and gas rights) and the certificate only goes back a prescribed number of years. This company does not intend to issue either title opinions or title certificates.

#### 4) (A) Disclosure by Attorney

Rule 1.8(a) governs business transactions with clients. A client has a special trust in, and is frequently dependent upon, the independent judgment of the lawyer, which is to be exercised in the client's best interest. The possibility of referral of legal clients to another business of the lawyer introduces an extraneous and potentially conflicting motive, which can threaten or interfere with the lawyer's independence of judgment.

The dual relationship of an attorney representing a client and also having an interest in the title insurance company that will issue title insurance is a closer relationship and a relationship with more risks to the client than the standard commercial transaction envisioned by the Comment to Rule 1.8. See generally, Howard W. Brill, "Business Transactions with Clients: Ethical or Ill-Advised?", Arkansas Lawyer (Winter 1995) 28. It is difficult, if not impossible, for an attorney to maintain the degree of independence and objectivity necessary to serve an individual client, when the attorney is also an owner and perhaps an employee of a land title company that is involved in the transaction for the individual client.

The client is entitled to know that the lawyer has an ownership interest in a title company, and that the title company will be making a charge for the services provided. Therefore, the committee concludes that an attorney may refer a client to a title insurance

company owned in part by the attorney, only if the attorney has disclosed in writing that the attorney has an ownership interest in the business, and that the same services may be obtained from other providers, and only after the client has acknowledged the same in writing. See New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 657.

If the attorney who is providing services for a client also provides services for the company in regard to the same transaction, the potential conflict must be analyzed by the attorney in light of Ark. R. Prof. Cond. 1.7(b). Only after successfully navigating the requirements of that rule can the attorney represent both the client and the company.

#### (B) Disclosure by Company

Rule 5.7 of the Model Rules of Professional Conduct, as adopted by the American Bar Association in February 1994, covers "the responsibilities regarding law related services." The proposed land title research and escrow company falls within the definition of such services. Although the rule has not been adopted in Arkansas, it is consistent with the existing rules and interpretations. If the lawyer individually or with others has control of the operations of a law related entity, the Rule requires the lawyer to take "reasonable measures to assure that a person obtaining the law-related services knows that the services provided by the separate entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply." This committee adopts that mandate. The burden is on the attorney, through the company, to communicate that information to the recipient of the law related services prior to an agreement for such services. The information should be communicated in a reasonable way, in light of the services and in light of the nature of the client.

#### (C) Litigation

Of further concern are situations where the attorneys which have an ownership interest in the title company oppose each other on behalf of clients. At least three primary scenarios present themselves. First the litigation is related to the land and to the services provided by the company, as for example, in a dispute over warranties of title. Second, the litigation involves the land, but not any services provided by the company, as for example, in a dispute over trespass upon the tract. Third, the litigation is unrelated to the land, as in a personal injury case.

In all three situations, because the possibility of conflict exists, the attorney must evaluate the situations by the three party test of Rule 1.7(b): whether a reasonable attorney would undertake the representation, whether the client has received complete disclosure of the role of both attorneys in the company, and whether the client has knowingly consented. In the first two situations, it is difficult to see an attorney, pursuant to the reasonableness standard of Rule 1.7(b), concluding that such representation would be permissible.

In the third situation, the possibility of a conflict exists between the opposing attorneys, not with the land or with the clients. Although unlikely, it is conceivable that the attorney may not be as zealous because his business partner is the opposing attorney. Therefore Rule 1.7(b) requires that, after having concluded that representation is permissible by the standards of a reasonable attorney, the attorney must make full disclosure of the corporate involvement with the opposing attorney and seek the consent of the client before proceeding with the representation. The client is entitled to knowledge of the personal ties that may pull at the loyalty of the attorney.

Such disclosure and consent is necessary to avoid the "appearance of impropriety." The Supreme Court has described the appearance of impropriety concept as "a rock upon which are built the rules guiding lawyers in their moral and ethical conduct", and likewise it should guide this committee in interpreting the rules of professional conduct. Burnett v. Morgan, 303 Ark. 150, 156, 794 S.W. 2d 145, 148 (1990) .

Conclusion:

At least four restrictions are applicable to the attorneys entering into the proposed company.

1) Clients who will be referred to the company or will be customers of the company must be informed in writing that the attorney has a financial interest in the company, and their written consent to the transaction obtained.

2) Likewise, individuals who deal with the company must be reasonably informed that the company is not practicing law or rendering legal services, and the protections of the profession are not applicable.

3) The attorney-owner cannot engage in an adversarial relationship with the company or with other owners of the company in regard to related property disputes.

4) The attorney-owner can engage in an adversarial relationship with other owners on non-property related disputes, only upon proper notice to and consent by all affected parties.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association 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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Reporter for Professional Ethics  
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