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Charles J. Jacobus is in private practice in Bellaire, Texas. He is Board Certified by the Texas Board of Legalization in both residential and commercial real estate law. He was a member of the Real Estate Probate and Trust Law Council of the State Bar of Texas, and currently serves as a member of the Texas Real Estate Commission’s broker-lawyer committee, and chairs the Title Insurance Committee for the State Bar of Texas. He is a member of the Houston Real Estate Lawyers Council and the American College of Real Estate Lawyers. He also serves as an adjunct professor at the University of Houston Law Center.


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# The Ethical Complications Of Fee Attorney Relationships

## Chapter 5

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I. THE EMERGENCE OF FEE ATTORNEYS

A. A little over a hundred years ago there was no title insurance. The transfer of titles was handled by licensed attorneys, who would often research the title and render attorney’s title opinions as to the status of title. Recognizing that this function was served by attorneys, the authors of the Texas Title Insurance Act saw the need to carve out this practice so that they did not inadvertently regulate the work customarily being performed by attorneys. In addition to recognizing that exception, authors of the Act further recognized that certain counties (mostly in West Texas and rural areas) did not have enough real estate transactions on an annual basis to justify the operation of an abstract plant and title insurance company. Therefore, a genuine need in certain areas of the state for fee attorneys; that is, attorneys who can serve the function of examining the title, rendering an opinion for title insurance purposes, and handling the closing of the transaction so that title insurance will be available to the public in such counties. As a result, the Code is careful not to limit availability of title insurance to the consumer in the urban areas, or alternatively, only those areas in which they could justify the assembly and maintenance of an abstract plant.

II. FORMS OF FEE ATTORNEY OPERATIONS

Because of the way the Act is written, clever attorneys have found ways to comply with the Act and participate in the title premium within the strict letter of the law. Attorneys now appear all over the state to be doing business under the following structures:

1. The attorney who actually examines title renders an opinion for the purpose of issuing title insurance.
2. The attorney who operates a bona fide closing office performing all of the functions of “closing the transaction” as the same is defined in the Act. These operations may maintain their own escrow accounts. The escrow account may be maintained by agent for whom title insurance is written under Procedural Rule P-22 for the closing of transactions in a particular county. If the office is not doing business under the name of the title insurance company, the escrow account may not be audited at all.
3. The fee attorney who, while representing a party to a transaction, shops his transaction to various title companies offering to perform closing services for a portion of the fee. In most cases, the attorney is involved in the closing of the transaction.

In Commissioner’s Bulletin #V-0017-07 (April 18, 2007), the Deputy Commissioner of Title Insurance set out two categories of lawyers who assist in closing transactions. The first, is the “fee attorney”, who is licensed to act as an escrow officer and who closes in the name of the title insurance company or title agent pursuant to Texas Insurance Code Section 2652.003(b)&(c). The second is known as a “outside closing attorney” “approved attorney” and P-22 attorneys, which are attorneys who do not have a license to act as an escrow officer (as none is required by the Texas Insurance Code Section 2652.003(a). They close transactions in the name of the law firm.

In accordance with Procedural Rule P-22, subsection (A)(iii) and (B), a P-22 attorney may receive a portion of the title insurance premium when the lawyer performs all the services described in Procedural Rule P-1, paragraph f. P-22 attorneys disburse funds using the law firm’s client trust account (IOLTA account).

A fee attorney receives a portion of the insurance premium in accordance with Procedural Rule P-22, subsection (A)(ii) and (B). Since the fee attorney is licensed as an escrow officer it must comply with all the requirements of the Texas Insurance Code and trust funds pursuant to Administrative Rule L-2, Par I, Subsection D. The fee attorney disburses funds using the title agent’s escrow account. In accordance with the foregoing, it was determined in the Commissioner’s Bulletin that insured closing letters cannot be used by P-22 attorneys, but could be used by fee attorney.

III. CONFLICTS OF INTEREST–LAWYERS AS ESCROW AGENTS

A. Texas Insurance Code, Procedural Rules and RESPA

The business of title insurance in Texas is defined in Article Nine of the Texas Insurance Code. This section of the paper will concentrate on Section 2502.051 of the Texas Insurance Code, its federal counter-part Section 8 of RESPA, and Procedural Rule P-22 and Form T00 of the Basic Manual for the Writing of Title Insurance in the State of Texas, as promulgated by the Texas Department of Insurance (the “Manual”).

1. Section 2502.051 - Rebates and Discounts

Section 2502.051 provides as follows:

A. No commission, rebate, discount, portion of any title insurance premium, or other thing of value shall be directly or indirectly paid, allowed or
permitted by any person doing the business of title insurance or received or accepted by any person for doing the business of title insurance or for soliciting or referring the title insurance business.

B. This Section may not be construed as prohibiting:

1. a foreign or domestic title insurance company doing business in this state under this Chapter, from appointing as its title insurance agent pursuant to this Chapter a person owning or leasing and operating an abstract plant of such county and making the arrangement for division of premiums with the agent as shall be set by the commissioner;

2. payments for services actually performed by a title insurance company, a title insurance agent, or a direct operation, in connection with closing the transaction, furnishing of title evidence, or title examination. Certainly, the receipt of kickbacks or rebates for which payment may not exceed the percentages of the premium or amounts established by the commissioner for those payments; or

3. payment of bona fide compensation to a bona fide employee principally employed by a title insurance company, direct operation, title insurance agent, or other reasonable payment for goods or facilities actually furnished and received; or

4. payments for services actually performed by an attorney in connection with title examination or closing a transaction, which payment may not exceed a reasonable charge for such services.

5. Nothing in this article shall affect the division of premium between a title insurance company and its subsidiary title insurance agent when the title insurance company directly issues its policy or contract of title insurance pursuant to Article 2704.001. For purposes of this provision, a subsidiary is a company.

6. Legal promotional and educational activities that are not conditioned on the referral of title insurance business.

C. A person receiving any form of compensation under Section B(2) of this Article must be licensed as provided for under this Chapter.

D. The payment or receipt of a commission, rebate, discount, or other thing of value to or by any person for soliciting or referring title insurance business in violation of this Article is engaging in the unauthorized business of insurance, and in addition to any other penalty, after notice and opportunity for hearing, is subject to a monetary forfeiture not less than the value nor more than three times the value of the commission, rebate, discount, or other thing of value.

E. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement or closing in connection with a transaction involving the conveyance or mortgaging of real estate located in the State of Texas other than for services actually performed.

Certainly, the receipt of kickbacks or rebates for referrals of business would be a violation of Section 2502.051. Accordingly, an attorney must carefully consider the following difficult questions:

1. What constitutes “services actually performed?”
2. What constitutes a “reasonable charge for such services?”

Since the enactment of Section 2502.051, there have been no Texas cases which provide a definitive answer to these questions. Rule 1.04 of the Texas Disciplinary Rule of Professional Conduct lists several factors to consider when considering the “reasonableness of the charges.” So, to gain a better idea as to whether or not an attorney’s charges are reasonable or not, an attorney should review Rule 1.04.

2. RESPA — Section 8: Prohibition Against Kickbacks/Unearned Fees

The federal counterpart to Section 2502.051 is Section 8 of the Real Estate Settlement Procedures Act of 1974 (“RESPA”). RESPA was enacted by Congress as a response to revelations that settlement charges for the purchase of homes in this country were inordinately high due to commissions, referral fees, rebates and kickbacks passing among providers of settlement services, including attorneys and title insurers.

Section 8 of RESPA provides, in part, as follows:

§§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the tendering of a real estate settlement service in connection with a federally related mortgage loan other than for services actually performed.
(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance . . . (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); . . . and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (hi)) may be obtained at the closing or settlement (except that a person make a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time) . . . (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangements, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, . . . For purpose of the preceding sentence, the following shall not be considered a violation of clause (4)(B); (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender’s interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State Laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorney’s fees.

(6) No provision of State law or regulation that imposes more stringent limitations or affiliated business arrangements shall be construed as being inconsistent with the action. (emphasis added).

Two provisions of Section 8 provide important insights. First, Subsection (d) provides that a more restrictive state law (such as Section 2502.051), should not be considered inconsistent with Section 8. Second, the federal statute addresses “affiliated business arrangements” which are not covered by Section 2502.051.

RESPA defines an “affiliated business arrangement” to mean an arrangement in which (A) a person who is in a position to refer business incident to or a part of the real estate settlement service involving a federally related mortgage loan, or an affiliate of such person, has either an affiliate relationship with or a direct or beneficial ownership of more than 1% in a provider of settlement services; and (B) either of such persons directly or indirectly refer such business to that provider or affirmatively influences a selection of that provider. “Associates” means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, a parent, or child of such person; (B) a corporation or business entity that controls, is controlled by or is under common control with such person; (C) an employer, officer, director, partner, franchiser, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial affect of which is to enable the person in a position to refer settlement businesses to benefit financially from the referrals of such business.
In addition to the foregoing, there are now more stringent timing requirements associated with disclosures of referrals in an affiliated business arrangement than in the past. The new requirements mandate that disclosures must be made no later than the time of the referral in the case of face-to-face or written or electronic referrals, and within three (3) days when the referral is by telephone. Failure to meet the special timing requirement can be overcome, though, if the attorney or law firm making the referral can prove by a preponderance of the evidence that procedures reasonably adopted to result in compliance with these conditions have been maintained and that any failure to comply with the conditions was intentional and the result of a bona fide error.

3. Texas Procedural Rule P-22

Procedural Rule 22 also applies to the payment of a fee for an examination and/or a closing. Rule P-22 is as follows:

P-22. Payment of a Fee for Examination and/or Closing — No payment shall be made by a Title Insurance Company, Title Insurance Agent, Escrow Office or any employee or agent of any of them, to any Person who is not its bona-fide employee, for examination of a title and/or closing transaction unless:

(A) Such Person is (i) a Title Insurance Company as defined in Section 2501.003, Insurance Code, and qualified to do business in the State of Texas, (ii) a Title Insurance Agent as defined in Article 9.02, Insurance Code, and licensed to do business in the State of Texas by the State Board of Insurance, or (iii) an attorney at law duly licensed by the Supreme Court of Texas to practice law in the State of Texas, or (iv) any Person legally authorized to perform such services; and

(B) Such Person has performed all of the services described in P-i, paragraph f, that such Person is legally authorized to perform, and/or the examination of the title required for the issuance of a commitment for title insurance prior to the issuance of any such commitment, construction binder, policy or other contract of title insurance, to determine the condition of the title to be insured; and

(C) Timely disclosures of such payment have been made as required by Rule P-21 and Section 2702.052; and

(D) Any payment made must be commensurate with the services actually performed; and

(E) The Person rendering the service shall have filed with the Company at least thirty (30) days prior to the rendering of such service a written schedule of charges normally imposed by such Person for such services (Schedule) and such Schedule shall have been agreed to and approved by the Company as being reasonable charges for such services. However, payments to licensed title insurance agents are excluded from the requirements of this paragraph (E); and

(F) The Person rendering the service shall have presented to the Company, at or prior to the time of payment of said services, a written itemized statement or invoice which clearly sets forth in detail the actual services rendered and billed for in representing the Company in the respective settlement, closing and/or (C) Timely disclosures have been made as required Section 2702.052; and examination, and such Company verifies, in writing, that such services were actually rendered in accordance with form T-00; and

(G) In the event of collection of the title insurance premium by such Person, the entirety of such premium shall have been remitted to the Company; and

(H) No portion of the charge for services actually rendered shall be attributable to, and no payment shall be made for the solicitation of, or as an inducement for the referral or placement of the title insurance business with the company; and

(I) Any portion of any payment inconsistent with the requirements hereof, or any payment of the Company to any Person for the solicitation of, or as an inducement for the referral or placement of title insurance business, is deemed to be a violation of Section 2502.051; and

(J) The Company shall keep written itemized statements or invoice, and the Schedule, in its official records for a period of five years and shall make such copies thereof available to the State Board of Insurance and its representatives for inspection and duplication upon request.

An important question is presented by Rule P22: what constitutes a payment that is “commensurate with the services actually performed?” Procedural Rule P-21 and Section 2702.052 of the Texas Insurance Code require an attorney to timely disclose through an itemized statement the payments received and the services rendered. However, there is no guidance as to how to determine whether the services rendered were comparable with the payment received.

Also of significance under Rule P-22 is Subsection (H), which restates the prohibitions contained in Section 2502.051 against payments for the solicitation or referrals of business to a title company.

Finally, the Company must maintain for a period of five (5) years the written itemized statements or invoices of the attorneys who they paid. This provision is
intended to provide a policing mechanism for the Department of Insurance.

4. Form T-00: Verification of Services Rendered

In conjunction with the written filing requirements under Rule P-22, attorneys are required to verify under Form T-00 the services they actually render. A copy of Form T-00 is attached hereto.

The verification form must not only include a detailed description of the services rendered, but it must also include the amount of money or the premium percentage received for such services. Of significance, both the fee attorney and the person paying the attorneys’ fees are required to verify the information contained in the form.

5. “Closing the Transaction”

A. Insurance Code Section 2501.006:

(a) For purposes of this title, “closing the transaction” describes the investigation that is made:

(1) on behalf of a title insurance company, title insurance agent, or direct operation before the title insurance policy is issued; and

(2) to determine proper execution, acknowledgement, and delivery of all conveyances, mortgage papers, and other title instruments necessary to consummate a transaction.

(b) Closing the transaction includes a determination that:

(1) all delinquent taxes have been paid;

(2) in the case of an owner title insurance policy, all current taxes, based on the latest available information, have been properly prorated between the purchaser and seller;

(3) the consideration has been passed;

(4) all proceeds have been properly disbursed;

(5) a final search of the title has been made; and

(6) all necessary papers have been filed for record.

B. Procedural Rules and Definitions, Rule P-1(f):

Closing the Transaction — The investigation made on behalf of a title insurance company, title insurance agent or direct operation before the actual issuance of the title policy to determine proper execution, acknowledgment and delivery of all conveyances,

mortgage papers, and other title instruments which may be necessary to the consummation of the transaction and includes the determination that all delinquent taxes are paid, all current taxes, based on the latest available information, have been properly prorated between the purchaser and seller in the case of an Owner Policy, the consideration has been passed, all proceeds have been properly disbursed, a final search of the title has been made, and all necessary papers have been filed for record. The foregoing definition does not prevent voluntary assistance rendered by the Company as a convenience to a party to the transaction, although not necessary to the closing of the transaction and issuance of the policy (such as receiving and disbursing money for the mortgagee, furnishing copies of restrictions, prorating insurance and rents, etc.), so long as the same does not violate the provisions of Article 9.30, Texas Title Insurance Act, 1967, prohibiting rebates, discounts, etc. The Company may specify the requirements necessary for the issuance of title insurance, but it is the responsibility of the applicant for the insurance to meet such requirements. It is not the responsibility of the Company to cure defects of title, nor to perform escrow or other services extraneous to closing the transaction. The premium does not include the cost of legal services performed for the benefit of anyone other than the Company. Legal services, as here referred to, are those constituting the practice of law, and shall, accordingly, be performed only by Attorneys at Law, licensed to practice law in Texas.

IV. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Fee attorneys are also restricted by the various disciplinary rules of professional conduct prescribed by the State Bar of Texas and the American Bar Association (“A.B.A”). Lawyers may be disbarred or sanctioned if they violate professional rules that prohibit referral fees, fee splitting, and the unauthorized practice of law. While not regulated by the State Bar, title insurance companies are also affected by certain statutes dealing with the authorized practice of law. Therefore, the fee attorney and the title insurance company should be aware of the following disciplinary rules and statutes that affect their services and division of premiums.

Rules 1.04 and 7.03 of the Texas Disciplinary Rules of Professional Conduct provide restrictions on things of value received and things of value provided by attorneys. The specific subsections of Rule 1.04 applicable to this discussion are as follows:
Rule 1.04. Fees

Illegal or Unconscionable Fee

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty difficulty of the questions involved, and the requisite to perform the legal service properly.

Division of Fees

(f) A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer.

(2) the client is advised of; and does not object to, the participation of all the lawyers involved; and

(3) the aggregate fee does not violate paragraph (a).

Rule 1.04 raises the same questions raised by Article 2502.051: are fees unconscionable and are they in proportion to the service performed by the lawyer?

Rule 7.03. Prohibited Solicitation and Payments

(c) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm.

The Committee on Professional Ethics has interpreted Rule 7.03(b) to prohibit corporations from receiving a discount in its legal fees for referring the work of other corporations to the law firm.

Also of concern because of its severe penalty and broad language, is Section 38.12 of the Texas Penal Code, which provides, in part, as follows:

38.12 Barrantry

(a) A person commits [a felony of the third degree] if, with intent to obtain an economic benefit, the person:

* * *

(2) solicits employment, either in person or by telephone, for himself or for another;

(3) pays, gives, or advances or offers give, or advance to a prospective client or anything of value to obtain representation from the prospective client;

(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;

(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or

(6) accepts or agrees to accept money or anything of value to solicit employment.

(b) A person commits an offense if the person:

(1) is an attorney. . .; and,

(2) knowingly:

(A) finances or invests funds the person knows or believes are intended to further the commission of an offense under Subsection (a); or

(B) accepts employment within the scope of the person’s license, registration, or certification that results from the solicitation of employment in violation of Subsection (a).

(c) It is an exception to prosecution under Subsection (a) or (b) that the person’s conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court.
April 18, 2007

COMMISSIONER'S BULLETIN NO. B0017-07
Title Bulletin No. 167

TO: All insurers writing title insurance in the State of Texas and all direct operations and agents thereof

RE: Premium Splits with Attorneys; Insured Closing Letters

The Department has received inquiries regarding the issuance of Insured Closing Letters (ICLs) when an attorney handles a title insurance transaction and whether a premium split is allowed.

- Important terminology.

Two categories of lawyers often assist in closing the transaction. The first, described as “fee attorneys,” includes attorneys who are licensed to act as escrow officers and who close in the name of a title insurance company or title agent pursuant to Texas Insurance Code §2652.003(b) & (c). The second, known variously by title practitioners as “outside closing attorneys,” “approved attorneys,” and “P-22 attorneys,” includes attorneys who do not have a license to act as an escrow officer—none is required by Texas Insurance Code §2652.003(a)—and who close the transaction in the name of a law firm.

- Insured closing letters.

Many national lenders require ICLs. ICLs guarantee settlement funds lost as a result of a fraud committed by a licensed Texas agent or licensed Texas direct operation. Pursuant to Texas Insurance Code, Chapter 2702, ICLs are to be issued by a title insurance company (i.e. an underwriter) in connection with a closing by a title agent or direct operation on a form prescribed by the Commissioner, which is called a “Form T-50.” Because Chapter 2702 does not authorize the issuance of an ICL unless the closing is conducted by a licensed title insurance agent, which includes fee attorneys or a direct operation, we have always taken the position that an ICL may not be issued for closings conducted by a P-22 attorney.

- Receiving a portion of the premium for closing the transaction.

In accordance with Procedural Rule P-22, subsection (A)(iii) and (B), a P-22 attorney may receive a portion of the title insurance premium when the lawyer performs all of the services
described in Procedural Rule P-1, paragraph f, defined as "closing the transaction." Part of closing the transaction, as defined in Texas Insurance Code §2501.006(b)(4) and Procedural Rule P-1, paragraph f, is ensuring that all proceeds are properly distributed. Handling all receipts and disbursements includes paying off existing liens, distributing payments to all service providers (for example, the realtor’s commission or the construction inspector’s fee), and, most significantly, transferring settlement funds. P-22 attorneys disburse these funds using the law firm’s client trust account (i.e. IOLTA accounts).

Fee attorneys, when performing functions defined as closing the transaction, are entitled to a fee split also. However, because an attorney who is licensed as an escrow officer must comply with the provisions of the Texas Insurance Code as if the attorney were a title insurance agent pursuant to §2652.003(b), a fee attorney receives a portion of the insurance premium in accordance with Procedural Rule P-22, subsection (A)(i) and (B). Furthermore, because an attorney who is licensed as an escrow officer must comply with all requirements of the Texas Insurance Code concerning escrow officers and trust funds pursuant to Administrative Rule L-2, part I, subsection D, a fee attorney disburses funds using the title agent’s escrow account.

It has come to the Department’s attention that some title agents have been disbursing funds on behalf of the P-22 attorney when a lender requests an ICL and then splitting the premium with the P-22 attorney as though the attorney had disbursed the funds. This practice is not permitted because the P-22 attorney has not disbursed the funds and has not, therefore, performed all of the duties defined as closing the transaction.

The Department’s position is not new and does not represent any change. The Department’s position is consistent with the existing statutory scheme, which prohibits an ICL from being issued when a P-22 attorney closes the transaction.

P-22 attorneys serve a valuable function and are encouraged to explore the various legal options available to them in transactions requiring an ICL, which include but are not limited to becoming licensed as an escrow officer and serving as a fee attorney. There is no statutory limit on the number of title agencies a fee attorney may serve. This bulletin should not impact a fee attorney’s practice, nor should it impact a P-22 attorney’s practice in closings where an ICL is not required by the lender.

The Department will continue to examine agents for compliance with the law and will take appropriate actions consistent with the efficient utilization of our resources to ensure such compliance. This bulletin is a reminder for title agents and those in the title insurance business to be mindful of all statutory and regulatory requirements. The Department will continue to evaluate the utilization of its resources and take additional measures as needed.

Robert R. Carter, Jr.
Deputy Commissioner - Title
The Ethical Complications of Fee Attorney Relationships

By Charles J. Jacobus
&
Douglas W. Becker

State Bar of Texas
Ethics Opinion 408

• Question Presented

Under what circumstances may an attorney representing a party to a real estate transaction accept a fee consisting of a percentage of the title insurance premium from the title insurer?
State Bar of Texas
Ethics Opinion 408

• Discussion
An attorney may accept a fee from the title insurance company if the attorney has actually performed services on behalf of the company. Any fee arrangement with the title company would give rise to an attorney-client relationship between the lawyer and the title company. The relationship would therefore be embraced by all the relevant disciplinary rules. In this regard, the fee received by the attorney must be reasonable under Disciplinary Rule (DR) 2-106, whether based on a percentage or some other mode of calculation.

State Bar of Texas
Ethics Opinion 408

• Since the arrangement causes the title company to become a client of the attorney, a situation of multiple client representation is presented. Disciplinary Rule 5-105(A) and (B) provides that an attorney shall decline employment or withdraw from employment if the multiple representation will, or is likely to, adversely affect the exercise of the attorney’s independent judgment on behalf of a client. On the other hand, such employment may continue despite DR5-105(A) and (B), if it is obvious that the lawyer can adequately represent each interest, and each client consents after full disclosure of the possible effects on the lawyer’s representation of the client interest. DR 5-105(C).
• Disciplinary Rule 5-105 requires disclosure if there is a likelihood of an adverse effect on the exercise of the attorney’s judgment. If the attorney seeks such a likelihood, he should, of course, disclose it, but circumstances may exist where a disclosure that the lawyer is also representing the title company is not only advisable, but required at the outset or when the joint representation requires it.

• This opinion makes no interpretation of Article 9 of the Texas Insurance Code.

• Conclusion
  An attorney representing a party to a real estate sale may accept a percentage of the title insurance premium only for services actually rendered the title company. The attorney becomes the attorney of the title company; the fee charged the title company should therefore be reasonable.

The lawyer should make such disclosures to all his clients in the transaction as the rules and statutes may require, depending on the facts in each situation, and is bound by the usual and customary rules of multi-client representation as they apply to the particular facts at hand. (9-0.)
Disciplinary Rule 1.06. Conflict of Interest: General Rule

a) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representations of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.
Disciplinary Rule 1.06. Conflict of Interest: General Rule

d) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

Why Does a Title Company Need A Fee Attorney?

- A. No qualified employees?
- B. A burning desire to share the premiums?
- C. Needs or wants the lawyer’s directed business (referrals?)
Texas Insurance Code
Section 2502.051
Rebates and Discounts

- A. No commission, rebate, discount, portion of any title insurance premium, or other thing of value shall be directly or indirectly paid, allowed or permitted by any person doing the business of title insurance or received or accepted by any person for doing the business of title insurance or for soliciting or referring title insurance business.

When is 40% payment Not a Referral Fee?

- A. Does the title company send the attorney other business to close?
- B. Does the attorney close deals for the title company that is non client business?
- C. Does the 40% fee go into the rate base as an expense (when the title company already has employees that can close the transaction?)
- D. If a client asks you a question at the closing, do you respond as his attorney or as an escrow officer?