

## **Avoiding conflicts in the sale of title insurance to clients**

**by**

**Patrick R. Burns, First Assistant Director**

**Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (June 2, 2008)

Some real estate practitioners also serve as title insurance agents, selling title insurance to their clients in real estate transactions.

In these transactions, the lawyer may seek to charge both a fee for the legal services provided and also collect a commission on the sale of the title insurance policy. This dual role creates conflicts of interest that must be addressed.

### **Personal interest**

Rule 1.7(a)(2) of the Minnesota Rules of Professional Conduct provides that a conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by, amongst other things, a personal interest of the lawyer.

A lawyer's financial interest in collecting the commission on the sale of title insurance is a personal interest that constitutes a conflict of interest. On the one hand, the lawyer owes a duty to the client to give independent legal advice in the transaction. That duty includes, under the right circumstances, advising the client to decline to go forward with the deal.

Such advice, however, runs counter to the lawyer's financial interest in closing the transaction in order to obtain the commission on the title insurance policy.

A further possibility for conflict arises if the situation dictates that the client ought to seek expanded coverage on the title policy. If the lawyer is also serving as the agent of the title insurance company and the company balks at providing the expanded coverage or insists on a prohibitively high premium, the lawyer is put in the position of negotiating on behalf of two parties who have incongruent interests – the client and the title insurance company.

Finally, does an attorney selling title insurance to a client have an obligation to advise the client that they may be able to obtain the same coverage from a different company for a lower premium?

Again, providing such advice conflicts with the lawyer's financial interests.

Having determined that a conflict of interest exists under Rule 1.7 does not, however, end the analysis. The question then becomes, may a client consent to the conflict and proceed with the lawyer serving both as

attorney and title insurance agent?

The answer is yes, if all four elements of Rule 1.7(b) are met.

### **Permission to proceed**

In order to proceed in the face of a conflict, (1) a lawyer must reasonably believe that, despite the conflict, she will be able to provide competent and diligent representation to each affected client; (2) the representation must not be prohibited by law; (3) the representation may not involve the assertion of a claim by one client against another client represented by the same lawyer in the same litigation; and (3) each affected client must give informed consent, confirmed in writing.

In the real estate client/title insurance purchaser scenario, only first and last elements are relevant. Thus, if the lawyer reasonably believes that, despite his financial interest in obtaining the commission from the sale of a policy, he or she can provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing, the lawyer may, under Rule 1.7, proceed in both roles.

Compliance with Rule 1.7 is still not the end of the conflicts analysis, however.

When selling title insurance to a client, the lawyer is entering into a business transaction with that client, which triggers the provisions of Rule 1.8(a) of the MRPC. [Ftn 1](#) Comment 1 to the rule states, in part, “The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer’s legal practice.” [Ftn 2](#)

A lawyer seeking to sell title insurance to a client must comply with Rule 1.8(a) by, amongst other things, providing written notice to the client of the desirability of seeking independent legal counsel on the transaction, giving the client the opportunity to consult with independent counsel and obtaining a separate informed consent to the transaction in writing and signed by the client.

The conflict of interest rules exist to ensure that clients get independent professional advice from their lawyers. While lawyers who sell title insurance to their clients are most likely motivated by providing good service to the clients, the financial implications of the dual roles cannot be ignored.

---

<sup>1</sup> Rule 1.8(a) of the MRPC, provides: (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 in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

<sup>2</sup> While the Minnesota Supreme Court declined to adopt the comments to the MRPC, the Director’s Office and the court both look to the comments for guidance as to interpretation of the rules. In this instance, the Director’s Office would seek to enforce Rule 1.8(a) consistent with the comment.

