THE ETHICAL TITLE INSURANCE LAWYER

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INTRODUCTION

There is a natural symbiotic relationship between the practice of law and the business of title insurance. That relationship provides many and varied opportunities for lawyers and title insurers alike to take advantage of the economies to be gained by combining the two areas. Nonetheless, attorneys who represent clients on issues involving title insurance or otherwise provide title services, must remain fully alert to the pitfalls that await unsuspecting attorneys. One must always be alert to actual and potential conflicts of interest, and there are a variety of other rules that can cause problems in a given situation. Comprehending and complying with the ethics rules is difficult in general. The various rules of professional responsibility can be difficult to apply to particular situations that arise, and even more difficult when those issues arise in a non-litigation setting given that the rules seem better suited for a litigation practice.

The local rules of ethics are only the starting point. State regulation of the title insurance business, as well as federal regulation, such as the Real Estate Settlement Procedures Act (“RESPA”) also may impact what practices are permissible and which ones could land the attorney in ethical or regulatory hot water.

This paper addresses the various issues that arise for lawyers engaged in the title insurance business. This outline does not provide a definitive look at the law of any particular state, but rather serves as a survey of the variety of approaches taken by different jurisdictions. Included in the discussion is a consideration of RESPA and the ethical issues that may arise because of the application that Act.

I. THE CONSEQUENCES OF VIOLATING THE RULES OF ETHICS

Violations of the rules of ethics can have significant professional and financial repercussions. Nonetheless, despite the potentially severe sanctions, sometimes the ethics requirements take a back seat to the energy we as attorneys expend in our drive to obtain a good result for our clients and in fact to be successful attorneys. Perhaps a review of the potential consequences of an ethics violation will remind those among us who tend not to consider specifically the professional responsibility requirements to do so in the future.

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The consequences of a violation of the rules of ethics include, 1) disciplinary action by the state bar or ethics board, which could result in a reprimand or suspension, or at an extreme level, disbarment; 2) forfeiture of attorney’s fees otherwise earned; 3) an award of damages pursuant to a claim of breach of fiduciary duty; and 4) damages awarded pursuant to a malpractice suit, which in this case, is grounded upon a breach of one or more of the duties created by the ethics rules.

Action by the state disciplinary board, at a minimum, can be an embarrassment, particularly if such action is public. When one considers the possibility of forfeiture of all or part of the fees that an attorney has otherwise earned or the possibility of damages, it is clear that the stakes can be high indeed.

Depending on the particular facts of a client’s case, a suit for malpractice and for breach of fiduciary duty may both be possible. Moreover, according to one commentator, a lawsuit for the breach of fiduciary duties has significant advantages over a malpractice claim, putting lawyers at even greater risk of significant consequences.1 According to Meredith Duncan, a lawsuit based on the breach of one or more of the fiduciary duties is more attractive than a malpractice claim based on negligence because, 1) the proof is easier as compared to a malpractice suit because expert testimony is not required to show the duty of care as is required for a malpractice suit; 2) the allocation of the burden of proof favors the client because once he establishes that a breach occurred, the burden of production shifts to the attorney to establish that he acted appropriately; 3) no showing of causation is required, unlike in a malpractice suit; 4) the only affirmative defense that may be available for a breach of fiduciary duty suit is the statute of limitations; and 5) there is a greater potential for damages with a breach of fiduciary duty case because some courts have allowed a remedy in the absence of actual damages.2

II. THE INITIAL INQUIRY: WHAT IS PERMISSIBLE?

This first section addresses the issues that arise when lawyers opt to represent a party to the real estate transaction and additionally to play a role in procuring the title policy. If the lawyer plans to keep his law practice entirely separate from his title business, only those issues outlined in Section IV. of this paper are likely to arise. Often, however, the impetus for entering the title business is to take advantage of the complementary nature of the law practice and the title business.

Lawyers may serve in any number of different roles in the title insurance business, including:
(1) title insurance agent, where the attorney's role is like that of any other title insurance agent with respect to issuing policies in the name of the insurer, consistent with the underwriting policies of the insurer; (2) examining counsel, where the lawyer has various responsibilities related to writing the title policy, including examining the title, attending the closing, and remitting the title insurance premium; (3) attorney/agent, wherein the lawyer has a dual capacity as both the legal representative of a party to the transaction--either the buyer, the seller, or the lender--and also represents the title insurer as its agent; (4) abstract company owner, through which title searching services are provided and through which the attorney may also serve as an agent for one or more title insurance underwriters; (5) participant in a bar-related title insurance company, i.e. a title insurance company, sometimes referred to as a "bar fund," that provides a means of ownership of a title insurance company by the attorneys who are members or shareholders of the company. (6) outside counsel, representing either or both the insured and the insurer in suits involving third parties; and (7) in-house staff attorney for a title insurer, representing either or both the insured and the insurer in suits involving third parties.

The above-list is not complete; lawyers may act in any number of variations on the roles described above.

The wide variety of possibilities has for many years sparked questions to state legal ethics committees about what is permissible and what crosses the ethical line, with different state committees reaching different conclusions. Moreover, within a jurisdiction, seemingly small differences between practices may result in different conclusions on the issue. Consequently, any lawyer looking to enter the title insurance business or who anticipates modifying, in even slight ways, the way he does business, must first determine if the practice is permissible under local rules of ethics.

The initial issue is often framed as some variation on the theme of dual representation, i.e. serving as the legal representative to a party to the real estate transaction, either the buyer, the seller, or the lender, while also providing services related to the title insurance business as either the agent, the examiner, or even the owner of the title insurance company that will issue the title policy. More precisely, two possible conflicts of interest arise in this dual representation situation:

1) the potential conflict that exists between the different purchasers of the attorney's services, for example, the conflict between the underwriter, on one hand, and on the other, the
parties to be insured under the title policy, i.e. the buyer of real estate and/or the lender; and

2) the potential conflict that exists between the lawyer himself and the lawyer’s clients or business customers, for example, those who will be insured under the title policy given that, depending on the role in which the attorney serves, he will have a business interest in the transaction.\textsuperscript{8}

One of the more common situations involving the first type of conflict includes where the lawyer is either the agent or the owner of a title agency that will issue a title policy to the lawyer’s client that involves exceptions to coverage, particularly if those exceptions are negotiable. There is an inherent conflict in that the insurer wants to limit its exposure by excluding as much as is reasonably possible from coverage under the title policy. On the other hand, the insured is interested in obtaining the broadest coverage possible.

The analysis of what is allowed must begin with the applicable rules of ethics.\textsuperscript{9} More specifically, providing title services for clients or other situations of the first type of conflict implicates rules 1.7. Rule 1.7 is the general provision regarding conflicts of interest. The lawyer must first determine if his representation of a client either will be directly adverse to another client or possibly be materially limited by his responsibilities to another client.\textsuperscript{10} If the lawyer determines that either possibility is present, the lawyer can proceed only if he believes that his representation of his clients will not be adversely affected.\textsuperscript{11} Important factors for consideration include the lawyer’s relationship with the clients involved. The lawyer must consider whether his relationship with the title company, and his possible concern in protecting his business interest might adversely affect his representation of a party to the transaction. In other words, the lawyer must question whether his independent judgment will be compromised in any material way. The lawyer should also consider the functions the lawyer will perform, the likelihood of conflict and the prejudice that will occur should a conflict actually arise. The lawyer should evaluate these factors in light of how a disinterested attorney would view the situation.\textsuperscript{12}

When it is clear (or relatively clear) that a planned practice is ethically permissible,\textsuperscript{13} there is a consistent requirement that the lawyer:

1) fully disclose to the client, in writing, the possible adverse effects on the lawyer’s professional judgement;

2) provide the opportunity for the client to seek the advice of independent counsel, and state such opportunity as part of the written disclosure; and
3) obtain the client’s written consent (to be discussed later).\textsuperscript{14}

Other potential ethical pitfalls await the attorney who acts in a dual capacity. Assuming that the dual representation is allowed, the lawyer must ensure that confidential information of the client is not compromised in any way by the attorney’s dual capacity, particularly where the attorney’s legal practice and insurance business are housed in the same building.\textsuperscript{15} The lawyer must be particularly concerned about disclosing client confidences should a dispute arise between the title company and his real estate client. The start of a new matter is not the only time when one must consider conflicts of interest given that later conflicts may also arise, particularly when the insured has a claim under the policy. In that case, the lawyer is in an especially precarious position if the insured’s loss has occurred because of negligence by the attorney or his staff. Even if the attorney is not at fault and the dispute is strictly between the insured and the insurer, it is doubtful that the lawyer would be allowed to represent either of the parties.\textsuperscript{16}

Finally, the lawyer should be aware of local rules that may require that fees received from the title company be credited against the fees otherwise payable by his client. Fees are an item for which there is little guidance in the rules. Nonetheless, one should be aware of the potential consequences legal fees be double-billed.\textsuperscript{17} In New York, a waiver of the conflict of interest in the situation where the lawyer provides legal services and serves as the title agent may be valid only if the lawyer credits his client with fees received from the title company.\textsuperscript{18} Similarly, in Florida, an attorney who receives fees from a title company must credit the fees to the client to the extent that the attorney has billed the client for similar services, unless the client has consented to allow the attorney to retain the fees from the underwriter.\textsuperscript{19}

When the second type of conflict of interest arises—the potential conflict between the attorney’s own business interests versus those of his clients, Model Rule 1.8 governs. When faced with the issue, courts and disciplinary boards tend to look askance at arrangements between a lawyer and his client beyond simple legal representation. As one court said, “Attorneys wear different hats when they perform legal services on behalf of their clients and when they conduct business with them. As to the latter, the law presumes the hat they wear is a black one.\textsuperscript{20}

Model Rule 1.8(a) forbids business transactions with clients unless the terms are fair and reasonable to the client, they are fully disclosed, and the client has an opportunity to consult with independent counsel on the transaction. The comments to Rule 1.8 counsel that transactions between a client and a lawyer should be fair and reasonable.\textsuperscript{21} One should recognize that the mandates of Rule 1.8(a) extend beyond a direct transaction between
an individual representing a particular client and such a client. Rule 1.8(a)
applies broadly to any business transaction between a lawyer and a client,
even if the lawyer is not representing the client in that particular transaction.

In terms of applying these rules, there is little consensus among the
different courts and advisory boards about what is permissible and what is
not. In addition, seemingly small differences may be the difference between
a proposed arrangement that is acceptable and one that is not.

The American Bar Association has taken a relatively liberal view on
the issue of an attorney representing both the title insurer and a party to the
real estate transaction. The ABA concluded that a lawyer does not
necessarily commit an ethical violation when he serves as the agent or title
examiner for the title company and legal representative to a principal to the
real estate transaction. The ABA also concluded that an ethical violation
would not occur simply by virtue of the attorney owning a financial interest in
the title company that would supply the policy.

The ABA's conclusions are conditioned on the lawyer abiding by the
rules of ethics. In this instance, that means, at a minimum, determining that
the lawyer's multiple employment will not adversely affect his independent
professional judgment on behalf of his client. Furthermore, when the
lawyer has a financial interest in the title company that will supply the title
policy, he must obtain the consent of his client after making full disclosure to
the client and obtaining the client's consent.

According to the ABA, dual representation would be permissible
only as long as it was obvious that the lawyer could adequately represent the
interests of each party and both the title company and the real estate client
consented to the dual representation after the lawyer had fully disclosed the
possible effects of such representation.

The states, when confronted with the issue of what is ethically
permissible have reached a variety of conclusions. For example, the Texas
position is fairly consistent with that of the ABA. In Opinion 408, the Texas
Professional Ethics Committee (the "Texas Committee") concluded that the
attorney could accept a percentage of the title insurance premium, but only
for services actually rendered. Furthermore, without distinguishing
between the types of services the attorney might provide, the Texas
Committee stated that the title insurer becomes the client of the attorney, thus
putting the attorney in a situation of multiple client representation and
implicating the analysis required for such potential conflicts of interest.
Because the Texas Committee deemed the title insurer to be the client of the
lawyer, the lawyer was bound to charge no more than a reasonable fee.

The New York State Bar Association Committee on Professional
Ethics (the "New York Committee") reached the same conclusion as did the Texas Committee on the propriety of an attorney acting in a dual role of attorney for a principal to the real estate transaction and agent for the title insurer. Similar to the Texas Committee, the New York Committee emphasized that the lawyer was entitled to fees for only the services actually rendered. Finally, New York Ethics Opinion 576 required a consideration of whether there were incurable conflicts, and it prohibited the dual representation entirely when such conflicts existed. The New York Committee specifically addressed the situation involving the negotiability of title exceptions. When the exceptions in the title policy are negotiable, dual representation is improper regardless of the lawyer's disclosure and the client's consent.

On the other hand, the New York Committee, in a close decision, reached the opposite conclusion when the question involved referring a client's business to a title insurance agency in which the attorney owned a financial interest. In Opinion 576, the question pertained to attorneys who had served as only the agent on transactions involving their clients. Where the attorney owns an interest in the title insurance agency, however, the New York Committee decided that no amount of disclosure could cure the inherent conflict of interest. Essentially, the New York Committee determined that the attorney could not adequately represent the interests of both the client and the title insurer.

The New York Committee further focused on the issue of exceptions to title, noting that the initial discussion with the title company of the omission of title exceptions or the issuance of the title policy would occur between the title insurer and employees of the abstract company. The New York Committee was concerned that because the attorney was one step removed from the negotiations on exceptions, he might not fully appreciate the title issues and react in the same manner as if he had been more directly involved in the negotiations.

Finally, the New York Committee expressed concern about the attorney/owner being in a position of negotiating with himself about the title exceptions. If the lawyer was dissatisfied with the determination reached by the employees of his abstract company, he would be torn between seeking a more favorable resolution on behalf of his client and his financial interest in having the policy issued by his abstract company with less risk of loss to the title insurer.

In short, in New York, with proper disclosure and consent by the client, the lawyer may be able to serve as both title insurance agent and legal representative for the client. The lawyer who owns an ownership interest in
an title abstract company, however, cannot refer the business of his real estate clients to his own abstract company.

The position taken in Virginia differs markedly from that of New York or Texas. The Virginia Legal Ethics Committee (the "Virginia Committee") spoke most recently in Legal Ethics Opinion 1564, which was meant to be a compendium opinion addressing the various issues on which it had written in the past. On the issue of an attorney serving in the dual capacity as attorney to a real estate client and title insurance agent or owner of an interest in a title insurance company, the Virginia Committee concluded that under DR 5-105(A) of the Model Code, it would be improper for an attorney to act as the agent, directly or indirectly, for the provision of services to his client or his client's lender. According to the Virginia Committee, the obviousness test of DR 5-105(A) could not be satisfied; the attorney could not cure the impropriety by giving disclosure to the client and obtaining the client's consent.

New Jersey takes one of the more restrictive positions on attorneys procuring title insurance for their clients. In New Jersey Ethics Opinions 495 and 612, the New Jersey Advisory Committee on Professional Ethics (the "New Jersey Committee") concluded that a conflict of interest arose when attorneys for real estate clients obtained title insurance from title insurers or title agencies in which they owned an interest. The New Jersey Committee even found it impermissible to refer client business to a title agency owned by an associate attorney of the law firm, notwithstanding that the associate had no equity interest in the firm and would not do real estate work for the firm's clients. The appearance of impropriety was sufficient for the New Jersey Committee to rule against this arrangement.

The New Jersey Committee more recently addressed the ownership issue in New Jersey Ethics Opinion 682. This time the issue arose in the context of a bar-related title insurance company. A group of lawyers sought to form a corporation that would initially serve as an agent for a commercial title insurer until it had accrued sufficient capital to meet the regulatory requirements to be a licensed title insurance company. The plan called for member lawyers to become holders of shares valued at only a nominal amount, which shares would never be traded, and for which there would never be a dividend. Attorney/shareholders would refer clients to the company for title examination and insurance, but prior to referring the clients, the attorney/shareholders would be required to disclose their interest in the company to clients.

The lawyer's compensation would consist of a portion of the premium paid by his clients for title services, based on the amount of work the lawyer
did in relation to title. The attorney/shareholders could opt not to participate in underwriting decisions. Questions concerning title exceptions were to be directed to an independent attorney.

The structure of this bar-related title insurance company, and the various checks included in that structure, seemingly were aimed at addressing the concerns that the New Jersey Committee had expressed in its previous opinions. Nonetheless, the Committee found that attorneys who were holders of substantive beneficial interests in a title insurance company, in the form of commissions, rebates, or profit sharing, could not purchase title insurance from that company for their real estate clients. According to the New Jersey Committee, such an arrangement constituted a conflict of interest.\textsuperscript{44}

The New Jersey Supreme Court upheld Opinion 682 when it reviewed that decision.\textsuperscript{45} Despite ABA Opinion 331\textsuperscript{46} and the recognition of the bar-related title insurance companies in other states, the Court remained concerned about the inherent conflict of interest, noting that the property owner has an interest in obtaining the greatest protection under the policy whereas the insurer’s interest lies in excluding as much risk as possible.\textsuperscript{47} The various safeguards incorporated into the plan aimed at securing objective underwriting decisions proved unpersuasive to the New Jersey Supreme Court. The court observed that the lawyer must first make the judgment call to seek the assistance of the planned-for independent counsel, and his decision to do so affirms that there is an inherent conflict of interest.\textsuperscript{48}

In short, the court held that the lawyer’s independence of judgement would likely be affected when the lawyer was both advocate for his real estate client and agent of a title insurance company. The New Jersey court did not address disclosure, but presumably would have concluded that no amount of disclosure could cure the defects with the proposed plan.\textsuperscript{49}

More recently, the New Jersey Committee rejected the idea of a law firm establishing a limited liability company to provide abstracts only, with no plan to provide title insurance services.\textsuperscript{50} The proposal called for the new company to secure necessary title searches from independent contractors, review the materials received, and to prepare title reports. The abstract company’s office was to be located in the same general space as the law firm, identified by separate signage. Nonetheless, the Committee rejected the proposed plan out of concern that the lawyers’ independent judgement could be compromised by the lawyer’s own financial interests.\textsuperscript{51} The Committee left open the possibility that such a company could exist if certain conditions were satisfied, namely if the lawyer, 1) disclosed in writing to the client his precise interest; and 2) advised the client, orally and in writing of the desirability of seeking independent counsel and is given a reasonable
opportunity to do so.

The New Jersey Committee rejected the proposed plan in part because the planned arrangement would not provide sufficient separation in the space used by the law firm as opposed to the abstract company and because the lawyers planned to limit their liability to their abstract company customers to $1000. While it is not uncommon for an abstract company to limit its liability, the proposed liability limitation was proof of the New Jersey’ Committee’s concern that the lawyers’ financial interest might interfere with their duty of loyalty, particularly since there would be no title insurance should there be any problems with the title report.\textsuperscript{52}

The above summaries are some examples of the different opinions among the jurisdictions. There is little consistency among the jurisdictions, and no guarantees that practices that are permissible in a given situation will be allowed if changed in only small ways. A lawyer contemplating entering the title business or modifying the way in which he provides title services should tread carefully to avoid violating local ethics rules.

If the lawyer determines that the proposed representation is permissible, he must next obtain consent from the concerned clients after providing adequate disclosure to the client. Compliance with this condition raises a number of additional issues.

First, an attorney seeking consent must consider what constitutes full and adequate disclosure. The requirement of informed consent presumes a client who is legally capable of giving consent. The lawyer should not seek consent from a client who is incompetent, ill-advised, or disadvantaged inasmuch as consent is likely to be invalid if it is based on an inadequate understanding of the nature and severity of the conflict or the client lacks the capacity to consent. This is not likely to be a problem with most corporate clients, provided that the person who consents is authorized to do so. Consider, however, the difficulties that might arise in dealing with private individuals who may lack legal sophistication, and thus present the biggest risk in conflicts cases.\textsuperscript{53}

The next consideration is the substance of the disclosure necessary to obtain consent. Obtaining consent in a where the lawyer plays several roles requires at a minimum a description of the risks of the representation and the possible effects of such representation, including the possible effect on the attorney’s independent judgement exercised on behalf of the different parties. The lawyer should describe how any contingent, optional, or tactical considerations or courses of action would be foreclosed or made less readily available by the common representation.\textsuperscript{54} In addition, the lawyer should disclose that the duty to maintain client confidences is modified such that no
confidentiality exists between the commonly-represented clients. Finally, the lawyer should warn the parties that should a nonwaivable conflict later arise, the lawyer may have to withdraw from representing them and consequently, the legal fees each party incurs may be greater than if separate counsel had been retained from the outset. In obtaining the necessary consent to waive the conflict, one must consider whether confidences of one client might have to be disclosed either during the representation or in order to obtain consent. Of course, the client whose confidences are to be disclosed must consent to the disclosure. If the client refuses to give the necessary consent, but disclosure is necessary to obtain the consent of other clients, common representation is impermissible.

Finally, the lawyer may have to disclose the source and amount of his compensation for the disclosure to be complete. As discussed above, one should be aware of the risk of double-billing, which could potentially subject a lawyer to disciplinary action.

Timely notice is also crucial to making the common representation permissible. It should occur in sufficient time to ensure that the client has adequate time to reflect on the choice. Ideally, the lawyer will put the disclosures in writing and obtain written consent from all clients, whether required to do so by local rules or not.

Where the potential conflict arises because of the lawyer providing business services to this client, for example the title policy, the attorney should address the different concerns that arise with that kind of conflict. The lawyer should certainly disclose his business or financial relationship with the that will provide the business services, as well as any compensation that the attorney will receive as a result of the client’s business. One should also consider the potential impact on confidentiality that the business services may have. In other words, if the attorney must disclose confidential information in connection with obtaining the business services, the client should expressly consent to the disclosure of that information. Moreover, the lawyer should apprise the client that the disclosure of this information may have the affect of waiving the confidentiality of that information. Finally, it would be wise to advise the client expressly to consider seeking independent counsel concerning the proposed transaction.

In seeking a client’s consent, the lawyer assumes the risk that the disclosures may later be found inadequate. According to one court, ‘‘Full disclosure’ obviously requires prediction, a warning of future perils as well as present problems. It is an ideal, rarely achievable, but nevertheless a condition which an attorney must satisfy at her risk.’
III. THE RESPA COMPLICATION

RESPA In General

The next issue facing any attorney wishing to participate in the transactional side of the title business is compliance with the Real Estate Settlement Procedures Act (RESPA).\textsuperscript{62} Congress enacted RESPA in 1974 to protect consumers from unnecessarily high costs for settlement services resulting from kickbacks or referral fees, as well as to address other concerns involving real estate settlement practices.\textsuperscript{62} RESPA is far-reaching, applying to essentially every residential real estate loan by virtue of RESPA's definition of a "federally related mortgage loan."\textsuperscript{64}

RESPA is both a disclosure law and an anti-kickback law. On the one hand, RESPA provides that, with respect to federally related mortgage loans, the person conducting the settlement provide to both the buyer and seller a statement of settlement costs on a form developed by the Department of Housing and Urban Development (HUD).\textsuperscript{65} However, it is the anti-kickback provisions that are probably most relevant to attorneys. Section 8 of RESPA prohibits any person from giving or accepting any "fee, kickback, or thing of value"\textsuperscript{66} pursuant to an agreement, oral or written, express or tacit, as a fee for referring settlement services involving federally related mortgages.\textsuperscript{67} RESPA also prohibits any person from giving or accepting a portion, split, or percentage of any charge for the rendering of settlement services.\textsuperscript{68} RESPA, however, does provide a defense of sorts in that it does not prohibit payment to attorneys, title companies, and others for services actually rendered.\textsuperscript{69}

RESPA defines "settlement services" broadly. The definition includes "any service provided in connection with a real estate settlement," including title searches, title examinations, the provision of title certificates, title insurance, and "services rendered by an attorney."\textsuperscript{70} The provisions of Regulation X\textsuperscript{71}, promulgated by HUD pursuant RESPA, give further definition to what is meant by settlement services, as well as what practices will violate RESPA's provisions.

In short, RESPA's aim is to allow for payment for services actually rendered, while proscribing rebates, kickbacks, or anything of value paid for referring real estate settlement business. RESPA does not prohibit excessive charges for settlement services. Rather, it prohibits the sharing of fees with a third party in return for that party's referral of settlement business.\textsuperscript{72} RESPA is implicated whenever there is, 1) the receipt of unearned fees from another provider of settlement services; 2) a provider that charges the consumer for third party services and retains an unearned fee from the payment received; or 3) a provider that accepts any portion of the charge for anything other than
services actually provided. According to Regulation X, a fee is unearned if it bears no reasonable relationship to the market value of the goods or services provided.\(^7\)

Therein lies the complication in applying RESPA. As Russell K. Booth of the National Association of Realtors stated in testimony before Congress, "The fundamental difficulty with RESPA is the attempt to distinguish between referral fees and other payments. The attempt to ban referral fees leads to a regulatory morass as more and more activities become subject to scrutiny as disguised referral fees."\(^7\) For example, are volume discounts a violation of RESPA if the provider does not pass on the discount to the consumer?

The lawyer is a natural source for the buyer or seller of real estate to seek advice on selecting a title insurer or obtaining answers to other title questions, particularly in residential real estate transactions, where the parties to the transaction are often unsophisticated. The court that decided *In the Matter of Ticor\(^7\)* recognized that the relationship between attorney/agents and title insurers is fraught with opportunities for the placement of title insurance business.\(^7\) According to the *Ticor* court, "In point of fact, the growth of a title insurer is largely tied to its ability to solicit and retain attorney-agents who can influence the placement of business."\(^7\)

Whether as the means to entering a new market or for other business reasons, some title insurers have entered into arrangements with attorneys calling for the attorney to receive a high percentage of the title insurance premium. Even where the payments are smaller, the question remains: how much of the payment is for services actually rendered as opposed to payment for the attorney’s referral of title business?

Section 3500.14(g)(3) of Regulation X applies directly to the situation of a person providing multiple services, such as where an attorney serves as both the legal representative of a party to a transaction and additionally provides settlement services. Payments to those individuals who are in a position to refer settlement services business must be for services that are "actual, necessary, and distinct from the primary services" provided by the attorney.\(^7\)

By way of example, Regulation X states that for the attorney for the buyer or seller to receive compensation as a title agent, the attorney must perform "core title agent services" for which liability arises *separate from the attorney services*.\(^7\) Included in the description of "core title agent services" is the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy on behalf of the title insurance company, and where customary, issuance of the
title commitment, performance of the title search, and attendance at the closing.\textsuperscript{80}

While the language of Regulation X suggests that the lawyer may need to provide all of the services listed as "core title agent services" before earning his fee as a title insurance agent, such a conclusion arguably conflicts with § 8(c) of RESPA, which allows compensation to attorneys for services actually rendered.\textsuperscript{81} Nonetheless, an arrangement whereby the attorney's compensation or the formula for calculating his compensation remains the same, regardless of the services the attorney provides to the title insurer for different matters, is likely to arouse suspicion. Certainly, there can be no argument that an attorney who provides no services or only nominal services for the fee paid by the title insurer, with little or no additional exposure to liability, violates RESPA.\textsuperscript{82}

From a practical standpoint, if an attorney routinely provides certain title services without assessing a separate fee, a change in that practice whereby the lawyer then receives a part of the premium or some other payment for those services may very well be viewed as a disguised referral fee, subjecting the lawyer and the title insurer to liability under RESPA.

In addition, charging duplicate fees is considered an unearned fee that violates § 8 of RESPA, precluding the attorney's claim that the fee from the title insurer is compensation for those same services for which his client has already paid.\textsuperscript{83} While in many jurisdictions, the rules of ethics allow an attorney to collect duplicate fees so long as he obtains his client's informed consent\textsuperscript{84}, no amount of disclosure will cure the RESPA violation.\textsuperscript{85}

Moreover, even when the attorney has clearly provided core title agent services, the inquiry is not complete. If the fee paid by the title insurer seems out of line for the services the attorney actually provided, a reasonable inference may be drawn that some part of the fee is indeed illegal under RESPA.\textsuperscript{86}

In the event those deals allowing the attorney/agent to retain a high percentage of the premium are challenged, it may be difficult to defend against the inference that some part of the commission is for the referral of business. That such arrangements may be offered by title insurers entering into a new market or a new line of business may mean the defense to allegations of a RESPA violation is even more difficult.

The New York State Bar Association has already indicated that an attorney's violation of RESPA automatically violates the rules of ethics.\textsuperscript{87} A similar conclusion could be expected in other jurisdictions.

Appendix B to Regulation X provides a number of examples of practices that violate RESPA's anti-kickback or premium-splitting provisions.
Suffice it to say that HUD recognizes that the number of practices that possibly may violate RESPA is limited by only the creativity of those who provide settlement services. Interestingly, while incentives that are given for the referral of business are clearly violations of RESPA, disincentives for failure to refer business, are not. 88

RESPA and Affiliated Businesses

Those provisions of RESPA that apply to affiliated businesses add yet another layer of complexity for the real estate lawyer who owns a direct or beneficial interest in a provider of settlement services or who is affiliated with such a business. The provisions related to affiliated businesses 89 would apply to a situation where an attorney owns an interest in a title agency or title insurer. According to RESPA, when a person (or his associate 90) refers business to a provider of settlement services, or influences the selection of such a provider, in which the person owns more than one percent of such a provider or otherwise has an affiliate relationship with such provider, he triggers the provisions related to affiliated businesses. 91

RESPA does not preclude an attorney’s referral to his affiliated title agency or title insurance company. Rather, RESPA prescribes certain conditions that must be satisfied to avoid violation of the Act. Specifically, RESPA requires (1) disclosure of the existence of the business arrangement, including an estimate of the range of fees generally made by the title agency; and (2) that the attorney not receive anything of value for the arrangement other than a return on his ownership interest and fees for services actually rendered. 92 If an attorney requires a client to use a particular title insurance agent 93, the attorney violates RESPA if he fails to give the disclosures required at the time of the engagement. 94 That suggests that if the disclosure either is not given or is not given timely, any fee charged is arguably unearned. Thus the attorney risks not only the RESPA violation, but also a violation of the local rules of ethics. 95

Again, RESPA’s goal is clear: to allow compensation for services provided and, inasmuch as there is no prohibition against lawyers owning title companies, to allow a reasonable return on the investment. 96 Any other payments, however, are presumed to be illegal fee-splits or referral fees. 97 Consequently, an arrangement providing that the affiliated company will pay a consulting fee or a fixed salary to the attorney is likely to run afoul of RESPA unless the attorney can establish a reasonable relationship between the payment and the services he rendered to the affiliated business. 98

HUD’s settlement with Coldwell Banker Residential Real Estate and various of its affiliated companies indicates HUD’s stance on the issue of
affiliated businesses. Coldwell Banker failed to comply with RESPA's requirements for referrals to affiliated businesses when it referred business to an unaffiliated business, which then referred the business to an affiliated business of Coldwell Banker.99 This practice ultimately resulted in Coldwell Banker's agreement to pay $700,000 and to change certain of its business practices.100

Those who violate § 8 of RESPA may be subject to civil or criminal penalties. The civil penalty under RESPA is a trebling of the unearned fee101, plus the possibility of court costs and reasonable attorneys fees.102 The only party with standing to seek monetary damages is the person charged for the settlement service103, although various state officials are empowered to bring an action to enjoin violations of § 8. The criminal penalty for a violation of § 8 is a fine of up to $10,000 and/or one year in prison.104

Proposed Changes to RESPA

In July 1998, the Board of Governors of the Federal Reserve System and the Department of Housing and Urban Development issued their joint report to Congress regarding recommended modifications to RESPA and the Truth in Lending Act ("Joint Report").105 Relying on information gathered from surveys, focus groups, and public comment letters, HUD and the Federal Reserve developed their recommendations. Some of the recommendations pertain specifically to § 8 of RESPA.

One of the major recommendations would provide an exemption from the prohibitions in § 8 for those settlement service providers who offer packaged settlement services at a guaranteed price. RESPA serves as the major stumbling block to one-stop shopping. The idea behind exempting packaged services is to improve the consumer's ability to shop effectively for such services and to allow competitive forces to reduce loan costs106, which is consistent with RESPA's purpose. Only those fees paid and arrangements made within a package would be exempt from § 8, and only if certain conditions were satisfied.107 The conditions include 1) offering a comprehensive package of the settlement services needed to close a loan; 2) providing consumers with a prescribed disclosure that gives the maximum price for the package of services; and 3) disclosing the rates and points for the loan with a guarantee of no increase, subject to market changes when the consumer has not "locked-in" a rate, and subject to verification of information provided by the consumer.108

The packager of the settlement services could set the package price by any method it desired, but it could not charge a consumer more than the quoted amount.109 Nonetheless, most fees required to obtain a loan, including
appraisals, title work, preparation and recordation of documents, inspections, and mortgage insurance, would need to be included in the package.110

HUD and the Federal Reserve, in recommending the exemption from § 8, recognized that the uncertainty regarding what constitutes a referral fee, as well as the affiliated business requirements, would serve as an impediment to packaging settlement services.111 If, however, settlement service providers who provide services within a package were exempt from § 8's application, questions about volume discounts and other incentives become moot points.

Four years have passed since the Joint Report, and no significant legislative action has occurred with respect to RESPA. If in fact the recommendations are eventually adopted as proposed, there would likely be some limitations on the exemption. First only those fees paid and arrangements made within the packages would be exempt. In addition, the § 8 exemption would apply to only the particular transaction for which the conditions were met; the exemption would not serve as a grant of blanket immunity for the packager for all activities that would otherwise be subject to § 8.112 Finally, fees for referrals to or from the packager of the settlement services would still be subject to the anti-kickback provisions. According to the Joint Report, a realtor could not receive a fee for referring consumers to a package.113

The Joint Report leaves unanswered some questions about its proposal for packaged settlement services, including what service providers will be entitled to package settlement services. Those lenders who provided comments apparently prefer to limit the class of qualified packagers to lenders on the grounds that a lender should not be bound by just any package selected by consumers, particularly when most of the services that must be included in the package are for the benefit of the lender. Other groups, such as title companies and real estate agents, argue that to limit the permitted packagers to lenders only would unnecessarily restrict competition.114 The Joint Report offers a compromise whereby if ultimately one of the conditions for packaged services was a commitment to a firm rate and points for the loan, any entity other than lender that packaged the settlement services would need to affiliate with a lender in order to qualify for the § 8 exemption.115

Other recommendations included in the report that specifically pertain to § 8 address the remedy for a violation of this section. HUD and the Federal Reserve recommend amending § 8(d) to allow competitors to sue for injunctive relief for violations of either § 8 or § 9 of RESPA.116

Although HUD's and the Federal Reserve's recommendations were released more than one year ago, no legislative action has occurred as of yet, and in fact, none is expected any time soon. Different factions are so far
apart in agreeing on what changes should be adopted, that a major overhaul of TILA or RESPA seems unlikely, and ultimately Congress may have little choice but to revise TILA and RESPA in a piecemeal manner.

Unless and until Congress modifies RESPA, lawyers should continue to beware of possible violations of the RESPA provisions. Moreover, even if Congress adopts the recommendations allowing for an exemption from the federal anti-kickback provisions, providers of settlement services may still remain liable under those state laws that limit rebates and referral fees (discussed in more detail below) unless Congress specifically preempts those state laws.

Parallel State Law Provisions

Many states have statutes similar to RESPA's current anti-kickback provision, thus potentially exposing lawyers and title companies to additional liability under state law.\(^{117}\) RESPA's provisions do not preempt state laws that regulate settlement services unless those statutes provide less protection to the consumer.\(^{118}\)

A brief survey of the laws of several states demonstrates some of the approaches taken by the states. Some states track RESPA fairly closely.\(^{119}\) In other cases, however, the state statute exposes the unwitting attorney to a greater risk of liability than the attorney has under RESPA.

New York prohibits title insurance companies, as well as anyone acting on their behalf, from rebating any portion of the fee, premium or charge or making other payments as an inducement for, or as compensation for, title insurance business. In addition, New York penalizes any person who accepts such payments.\(^{120}\) Unlike RESPA, however, the New York statute contains no provision allowing compensation for services that are actually provided. Therefore, there is nothing on which to base a discussion of issues like core title agent services, or what one must actually do to earn payment from the title insurer. The most one can do under the New York statute is make a logical argument that payments for services actually rendered do not violate the New York statute inasmuch as it prohibits only those payments made "as an inducement for, or as compensation for, any title insurance business."\(^{121}\)

The Florida statute addresses title insurance specifically rather than the broader settlement services regulated by RESPA.\(^{122}\) However, like RESPA, it prohibits direct or indirect payments as inducements for title insurance business. Moreover, similar to RESPA's provisions, the Florida statute allows the payment of fees to attorneys for the actual examination of title to real property as a condition to the issuance of the title policy as well as
commissions to duly-appointed agents who actually issue the policy.

Various regulations contained in the Florida Administrative Code provide additional stipulations related to title services. Those provisions require the title insurer to retain a minimum 30% of the risk premium. Nor can a title insurer circumvent the 30% minimum by providing services to an agent for less than actual cost.

Beyond the prohibition against referral fees, another issue for consideration under state laws is the handling of affiliated businesses. Of the state statutes this author reviewed, only the Virginia statute addressed this issue with any specificity. In essence, it states that ownership of a title insurance company or title agency is not a per se violation of the anti-kickback statute where such person receives returns on investment arising from the ownership interest. This language, similar in concept to the language included in RESPA, is evidence that a reasonable inference can be drawn that ownership of a title company could otherwise violate RESPA or the parallel state law provision. From an ethics standpoint, violations of the state statute, as well as RESPA, are likely to violate the rules of ethics, thus subjecting an attorney to sanctions for the violation. As discussed above, various state ethics committees have conditioned approval of the attorney’s dual role on the attorney receiving fees for only services actually rendered. Any violation of RESPA or the equivalent state anti-kickback statute logically leads to the conclusion that fees collected in violation of RESPA are either unearned fees or fees that are not for services rendered. As such they are likely to violate the provisions of the local ethics rules.

IV. ETHICAL ISSUES ARISING FROM THE INSURER’S DUTY TO DEFEND

Typically, the insurance contract obligates the insurer to defend the insured against any claims that are covered under the policy. Essentially the duty to defend requires the insurer to provide a lawyer to represent the interests of the insured at the insurer’s expense. This duty gives rise to a variety of ethics issues that the lawyer responsible for defending the insured must consider.

Outside Lawyers

Many jurisdictions recognize the tripartite relationship that results from the duty to defend, existing between the insured, the insurer, and the attorney retained by the insurer. The initial question to be addressed is whether the lawyer can represent both the insured and the insurer in actions involving third parties. This again requires consideration of rules 1.7 and 1.8 of the Model Rules of Professional Conduct. The simple answer is that as
long as the interests of the insured and the insurer are aligned, there is no conflict of interest that would prevent the lawyer from jointly representing both the insured and the insurer.\textsuperscript{129}

Where there is a conflict of interest, the insurer is required to appoint separate, independent counsel to represent the interests of the insured. The most common situation that requires the appointment of independent counsel arises when the insurer agrees to provide a defense for the insured, but reserves its rights under the policy.\textsuperscript{130}

Nonetheless, the inquiry into whether independent counsel is required is not so easily determined. The insurer is not required to retain independent counsel in every situation where there is a reservation of rights, nor is a reservation of rights the only conflict that may result in the insurer needing to retain separate counsel for the insured. For example, although the language in the \textit{San Diego Navy Federal Credit Union v. Cumis}\textsuperscript{131} case could be read broadly as requiring independent counsel whenever some of the allegations made by a third party fall within the policy, while others do not\textsuperscript{132}, in practice the question centers on whether there is in actuality a conflict. The court in \textit{Native Son Investment Group v. Tico Title Insurance Co.}\textsuperscript{133}, clarified the rule regarding independent counsel, determining that the insurer was not obligated to retain independent counsel at its own expense despite that some of the third party allegations were for covered items while other allegations were not. The court concluded that separate counsel was unnecessary because determination of the third party allegations would in no way be determinative of the policy coverage issues. Rather, an interpretation of the policy terms would determine the coverage issues. As such, there was no conflict of interest.\textsuperscript{134}

The case \textit{69th Street and 2nd Avenue Garage Associates v. Tico Title Guarantee Co.}\textsuperscript{135} illustrates a conflict unrelated to issues of coverage under the title policy, but which nonetheless entitled the insured to separate counsel. Although the court recognized that both the insured and the insurer shared an interest in protecting the insured’s title, it determined that there was, nonetheless, a divergence in their interests. On one hand, the insured had a business interest in resolving the claim quickly to avoid losing customers and employees and to keep open the possibility of refinancing the property, while the insurer’s only interest was in protecting the title, which could be done even if the case proceeded at a leisurely pace. The court stated, “There was a crucial conflict of interests between [the insured and the insurer, and the insured] had the right to its own attorneys.”\textsuperscript{136}

In short, the insurer and counsel retained by the insurer, must be mindful of conflicts that may necessitate the insurer retaining separate
counsel to represent their separate interests. It is fairly clear that independent counsel must be appointed whenever the resolution of third party claims will bear directly on the outcome of any coverage dispute. Other conflicts may also necessitate retaining independent counsel.

Regardless of whether the attorney is retained as separate counsel or can represent both the insurer and the insured, the lawyer must be alert to other ethical requirements and potential pitfalls. Two rules are relevant in this situation: rule 1.7(b)\(^{137}\), which addresses conflicts of interest in general, and rule 1.8(f)\(^{138}\), which amplifies the requirements of rule 1.7. Rule 5.4(c) also applies, inasmuch as it prohibits lawyers from permitting a person who employs or pays the lawyer to direct or regulate the lawyer’s professional judgement. Essentially, to avoid running afoul of the ethics requirements, the lawyer, 1) must inform the insured of the payment arrangement and disclose the possible adverse effects on the lawyer’s professional judgment; 2) provide the opportunity for the client to seek the advice of independent counsel; 3) obtain the insured’s consent; 4) maintain the confidences of the insured; and 5) ensure that the arrangement does not compromise the lawyer’s duty of loyalty to the insured. In this situation, the client to whom utmost loyalty is due is the insured.\(^{139}\) Anything less than undivided loyalty may raise questions about the defense provided by the insurer.\(^{140}\)

Therefore, the lawyer must again closely examine whether his professional judgement will be impacted by his own interests or the interests of the insurer who is paying the lawyer’s fees. The potential conflict can arise in a number of different ways that may not always be readily apparent.

A lawyer or firm which has established a relationship with the insurer, serving as insurance defense counsel for a number of the insurer’s matters, must assure that decisions made about a particular insured’s case are not influenced by the attorney’s desire to maintain the business relationship or in fact to acquire more business from the insurer. To do so would violate the lawyer’s obligation to avoid representation where the lawyer might be materially limited by his responsibilities to another client or his own interests.\(^{141}\)

Outside counsel guidelines could provide another source for claims that the lawyer breached his duty to maintain his professional independence. Many companies that regularly retain outside counsel have developed a set of guidelines and procedures aimed at ensuring clear communication with outside lawyers, assuring efficiency in the handling of the company’s cases, and containing legal costs. There is nothing that suggests that outside counsel guidelines are automatically troublesome for the attorney who is retained to represent the insured. However, the attorney must not let those
guidelines interfere with his professional judgement or allow the insurer to impermissibly control the matter.

An issue that has arisen more recently involves flat-fee billing. As a means of controlling legal fees and aiding in the budgeting process, many companies have sought billing methods other than the standard hourly fee. Nonetheless, there is the potential for such a billing arrangement to violate the ethics rules. Of major concern is the possibility that the lawyer will fail to provide competent representation, particularly if the matter ultimately is more complex and time-consuming than the parties anticipated at the time they reached an agreement on the flat fee. That the lawyer has a conflicting interest in doing as little work as possible is a related concern with flat fee billing.

Of the ethics committees or courts that have considered the issue, the majority have concluded that flat fee billing is permissible, with caveats.142 The fee agreed to must be reasonable so that the lawyer does not have a disincentive to providing competent and zealous legal services.143 Moreover, the lawyer must not allow his loyalty or professional judgement to be compromised.144

That the flat fee might be deemed excessive is a possibility, but one that presents little risk. Of course, rule 1.5 of the Model Rules requires that the fee charged by the lawyer be reasonable.145 Neither the rule, nor the comments following it provide any guidance on determining what constitutes a reasonable fee. Nonetheless in this particular setting, the risk that the fee might be considered too high to be reasonable is small. After all, the reason for such flat fee arrangements is often to contain legal fees, and given the bargaining power of most insurers, it is doubtful that the arrangement will be questionable on the grounds that the fee is unreasonable.

Kentucky is the noted stand-out in finding that flat fee representation by the lawyer retained to represent the insured is impermissible. In American Insurance Association v. Kentucky Bar Association146, the court affirmed Advisory Ethics Opinion E-368, issued by the Kentucky Bar Association, which concluded that attorneys could not enter into an agreement whereby the lawyer agreed to do the insurer's defense work for a set fee. The Kentucky court found that such an arrangement resulted in numerous conflicts, including giving the lawyer a financial interest in the outcome of the litigation, as well as creating a conflict with the insurer who is obligated to provide the insured a defense, but which then limits the representation by limiting the fee of the outside counsel. The court rejected the argument that an unreasonably low hourly fee similarly allowed the insurer to control outside counsel and to constrain representation.

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The better position is to allow flat fee representation, subject to careful scrutiny to assure that the insured is competently and zealously represented by a lawyer who completely fulfills his obligation of loyalty.

Assuming that flat fee representation is permissible, one issue that is not entirely clear is whether the attorney must disclose to the insured, the terms of his set compensation or whether the lawyer has adequately complied with his ethical duty when he discloses simply that the insurer will pay his fee. The New Hampshire Committee suggested that the lawyer may need to disclose the fixed rate arrangement if there was a possibility that it would have a financial impact on the insured. This is probably the better course to follow.

Another ethical consideration for lawyers retained to represent the insured is the requirement to maintain the insured’s confidences. Rule 1.8(f) obligates the lawyer to such a duty in this situation. If the situation should arise that the insured reveals information to his lawyer that would benefit the insured, can the attorney reveal such information to the insurer? Where the lawyer represents both the insured and the insurer, the answer is likely no, particularly if the confidence would result in a loss of coverage, unless the client consents to disclosure.  

To the extent that disclosure of such information is necessary for the insured to meet his duty to cooperate with the insurer, that may serve to persuade the insured to give the necessary consent. If, however, the insured refuses the consent, the lawyer cannot disclose the information. In addition, if the lawyer is representing both the insurer and the insured, the client’s refusal to consent to disclosure of the information may create the kind of conflict that requires the lawyer to withdraw from representing either the insured or the insurer.  

**In-house Counsel**

Many of the same issues discussed above regarding outside lawyers arise when the insurance company opts to use its own employees to represent insureds in third party claims. There is, however, the additional concern about the staff attorney’s loyalty and professional judgement given his status as an employee. In many respects, in-house lawyers are little different, qualitatively, from attorneys who rely almost exclusively on one or two clients for their livelihood. Nonetheless, the duties owed by an employee to his employer require a consideration of how that difference affects the lawyer’s professional responsibility. Moreover, when in-house lawyers provide legal services to clients other than their employer, it raises the issue of whether such arrangement results in the unauthorized practice of law by a
corporation.

Most jurisdictions have concluded that in-house representation of insureds does not violate the ethics rules.\textsuperscript{149} The Tennessee Supreme Court addressed the issue in \textit{In re Youngblood}\textsuperscript{150}, recognizing that while the employer-employee relationship created a potential conflict of interest, the Model Code of Professional Responsibility prohibited representation only when there was the "reasonable probability" of a real conflict.\textsuperscript{151} The court, however emphasized that the employer must not implement any policy, arrangement, or device that served to limit the attorney's professional judgement or loyalty owed to the insured.\textsuperscript{152} Finally, the Tennessee court concluded that staff attorney representation of insureds constituted neither the unauthorized practice of law by a corporation nor the aiding of the corporation in the unauthorized practice of law. The court noted that there is no problem when a corporation hires outside lawyers to represent its insureds pursuant to its contractual duty to defend. Relying on California authority,\textsuperscript{153} the court concluded that the employment relation alone, without a closer examination of the duties, loyalties, prerogatives and interests, was insufficient to establish any wrong-doing. Kentucky, again, reached a directly contrary position on the issue of in-house lawyers.\textsuperscript{154} Rejecting the cases and opinions from other states allowing in-house lawyers to represent an insured, the Kentucky Supreme Court questioned whether a staff attorney could represent the insured with the requisite loyalty while remaining on the payroll of the insurance company.\textsuperscript{155} The court was particularly concerned that to allow such a practice would amount to the unauthorized practice of law.\textsuperscript{156}

In those states where in-house lawyers are allowed to defend claims brought against insureds, the lawyer must consider whether only the insured is the client (as suggested in \textit{Youngblood}), or whether the insurer is also a client. In a situation of dual representation, rule 1.7 is clearly implicated, and the attorney must undertake the appropriate analysis.

Regardless of whether the insurer is a client or not, the in-house lawyer must also consider rule 1.8, because clearly the staff attorney has an interest in his continued employment with the company. The same questions that arise with outside counsel concerning the lawyer's professional judgement and loyalty must be considered by the in-house lawyer. In addition, the attorney's financial and professional interest as an employee must also be taken into consideration.

Finally, consideration must be given to the confidentiality issues raised above, and whether the staff lawyer can fulfill the obligation under the ethics rules to maintain the client's confidences.
Of course, in all situations, the staff attorney should disclose the arrangement, including the possible effect of such representation on the lawyer’s independent judgement, and obtain the client’s consent. In addition, the in-house attorney should give the insured the opportunity to evaluate the need for independent representation.\(^{157}\)

V. THE ANCILLARY BUSINESS ISSUE

The most complex questions seem to arise either in a dual representation situation or where the attorney has a business interest in the title agency or the insurance company. However, even when the lawyer or the law firm will provide no legal services to a client, but only law-related services, i.e. business services that are not strictly the practice of law, but for which there is a natural relationship\(^{158}\), there are questions that can arise. Some examples of law-related businesses include court reporting firms, title insurance agencies and companies, financial planning firms, and real estate brokerage firms.\(^{159}\)

One of the key questions is whether a lawyer who provides only law-related services is subject to the rules of ethics. In 1994, the ABA added the current version of rule 5.7 to the Model Rules of Professional Conduct.\(^{160}\) Its aim is to reduce the possibility that a customer of the law-related business fails to understand that the business services do not carry with them the normal protections found in the attorney/client relationship. Towards that end, rule 5.7 creates a presumption that the rules of ethics apply unless the lawyer has taken reasonable measures under the circumstances to assure that a person using law-related services understands the inapplicability of the Rules of Professional Conduct.\(^{161}\)

To ensure that the customer for the law-related services understands that he has no attorney/client relationship with the lawyer, of course the lawyer or the firm should be express about the nature of the relationship. In addition, lawyers are advised to avoid practices that imply that the user of the law-related services will benefit because the ancillary business is owned or controlled by attorneys.

For example, stationery of the title company that identifies the attorneys that own or control the company tends to imply that the legal services of those attorneys are part of the service package.\(^{162}\) The Connecticut Committee on Professional Ethics was asked to review a newspaper advertisement, placed by a law firm, that began with the startling question, “Do the Indians Have a Claim to Your Real Estate?” The ad appeared primarily aimed at encouraging readers to purchase title insurance, but it concluded with the statement, “We can also defend you if you have
been sued by the Indians." Therefore the Committee reviewed it to determine if it complied with the requirements for advertising by lawyers. Reviewing the advertisement as a whole, the Committee concluded that people who contacted the firm concerning the purchase of title insurance might be led to believe that they were creating a attorney/client relationship. Therefore, the Committee urged the firm to revise the ad to eliminate confusion regarding the offering of legal services.\textsuperscript{163} Under similar circumstances, the lawyers may nonetheless be bound by the rules of ethics notwithstanding that there was no intent to establish an attorney/client relationship.

Application of the rules of ethics to the business relationship will greatly impact the conduct of the law-related business. Consider the various rules that regulate referrals, such as the rules on advertising and solicitation and how they might impact the law-related business.

Perhaps a more troubling concern is the possibility of disqualification. It is possible that customers of the law-related business, although not law clients of the lawyer might succeed in having the lawyer disqualified if he possesses confidential information of the business customer that might be used should the lawyer represent a party adverse to that customer.\textsuperscript{164} There is little doubt that the attorney in such a situation would be bound by the attorney/client privilege.

Finally, the failure to keep the ancillary business clearly separate from the law practice may subject the records of the ancillary business to audit under local random audit programs. The case \textit{In the Matter of Unnamed Attorney}\textsuperscript{165}, demonstrates the point clearly. In that case, the New Hampshire Supreme Court determined that there was a sufficient nexus between an attorney and a title closing corporation to conclude that the title company's financial records were subject to audit, just as the lawyer's records were. The facts were that, the attorney essentially could control the title company through his 73\% ownership of outstanding shares, the attorney shared office space with the title company, the title company and the attorney shared employees, and the lawyer occasionally provided legal services to the customers of the title company. Consequently, the totality of the circumstances subjected the title company's records to the audit.\textsuperscript{166}

The potential for unintended consequences is significant enough to take the necessary precautions to avoid the client's misunderstanding of the nature of the business relationship. This paper has addressed only a few of the potential issues.
CONCLUSION

Lawyers who choose to provide services in the title insurance industry must be ever sensitive to the myriad ethical issues that may arise in that kind of practice. The various rules and their interpretations, as well as RESPA and similar state laws, potentially expose the lawyer to civil liability, criminal penalties, and disciplinary action for violations of the various provisions. Serious consideration of the implications is a must for an attorney providing title services to both law clients and business clients lest he violate one of the applicable rules.

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1. See Meredith J. Duncan, Legal Malpractice By Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet, 34 Wake Forest L. Rev. 1137 (1999).

2. Id. at 1158-1167.

3. While in many respects the role of abstract company owner is similar to the agency role played by some attorneys, in at least one instance, the ownership of an abstract company is treated differently than the situation of a lawyer who is simply acting as an agent for a title insurer. Some of the legal issues that arise in an ownership situation will be discussed later in this paper.

4. Ownership or membership in the bar fund, however, is more a method for determining who can write policies on the company than it is a financial investment. In any event, the shareholders or members of the company receive a part of the premium collected as compensation of the services provided: the remainder is retained by the company for reserves for losses and administrative costs. See In re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360, 687 A.2d 1000, 1002 (1997); T. Mary McDonald, RESPA’s New Requirements for Attorneys Writing Title Insurance and Ongoing Ethical Concerns, in TITLE INSURANCE 1993: OBTAINING THE COVERAGE YOU WANT, at 151 (PLI Real Estate Law and Practice Course Handbook Series No 397, 1993).
5. For a more complete discussion of the roles that attorneys may play see McDonald, supra note 2, at 151, 158.

6. The ethics opinions referred to in this paper are not binding on courts of law, but most jurisdictions tend to defer to the extent that a lawyer who has acted in accordance with a recent ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings. Wolfram, Modern Legal Ethics, § 2.6.6 (West 1986).

7. In New York, for example, the New York State Bar Association Ethics Committee distinguished between simply serving in the dual capacity of title insurance agent and legal representative to one of the parties to the real estate transaction on one hand, and a lawyer's ownership of the abstract company that provides services to his own clients. See N.Y. St. Bar Assn. Comm. Prof. Eth., Op. 621 (1991) (clarifying and amplifying N.Y. St. Bar Assn. Comm. Prof. Eth., Op. 595 (1988)).

8. Examples of situations in which the attorney has a business interest include where the attorney serves as the title insurance agent, the owner of a title company, or where the attorney is paid by the insurer to represent the insured, among other examples.

9. Because the vast majority of states have adopted the Model Rules, this paper will rely on those rules in discussing the issues.


11. Id.


13. The various ethics opinions provide guidance as to when the lawyer’s representation will be so adversely affected that no amount of disclosure or consent can clear the conflict.


17. ABA Formal Ethics Op. 93-379 states that a lawyer may not bill more than one client for the same time expended on the same service. Doing so violates the rule which prohibits charging an excessive fee and the rule which make it professional misconduct to engage in conduct involving dishonesty, fraud, or misrepresentation.

18. N.Y. St. Bar Assn. Comm. Prof. Eth., Op. 576 (1986). One New York case required an attorney to credit against his legal bill the amount received for commissions. Because the commissions were sufficient to compensate the attorney for his legal services, no additional compensation was allowed from the client for legal fees. *In re Equitable Office Building Corp.*, 83 F. Supp. 531 (S.D.N.Y.), *aff’d*, 174 F.2d 827 (2nd Cir.), *rev’d on other grounds* 175 F.2d 28 (2d Cir. 1949).


22. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 304 (1961). The ABA reached its conclusions based on the Model Code of Professional Responsibility. Specifically, the opinion refers to *Model Code of Responsibility* EC 5-19, DR 5-101(A), DR 5-105 (A), (B), and ©), and DR 5-107(A)(1) and (2) (1972).

23. ABA Formal Op. 331. This opinion was decided under the Model Code of Professional Responsibility, the predecessor to the current Model Rules of Professional Conduct. The ABA would likely reach the same result under the Model Rules. Although the language of rules 1.7 and 1.8 of the Model Rules is different than comparable sections in the Model Code, the intent was that the Model Rules would clarify DR 5-105(A) and ©) of the Model Code. The Model Rules have been adopted by more than 40 states as of the date of this


28. Under current Texas law, the lawyer would need to complete the analysis required by Rule 1.7 of the Model Rules.


31. *Id.*

32. *Id.* at n.5.

33. Four members of the committee joined in dissenting from the conclusion reached by the majority.

34. N.Y. St. Bar Assn. Comm. Prof. Eth., Op. 621 (1991). In reaching what appears to be a decision that conflicted with its earlier decision on attorney-agents, the New York Committee distinguished between owning an interest in the abstract company that acts as agent for the title insurer versus simply serving as the agent for a title insurer. The New York Committee concluded that the different practices implicated different ethical rules. Disciplinary Rule 5-101(A) applies in the ownership situation, while DR 5-105 applies to dual representation. However, although the obviousness language derived from DR 5-105(C), the New York Committee applied the obviousness standard to both DR 5-105(C) and DR 5-101(A). The dissent to New York
Ethics Opinion 621 blasts the majority for "importing" the obviousness standard of DR 5-105(C) into DR 5-101(A). *Id.*

35. *Id.*

36. *Id.*

37. The New York Committee's conclusions in Opinion 621 seem strained at best. Having shown approval for the attorney/agent situation described in Opinion 576, under certain circumstances, essentially every contention stated in Opinion 621 to prohibit ownership of the abstract company, is applicable to the attorney/agent scenario. Or stated another way, the problems identified in New York Ethics Opinion 621 are resolvable, as pointed out in the dissent to that opinion.


39. *Id.*


42. *Id.*


44. *Id.*

45. *In Re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360, 687 A.2d 1000 (1997).*

46. *See supra n. 7.*

47. *In re Opinion 682, 147 N.J. at 370, 687 A.2d at 1005.*

48. *In re Opinion 682, 147 N.J. at 370, 687 A.2d at 1005* (citing Paul
Bintinger, *Conflict of Interest: Attorney as Title Insurance Agent, 4 Geo. J. Legal Ethics 687 (1991)).

49. *Id.*, 147 N.J. 360, 373, 687 A.2d 1000, 1006. The court did leave the door open for further consideration of a bar-related title company that addressed the concerns raised by the court's opinion.


51. *Id.*

52. *Id.*

53. One commentator doubts that private individuals can be made to actually understand the legal significance of the conflict given that they are often unsophisticated legally. Paul Bintinger, *Conflict of Interest: Attorney as Title Insurance Agent, 4 Geo. J. Legal Ethics 687 (1991)).


58. *See Model Rules of Professional Conduct Rule 1.5; Model Code of Professional Responsibility DR 2-106(B).*

59. *See, In re Dolan, 76 N.J. 1, 384 A.2d 1076, 1081-82 (1985). In Dolan, disciplinary charges were brought against a lawyer for a number of alleged ethics violations, including that the attorney regularly represented the seller, purchaser/mortgagor, and the mortgagor at real estate closings. The lawyer did not disclose this to the buyers or seek their consent until the closing, which was not deemed timely. Id.*
60. See Okla. Adv. Opin. 316 (2001) for particularly well-considered suggestions for disclosures.

61. DeBolt v. Parker, 234 N.J.Super. 471, 560 A.2d 1323 (1988). In some jurisdictions, the standard may be particularly high, requiring that the lawyer explain the nature of the conflict in such detail that the client can understand the reasons why it would be desirable for each client to retain independent counsel with undivided loyalty to each. See, e.g., Image Technical Services v. Eastman Kodak Co., 820 F.Supp. 1212, 1217 (N.D. Calif. 1993).


64. "Federally related mortgage loan" includes any loan for a residential property designed for one to four families and, 1) is made by a lender whose deposits are insured or regulated by the Government; 2) is made or insured, guaranteed, or supplemented by any of the federal loan programs such as the Federal National Mortgage Association or the Government National Mortgage Association; 3) is intended to be sold to one of the federal loan programs; or 4) is made by certain creditors, as defined in 15 U.S.C. § 1602(f) (1994), 12 U.C.C. § 2602(1) (1994).


66. 12 U.S.C. § 2607. RESPA defines "thing of value" to include any payment, advance, funds, loan service, or other consideration. 12 U.S.C. § 2602. Section 3500.14(d) of Regulation X includes more examples of "things of value."


76. *Id.* at Finding of Fact 44.

77. *Id.*


79. *Id.*

80. *Id.*


83. 24 C.F.R. § 3500.14(c) (1997). In a lawsuit brought by HUD against Coldwell Banker, HUD alleged that Coldwell Banker had received unearned fees. Coldwell Banker had developed the practice of charging homeowners who listed their homes with it a $195 for administrative and closing services. Coldwell Banker then entered agreements with approved closers who would receive $100 of the $195 fee; Coldwell Banker received $95 to defray
administrative costs. HUD alleged that the $95 fee was for real estate services covered by the commission, and thus was an unearned fee, not commensurate with the services Coldwell Banker provided. Coldwell Banker ultimately settled with HUD. Michael Zerega and Bob Nipp, *HUD Presses Consumer Protection in 700,000 Coldwell Banker Settlement*, News Release, HUD No. 93-27, May 17, 1993.


86. Any claim by the attorney that the entire fee is intended to compensate him for those settlement services he provided may raise questions about whether he has violated the ethics rules inasmuch as most, if not all jurisdictions, prohibit an attorney from charging an excessive fee. See Model Rules of Professional Conduct Rule 1.5.


89. Earlier versions of RESPA referred to a "controlled business arrangement". In its 1992 amendments, Congress changed the term to "affiliated business arrangement".

90. An "associate" is "one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, 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; ©) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding with such person, the purpose or substantial effect of which is to enable the
person in a position to refer settlement business to benefit financially from the referrals of such business.


92. 12 U.S.C. § 2607(c) (1994); 24 C.F.R. § 3500.15 (1997). An attorney's referral to affiliated settlement service providers, other than his title agency, requires the attorney to satisfy an additional condition, namely that he disclose to his client that the client is not required to use any particular provider of settlement services. _Id._

93. An attorney can require the use of a particular title agency. He cannot, however, impose such a requirement on the selection of other providers of settlement services. Nonetheless, the required use of a particular agency will of course influence the selection of the title insurer.

94. 12 U.S.C. § 2607(c) (1994); 24 C.F.R. § 3500.15 (1997). An attorney's referral to affiliated settlement service providers, other than his title agency, requires the attorney to satisfy an additional condition, namely that he disclose to is client that the client is not required to use any particular provider of settlement services. _Id._


96. 24 C.F.R. § 3500.15 (1997) provides guidance on determining an acceptable return on the ownership interest. The provisions are apparently aimed at deterring attempts to conceal an illegal referral fee.

97. Regulation X provides guidelines for determining the return on the ownership interest. It excludes from the calculation payments that are designed in any way to reward the recipient for business generated in the past or in the future. _See_ 24 C.F.R. 3500.15(b)(3)(i), (ii), and (iii). (1997)

98. _See_ note 81, _supra_, for a description of the unearned fees that resulted in Coldwell Banker settling with HUD.

99. _See supra_, note 81.
100. Zerega, supra note 81.


103. Id.


106. Joint Report Executive Summary at p. XIV.


108. Joint Report Executive Summary at p XIV.

109. Joint Report Executive Summary at p. XII. A related recommendation would allow settlement service providers either to package their services or to continue providing a good faith estimate (GFE) of settlement costs, subject to tighter controls to ensure more accurate estimates.


111. Joint Report Executive Summary at p. XIV.

112. Joint Report at 32.

113. Joint Report at 32.


116. Section 9 (12 U.S.C. § 2608) restricts sellers of real estate under certain circumstances from conditioning the sale on the purchase of title insurance from a particular title company.

117. See, e.g. ARIZ. REV. STAT. ANN. § 20-1586 (West 1990); FLA. STAT. ANN. § 626.9541(1)(h)3.a (West 1996); 215 ILL COMP. STAT. 155/24 (West 1993); N.J. STAT. ANN. § 17.46B-35 (West 1994); N.Y. INS. LAW § 6409 (McKinney 1985); VA. CODE ANN. § 38.2-4614 (Michie 1997).


119. See, e.g. VA. CODE ANN. § 38.6-4614A.1 (Michie 1997).

120. N.Y. INS. LAW § 6409.

121. Id. See also, 215 ILL. COMP. STAT. 155/24 (West 1993). This section prohibits any person from directly or indirectly paying or accepting any commission, discount, referral fee, or other consideration for the referral of title business, at the risk of conviction for a Class A misdemeanor. The Illinois statute similarly contains no provisions related to affiliated businesses.

122. See FLA. STAT. ANN. § 626.9541(1)(h)3.a (West 1006).

123. See FLA. ADMIN. CODE ANN. r. 4-186.003(13) (1997).

124. Id. The Florida Ethics Committee Opinion discussed above assumed that the attorney bore responsibility to the title company for the status of title in the event a title defect caused loss. As such, this assumption of some of the risk would suggest that the attorney is providing some very real services, despite the way the arrangement is described in the opinion. See Fla. St. Bar Assn. Comm. Prof. Eth., Op. 75-40 (1977).

125. FLA. ADMIN. CODE ANN. r. 4-186.003(11) (1997).

127. VA. CODE ANN. § 38.2-4614C (Michie 1997).

128. See supra, note 47.


131. Supra note 127.

132. "A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. * * * Opposing poles of interest are represented on the one hand in the insurer’s desire to establish in the third party suit the insured’s ‘liability rested on intentional conduct.’" Cumis, 162 Cal. App 3d at 364, 208 Cal.Rptr. at 498 (quoting in part Gray v. Zurich Insurance Co., 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 (Cal. 1966).


134. Id. See also, McGee v. Superior Court, 176 Cal.App.3d 221, 221 Cal.Rptr. 421 (Cal App. 1985); L&S Roofing Supply Co. v. St. Paul Fire & Marine Insurance Co., 521 So.2d 1298 ( Ala. 1987). In L&S Roofing, the court rejected the idea of a presumptive conflict arising simply because the insurer reserved its rights.


136. Id. at 226-27, 622 N.Y.S.2d at 14. Arguably, the court is guilty of a little "Monday morning quarter-backing." The dispute between the insured and the insurer arose when the insurer agreed to defend the insured, but insisted that it absolutely control the defense. The insured’s preferred lawyer
intended to a declaratory action filed in federal court by the insured’s attorney should be discontinued. The insured disagreed with that course of action, and through counsel that it retained, sought and received expedited consideration of the declaratory action. Ultimately, the declaratory action proved successful in protecting the insured’s rights in the property. The court described the insurer’s counsel as showing disregard for the wishes and interests of the insured. One must question whether the court would have found the insured justified in proceeding on its own if the result of the declaratory action had been different.

137. See supra note 47.

138. The text of 1.8(f) reads as follows:
   A lawyer shall not accept compensation for representing a client from one other than he client unless:
   (1) the client consents after consultation;
   (2) there is no interference with the lawyer’s independence of professional judgement or with the client-lawyer relationship; and
   (3) information relating to representation of a client is protected as required by Rule 1.6.

139. See L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So.2d 1298, 1303 (Ala. 1987); Van Dyke v. White, 55 Wash2d 601, 613, 349 P2d 430 (1960); See, also MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.4(c).


141. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1995).


143. The insurer must also be concerned that a fee which is unreasonably low may lead to a finding that it has breached its duty to defend the insured.


146. 917 S.W.2d 568 (Ky. 1996).


150. Supra, note 147.

151. Youngblood, 895 S.W.2d at 328. The court’s opinion includes an odd statement to the effect that the staff attorney did not have an attorney-client relationship with the insurer, and this premise seems to underlie the court’s opinion. In addition, the court stated that the employment relationship did not necessarily impose on the attorney a duty of loyalty that impaired the attorney-client relationship between the staff lawyer and the insured. Id. This is arguably an oversimplification of the issue.

152. Id. at 328.


155. "No man can serve two masters" [cite omitted] regardless here of either any perceived ‘community of interest,’ or Complainants’ Pollyanna postulate that house counsel will continue to provide undivided loyalty to the insured.” Id. at 571.

156. Id.

158. Rule 5.7(b) of the *Model Rules of Professional Conduct* defines "law related services" to denote "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."


160. The ABA adopted an earlier version of Rule 5.7 in 1991 by an 11 vote margin. That version of Rule 5.7 would have allowed attorneys to provide law-related services to only clients of the lawyer or the firm. One year later, however, that rule was repealed by a vote for which the margin was even more narrow. *See* Genesis of the Rule, ABA Annotated Model Rules of Professional Conduct.

In August 1996, Pennsylvania became the first state to adopt Rule 5.7 although it modified it substantially to address a wider range of practices. Terry, Pennsylvania Adopts Ancillary Business Rule, 8 Prof. Law. 10 (1996).


157. Connecticut Ethics Opinion 95-25 (July 6, 1995). *See also* Illinois Advisory Opinion 90-32 (1991), which indicates that if advertisements for an ancillary business identifies someone within the business as being a lawyer, the rules regarding lawyer advertising apply.

164. *Id.*


166. *Id.* at 734-35, 645 A.2d at 71-72.