



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 1.8. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 841
July 15, 1983

Topic: Potential Conflict of Interest

Digest: A lawyer-member of Attorney's Title Guaranty Fund, Inc., when representing a seller obligated to provide title insurance as part of real estate transaction, need not obtain the purchaser's consent to place the insurance with Attorney's Title.

Ref.: Rule 5-101(a); ISBA
Opinion No. 227; ABA Formal Opinion 304

FACTS

The Attorney for a seller in a real estate transaction is also a shareholder-member and authorized signatory of Attorneys' Title Guaranty Fund, Inc. He intends to utilize the services of such company to satisfy his client's contractual obligation to provide title insurance. The seller has been fully apprised of his attorney's relationship with Attorney's Title and has consented to such company's acting as title insurer. The purchaser, however, contends that, inasmuch as he is the person primarily relying on the title insurance, his consent is also necessary to the placing of such insurance with a title company in which the seller's attorney has an interest. Absent such consent, the purchaser claims that a conflict of interest exists on the part of the seller's attorney.

QUESTION

Is it a conflict of interest for the seller's attorney to obtain title insurance from a company in which the attorney has an interest without first obtaining the purchaser's consent?

OPINION

In our Opinion No. 227, issued October 25, 1963, we adopted ABA Formal Opinion No. 304 recognizing the ethical propriety of bar related title insurance companies. At the same time, we recognized that an attorney obtaining title insurance from an affiliated title company, and possibly receiving a commission for so doing, must disclose his financial interest in the transaction to his client and obtain the client's consent thereto.

The rationale for such a requirement is the possibility of a conflict of interest inherent in an attorney's representing a client while at the same time standing to profit from the client's purchase of title insurance from the attorney's affiliated company.

The purchaser in the present instance would have us expand our prior Opinion to additionally require disclosure to and consent by the other party to the real estate transaction, a non-client of the attorney. However, the rationale of our prior opinion does not apply to one not the attorney's client. While recognizing the purchaser's foreseeable reliance on the title insurance obtained, as well as his status as the named insured on the policy issued, these facts do not create an attorney-client relationship so as to impose upon the seller's attorney a direct duty to the purchaser. Absent such an attorney-client relationship, the provisions of Rule 5-101(a) dealing with the duty owed a client when the attorney's financial or personal interests may affect the representation do not apply. Nor do we deem any other provision of the Code of Professional Responsibility to impose upon an attorney the duty to a non-client suggested by the purchaser here.

The presence of insurance to provide reimbursement for a defective title may not be the equivalent to the purchaser of possessing merchantable title itself. However, in our view this is a matter to be dealt with by way of the real estate contract between the parties, not by resort to ethical considerations. The purchaser is entirely free to negotiate into the contract that he shall obtain the necessary title insurance or have a voice in the selection of the title insurer. The contract in the present instance did not so provide, but instead placed the obligation of acquiring title insurance solely upon the seller. In such instance, the seller's attorney, in obtaining such insurance pursuant to the contract, owes a duty of disclosure and consent only to his client, the seller. In short, we find no possibility of a conflict of interest requiring the purchaser's consent under the present circumstances to the procurement of insurance from Attorneys' Title.

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