This author argues that attorneys can act as title agents while representing clients in the same real-estate transaction. They must, however, make key disclosures and obtain corresponding consents, follow the Illinois Title Insurance Act, and overcome the rebuttable presumption that a transaction between lawyer and client is fraudulent.

By Michael J. Rooney

ETHICS
and the Attorney/Title Agent

Lawyers are indeed permitted to provide title insurance services to or on behalf of clients. But lawyers who act as title agents while also representing real-estate clients must meet the dictates of key provisions of the Rules of Professional Conduct,[1] which are discussed below. Although a recent article in this *Journal*[2] discussed the ethical obligations of lawyers providing "law-related services," it did not offer specific guidelines for lawyers serving as title agents.

Last August, in *In re Rukavina,* the ARDC administrator filed a complaint against an attorney who referred clients to a separate title agent entity he owned.[3] With that caution in mind, this article offers a review of the Rules and some ethical guidelines for real estate practitioners.

This article discusses the three – and in some cases four – disclosures to and consents from clients that every real estate lawyer who is also acting as title agent must make. Additionally, the Illinois Title Insurance Act requires the lawyer acting as a title agent to complete and distribute a "Disclosure Statement Controlled Business

1. References to the Rules of Professional Conduct are to the current Rules, not to those currently pending before the Illinois Supreme Court.
2. Jennifer E. Smiley and Michael L. Shakman, *Ethical Challenges When Lawyers Sell Non-Legal Services*, 95 Ill Bar J 258 (May 2007).
3. Commission No 07 CH 96 (August 30, 2007).

Arrangement,"[4] and that requirement is discussed below.

Also, lawyer/title agents must be able to overcome the rebuttable presumption that the sale of title insurance to a client is fraudulent because it is between attorney and client. The article discusses the presumption and how to rebut it.

Rule 2.3(a): use of the title evaluation by third parties

Some argue that the seller's attorney cannot provide title insurance because the policy is in the name of, and protects, the buyer (and the lender, if any). Some say the buyer's attorney cannot provide it because the seller is obligated under most real estate sales contracts to provide a title insurance commitment as evidence of marketable title. Others argue that the lender's attorney cannot issue the policy because it is relied upon by other transaction principals who are not clients of the lender's lawyer.

These arguments fail because of the provisions of Rule 2.3, "Evaluation for Use by Third Persons," which reads as follows:

> 2.3(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if: (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and (2) the client consents after disclosure.

This is one of the disclosure and consent requirements set forth in the Rules of Professional Conduct. (For sample disclosure language, see page 134).[5]

Note that neither this disclosure/consent requirement nor any of those to be discussed later need be in writing. But oral disclosures and consents pose risks, principally because they leave no record and thus can be hard to prove. Also, if the lawyer and client disagree about whether there was a disclosure and consent, the lawyer may be required to withdraw from the representation because his or her testimony could be prejudicial to the client.[6] A written record in the file should make this unnecessary.

Interestingly, the 2.3(a) requirement could oblige counsel representing "another" (i.e., someone not the title-agent lawyer's client) who relies on the title evaluation to inquire about whether the agent-lawyer actually disclosed and got consent from his or her client. Why? Because under Rule 2.3 the agent-lawyer may only make the evaluation once his or her client consents after disclosure; without that, a court might not permit the client of opposing counsel to rely on the evaluation.[7]

Exploration of this question is beyond the scope of this article. What is clear, however, is that an agent-lawyer must disclose to and get consent from his or her client before making an evaluation that will be relied on by third persons.

Rule 1.7(a): conflicts when interests are "directly adverse"

Some lawyers have been retained by title insurance companies to examine title. That attorney-client relationship is typically memorialized by a written contract. Where those lawyers also represent principals in real estate transactions, the provisions of Rule 1.7 on "Conflict of Interest" come into play. Rule 1.7(a) provides as follows:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after disclosure.[8]

This is a second disclosure and consent requirement imposed by the Rules, though it only applies when the lawyer seeks to represent both the title company and one of the principals to the transaction.

While it can be argued that the interests of the title company and any of the principals to a transaction are not necessarily "directly adverse," it is easy to see that they might become so. But even if that happens, the dual representation may proceed if the lawyer reasonably believes that representing a principal will not adversely affect his relationship with the title company, assuming he discloses to and gets consent from each client.

Would proposed revisions to the Illinois Rules of Professional Conduct affect attorney/title agents? See the sidebar on page 131.

As for conflicts between clients, what precisely must be disclosed? According to Rule 1.7 (c), "[w]hen representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved." Further guidance is contained in the "Terminology" section, which states that "'[d]isclose' or 'disclosure' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

From the non-title-company client's standpoint, a lawyer

4. 215 ILCS 155/18(b), form available at http://www.idfpr.com/dfi/titleinsur/pdf/disclosure_statemenmt.pdf (note the spelling of "statement" in the URL as "statemenmt").

5. While ISBA Revised Ethics Opinion 93-1 (January 21, 1994) addresses attorneys acting as title agents and does cover some of the Rules, that Opinion does not specifically discuss Rule 2.3.

6. Rule 3.7 Lawyer as Witness "(b) If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client."

7. A further question is opposing counsel's responsibility if the lawyer responds to an inquiry by indicating no disclosure has been made and no consent given. Now may the other party rely on the evaluation? Suppose the lawyer responds only with a general statement to the effect the lawyer is ethical and would never do anything contrary to the Rules. Now may the other party rely on the evaluation?

8. Interestingly, it is not the "representation of" the other client that must not be adversely affected by the new client, but the "relationship with" the other client. This seems to be an important distinction and one can easily imagine that the original client might be quite upset, with or without good cause, by the lawyer accepting the new client and the "relationship with" the original client could be irretrievably broken.

Michael J. Rooney is a former president of Attorneys' Title Guaranty Fund, Inc., a past chairman of the board of directors for the Illinois Institute for Continuing Legal Education, and a 1976 graduate of the University of Illinois College of Law.

who also represents the title company may have gained extensive experience in examining titles, which should give the client confidence in the finished work-product. That lawyer should also be familiar with the title company's operations and personnel and, therefore, better able to get exceptions waived or to gain more coverage for the insured.

A risk, though, is that the lawyer has come to view titles from the perspective of the insurer, a view that may be at odds with that of other lawyers in the area. In the dual-representation scenario, the lawyer must craft the disclosure to the level of sophistication and detail appropriate to the client. (see sidebar on page 135).

Rule 1.7(b): conflicts that could cause the representation to be "materially limited"

Even if there is no dual representation and the lawyer is simply an agent, not a lawyer, for the title insurer, issuing commitments and policies after examining the title while representing only one of the principals to the transaction in an attorney-client relationship, the lawyer must observe the requirements of Rule 1.7(b):

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation[9] will not be adversely affected; and (2) the client consents after disclosure.

This third disclosure and consent requirement imposed by the Rules of Professional Conduct covers both dual and single representation.

Regardless of how many clients she has, the lawyer's responsibilities under the agency agreement with the title insurance company and her personal interest in minimizing liability for errors must be analyzed under Rule 1.7(b). In other words, even if there isn't another client involved, the lawyer has responsibilities to the title insurance company, as outlined in the agency agreement and the company's instruction manuals.

Further, the lawyer's own interests could come into conflict with the client's if the lawyer were to make a mistake that resulted in liability or declined to take an action requested by the client (such as waiving a title exception) because of the strictures of the title insurance company's rules and regulations. However, if the lawyer reasonably believes the representation will not be adversely affected *and* the client consents following

9. Note that here it is the "representation" that must not be adversely affected, where in Rule 1.7(a) it was the "relationship".

Disclosure and Consent

[This sample language is for illustrative purposes only – your disclosure and consent forms must be tailored to your circumstances.]

DISCLOSURE AND CONSENT

I intend to provide a title insurance commitment and policy(ies) through _____ as an agent for that company in your transaction. Although other parties besides you will rely on or be protected by my title services, my making that evaluation of title is not inconsistent with my representation of you and may reveal information that will benefit you by allowing us to uncover, and resolve, a variety of potential problems early in the transaction. I do need your permission and recommend you give your consent for me to proceed.

In providing this service, I will perform the work and be compensated by the title insurance company with which I have an agency contract that establishes obligations to that company on my part. However, I believe those obligations will not prevent me from adequately representing your interests in this transaction. I also have personal interests because of my potential for liability for serving as a title agent and because of my ownership interest in (title insurer or agent, if applicable). But these personal interests will not prevent me from adequately representing you. In fact, you are the only client I represent as an attorney in this matter. If a serious conflict arises and I conclude my representation of you will be materially limited, I will so advise you and withdraw as your attorney. I need your permission to proceed despite these potential conflicts and recommend you give your consent for me to proceed.

The total title insurance bill you will incur will be approximately $_____ and, after paying the title insurance premium and other service providers' fees, I will retain approximately $_____. There are others who can do this work if you prefer, but I have found it beneficial to clients when I provide the title insurance due to my knowledge of your situation and real estate contract, ease and simplicity of communication and my experience. You should be aware that you are free to contact independent counsel to advise you about allowing me to provide these title services as there are other providers available to you. I believe if you make a comparison, you will find the cost to you is substantially the same as if another provider did the work. I need your permission to provide these services and receive these fees and recommend you give your consent for me to proceed.

Your signature below indicates you understand these three disclosures required under Rules 1.7(b), 1.8(a) and 2.3 of the Illinois Rules of Professional Conduct, you give your consent under each Rule and you understand you are free to consult with another attorney of your choosing.

Dated:_____ _____

_____

disclosure, the lawyer may proceed.

Once again, the lawyer must carefully consider how much "disclosure" is necessary. Also, as with the earlier two disclosure and consent requirements, she should memorialize consent and disclosure in writing.

Rule 1.8: business transactions with clients and the presumption of fraud

A fourth and final disclosure and consent requirement is imposed by Rule 1.8, "Conflict of Interest; Prohibited Transactions." Rule 1.8(a) provides as follows:

> Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

The two conditions are stated in the alternative, so that if either is true, disclosure and consent are required. Taking the second one first, when would a client *not* expect the lawyer to exercise professional judgment for his or her protection? The average consumer knows – and wants to know – nothing about title insurance and clearly expects the lawyer to exercise professional judgment on his or her behalf.

As for the first alternative, while the attorney as title agent and the client don't necessarily have conflicting interests, they obviously might at some point. Whether the interests conflict or not, the client expects the lawyer to exercise professional judgment on his or her behalf, and thus disclosure and consent are required.

Disclosing title-related fees. But what precisely must be disclosed in "ancillary business" or "law-related services" transactions? The client, to "appreciate the significance of the matter in question,"[10] must be advised by the lawyer how much money the lawyer will keep out of the total title charges shown on the HUD-1 Settlement Statement.

In the typical arrangement, the lawyer does not retain all of the funds paid for title insurance by the client and other principals in a real estate transaction. The amount the lawyer keeps may be a percentage of the premium charged, perhaps together with a percentage of the charge for endorsements.

The amount may also be calculated as a flat fee to compensate the lawyer for examining the title. In some instances, the lawyer must also pay either the title company or another entity for title search services. Realistically, the client cannot come "to appreciate the significance of the matter in question" unless the client receives from the lawyer a disclosure of how much of the aggregate title charges the lawyer will keep.

Rebutting the fraud presumption. Disclosing how much in title charges he or she will keep also enables the lawyer to rebut the presumption that the transaction with the client is fraudulent.[11] Generally, transactions between attorneys and their clients are presumed to be fraudulent because of the fiduciary relationship between the lawyer and the client, though the presumption may be rebutted.[12]

Complete disclosure and recommending to clients that they obtain independent legal advice before consummating transactions protects clients and lawyers alike.

10. Rules of Professional Conduct, Terminology section, "disclose" or "disclosure".

11. See Smiley and Shakman, *Ethical Challenges,* 95 Ill Bar J at 260 (cited in note 2).

12. *In re Imming*, 131 Ill 2d 239, 545 NE2d 715 (1989).

Rule 1.7(a) "Adverse Client" Disclosure and Consent

[This sample language is for illustrative purposes only – your disclosure and consent forms must be tailored to your circumstances.]

RULE 1.7(a) "ADVERSE CLIENT" DISCLOSURE AND CONSENT

My agency contract with _____ specifies that they have retained me as counsel to examine titles and prepare and issue commitments and policies as their attorney. I also represent you in this transaction and there is a possibility that your interests and the interests of the title insurance company may conflict at some point. While such conflicts do not always occur, you are advised that it is possible.

Generally, it is in the interests of all parties that the status of title be accurately determined and that coverage be afforded pursuant to sound principles of title examination and underwriting. My experience with this company causes me to believe the coverage the company will authorize will be commercially reasonable in price and scope. In the event that turns out not to be the case for whatever reason, I will promptly notify you of my concerns and withdraw as your attorney.

I believe representing you will not adversely affect my relationship with the company, but need your permission to do so and recommend you and the company both give your consent for me to proceed.

Date:_____

_____ Title Insurance Company

_____ Client(s)

Proof of adequate consideration is one showing the lawyer must make.[13] By disclosing the amount of money he or she kept out of the total title charges, the lawyer satisfies this requirement and can also show that the fee was reasonable.[14]

Advising clients to seek independent advice. The lawyer can also show that he or she advised the client to obtain independent legal advice.[15] In the *Rukavina* complaint, the ARDC administrator included in each of the four counts an allegation that the respondent should have advised his clients to obtain independent legal advice before entering into the transactions for the purchase of title insurance (and land surveys) from him. As with the disclosures and consents, prudence suggests that the recommendation be made in writing and signed by the client to indicate both receipt and understanding of it.

As a practical matter, few clients will obtain independent legal advice before purchasing title insurance from their lawyer. The cost of such advice probably outweighs any benefit. However, a client might be nervous enough to inquire about other service providers and how much they charge. They may find that the price quoted by the lawyer is competitive. And when they compare the overall price to the amount the lawyer keeps, the clients can reach their own conclusions about whether to purchase title insurance from the lawyer.

In fact, one of the other allegations in each count in *Rukavina* is that the lawyer did not advise the clients that other service providers offer the same services. The point is that consent can't be knowing unless disclosure is complete. Clients should be advised that they are free to seek independent legal advice before doing business with their lawyer.

Form DS-1. Form DS-1 (DFI-Rev. 05/01/97)[16] is called Disclosure Statement Controlled Business Arrangement. Producers of title business use it to disclose their affiliations with title insurance companies, title insurance agents, and escrow agents and to estimate fees and charges.

This form is not for making the disclosures discussed in this article. Though it is required by law,[17] it is designed to be used also by lawyers and nonlawyers alike. It is necessary but not sufficient; it does not contain all of the information the client needs to make an informed decision and will not satisfy the lawyer's ethical obligations.

A public trust

When a lawyer acts as a title agent while representing only one client, the Illinois Rules of Professional Conduct require three sets of disclosures and consents in each transaction. If the lawyer represents more than one client in the transaction, a fourth disclosure and consent is required.

First, Rule 2.3 requires the lawyer reasonably to believe that doing a title evaluation for the use of a third party is compatible with other aspects of the lawyer's relationship with his or her client. The client must consent following that disclosure. The lawyer's disclosure should explain why his or her belief is reasonable and advise the client about the benefits and risks of having the lawyer make the evaluation.

Disclosure and consent is also required under Rule 1.7(a) where the lawyer represents two clients in the same matter or transaction. The lawyer should explain why he or she reasonably believes the representation of the new client will not adversely affect the lawyer's relationship with the earlier client. The lawyer should also explain any potential benefits or risks to each client. In this situation, both clients must consent.

And, even where there is no dual representation, Rule 1.7(b) requires disclosure and consent. This disclosure should advise the client of any actual or potential conflicts between the lawyer's duties to the client and the lawyer's responsibilities to third persons or his or her own interests.[18] It should also explain why he or she reasonably believes the representation of the client will not be adversely affected.

Finally, Rule 1.8(a) requires disclosure and consent for the business transaction between the lawyer and the client. The lawyer must disclose the amount of money the lawyer will keep from the total title charges. He or she should also advise the client that other providers are available and, most importantly, should at least suggest that the client obtain independent legal advice about the title insurance transaction.

Lawyers in Illinois have represented buyers and sellers in real estate transactions for generations. They are comfortable with their fiduciary obligations to their clients. For some lawyers, the very thought that providing a client with title insurance as an agent is presumptively fraudulent is disconcerting, to say the least.

After all, the purchase of title insurance is usually not discretionary. Sellers are nearly always already contractually obligated to provide it as evidence of marketable title. In refinance transactions, the lender generally requires the borrower to provide it. Where parties other than the lawyer require clients to purchase title insurance, it may seem harsh to presume fraud just because the lawyer provides it to or on behalf of the client.

And yet, as the Preamble to the Rules says, "The practice of law is a public trust." Some would call it a sacred trust. The disclosures and consents the Rules require, as outlined in this article, are designed to protect that trust and those clients who rely so heavily upon it. Beyond that, complete disclosure and recommending clients obtain independent legal advice before consummating transactions with their lawyers protects not only clients but lawyers as well. ■

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13. *In re Marriage of Kantar*, 220 Ill App 3d 323, 581 NE2d 6 (1st D 1991).
14. Rule 1.5(a).
15. *Imming* at 259, 545 NE2d at 724.
16. Disclosure Statement (cited in note 4).
17. 215 ILCS 155/18(b).
18. The ownership or other financial interest of the attorney in the title insurer or title agency should be included.

Reprinted from the *Illinois Bar Journal*,
Vol. 96 #3, March 2008.