

Title Insurance: Disclosure to and Consent by Client

At the 2008 Annual Meeting of the NYSBA, the Real Property Law Section (RPLS) included in its CLE program a presentation regarding an attorney acting as an agent for a title insurer, with a particular emphasis on title insurance for the attorney's own clients. The RPLS, through its Title and Transfer Committee, determined that it could assist the Section members by preparing and disseminating a recommended form for disclosure to, and consent by, such clients regarding title insurance provided by their own attorney, acting as an agent, in an effort to comply with the requirements of the Real Estate Settlement Procedures Act (RESPA), the N.Y. Insurance Law § 6409, and the relevant Disciplinary Rules and Opinions of the NYSBA Ethics Committee pertaining to title insurance and excessive compensation.

The form below has been approved by the Title and Transfer Committee and the Executive Committee of the RPLS. It is intended for use in both residential and commercial transactions involving title insurance. However, in most residential transactions, it will be unusual for the portion of the title premium retained by or paid to the attorney (pursuant to the attorney's agency agreement) to be in an amount so as to require adjustment of the legal fee as Ethics Opinion No. 576 and succeeding related Opinions mandate.

In utilizing this form, the attorney should consider, *inter alia*, the following issues:

1. This is only a suggested form, which each attorney may need to revise as may be appropriate for each transaction.
2. Section 8 of RESPA prohibits compensation for anything other than the performance of "core title services." Similarly, Section 6409(d) of the New York Insurance Law prohibits compensa-

tion for referrals of title insurance business.

3. An attorney must provide not only a credit for any "duplication of services," but also must comply with Disciplinary Rule 2-106(a) of the New York Code of Professional Responsibility which prohibits an attorney from receiving an "excessive fee." Whether a fee arrangement with a client violates the Disciplinary Rule is determined on a case-by-case basis.
4. In large commercial transactions where the title insurance premium is substantial, and the portion to be retained by, or paid to, the attorney greatly exceeds the value of the legal services, the method of crediting the client for duplicative services, avoiding excessive compensation and protecting one's independent legal judgment will require careful consideration.
5. Client acknowledgment and return of the disclosure form, although not required by the Ethics Opinions set forth below, is (a) recommended to confirm the client's receipt and consent to the terms of the disclosure; and (b) necessary for the client to request an owner's title insurance policy.
6. The form may be used, with appropriate revision, by an attorney acting as an agent, examining counsel or closing counsel, and for any other ethically permitted direct agency relationship between an attorney and a title underwriter.

The attorney also should read carefully and be familiar with the following Ethics Opinions (as the digests may not accurately represent the full import of each opinion):

NYSBA Opinion #351 (1974): attorney may act as title examiner and agent for a title company where he also represents a party if there is full disclosure and consent.

NYSBA Opinion #576 (1986): proper for an attorney representing a seller, buyer or mortgagee to act also as a title insurance agent provided such conduct is legal, no prohibited conflict exists, consent is obtained from all parties after full disclosure, legal fee is reduced by remuneration for the title company absent express consent to the contrary from the client and the legal fee is not excessive.

NYSBA Opinion #595 (1988): improper for law firm that represents real estate clients, and that has formed and is a principal in an abstract company, to refer clients to the title abstract company except for purely ministerial title searches.

NYSBA Opinion #621 (1991): improper for an attorney to refer a client to an abstract company in which the attorney has an ownership interest (clarifies #595) (*but see dissent*).

NYSBA Opinion #626 (1992): lawyer representing a lender in a transaction where fee is paid by borrower must disclose to borrower that the lawyer also will receive compensation from title insurer for representing its interests at closing; lawyer may retain the total fees paid by the borrower and title insurer so long as the lender-client consents and the total amount is not excessive.

NYSBA Opinion #631 (1992): proper for lawyer serving as agent of title insurance company to represent a County Resource Recovery Agency and offer title insurance for a bonded project if each consents after full disclosure, and no conflicting interests are present.

NYSBA Opinion #731 (2000): lawyer may not compensate lawyer's employees for soliciting clients to engage

services of title insurance agency in which lawyer has ownership interest in transactions in which the lawyer represents the lender. This follows from N.Y. State 595 and 621.

NYSBA Opinion #738 (2001):

Improper for attorney to refer client to title abstract company owned by attorney's spouse. For the reasons stated in N.Y. State 595, as clarified and amplified in N.Y. State 621, the opinion adheres to the same *per se* non-consentable result.

NYSBA Opinion #753 (2002): Where client uses ancillary business owned by the lawyer, rules applicable to personal conflicts of interest and transactions between clients and lawyers continue to apply after DR 1-106. Under those rules, lawyer owning mortgage brokerage and title abstract business may not, even with informed consent, represent buyer or

seller and act as mortgage broker in the same transaction or act as title abstract company with respect to non-ministerial tasks, but may, where the client consents after full disclosure, act as abstract company with respect to purely ministerial abstract work.

NYSBA Opinion #755 (2002): provisions of DR 5-104(A), relating to business transactions between lawyer and client, should not apply to lawyer's recommendation that client employ a distinct lawyer-owned ancillary business (or referral from the business to the lawyer), where lawyer takes steps to ensure that client understands that protections of attorney-client relationship do not apply to the non-legal services, as provided for in DR 1-106(A).

The Model Title Insurance Disclosure Form reflects the consensus of the members of an Ad Hoc Subcom-

mittee of the Title and Transfer Committee created for the purposes of preparing the attached form. It does not necessarily reflect the views of individual members of the Subcommittee or their respective law firms and/or organizations. The Model Title Insurance Disclosure Form is intended to represent a good-faith effort on the part of the Subcommittee to draft a form that complies with the various ethics opinions issued by the Committee on Ethics of the New York State Bar Association. We note, however, that we do not examine what legal duties and restrictions are imposed upon an attorney/title agent. An attorney/agent should well consider the statutory restrictions and limitations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* and Section 6409 of the New York Insurance Law before undertaking an attorney/agency relationship with a client.

Model Title Insurance Disclosure Form

Thank you for the opportunity to represent you in connection with your real estate matter. We are required by our code of ethics, the *Lawyer's Code of Professional Responsibility* adopted by the New York State Bar Association, to disclose some important information to you regarding the requirements for title insurance in connection with your transaction. As a part of your real estate financing transaction, your mortgage lender will require you to obtain title insurance to protect the Lender's interest in the property, but not your interest as owner. **[Optional: In addition, if you so elect, we will obtain an owner's policy of title insurance to protect your ownership interest in the property].** We will make arrangements for this title insurance coverage and you will pay an insurance premium (which is a one-time charge payable at the closing) in the approximate amount of \$_____ for a mortgage policy based on a mortgage amount of \$_____. **[Optional: Please note that there is a substantial discount should you elect to purchase the mortgage title insurance policy at the same time as you purchase an owner's title insurance policy. Based on a purchase price of \$_____, the "simultaneous issue rate" for both policies would be \$_____.]** Title insurance premium rates throughout New York State are established in accordance with a rate schedule filed by title insurance companies and approved by the New York Superintendent of Insurance.

In addition to representing your interests in this matter, we will serve as agent for the title insurance company. The title insurance company will compensate us for our services rendered to it including, but not limited to, **[Tailor to reflect services to be performed by attorney/agent: e.g., examining the title, issuing the title commitment, clearing underwriting objections and preparing the final policy]**. Our compensation from the title insurance company for performing the foregoing services and our assumption of responsibility as agent will be ___% of the estimated title insurance premium noted above (approximately \$_____ for the mortgage policy **[Optional: and \$_____ for both an owner's and mortgage policy]**).

Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company. This reduction will be reflected as a credit on your statement for legal services rendered.

Although unlikely and we do not expect it, a situation may arise in which our representation of your interest in this transaction would create a conflict of interest with our obligations to the title insurance company. In most cases, conflicts can be readily resolved by communication between us and the title company. However, if a conflict arises which cannot be resolved, we would withdraw from acting as title agent and would arrange for the title insurance to be issued by another insurance company. In the unlikely event that an actual conflict cannot be resolved by placing the title insurance with another title insurance company, we would be required by our code of ethics to withdraw from our representation of you and the title insurance company. It is important to us that our representation of you be based on a duty of undivided loyalty and zealous representation.

Should you have any questions about this arrangement, please feel free to contact us or another independent attorney to discuss our proposed arrangement. You have the right not to consent to this arrangement. However, if you elect not to proceed with this arrangement, you will still be required to obtain title insurance to protect your mortgage lender's interest in the property [**OPTIONAL: and, if you elect, we will still obtain title insurance to protect your interest in the property**]. As a result, the overall cost of the title insurance will be unchanged regardless of whether or not you consent to this arrangement.

We look forward to representing you and to working with you in connection with your real estate transaction.

[LAW FIRM NAME]

By: _____
Name:
Title:

By signing below, you acknowledge that you have read a copy of this disclosure and consent to the foregoing arrangements. In addition, in order to authorize us to obtain an owner's policy of title insurance for you in addition to the mortgage title insurance policy required by your lender, please check the appropriate box on the enclosed copy of this title insurance disclosure, sign below and return it to us.

I/We want an owner's policy of title insurance and authorize you to obtain such policy on my/our behalf.

I/We do not want an owner's policy of title insurance. I/We acknowledge that you will not provide an opinion of title to me/us.

Dated: _____

Name:

Name: