



Committee on Professional Ethics

Opinion 891 (11/17/11)

Topic: Conflict of Interest; Referrals by attorney to a title abstract company or title company agent in which the attorney has a financial interest.

Digest: An attorney may refer a client to a title abstract company or title company agent in which the attorney has a financial interest in the limited case where the Company or Agent does only ministerial tasks. The attorney's personal interest conflict arising from the financial interest may preclude the attorney from representing that client in the same transaction that the title abstract company or title company agent is providing services in.

Rules: DR 1-106; 5-104(A); Rule 1.7; 1.8; 5.7

QUESTIONS

1. May an attorney refer work to a title abstract company or title company agent in which the attorney has a financial interest? (A "title abstract company" and a "title company agent" being hereinafter collectively referred to as a "title company".)
2. May an attorney represent a client in a transaction where the title company in which the attorney has a financial interest is providing services to that client?

OPINION

3. Both of the above questions were answered under the Code of Professional Responsibility by opinions of this Committee. See N.Y. State 595, 621, 738, 752, 753 and 755. The answers and reasoning set forth in those opinions are still valid under the NY Rules of Professional Conduct which replaced the Code of Professional Responsibility effective April 1st, 2009.

4. N.Y. State 595 held that an attorney could refer clients to an abstract company in which the attorney has an interest and continue to represent the client in the transaction, provided that the abstract company performs only ministerial tasks. If the abstract company were to perform non-ministerial tasks (such as title insurance or recommendations for title insurance), the resulting personal interest conflicts with the attorney's duty to the client in the transaction and is a non-consentable conflict.

5. N.Y. State 621 confirmed the result in N.Y. State 595 and distinguished N.Y. State 576 which allowed an attorney to refer a client in a transaction to a title company that paid a commission to the attorney, provided that, among other things, the attorney passed the commission on to the client and where exceptions to title were not negotiable.

6. N. Y. State 738 applied the prohibition where the attorney's spouse holds a financial interest.

7. N. Y. State 752 made clear that notwithstanding the adoption of DR 1-106 the prohibitions regarding title companies remained valid.

8. N. Y. State 753 reiterated that a lawyer's interest in a title abstract company providing insurance or making an insurance recommendation could not, even with client consent, represent the buyer, seller or lender in the transaction unless the abstract company performs only ministerial tasks.

9. Rule 5.7 is substantially the same as DR 1-106 and accordingly the same reasoning applies regarding the permissibility of referrals to title companies.

CONCLUSION

11. An attorney may refer a client to a title company in which the attorney has a financial interest provided that the attorney may not represent the client in the transaction in which that title company will provide title services to the client unless the services are purely ministerial or if, among other things, the attorney passes the commission on to the client and where exceptions to title are not negotiable.

(27-11)