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## Lawyer-Controlled Title Insurance Companies: Legal Ethics and the Need for Insurance Department Regulation

### Cover Page Footnote

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# LAWYER-CONTROLLED TITLE INSURANCE COMPANIES: LEGAL ETHICS AND THE NEED FOR INSURANCE DEPARTMENT REGULATION

H. LEE ROUSSEL\*  
MOSES K. ROSENBERG\*\*

## INTRODUCTION

**I**N a real estate transaction, the lender often requires the purchaser-borrower to obtain title insurance as a condition of receiving a mortgage.<sup>1</sup> When the transaction involves a residence, the purchaser generally relies upon real estate professionals, such as the lender, the lawyer, or the realtor, for the selection of a title insurance company.<sup>2</sup> The result is a process called "reverse competition" by which title insurance companies compete for the recommendation of these real estate professionals rather than appealing directly to the ultimate consumer.<sup>3</sup> Reverse competition has frequently taken the form of rebates, commissions, or other payments from a title insurance company to lawyers, realtors, or other business referrers. Such payments are generally not justified by the work performed by the referrer.

Regulations issued by the Pennsylvania Insurance Commissioner prohibit, as rebates, payments made or inducements for business given

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1. Johnstone, *Title Insurance*, 66 Yale L.J. 492, 493-94 (1957). See Hofflander & Shulman, *The Distribution of Title Insurance: The Unregulated Intermediary*, 44 J. of Risk and Ins. 435, 438-40 (1977).

2. Hofflander & Shulman, *supra* note 1, at 437-38. "In Pennsylvania, as in nearly every other state, placement of title insurance business is controlled by real estate brokers and attorneys . . ." *In re: Chapter 125 Title Insurance*, stenographic notes of *Hearings Before the Insurance Department of the Commonwealth of Pennsylvania*, 27 (Feb. 10, 1977) [hereinafter cited as *Hearings*] (statement of Fred B. Fromhold).

3. U.S. Dep't of Justice, *The Pricing and Marketing of Insurance* 274 (1977): "Reverse competition presently overwhelms most forms of competitive pressure in its tendency to drive title insurance rates up. Unless this problem can be solved, or unless title insurance is marketed in new, direct ways which eliminate reverse competition, competitive controls cannot be relied upon to prevent excessive rates." *Id.*

to someone other than a bona fide insurance agent.<sup>4</sup> To circumvent this prohibition, a number of real estate brokers in the suburban counties of Philadelphia established wholly-owned title insurance agencies to which they referred their real estate purchasers, and to which the title insurance companies made payments. The realtors thereby received payments indirectly from the title companies as dividends from the title agencies, which payments arguably would have been rebates had they been made directly to the realtors. The practical effect was no loss of revenue to the referring realtor, who could no longer accept direct rebates.<sup>5</sup>

On July 16, 1977, the Pennsylvania Insurance Commissioner filed a notice of proposed regulations designed to "limit the extent to which persons who influence the placement of title insurance business may operate title insurance agencies for their own benefit."<sup>6</sup> In large measure, the proposed regulations were designed to counteract the effects of reverse competition by requiring full disclosure of a business referrer's ownership interest in the title company or agency he had recommended. In addition, a title insurance agency would have been prohibited from relying on its owners or stockholders for more than forty percent of its business.<sup>7</sup>

On September 9, 1977, the Board of Governors of the Pennsylvania Bar Association adopted a resolution opposing the proposed rules.<sup>8</sup> Finally, on February 3, 1979, the Insurance Commissioner withdrew

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4. 31 Pa. Code § 125.1 (1979).

5. A challenge to this practice is presently pending before the Pennsylvania Insurance Department. *See Commonwealth Land Title Ins. Co. v. Berks Title Ins. Co.*, No. C76-10-6 (filed Oct. 21, 1976, amended Dec. 21, 1978).

6. *Proposed Rule Making*, 7 Pa. Bull. 2021 (1977).

7. *Id.*

8. Minutes of meeting of the Board of Governors, Pa. Bar Ass'n (Sept. 9, 1977). The text of the resolution by the Board of Governors is as follows: "BE IT RESOLVED, that the Pennsylvania Bar Association go on record as opposing the Proposed Rules of the Pennsylvania Insurance Commissioner as published in the Pennsylvania Bulletin, Volume 7, No. 29, dated July 16, 1977, on the grounds that they are adverse to the public interest because: (1) The Proposed Rules will increase the cost of a real estate transaction to the consumer by ultimately requiring all transactions with title insurance to be on the 'all-inclusive rate basis' with the attorney fee added on top of this rate, or in the alternative, counsel will not be economically available. (2) The Proposed Rules, by eliminating lawyers from the real estate transaction, will foster or require title insurance company personnel to draft legal documents and advise customers on legal rights and liabilities when such personnel are not qualified by schooling or training so to act and, in fact, such personnel may be guilty of the unauthorized practice of law if they do so act. (3) The Proposed Rules tend to eliminate competition by encouraging the extinction of small title insurance companies by making the agency system economically impossible and thus promote the growth of the large companies operating under the Branch office system. (4) The Proposed Rules exceed the authority granted to the Insurance Commissioner by the legislature under the Pennsylvania Insurance Law in regulation of insurance companies. (5) The Proposed Rules exceed the authority granted to the Insurance Commissioner by the legislature in that they attempt to regulate the practice of law and conduct of lawyers."

the proposed regulations.<sup>9</sup> The Association's action brings to light the little considered but nationally growing involvement of lawyers and their bar associations in the development of title insurance companies established and controlled by lawyers.<sup>10</sup>

This Article considers the growth of lawyer-controlled title insurance companies and agencies, the conflict of interests and accompanying ethical questions which arise from the development of these companies, and the desirability of regulation as a means of resolving the conflicts created by their development.

## I. LAWYER-CONTROLLED TITLE INSURANCE COMPANIES

The impetus for lawyer-controlled title companies is the "preservation" of the role of the lawyer in real estate transactions.<sup>11</sup> The need for preservation arises because in many states both lawyers and commercial title companies may legally conduct title searches, prepare deeds and mortgages, clear liens, and conduct closings incident to residential real estate transactions.<sup>12</sup> The position of bar-related title

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9. 9 Pa. Bull. 450-51 (1979).

10. The description of bar-related title insurance companies in this Article is based on the descriptions in ABA Standing Comm. on Lawyers' Title Guaranty Funds, *how-to-do-it: Bar-Related Title Assuring Organizations* (1976) [hereinafter cited as ABA *how-to-do-it*] and in ABA Standing Comm. on Lawyers' Title Guaranty Funds, *Bar-Related Title Assuring Organizations* (1976) [hereinafter cited as ABA *Bar-Related Organizations*]. The terms "bar-related title assuring company/organization/fund," "bar-related company," "bar fund," and "bar-related title insurance company" are used interchangeably. See ABA *how-to-do-it, supra*, at iv. As used herein a lawyer-controlled company is any title company or agency in which practicing real estate lawyers own all or a substantial amount of the stock or ownership interest; a bar-related company is one which follows the policies described by the ABA Standing Committee.

11. ABA *Bar-Related Organizations, supra* note 10, at 5-6. "The first and most important benefit [from bar-related title companies] is the expansion of the lawyers' real estate law services. In many areas where lawyers did not add this service to their practices, they were largely eliminated from real estate law practice." Miles, *Bar-Related Title Insurers: Their Benefits To The Bar And The Public*, 12 ABA Docket Call 8, 9 (Winter 1977); see Letter from Harry L. McNeal, Jr., Esq., Chairman, Pa. Bar Ass'n Bar-Related Title Insurance Study Comm., to the Board of Governors and the House of Delegates of the Pa. Bar Ass'n (Apr. 21, 1975) (on file with the *Fordham Law Review*).

12. *LaBrum v. Commonwealth Title Co.*, 358 Pa. 239, 56 A.2d 246 (1948). Commercial title insurance companies may perform only those services which are incident to the issuance of title insurance policies, and may not perform them for home purchasers who are not also purchasing title insurance policies from the company rendering the services. Other states differ on this issue, with some, like Pennsylvania, permitting commercial title companies to perform all aspects of a real estate conveyance, and others restricting all or some parts of the transaction to lawyers. Compare *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954); *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 74 Nev. 186, 326 P.2d 408 (1958); *People v. Title Guar. & Trust Co.*, 227 N.Y. 366, 125 N.E. 666 (1919); *LaBrum v. Commonwealth Title Co.*, 358 Pa. 239, 56 A.2d 246 (1948); and *Bar Ass'n of Tenn. v. Union Planters Title Guar. Co.*, 46 Tenn. App. 100, 326 S.W.2d 767 (1959) with *Beach Abstract & Guar. Co. v. Bar Ass'n of Ark.*, 230 Ark. 494, 326 S.W.2d 900 (1959); *State Bar of Ariz. v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), *modified* 371 P.2d 1020 (1962); *Title Guar. Co. v. Denver Bar Ass'n*, 135 Colo. 423,

companies is that all aspects of the real estate transaction, except the actual underwriting of the title insurance policy, should be handled by the lawyer in private practice retained or paid by the purchaser, rather than by title companies or their employees.<sup>13</sup>

The first bar-related title insurance company was organized in 1947 by 1,400 members of the Florida Bar.<sup>14</sup> By 1976, over 10,000 lawyers in nineteen states were organized in nine separate bar-related companies, with assets in excess of \$18 million.<sup>15</sup> Organization of such companies is supported by the American Bar Association Standing Committee on Lawyers' Title Guaranty Funds (ABA Standing Committee).<sup>16</sup>

Bar-related title companies normally have a number of common elements. They are established, managed and controlled by lawyers in private practice. These companies issue policies only through private lawyers to home purchasers who retain private real estate attorneys to represent them in the transaction, or to the lenders.<sup>17</sup> Most bar-related companies provide their member attorneys with rebates or commis-

312 P.2d 1011 (1957); *People v. Lawyers Title Corp.*, 282 N.Y. 513, 27 N.E.2d 30 (1940); *State Bar of N.M. v. Guardian Abstract & Title Co.*, No. 11213 (N.M. Mar. 14, 1978); *Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 179 S.W.2d 946 (1944); *Rattikin Title Co. v. Grievance Comm.*, 272 S.W.2d 948 (Tex. Ct. App. 1954); and *Stewart Abstract Co. v. Judicial Comm'n*, 131 S.W.2d 686 (Tex. Ct. App. 1939).

13. Title insurance is sold by commercial companies either at an "all-inclusive" rate, which includes both the underwriting cost of the policy and all services incident to the transaction, such as title search, preparation of deed and closing, or at an "approved-attorney" rate, which includes only the underwriting cost of the policy. Regulatory Research Corp., *Economic Principles and Title Insurance Rate Review: Report to the Ohio Title Insurance Rating Bureau* 15 (Dec. 8, 1977) (on file with the *Fordham Law Review*) [hereinafter cited as Regulatory Research Corp.]. Proponents of lawyer-controlled companies contend that commercial title companies have been reluctant to "approve" attorneys for the approved-attorney rate, making it more of a theoretical than a practical alternative to the "all-inclusive" rate which the companies allegedly prefer. See *Hearings*, *supra* note 2, at 60 (statement of Robert C. Dean). For a discussion of the factors underlying title insurance rates, see Regulatory Research Corp., *supra*, at 12-17. Unlike other forms of insurance which focus on indemnity for loss, title insurance focuses on prevention of loss. Loss can be prevented by rigorous examination of title and steps to remove or exempt exceptions to title. Many states statutorily require that title insurance be issued only after the title examination. *Id.* at 12. See generally Rosenberg, *Historical Perspective of the Development of Rate Regulation of Title Insurance*, 44 J. of Risk and Ins. 193 (1977).

14. Johnstone, *supra* note 1, at 509; ABA *how-to-do-it*, *supra* note 10, at 6; ABA *Bar-Related Organizations*, *supra* note 10, at 4.

15. ABA *how-to-do-it*, *supra* note 10, at 9; ABA *Bar-Related Organizations*, *supra* note 10, at 4. The formally recognized bar-related companies in their states of operation are: Attorneys' Title Guaranty Fund, Inc. (Colo., Minn., Utah); Attorneys' Title Guaranty Fund, Inc. (Ga.); Attorneys' Title Guaranty Fund, Inc. (Ill.); Connecticut Attorney's Title Guaranty Fund; Insured Titles, Inc. (Kan., La., Mo., Mont., Neb., N.M., N.D., Okla., Wis.); Lawyers' Title Guaranty Fund (Fla.); Mutual Title Insurance Co. (Me.); National Attorneys' Title Assurance Fund, Inc. (Ind.); Ohio Bar Title Insurance Co. ABA *how-to-do-it*, *supra* note 10, at 6-7.

16. ABA *how-to-do-it*, *supra* note 10; ABA *Bar-Related Organizations*, *supra* note 10.

17. ABA *Bar-Related Organizations*, *supra* note 10, at 11; Miles, *supra* note 11.

sions proportionate to the excess of company premiums and earnings over expenses attributable to the business written by the member.<sup>18</sup> This practice provides an incentive to private lawyers to support and utilize the bar-related company rather than a commercial title company.

In some states, the alternative to establishing a bar-related company has been for lawyers to invest in a controlled title insurance company and then to establish an abstracting company which serves as an agent for the controlled company.<sup>19</sup> Such companies do not share all the attributes of a bar-related company and are not formally recognized by the ABA Standing Committee as "bar-related."<sup>20</sup> The abstracting company searches the title, issues the policy, and receives a commission from the title company on policies issued. Unlike the bar-related companies, these lawyer-controlled title or abstracting companies often compete with commercial title companies by holding settlements and issuing policies when private lawyers are not involved in the residential real estate transaction.<sup>21</sup> Lawyers investing in controlled companies have the same profit incentive of self-referral as do members of bar-related companies.<sup>22</sup> The reverse competition which characterizes

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18. ABA *Bar-Related Organizations*, *supra* note 10, at 11. Florida Lawyers' Title Guaranty Fund is typical: each member lawyer pays \$200 upon joining the Fund, and a premium for each policy. An account is maintained in the name of each member, to which all premiums, investment income, and a share of expenses are credited or debited. A member may withdraw his account balance after seven years. Johnstone, *supra* note 1, at 509-10.

19. In Pennsylvania, Conestoga Title Insurance Co. and its related abstracting companies are lawyer-owned and controlled title companies and title insurance agencies. Conestoga was established as a wholly-owned subsidiary of Lancaster Title Abstracting Co. Lancaster Abstracting, in turn, was principally owned by members of the Lancaster County Bar. Lawyers composed approximately ninety percent of the company's shareholders, owning approximately ninety-five percent of its stock. In 1977, Lancaster Abstracting and Conestoga became parallel co-subsidiaries of a newly formed parent entity, Conestoga Financial Corp. Beneficial ownership was not affected since outstanding shares of Lancaster Abstracting were replaced by shares representing an identical percentage interest in Conestoga Financial. See National Association of Insurance Commissioners' (NAIC) Form 9, 1978, Part B at 11 (on file with the *Fordham Law Review*). Conestoga's method of expansion has been to encourage local lawyers in a specific county to organize abstracting companies, which handle title searches, settlements, and issue policies for Conestoga. The abstracting company returns a profit to the organizing lawyers who are shareholders therein.

20. See note 10 *supra*.

21. See "Questions and Answers about the Formation of a Title Abstracting Company Owned by Chester County Attorneys," attached to Letter from Sam Ferguson Musser, President, Conestoga Title Insurance Co. (Nov. 13, 1974) (on file with the *Fordham Law Review*) [hereinafter cited as Questions and Answers]. Conestoga does encourage purchasers without lawyers to retain one.

22. Title insurance companies or agencies owned by realtors, lenders, or other real estate professionals in a position to control the placement of title insurance policies, are also controlled title companies. These realtor-controlled title insurance companies, while not the subject of this Article, are involved in many of the same conflict of interests as lawyer-controlled companies. See Michigan Dep't of Commerce, Insurance Bureau, Bull. 77-2, Broker Owned Title Insurance

the title insurance field provides a near captive market, which all but assures the controlled title company or agency a certain volume of business from those controlling it. This burgeoning growth and virtual assurance of success explains the growing interest in and organization of controlled title insurance companies by lawyers.

Not surprisingly, organizational efforts by proponents of bar-related companies have stimulated active opposition by representatives of commercial title companies. For example, the 1967 movement for an American Bar Association (ABA) sponsored company was opposed by the American Land Title Association (ALTA), an organization representing commercial title insurance companies and which contended, among other things, that such a bar-related company would be an impermissible and unethical conflict of interest.<sup>23</sup>

## II. CONFLICT OF INTERESTS IN RESIDENTIAL REAL ESTATE TRANSACTIONS

In many real estate transactions only one lawyer is retained and he essentially serves as a knowledgeable real estate professional for all the parties, regardless of who pays him. He is a middleman, whose role it is to insure that an agreement, reached by the parties on their own and without his involvement as an advocate, is put in proper legal form, to see that the proper papers are drafted and recorded to correctly accomplish the parties' common desire in transferring the ownership of property.<sup>24</sup> In these transactions the lawyer searches the title and renders an opinion to the buyer and lender, participates in elimination of defects of title, prepares deeds and required closing papers, and

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Agencies (June 3, 1977), establishing guidelines to eliminate the channeling of controlled business through the vehicle of controlled title insurance agencies established by realtors.

23. David F. Maxwell, Esq., Obermayer, Rebmann, Maxwell & Hippel, Statement in Opposition to the Joint Report of the Subcommittee of the Board of Governors and the Special Committee on Lawyers Title Guaranty Funds Recommending That the American Bar Association Organize a Bar-Related Title Insurance Company in Collaboration with Continental Insurance Company 8-13 (on file with the *Fordham Law Review*) [hereinafter cited as Maxwell Statement]; Thomas S. Jackson, Esq., Jackson, Gray & Laskey, Statement in Opposition to Action by the Board of Governors to Sponsor a National Title Insurance Company 6-11 (on file with the *Fordham Law Review*) [hereinafter cited as Jackson Statement]. On the issue of the legality of a bar-related title insurance company under the federal antitrust laws, see Roussel, Pera, & Rosenberg, *Bar-Related Title Insurance Companies: An Antitrust Analysis*, 24 Vill. L. Rev. 639 (1979).

24. ABA Special Comm. on Residential Real Estate Transactions, *The Proper Role of the Lawyer in Residential Real Estate Transactions . . . His Services and His Compensation* (1976) [hereinafter cited as *ABA Residential Real Estate Transactions*].

This concept of the lawyer's role is strongly opposed by the ABA. See *id.* at 19. The August, 1978 revision of this report, *Residential Real Estate Transactions: The Lawyer's Proper Role—Services—Compensation*, takes an identical position: "The conclusion to be drawn from the previous discussion is that it is desirable for all parties in the residential real estate transaction, the seller, the buyer, and the lender, to be represented by counsel." *Id.* at 21.



conducts the closing. When a lawyer is not involved in such a transaction, these services, except, of course, the lawyer's opinion of title which would not be issued, are performed by laymen employed by a title or abstracting company.

The involvement of a single lawyer in a real estate transaction to advise all the parties is looked upon with disfavor by the ABA, which strongly attacks the belief "peculiar to this country . . . that only one lawyer is needed to complete a title transaction."<sup>25</sup> Despite this criticism by the ABA, the fact remains that in many states a single lawyer will participate as counsel to all participants in a residential real estate transaction.<sup>26</sup>

The factual predicate underlying the use of only one lawyer in a residential real estate transaction is the belief that there is no apparent conflict between the parties. The basis of the ABA's attack on the propriety and advisability of a single lawyer conducting a real estate transaction is the existence of latent conflicts between each of the parties.<sup>27</sup> When the sole attorney to a transaction is an owner of a title insurance company or agency, conflict of interests will almost invariably arise. He, like the lender or realtor, has a personal financial interest in consummating the transaction. If there is no transaction, then the lawyer receives no profit from the sale of the title insurance.

When a lawyer is affiliated with a bar-related company, such as the Lawyers' Title Guaranty Fund of Florida, he receives what is essentially a rebate of part of the premium paid by the client and any earnings thereon.<sup>28</sup> Other bar-related companies return excess pre-

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25. ABA *Residential Real Estate Transactions*, *supra* note 24, at 19. The ABA position is not opposed by ALTA. In a response to the report of the ABA Special Committee on Residential Real Estate Transactions, Thomas S. Jackson, Esq., General Counsel for ALTA, endorsed the view that each party should have his own lawyer. Letter from Thomas S. Jackson, Esq. to James B. Fellers, Esq. 5 (Feb. 12, 1975) (on file with the *Fordham Law Review*).

26. In most mid-Atlantic and southern seaboard states, one attorney paid by the purchaser usually handles the entire transaction. In other areas of the country, an attorney is often not involved in the transaction at all. Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 *Geo. L.J.* 1311, 1334 (1974). At least in New Jersey, however, such single attorney representation has been held to be unethical except under the strictest proof of knowing, intelligent and voluntary consent. *In re Dolan*, 76 N.J. 1, 12-13, 384 A.2d 1076, 1081-82 (1978); *In re Kamp*, 40 N.J. 588, 595-96, 194 A.2d 236, 240-41 (1963). In *Dolan*, the court refused to adopt a *per se* rule completely barring dual representation because of the "stark economic realities" that such an unbending rule would leave many "purchasers in marginal financial circumstances" without any representation. *Id.* at 12-13, 384 A.2d at 1081.

27. ABA *Residential Real Estate Transactions*, *supra* note 24, at 10-13. These conflicts between the buyer and the lender, after interest and payment terms are agreed upon, include the terms of financing, such as acceleration clauses, or the effect of minor restrictions on the use of the property which do not substantially affect its value. *Id.* at 11-12. The conflicts between buyer and seller include issues concerning the mode of payment of the purchase price. *Id.* at 11.

28. See ABA *how-to-do-it*, *supra* note 10, at 6. A share in the profits or a return of reserve

miums and earnings to the lawyers who write policies by means of dividends<sup>29</sup> and/or commissions.<sup>30</sup> In the case of an abstracting agency owned by lawyers, the lawyer stands to gain financially from commissions and/or dividends to his company only if it is provided with business.<sup>31</sup> The monetary interest of the lawyer who is both the attorney in a real estate transaction and the owner of or an investor in a title company or agency, provides an impetus to carry the transaction to conclusion despite borderline defects in title.<sup>32</sup>

Beyond this, however, the lawyer who is a controlling person in a title company or agency faces far more conflicts than a lawyer merely representing the lender or seller as well as the buyer. For example, when title insurance is required by a lender, and is thereby necessary for the consummation of the transaction, the lawyer will often have the opportunity to select the title company the buyer will patronize.<sup>33</sup> In other words, the client will seek the lawyer's professional advice as to which title company serves the client's best interest. Even when title insurance is not required by the lender, the attorney's professional opinion will often be sought as to whether it is in the buyer's best interest to purchase a title insurance owner's policy.

When the lawyer is interested in a title company, there is an inherent conflict on these issues. The attorney has a definite monetary interest in recommending the use of title insurance and, thereafter, the use of his own title company. As the owner of a title company or agency, the lawyer has an interest in protecting that company against

credits comparable to that used by the Florida Fund is also utilized by Connecticut Attorney's Title Guaranty Fund and National Attorneys' Title Insurance Fund, Inc. (Ind.). *Id.*

29. Dividends are paid by Attorneys' Title Guaranty Fund, Inc. (Colo., Minn., Utah); Attorneys' Title Guaranty Fund, Inc. (Ill.); Insured Titles, Inc. (Kan., La., Mo., Mont., Neb., N.M., N.D., Okla., Wis.); National Attorneys' Title Assurance Fund, Inc. (Ind.); and Ohio Bar Title Insurance Co. ABA *how-to-do-it*, *supra* note 10, at 6-7.

30. Commissions are paid by Attorneys' Title Guaranty Fund, Inc. (Colo., Minn., Utah); Insured Titles, Inc. (Kan., La., Mo., Mont., Neb., N.M., N.D., Okla., Wis.); National Attorneys' Title Assurance Fund, Inc. (Ind.); and Ohio Bar Title Insurance Co. *Id.*

31. The lawyer-owned abstracting company receives a 50% commission from Conestoga on all title insurance premiums paid, whether a lawyer participates in the transaction or not. Questions and Answers, *supra* note 21, at 2. The abstracting company is promoted not only on the basis that it enables a lawyer to preserve his profitable real estate practice, but also as "a source of long-term growth in the value of [his] shares, providing a profitable return on [his] investment." *Id.* at 1. The owners of Lancaster Title Abstracting Co., which owns Conestoga Title Insurance Co., include 26 members of the Lancaster Bar, each of whom contributed \$10 upon the company's founding. By 1974, the commercial value of each member's original share had risen to \$1,000. Petition to the Members of the Bar of Chester County, Pa., attached to Letter from Sam Ferguson Musser, President, Conestoga Title Insurance Co. (Nov. 13, 1974) (on file with the *Fordham Law Review*).

32. See Hofflander & Shulman, *supra* note 1, at 444-45. These commentators consider the "[d]egradation of the [t]itle [i]nsurance [p]roduct" resulting from this conflict to be one of the "most lasting consequences" of controlled business. *Id.*

33. Hofflander & Shulman, *supra* note 1, at 438.

loss. A title company often protects itself from loss by making exceptions to its coverage. Conversely, the purchaser in a real estate transaction is interested in securing as few exceptions as possible, so as to maximize his protection. This dichotomy places the attorney representing both a purchaser—either as private counsel or as the single attorney involved in a transaction—and a title insurance company or agency in an inherent conflict. On the one hand, as attorney to the purchaser he is obligated to point out to his client any exceptions on the proposed title coverage and attempt to remove them. On the other hand, as a principal of the company or agency issuing the policy, he has a duty to protect his company by excepting those circumstances which could result in loss. Regardless of the number of lawyers involved in the transaction, these two duties will always conflict when one lawyer represents both a title insurance company or agency and the purchaser.

In many states, title policies vary in coverage, with some companies insuring mechanic's liens, zoning and marketable title, and other companies refusing to issue such coverage.<sup>34</sup> In some states, title companies compete in the rates offered.<sup>35</sup> When an attorney is personally interested in a title company, he has substantial incentive to refer clients to it, even if broader and less expensive coverage may be available elsewhere.

This conflict is accentuated by the policies of and the pressures applied by some lawyer-controlled title insurance companies in dealing with their participating lawyers. Bar-related companies encourage their member attorneys to issue title insurance policies in the bar-related company "as a regular part of their office routine."<sup>36</sup> The policy is to issue insurance from bar-related companies "in every case,"<sup>37</sup> not just in borderline cases, or when a client specifically asks for such insurance or decides after consideration that he chooses to buy it. The ABA Standing Committee urges bar-related companies to stimulate business by keeping records of policies issued by members and making personal office visits to attorneys who do not issue bar-related company policies on a regular basis.<sup>38</sup> The client, therefore, is to be accorded little choice in whether he receives a policy and in which company's policy he receives.

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34. North Carolina Bar Notes, *Title Insurance "Kickbacks"* 256, 259 (1974) [hereinafter cited as Bar Notes].

35. In North Carolina, rates may vary from \$2.00 to \$3.50 per \$1,000 of coverage. *Id.*

36. ABA *how-to-do-it*, *supra* note 10, at 8. One of the maxims of bar-related title companies is that the "member provides [title insurance coverage] as a routine professional service and considers it sound protection for his client. He does not 'sell' a fund guarantee as a commodity." ABA *Bar-Related Organizations*, *supra* note 10, at 8.

37. ABA *Bar-Related Organizations*, *supra* note 10, at 8.

38. ABA *how-to-do-it*, *supra* note 10, at 12.

The conflict between the roles of lawyer as advisor to the buyer and lawyer as principal of the insurance company becomes particularly clear when a claim is made on the title insurance policy. The scenario is easily imagined. The purchaser, learning that there is a defect in title, asks his lawyer who handled the transaction to pursue a claim under the title policy the lawyer has issued him. If the loss is covered, the lawyer loses personally, under either the bar-related company system or the lawyer-controlled agency system. In the former, the loss is applied against the individual lawyer's account and offsets his share of premium earnings and profits. In the latter, the value of the agency and his ownership interest therein is reduced. The client's interest is in direct conflict with the lawyer's personal monetary interest.<sup>39</sup>

The conflict of interests that arises when lawyers issue title policies in or through companies in which they have a personal interest to clients whom they represent professionally in the same transaction has been the subject of dispute between the proponents and opponents of bar-related companies.<sup>40</sup> It seems beyond argument that the conflicts identified do exist.<sup>41</sup> The proponents of bar-related companies, however, contend that the existence of these conflicts should not prevent the lawyer from fulfilling both roles: "The position of trust occupied by lawyers is not based upon the absence of a conflict of interest but rather upon the ability of lawyers to resolve such conflicts by invariably placing the clients' interests ahead of their own."<sup>42</sup>

This contention, however, conflicts with the almost universally adopted ABA Canons of Ethics.<sup>43</sup> Canon 5 provides that "a lawyer

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39. The bar-related title company movement contends that the alternative to the bar-related company is the displacement of the lawyer from the residential real estate transaction, with the purchaser deprived of "independent legal advice." *ABA Bar-Related Organizations*, *supra* note 10, at 4. The word "independent" is meaningless unless it means independent of other conflicting interests. Similarly, the lawyer who has allegiance to his lawyer-controlled title company is no more independent of interests which conflict with those of his client than the lawyer asked to sue or file a claim against his own company, resulting in financial loss to himself.

40. Compare Maxwell Statement, *supra* note 23, at 8-10, and Jackson Statement, *supra* note 23, at 2-9 with *ABA how-to-do-it*, *supra* note 10, at 2, and *ABA Bar-Related Organizations*, *supra* note 10, at 13.

41. See *ABA Residential Real Estate Transactions*, *supra* note 24, at 12-13.

42. *ABA Bar-Related Organizations*, *supra* note 10, at 13. A similar view is expressed in *ABA how-to-do-it*, *supra* note 10, at 2 ("Lawyers are professionals who are required to place their clients' interests before their own.").

43. The "Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers. . . . The Ethical Considerations are aspirational in character and represent the objectives towards which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." Pa. Bar Ass'n Code of Professional Responsibility 1 (3d ed. 1977) [hereinafter cited as PBA Code of Professional Responsibility]. This Code of Professional Responsibility has also been adopted by the ABA. A booklet containing the PBA Code of Professional Responsibility, the Pennsylvania Rules of Disciplinary Enforcement, Disciplinary Board Rules and Procedures, Code of Judicial Conduct, and Judicial Inquiry Review Board Rules of Procedures was distributed by the Bar Association to all lawyers in Pennsylvania.

should exercise independent professional judgment on behalf of a client."<sup>44</sup> The Ethical Considerations interpreting this provision state that a lawyer should avoid conflicts between his personal business interests and those of a client, or, alternatively, represent a client in such a situation only after a full explanation is made and the client's consent is received.<sup>45</sup>

Nothing in the Ethical Considerations supports the novel view of the ABA Standing Committee that conflicting interests between a lawyer and client are acceptable and ethical because of a superhuman ability of lawyers to resolve such conflicts by "invariably" subordinating their own interests to those of their clients. To the contrary, under the Disciplinary Rules,<sup>46</sup> which were enacted to enforce the Canons and the Ethical Considerations, the lawyer is required, absent the client's informed consent, to refuse employment when his own business, financial or personal interests may reasonably affect his representation. Furthermore, he must decline to enter into any business transaction with a client if they have differing interests therein, and decline anything of value related to his relationship with a client from another person.<sup>47</sup>

### III. THE ETHICS OF LAWYER-CONTROLLED TITLE COMPANIES

The conflicting interests inherent in lawyer-controlled title insurance companies resolve themselves into two distinct types. First, in addition to his legal practice, the attorney conducts a lay business, in this case the sale of title insurance policies, and in conducting that business enters into business dealings with his legal clients for his own profit.<sup>48</sup> Second, the attorney represents parties with radically conflicting interests, in this case the buyer and the seller of title insurance policies.

The lawyer who is also the owner of or agent for a title company is not the first to combine the practice of law with the practice of a lay occupation.<sup>49</sup> Nor is it unheard of for the lawyer to view his legal

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44. PBA Code of Professional Responsibility, *supra* note 43, at 19.

45. *Id.* at EC 5-1, 5-3.

46. The Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall . . ." *Id.* at 1.

47. *Id.* at DR 5-101(A), 5-104(A), 5-107.

48. The same conflict of interest does not exist when a title company issues a policy to a buyer based on a search by an approved attorney who represents the purchaser. In that circumstance, the lawyer is free to deal with any title company to obtain the broadest possible coverage for his client, and does not have a personal financial stake in choosing one company over another—assuming that either he does not accept a commission from the company or the commissions offered by the title companies are essentially the same size.

49. The joint practice of law and of a lay business has been the subject of a respectable number of ethics opinions. *See generally*, O. Maru, Digest of Bar Association Ethics Opinions (1970 & Supp. 1975). Particularly noteworthy are those opinions found in ¶¶ 8421, 8623, 8966, 9004, 9051, and 9690 which give general guidance for combining a lay business with a law practice. *See* notes 51-55 *infra* and accompanying text.

clients as a market for the products and services of his lay business. No substantial body of law and ethics opinions have yet developed concerning sales by an attorney/title insurance agent of title policies to his real estate clients; however, numerous parallel cases in similar circumstances indicate the significant ethical problems involved.

One of the areas of joint practice most frequently considered in the ethics opinions is that of law and real estate brokerage. The result reached in most formal ethics opinions<sup>50</sup> has been to prohibit the lawyer from functioning as a real estate broker in transactions in which he also represents a client, except in the most unusual of circumstances.<sup>51</sup> A similar ban has been imposed on a lawyer repre-

Mr. Maru has compiled the best single published source available of ethics opinions from the numerous state and local bar associations. The Digest is a research project supported and administered by the ABA. It is limited to formal opinions of the ABA and state and local member associations represented in the House of Delegates of the ABA. Because the opinions are arranged according to issuing organization rather than subject, it is difficult for the lawyer to use the Digest as a general guide to ethical practice. Although bar association ethics opinions are normally advisory only, American Bar Foundation, Special Comm. on Canons of Ethics, Report 17 (1958), cited in O. Maru, *supra* at 2 n.6, they have also been considered to be "respected" and as effective in determining the conduct of lawyers as "positive law." O. Maru, *supra* at 2-3.

50. The source for all ethics opinions cited hereafter is O. Maru, *supra* note 49.

51. *E.g., id.* at:

¶ 8001 (Colo. Bar Ass'n, Inf. Op. Apr. 10, 1972), improper for attorney-broker to participate as lawyer in any matter that arose as a real estate brokerage matter, or to accept a real estate broker's commission in any matter that arose as a legal matter.

¶ 633 (Fla. Bar Ass'n, 1955), a lawyer may not be a real estate broker.

¶ 8162 (Fla. Bar Ass'n, Op. 72-19, June 5, 1972), lawyer seeking a real estate brokerage should associate with a broker outside the geographic area of his law practice, and should not conduct legal business for or through the broker.

¶ 917 (Ill. Bar Ass'n, Op. 156, undated), it is unethical for a lawyer-broker to accept a share of a real estate commission if the real estate transaction arose out of his legal practice, or if he performed legal services incident to the transaction.

¶ 8537 (Ky. State Bar Ass'n, Op. E-74, undated), attorney may not under any circumstances act as attorney in connection with a transaction initiated by himself as broker.

¶ 521 (Los Angeles Bar Ass'n, Op. 282, 1964), a practicing attorney may not conduct a real estate brokerage business regardless of name or location.

¶ 8790 (N.H. Bar Ass'n, Inf. Op. 2, July 30, 1970), "[a]n attorney in active practice may not also be a real estate broker."

¶ 2864 (Ass'n of the Bar of the City of New York, Op. 708, May 28, 1947), a lawyer entering the real estate business should refuse legal business from persons coming to him through his real estate transactions.

¶ 2098 (Ass'n of the Bar of the City of New York, Yearbook Question 482, 1959), a lawyer engaged in the real estate business may not act as an attorney in any transaction in which he serves as broker.

¶ 9248 (Ass'n of the Bar of the City of New York, Op. 883, Apr. 8, 1974), an attorney realtor who arranges as a broker for a realty transaction may not serve as attorney in the deal even without a fee.

¶ 8968 (N.Y. State Bar Ass'n, Op. 208, Nov. 22, 1971), "[a] lawyer who is also a real estate broker may not act both as broker and lawyer in the same transaction."

¶ 9051 (N.Y. State Bar Ass'n, Op. 291, Apr. 27, 1973), a lawyer may not accept both a legal fee and a real estate commission from the same client in the same transaction.

senting a party in a real estate transaction in which the attorney's spouse is the realtor, because of the inherent conflict with his or her interests in securing the sales commission.<sup>52</sup> To enforce this prohibition against the lawyer serving in such dual capacities, other ethics opinions require that the lawyer's legal practice and his brokerage business be maintained completely separately, including different identities and offices.<sup>53</sup>

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¶ 3319 (N.C. State Bar, Op. 295, Jan. 15, 1960), a lawyer engaged in a real estate partnership may not receive any legal business emanating from the copartnership.

¶ 3541 (Ohio State Bar Ass'n, Op. 9, June 5, 1950), "[a]n attorney may not act both as an attorney and a real estate broker in the same transaction and charge a fee in each capacity."

¶ 3553 (Ohio State Bar Ass'n, Op. 21, undated), a lawyer may not hold himself out as an insurance agent or a real estate broker and may not engage in the practice of law if he is in the real estate or insurance business.

¶ 3916 (Ore. State Bar Ass'n, Op. 80, July, 1960), "[a]n attorney may not perform legal services in connection with his services as a real estate broker."

¶ 9922 (Utah State Bar Ass'n, Nov. 28, 1973), it would be difficult to carry on a real estate business even from a separate office without violating the Code of Professional Responsibility.

52. *E.g.*, *id.* at:

¶ 8914 (N.J. State Bar Ass'n, Op. 312, 1975), an attorney whose wife is a realtor may not represent a party in a transaction in which his wife is the selling agent "because of the wife's interest in completing sales."

¶ 9004 (N.Y. State Bar Ass'n, Op. 244, Apr. 28, 1972), a lawyer's office must be completely separate from his spouse's real estate office and the lawyer may not accept new clients referred through his spouse's real estate business.

¶ 9100 (N.Y. State Bar Ass'n, Op. 340, Apr. 25, 1974), a lawyer whose spouse is a real estate salesperson may not represent a party in a transaction in which she has participated, even with full disclosure of the facts to the client.

53. *Id.* at:

¶ 632 (Fla. Bar Ass'n, 1955), a lawyer may not practice law from the office of an abstract or real estate business.

¶ 997 (Ill. Bar Ass'n, Op. 237, July 29, 1964), it is virtually impossible to avoid impropriety in a situation where a lawyer practices law and operates a real estate brokerage firm from a common office.

¶ 8309 (Ill. Bar Ass'n, Op. 371, 1972), a lawyer may not conduct a real estate business from the same office as his legal practice, or collect duplicate fees for the same services in each capacity.

¶ 7695 (Los Angeles County Bar Ass'n, Op. 340, Dec. 20, 1973), a lawyer may not conduct a legal practice and real estate consulting business out of the same office.

¶ 8623 (Md. Bar Ass'n, 1971), a practicing lawyer who engages in business undertakings such as real estate brokerage, provision of insurance, tax return services, and others, should maintain a complete separation of identities among them.

¶ 2098 (Ass'n of the Bar of the City of New York, Yearbook Question 482, 1959), a lawyer engaged in the real estate business preferably should not practice both in the same office.

¶ 1615 (N.Y. State Bar Ass'n, Op. 26, Feb. 9, 1966), it is improper for a lawyer to operate a real estate agency under his name in his law office.

¶ 3423 (N.C. State Bar, Op. 399, Oct. 5, 1962), it is improper for an attorney to conduct a real estate business and a law practice in adjoining offices.

¶ 4427 (Va. State Bar Ass'n, Op. 48, Feb. 28, 1955), "[i]t is improper for a lawyer to operate both his law practice and his real estate business from the same office."

¶ 4432 (Va. State Bar Ass'n, Op. 63, Nov. 30, 1955), the requirement of separate offices for the simultaneous practice of law and real estate necessitates a "substantial physical separation."

In addition to real estate brokerage, lawyers have also considered the sale of general insurance as a profitable sideline to their legal practice. The reported ethics opinions, however, have imposed a general ban on a lawyer serving as a seller of or an agent for insurance in the same transaction in which he also serves as attorney.<sup>54</sup> As with real estate brokerage, there is also a requirement that the insurance business and the law practice be operated completely separately.<sup>55</sup>

¶ 4671 (W. Va. State Bar Ass'n, Op. 21, undated), "[i]t is unethical for a lawyer to conduct his legal practice and real estate business from the same office."

*Contra, id. at:*

¶ 1364 (Mich. State Bar Ass'n, Op. 190, Jan., 1962), conduct of real estate brokerage, insurance business, and law practice from the same office "is not per se improper," but care must be taken not to use one as a "feeder" business for the other.

¶ 8768 (Neb. State Bar Ass'n, Op. 74-3, undated), "[a] lawyer may simultaneously hold himself out as a real estate broker. . . . it is not per se improper for a lawyer to engage in a second occupation, even though it is closely related to the practice of law . . . ."

54. *Id. at:*

¶ 386 (Los Angeles County Bar Ass'n, Op. 142, 1942), a lawyer may not operate an insurance brokerage business.

¶ 458 (Los Angeles County Bar Ass'n, Op. 215, 1954), a practicing lawyer may not actively engage in the insurance business.

¶ 470 (Los Angeles County Bar Ass'n, Op. 227, 1955), it is improper for an attorney to procure an insurance agents' or brokers' license for the purpose of writing insurance for his clients when he sees a business situation in his client's affairs that could be helped by the use of insurance.

¶ 524 (Los Angeles County Bar Ass'n, Op. 285, 1965), a practicing lawyer may not also be employed as a life insurance agent.

¶ 1449 (Mo. Bar Ass'n, Op. 63, 1958), an attorney may join a partnership to sell insurance only if he has ceased to practice law.

¶ 8759 (Neb. State Bar Ass'n, Op. 73-9, undated), a lawyer who sells insurance from a bank office may not deal with customers at the bank or insurance office on legal matters.

¶ 3751 (Okla. Bar Ass'n, Op. 147, June 1950), [a] lawyer who practices law and also operates an insurance business must not use either occupation to procure business for the other.

¶ 7970 (San Diego County Bar Ass'n, Op. 1974-18, Oct. 2, 1974), "[i]t is improper for an attorney to engage in the selling of insurance while pursuing the practice of law."

¶ 4321 (State Bar of Tex., Op. 264, Sept., 1963), it is unethical for a lawyer to enter into an arrangement with an insurance company in which he agrees, for a fee, to sell or to advise clients to buy a plan of insurance from that company.

¶ 4555 (Wash. State Bar Ass'n, Op. 37, Oct., 1954), a practicing lawyer may not perform legal services for those to whom he sells insurance.

¶ 10185 (State Bar of Wis., Inf. Op. B-1967, Dec., 1974), "[i]t is improper for a lawyer to engage in [the] life insurance business."

*Contra, id. at:*

¶ 3598 (Cleveland Bar Ass'n, Op. 42, Apr. 1, 1964), the lawyer's professional conscience should direct that he either sell no insurance to his clients or disclose his insurance interest before he is retained. The opinion reported at ¶ 3588 (Cleveland Bar Ass'n, Op. 32, Apr. 27, 1961) is in accord.

¶ 8408 (Ind. State Bar Ass'n, Op. 4-1964, July-Aug., 1967), an attorney may not do any legal work in connection with insurance sold, but may sell life insurance to a client if he fully discloses his interest therein and he did not solicit the client.

55. *Id. at:*

¶ 321 (Ala. State Bar, Feb. 19, 1965), "[a] practicing attorney may also sell life insurance, but he should do so from separate offices."



There is also judicial authority which prohibits an attorney from making a commission or a profit from real estate or similar business transactions with his legal clients.<sup>56</sup> In *Reichert's Estate*<sup>57</sup> the court found the attorney's acceptance of part of the commission for sale of the trust's real estate to be a violation of his duty of loyalty to his client:<sup>58</sup> "Both the trustee and his counsel ceased to be impartial and ceased to regard with singleness of purpose the interest of the trust alone the moment they agreed to accept commissions."<sup>59</sup> The court,

¶ 8381 (Chicago Bar Ass'n, Op. 75-22, undated), it is virtually impossible to keep a lawyer's law practice and insurance business separate if the same office is used for both.

¶ 632 (Fla. Bar Ass'n, 1955), an attorney may not operate a title or insurance business from his law office.

¶ 795 (Fla. Bar Ass'n, Op. 64-51, 1965), "[a] lawyer may not conduct an insurance business from his law office."

¶ 10276 (Milwaukee Bar Ass'n, Op. 12, Oct. 25, 1965), a lawyer may engage in the insurance business, but not from his law office.

¶ 2650 (Ass'n of the Bar of the City of New York, Op. 494, Apr. 19, 1939), "[a]ttorneys may not conduct an insurance consulting business from their law offices."

¶ 3296 (N.C. State Bar, Op. 272, July 17, 1959), an attorney may sell insurance from a separate building.

¶ 9669 (State Bar Ass'n of N.D., Inf. Op. 005, Apr. 22, 1974), ethical violations may result when a law firm carries on an insurance business from its law offices.

*Contra, id. at:*

¶ 1364 (Mich. State Bar Ass'n, Op. 190, Jan., 1962), conduct of real estate or insurance business from a law office is not "per se improper."

¶ 8722 (Neb. State Bar Ass'n, Op. 68-3, undated), a lawyer may sell insurance from his law office provided the volume is so small that separate quarters are not economically feasible.

¶ 3536 (Ohio State Bar Ass'n, Op. 4, Aug. 9, 1943), an attorney may engage in the insurance business from his law office, but the insurance business should not be used to promote the legal work.

56. The general rule, frequently stated, is that contracts between any attorney and client entered into after commencement of the attorney-client relationship are viewed with suspicion and will, if challenged by the client, be closely scrutinized for overreaching and unfairness. *SEC v. W. L. Moody & Co.*, 363 F. Supp. 481, 484 (S.D. Tex. 1973); *Meara v. Hewitt*, 455 Pa. 132, 135-36, 314 A.2d 263, 265 (1974); *Kribbs v. Jackson*, 387 Pa. 611, 621-22, 129 A.2d 490, 495-96 (1957). Such transactions will not, however, be voided absent proof of overreaching or unfairness. *Ruth v. Crane*, 392 F. Supp. 724, 731 (E.D. Pa. 1975), *aff'd* 564 F.2d 90 (3d Cir. 1977). Business transactions between a lawyer and his client are voidable and not void. *Id.*

57. 56 Pa. D. & C. 1 (1946), *aff'd* 356 Pa. 269, 51 A.2d 615 (1947).

58. *Id.* at 22. The estate owned a store sought by two competing linoleum retailers. The realtor for one competitor entered into an agreement to split part of his realtor's commission with the trustee and/or his attorney. The property was ultimately sold to a retailer represented by this realtor at a price well in excess of its normal fair market value. The other competitor sued to set aside the sale on the ground that he had wanted to offer even more, but had not been given sufficient opportunity to do so. The court found, *inter alia*, that the trustee's counsel had violated his obligations to his client by accepting the commission: "[A]ttorneys, agents and fiduciaries all render themselves unable to adequately safeguard the interest of clients or cestuis que trust, when they accept such commissions. . . . [Numerous] authorities [condemn] the practice as disloyal. The case before us is but another illustration of the reason for the principle." *Id.* The court went on to note that the attorney and the trustee "may have been more interested in protecting their commissions than in getting the best possible price for the trust assets." *Id.*

59. *Id.* The court expressed concern over the seemingly general practice of sharing commis-

criticizing what it considered "the strange inability of these two respondents to see any impropriety in their actions"<sup>60</sup> and expressing concern that such improper and unethical conduct might be widespread among the bar, recommended adoption of a specific court rule which would require submission of an affidavit that no commission-splitting had taken place.<sup>61</sup>

The impropriety does not depend on whether harm is suffered by the client. Rather, as a prophylactic measure, courts have denied any compensation to attorneys who place themselves in positions to receive commissions from their clients' real estate sales, even where no harm to the client is shown to exist.<sup>62</sup> The rule generally adopted by the courts is that the commingling of the roles of vendor to and attorney for one's client is highly undesirable and, insofar as possible, should be avoided.<sup>63</sup>

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sions to the detriment of trust beneficiaries: "The increasing number of cases in which property has been sold at a price far too low, or under circumstances showing undue favoritism to a favored broker, makes us wonder whether there is not a secret sharing of commissions by agents and trustees or with employes of trustees. Perhaps we ought, under our supervisory powers, adopt a rule requiring brokers, as a condition to collecting commissions, to furnish an affidavit available to inspection by the cestui que trust, that the broker has not paid or agreed to pay directly or indirectly to the trustee or any employe of the trustee or to the attorney of the trustee, any share of the commission." *Id.* at 23.

60. *Id.* at 23.

61. *Id.*

62. "Where an actual conflict of interests exists, no more need to be shown . . . to support a denial of compensation." *In re Estate of Clarke*, 12 N.Y.2d 183, 187, 188 N.E.2d 128, 130, 237 N.Y.S.2d 694, 697 (1962) (quoting *In re Estate of Jones*, 8 N.Y.2d 24, 28, 167 N.E.2d 336, 338, 200 N.Y.S.2d 638, 641 (1960)). In *Clarke* the attorney for an estate entered into an agreement with a broker to split the brokerage fee, and then recommended to the trustees that they sell the property to the broker's clients for \$150,000. In a subsequent suit by a beneficiary to void the transaction, the court upheld the sale because the purchase price had been independently negotiated and was not "tainted" by the attorney's machinations. *Id.* at 187, 188 N.E.2d at 129-30, 237 N.Y.S.2d at 696-97. The court, however, held that the attorney by accepting the commission breached his duty of "undivided loyalty . . . [a]nd it matters not that no actual harm was done to the estate; the vice is placing oneself in a position where self interest presents a second master to serve." *Id.*, 188 N.E.2d at 130, 237 N.Y.S.2d at 697.

63. *In re Goldstein*, 46 Del. 450, 458, 85 A.2d 361, 364 (1951). In this case, a woman retained an attorney to handle her real estate purchase. The attorney offered her a "more desirable" home for the same price and the client accepted it. The client later discovered that the lawyer had purchased the house for less than he had sold it to her, and brought suit. The Supreme Court of Delaware found the client to be entitled to the lawyer's profit. "[A] lawyer is not permitted to traffic in his client's affairs for his own profit in disregard of the undivided loyalty commanded by his professional duties." *Id.* at 456, 85 A.2d at 363-64. The court also noted that the lawyer never advised the client that "since he was dealing with her as a seller he was disqualified from acting for her and that she should obtain immediately other and independent advice . . ." *Id.* at 456, 85 A.2d at 364. See also *Hines v. Donovan*, 101 N.H. 239, 139 A.2d 884 (1958). In this case an attorney-realtor brought suit against another realtor to determine entitlement to a real estate commission. Throughout the transaction the client was aware that her attorney claimed to be entitled to the commission. The court found the lawyer-realtor entitled to the commission, but reduced it by the additional expenses incurred by his client in the subsequent litigation "necessitated because her lawyer acted in the dual capacity of attorney and realtor." *Id.* at 244, 139 A.2d at 888.

Of particular interest to an analysis of lawyer-controlled title insurance companies is an exception to the general rule discouraging multiple representation,<sup>64</sup> which permits such representation if each client gives his informed consent after full disclosure.<sup>65</sup> It has been held, however, that even full disclosure will not suffice in circumstances where the relative lack of sophistication of one party serves to prevent that party's consent from being truly knowing and informed, and in such circumstances multiple representation, even with full disclosure and consent, is improper.<sup>66</sup>

The ABA and state bar associations have not been consistent in their application of the above legal principles to title insurance.<sup>67</sup> A number of state ethics opinions follow the ABA approach of authorizing both multiple representation and self-dealing by the attorney provided there is full explanation to and informed consent by the parties.<sup>68</sup>

64. See notes 43-47 *supra* and accompanying text.

65. PBA Code of Professional Responsibility, *supra* note 43, at DR 5-105(C). See also *Holley v. Jackson*, 39 Del. Ch. 32, 158 A.2d 803 (1959); *Florida Bar v. Teitelman*, 261 So. 2d 140 (Fla. 1972); *In re Lanza*, 65 N.J. 347, 322 A.2d 445 (1974); *Guardian Abstract & Title Co. v. San Antonio Bar Ass'n*, 278 S.W.2d 613 (Tex. Ct. App. 1955) *rev'd on other grounds* 156 Tex. 7, 291 S.W.2d 697 (1956). The caveat is usually added that if an actual conflict of interest arises, the attorney should suggest the parties employ separate counsel. *Id.*

Full disclosure as defined by the courts requires more than merely informing the client of conflict. "Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise . . . which would make it desirable that the buyer have independent counsel." *In re Kamp*, 40 N.J. 588, 595-96, 194 A.2d 236, 240 (1963). See also *In re Boivin*, 271 Or. 419, 424, 533 P.2d 171, 175 (1975).

66. *In re Boivin*, 271 Or. 419, 425, 533 P.2d 171, 174 (1975) (quoting *Kelly v. Greason*, 23 N.Y.2d 368, 378, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937, 946 (1968)): "[T]he unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him."

In *Boivin*, an attorney represented both the buyer and seller of real estate, as well as himself as the lessor of the real estate. The buyer wanted to purchase the property in the name of a corporation so as to avoid personal liability. The contract prepared by the lawyer provided for a purchase by a corporation to be established by the buyer, with a personal guarantee. The lawyer apparently believed he was only putting in legal form the agreement of the parties. When the corporation defaulted and the buyer was sued on the guarantee, he filed charges of unethical conduct against the lawyer.

67. O. Maru, *supra* note 49, at:

¶ 304 (ABA, Op. 304, May, 1962), "[a] lawyer who receives a commission for recommending or selling title insurance without fully disclosing to the client his financial interest in the transaction is guilty of unethical conduct. On the other hand, there is nothing unethical in recommending title insurance to buttress a lawyer's opinion . . . ."

¶ 7326 (ABA, Op. 331, Dec. 15, 1972), "[i]t is not improper per se for lawyers to issue title policies, to act as agents for title companies, and to receive compensation from such companies. If a lawyer has financial interest in the company that will provide title insurance for his client, he must make a full disclosure of this to the client and must obtain the client's consent for the transaction. If a lawyer performs legal services for both the title company and the client, he must get the consent of both after full disclosure of possibly conflicting interests. It is assumed, of course, that he will be able to represent the interests of both parties in an adequate fashion."

68. *Id.* at:

Other states, however, have adopted rules which either prohibit lawyers who have an interest in a controlled title company from issuing policies in that company to their clients, or permit the lawyer to issue the policy only in the unusual case where the client "insists" after having been fully informed.<sup>69</sup>

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¶ 8027 (Conn. Bar Ass'n, Op. 23, 1972), an attorney may issue title insurance upon disclosure to the client of his fee arrangements with the company. An attorney who is a member of the Connecticut Attorney's Title Guaranty Fund, Inc., should disclose the remittance to the Fund as "disbursements" but not otherwise include them in his fee. An attorney need not, however, disclose the prospective payments to himself or his estate from the Fund.

¶ 987 (Ill. State Bar Ass'n, Op. 227, Oct. 25, 1963), full disclosure of the attorney's financial interest is required. Attorneys are specifically authorized to issue policies of the Illinois Attorneys' Title Guaranty Fund. The opinion reported at ¶ 8334 (Ill. State Bar Ass'n, Op. 415, June 3, 1974) reaches a similar result.

¶ 2161 (Ass'n of the Bar of the City of New York, Op. 5, Apr. 25, 1924), "[a] lawyer may receive commissions from title, mortgage, or bond companies for services rendered to a client if the facts regarding such commissions are disclosed to the client."

¶ 2311 (Ass'n of the Bar of the City of New York, Op. 155, 1930), an attorney who procures a title policy for a client may not accept a rebate without the client's knowledge and consent.

¶ 2359 (Ass'n of the Bar of the City of New York, Op. 203, Oct. 30, 1931), an attorney may accept a title insurance commission with the knowledge and consent of the client.

¶ 3483 (N.C. State Bar, Op. 459, Oct. 22, 1964), an attorney may act as an issuing agent or validating officer for a title company and accept compensation for such services with full disclosure to his client.

¶ 9865 (S.C. Bar, Op. 75-3, Sept., 1975), a law office may act as agent for a title company but may not receive a commission without disclosure to the client.

69. *Id.* at:

¶ 4462 (Va. State Bar, Op. 93, Dec. 29, 1959), lawyers who are title insurance agents should not both examine title for a client and issue a policy on behalf of the company, except in the unusual situation where the client, being informed of the conflict, insists on the lawyer acting on his behalf. The text of this opinion emphasizes the inherently sharp conflict between the title company and home purchaser which results when a lawyer issues a title policy from his company to his client. The opinion notes that where title is questionable, the lawyer has two divergent obligations. On the one hand, his obligation to his client requires that the lawyer attempt to have the policy issued with as few exceptions as possible. On the other hand, the lawyer's obligation to the title company requires him either to advise the company against issuing the policy at all or to advocate inclusion of as many exceptions as possible. This conflict, of course, is magnified when the lawyer has a personal financial stake in the title insurance company or agency issuing the policy.

¶ 9936 (Va. State Bar, Op. 174, Apr. 24, 1972), a lawyer who is either an agent, or a substantial stockholder, or owner or officer of a title insurance company may not issue title policies for clients for whom he has examined the title. The opinion reported at ¶ 9937 (Va. State Bar, Op. 174-A, Jan. 25, 1974) modified this rule to permit the lawyer to submit a policy application to his insurance company on behalf of his client where the lawyer does not have any substantial degree of control over the issuance of policies or their terms.

¶ 10084 (Va. State Bar, Inf. Op. 154, undated), an attorney may operate a title agency through his law office if he does not apply for title insurance through his own agency on behalf of a client for whom he has examined title.

¶ 3965 (Ore. State Bar, Op. 129, Nov., 1963), an attorney who is an officer of a title insurance company "may not advise clients with respect to real estate matters involving the purchase of title insurance policies from the company or about the policies. He may not advise a prospective

Dissatisfaction with this state of affairs, and the policy of voluntary rather than mandatory compliance with ethics opinions, has led to occasional legislative action designed to keep lawyers from issuing title insurance policies in connection with real estate conveyances in which they also represent clients.<sup>70</sup> In 1974 the North Carolina Bar Association endorsed a bill drafted by its real property committee which was designed to ensure that "attorneys cannot legally act as title insurance agents in transactions wherein they are involved as attorneys."<sup>71</sup> The bill was enacted into law with the support of the state bar association.<sup>72</sup> North Carolina's dissatisfaction with ABA and local bar association opinions authorizing lawyers to sell clients title insurance policies on which they receive substantial commissions appears justified. Such bar opinions are inconsistent with the general ethical prohibitions on both self-dealing with a client to one's own profit and multiple representation. Further, ethics opinions have imposed essentially blanket bans on an attorney serving as a realtor for profit in the same transaction in which he represents the purchaser as a client, and on selling general insurance policies to a client. Application of these general principles to the related field of title insurance should result in the imposition of a parallel ban on lawyers issuing title insurance policies from controlled companies to purchasers whom they represent in a real estate transaction.

The proponents of bar-related title companies point to certain opinions as establishing the ethical propriety of bar-related and other controlled title insurance companies.<sup>73</sup> In most cases, however, these

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vendor whether to supply title insurance or a prospective vendee whether to negotiate for it. If the client is unaware of title insurance and the attorney thinks the client needs it, he should so advise the client, but he may not give any suggestion that it be purchased from the attorney's employer."

70. "Attorneys should be out of the title insurance business as agents because it leads to abuses and conflicts." Herbert C. Denenberg, former Pennsylvania Insurance Commissioner, *quoted in Kicking back on title insurance*, Business Week, Apr. 13, 1974, at 97, col. 2. In its following issue Business Week editorialized: "It is a little surprising . . . that the American Bar [Association] and the various state associations have made no real efforts to stop the kickbacks. . . . It is time for the bar association to spit the mush out of its mouth, take a firm stand on kickbacks, and enforce it rigorously." Business Week, Apr. 20, 1974, at 124, col. 2.

The Code of Professional Responsibility itself has recently received criticism for preferring the private interests of the members of the bar, or at least the powerful and organized sectors thereof, over the public interest. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702 (1977). Professor Morgan concludes that legal ethics as defined in the Code of Professional Responsibility are "consistently self-serving and that pressure for revision . . . is both sound and inevitable." *Id.* at 704.

71. Bar Notes, *supra* note 34, at 257.

72. N.C. Gen. Stat. § 58-135.1 (1975).

73. See *ABA Bar-Related Organizations*, *supra* note 10, at 4, App. A. The proponents of bar-related title companies contend that "[t]here is no more 'conflict' in [one of their members] issuing a . . . title insurance policy than in issuing a title opinion with exceptions." *ABA how-to-do-it*, *supra* note 10, at 2. The comparison is disingenuous. The title company is liable for

opinions appear to be insufficient to insulate the attorney from either liability to his client or charges of unethical conduct in the event the client decides that he did not receive the disinterested attention and advocacy which he had expected.<sup>74</sup>

There is substantial doubt that a court or a disciplinary body would find the conduct of the lawyer members of controlled title companies complies with the standards necessary to establish disclosure and consent. Full disclosure means much more than informing the client of the attorney's ownership interest in the controlled company while the client is writing his check for the policy. Rather, the disclosure must include a detailed explanation of the conflicts which may arise, their legal significance, and why it would be desirable in such cases for the client to have independent counsel.<sup>75</sup> After the client and the lawyer are sufficiently involved in the transaction, retaining separate counsel may result in complications or delay. To be effective, proper disclosure must take place when the possible conflict of interest first presents itself; that is, at the beginning of the transaction.

While a survey of the actual practices of attorney-owners of con-

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any loss covered by any defect, or possible defect, not excepted in the policy, regardless of whether it had or should have had knowledge of the defect. Moreover, title insurance companies can and do agree to insure what they consider marginal risks. By contrast, an attorney's only liability is for negligence, and his opinion provides no protection for non-negligent omissions. The client's interest is best served by a lawyer who searches title, finds all discoverable defects, excludes them in his opinion to his client, and persuades a title company to insure them. When the same lawyer is paid by the purchaser to examine the title, and by the title company to include the maximum possible exceptions in the insurance policy to protect the company from loss, he essentially is in a situation where he must negotiate with himself. A lawyer who finds defects in the chain of title which prevent the purchase from taking place will often have done his client a service; indeed, the service for which he was retained. Conversely, the lawyer who finds exceptions to exclude from title insurance coverage has done the title company, but not the purchaser, a service. Accordingly, the lawyer who simultaneously represents both the controlled title company and the purchaser in issuing a title insurance policy, and in determining the exceptions to include or not include in the policy, is faced with an inherent conflict, even when he has no personal stake in the profit or loss of the title company. See generally ABA, *Residential Real Estate Transactions*, *supra* note 24, at 12-14.

For a general study dealing with the representation of conflicting interests both in real estate and other fields see Annot., 17 A.L.R.3d 835 (1968). Also of general interest on the subject of conflicting representations are Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 Ins. Counsel J. 244 (1978) and articles collected in O. Maru, *supra* note 49, at 4-5 nn.16-18.

74. Certain opinions, e.g., Conn. Op. 23 (1972), Ill. Op. 227 (Oct. 25, 1963), and others dealing specifically with bar-related title insurance companies contained in ABA *Bar-Related Organizations*, *supra* note 10, at App. A, specifically authorize the issuance of bar-related policies by attorney members of those companies. These opinions arguably would provide substantially greater protection for the attorneys in those states which act in accordance therewith and in reliance thereon.

75. See note 65 *supra* and accompanying text. The disclosure, essentially, must be sufficient so as to result in informed consent by the client. *In re Boivin*, 271 Or. 419, 424-26, 533 P.2d 171, 174 (1975).

trolled companies is beyond the scope of this Article, examination of the literature produced by the proponents of bar-related title companies raises a substantial question as to compliance with the requirement of "informed consent." The ABA Standing Committee has issued directions on how to establish a bar-related company, including a typical prospectus, policy, and instructions for issuance of policies.<sup>76</sup> The discussion of conflict of interests in the text of that publication does not refer to the ethical problems involved or to any requirements of disclosure. Nowhere does this booklet even mention the minimum ethical requirements of full disclosure and client consent set forth in those opinions authorizing the issuance of title insurance policies by lawyers to their clients. Nor does it discuss the type of disclosure necessary for consent to be informed.

Even assuming full and adequate attempts at disclosure, the protection accorded the practicing lawyer by the ethics opinions permitting the sale of policies issued by controlled title insurance companies to clients is substantially reduced by the judicially grafted exception for unsophisticated clients.<sup>77</sup> The central fact which characterizes most residential real estate transactions is the lack of sophistication of the buyer. Professors Hofflander and Shulman have observed that it is this very lack of sophistication on the part of the average buyer that gives real estate professionals their inherent power over controlled business.<sup>78</sup> The Department of Justice task group on antitrust immunities concurs,<sup>79</sup> as do the proponents of lawyer-controlled title insurance companies who concede that the average member of the public first comes in contact with an attorney through the purchase of his home.<sup>80</sup>

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76. ABA *how-to-do-it*, *supra* note 10. The sample prospectus, policy, and instructions are those of the Attorneys' Title Guaranty Fund, Inc. of Illinois. *Id.* at App. A-D.

77. *See* note 66 *supra* and accompanying text.

78. Hofflander & Shulman, *supra* note 1, at 437-38. The article suggests that "because consumers usually are unfamiliar with the settlement process, producers should act in a fiduciary capacity with respect to the placement of orders for ancillary services" including title insurance. *Id.* at 437 (footnote omitted).

79. U.S. Dep't of Justice, *The Pricing and Marketing of Insurance* 258 (1977): "We have indicated that reverse competition in the title insurance industry is brought about because of a lack of knowledge, lack of time, and lack of interest on the part of the purchasers of title insurance policies."

80. ABA *how-to-do-it*, *supra* note 10, at 3. If the ABA surveys cited in this booklet are correct, then presumably the purchaser who relies on a title company, abstractor or realtor to conduct his closing has a good chance of being one of that happy group of citizens who are able to go through their entire lives without ever needing a lawyer. The ABA Standing Committee, needless to say, is well aware of this possibility, and expectedly trumpets the real estate transaction as "an excellent opportunity to develop a good attorney-client relationship" and "do the legal checkup [the] client usually needs." *Id.* Stated differently, the real estate purchase gives a lawyer looking for business an excellent chance to persuade the purchaser or seller that he has legal problems he never really knew he had. It is, as yet, too soon to judge the extent to which the return of legal advertising will reduce the importance of the real estate transaction in creating this previously unknown or unfelt "need" for legal services.

Because many real estate purchasers have only lay education and no prior experience, it is doubtful that the requirement that the purchaser be made to actually understand the legal significance of possible future conflicts of interest can be met.<sup>81</sup> In these cases it is unethical and improper for the lawyer to proceed to handle the sale of the controlled title insurance company's policy to the client. In addition, it must be recalled that because the lawyer-controlled title company involves not only dual representation, but also business dealings with the client for the lawyer's personal profit, the title insurance contract itself would be "voidable" and subject to possible reformation by the court. The extent to which an "exemption" in the policy on which the lawyer-owned company relies to defend against a claim, could itself be voided so as to impose liability on the company is beyond the scope of this Article.

The present ABA ethics opinions concerning lawyer-controlled title insurance companies appear to be inadequate both from the point of view of the members of the organized bar who look to them for direction and from the point of view of members of the public who look to them for protection.<sup>82</sup> The problem, simply put, is that these influential ethics opinions appear to specifically approve controlled business with the knowledge and consent of the clients; whereas in many, if not most, residential real estate transactions analysis shows that informed consent of the type required may simply not be practicable. The pertinent opinions create the impression, contrary to substantial legal authority, that in most cases consent can or should be obtainable. In fact, informed consent may frequently be unobtainable because the client will be unable or unwilling to understand the legal consequences of the conflict.<sup>83</sup> Even where informed consent can be obtained, the attorney, if challenged, will ultimately have a difficult, if not impossible time, proving that it was obtained.<sup>84</sup> The bar associations owe it to their members to make this clear. A preferable approach, which the ABA and state bar associations would do well to adopt and which accords more with the realities of the situation, is expressed in an opinion of the Virginia State Bar.<sup>85</sup> This opinion makes clear that it is an unusual situation in which the lawyer may

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81. The burden of proving the client's informed consent is on the lawyer. See *In re Boivin*, 271 Or. 419, 426, 533 P.2d 171, 174-75 (1975).

82. ABA Opinions 304 and 331, *supra* note 67, are singled out because of their persuasive influence on the decisions of local and state bar associations. For example, in the opinion reported in *O. Maru*, *supra* note 49, ¶ 8404 (Ind. State Bar Ass'n, Op. 4-1964, July-Aug., 1967), the state bar indicated its discomfort and distaste with what it viewed as attorneys representing clients and insurance companies in the same transaction, but ultimately, albeit apparently with reluctance, permitted controlled business in reliance on these ABA opinions.

83. See note 96 *infra* and accompanying text.

84. *In re Boivin*, 271 Or. 419, 426, 533 P.2d 171, 174 (1975).

85. *O. Maru*, *supra* note 49, ¶ 4462 (Va. State Bar, Op. 93, Dec. 29, 1959).



ethically represent both the insurance company and his client.<sup>86</sup> While not a perfect exposition of the present state of law,<sup>87</sup> this opinion is more in keeping with the actual judicial result and is commended to the bar for study.

#### IV. STATE REGULATION

The failure of the organized bar to make self-dealing and dual representation by lawyers who own or invest in controlled title insurance companies or agencies an infrequent rather than routine procedure has led a number of states to seriously consider the Department of Justice's call for state regulation of controlled title insurance companies. These states have generally reacted in either of two ways: imposition of a blanket ban on all lawyer or realtor-controlled title insurance companies, or the establishment of a percentage test which limits the degree of business any title company can receive from its controlling persons.

Illustrative of the blanket ban is the North Carolina statute, passed April 12, 1974 with the support of the Real Property Committee of the State Bar.<sup>88</sup> This statute is designed to impose a blanket ban on lawyers serving as issuing officers for title companies and representing a client in the same real estate transaction. Illustrative of the percentage approach are a New Jersey statute,<sup>89</sup> and regulations proposed and later withdrawn by the Insurance Department of the Commonwealth of Pennsylvania.<sup>90</sup>

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86. *Id.*

87. To more precisely reflect the state of the law, the Virginia opinion should also have noted that there are many instances in which an unsophisticated client is involved when even the "insistence" of the client should be insufficient to permit the attorney to represent both the title company and the client. In addition, the opinion also should have precisely specified that which constitutes informed consent in a legal context. All too many ethics opinions appear to assume that lawyers are aware of what in fact constitutes legal consent. Finally, the opinion does not address the factual situations from a self-dealing analysis, and the resulting voidability of the transaction between the attorney and his client for unfairness.

88. See notes 71-72 *supra* and accompanying text. See also California Dep't of Insurance, Bull. No. 74-2, Title Insurance Rebates 7 (Jan. 9, 1974) (prohibiting the receipt of collateral benefits for channeling title insurance business, including buying from or selling to business referrers "shares of stock in any title entity or any other business concern owned by, or affiliated with, a title entity," except through "a general public offering").

89. N.J. Stat. Ann. § 17:46B-1 to -62 (West Supp. 1979).

90. *Proposed Rule Making*, 7 Pa. Bull. 2021-22 (1977), withdrawn 9 Pa. Bull. 450 (1979). *Accord*, Michigan Dep't of Commerce, Insurance Bureau, Bull. No. 77-2, Broker Owned Title Insurance Agencies (June 3, 1977) (prohibiting realtor-controlled title insurance agencies where controlled business is "a primary purpose" of the controlled agency, and requiring annual reporting of the percentage of the agency's business attributable to its controlling persons). While Bull. No. 77-2 is specifically directed at realtor-controlled title insurance agencies, the Bulletin expressly states that its coverage "may also be expanded to include real estate producers other than real estate brokers to the extent it appears necessary to eliminate similar abuses." *Id.* at 2.

The proposed Pennsylvania regulations defined an illegal rebate as any payment by a title company to one who has an interest in the company when more than forty percent of the company's fees were derived from business referred by its owners, or when the controlling interest of the persons recommending use of the particular company or agency were not adequately disclosed.<sup>91</sup> Consequently any controlled agency or company, in order to be able to operate in Pennsylvania, would have had to be able to attract over sixty percent of its business from individuals who have no special pecuniary interest in dealing with it.<sup>92</sup> The regulations would also have prohibited the policy, followed by some bar-related companies, of making payments of premiums and earnings proportionate to business referred rather than stock owned.<sup>93</sup> The proposed regulations would also have required full disclosure of the economic interest of the lawyer or realtor engaging in the controlled business, and of the fact that the person referring the business would economically benefit therefrom.<sup>94</sup> Under the New Jersey statute, receipt of more than twenty-five percent of the company's total business from one person, or the receipt of more than fifty percent of total business from all controlling persons, is unlawful as an illegal rebate.<sup>95</sup>

These two approaches must be evaluated against the conditions they are intended to ameliorate. These situations can be divided into two types. The first, discussed previously, involves the conflict of interest faced by the lawyer interested in a title company or agency who issues or recommends title coverage to his clients. The second is the reduction of free competition in the title insurance industry resulting from the reverse competition that permits the development of controlled title companies and agencies. It takes little imagination to foresee that if the development of controlled business is permitted to continue unchecked, companies or agencies controlled by the largest firms or most active referring lawyers or realtors would be able to establish a monopoly—or if they establish several controlled companies, an oligopoly—over the sale of title insurance in their area.

The disclosure requirement adds nothing, except specificity and sureness, to the attorney's already existing ethical obligations. Indeed,

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91. 7 Pa. Bull. 2021-22 (1977).

92. The proposed regulations were less restrictive than those proposed by Commonwealth Land Title Insurance Co. at public hearings on controlled title insurance business. Commonwealth Land Title took the position that an agency should be required to receive "at least 75% of its gross revenue . . . from title insurance business which has not been placed with or through said agency by its stockholders or owners or business enterprises in which said stockholders or owners have sufficient interest or control to influence the placement of title insurance business." *Hearings, supra* note 2, at 34 (statement of Fred B. Fromhold).

93. 7 Pa. Bull. 2022 (1977).

94. *Id.*

95. N.J. Stat. Ann. § 17:46B-39 (West Supp. 1979).

the proposed disclosure requirements are not sufficiently extensive in detailing the potential effects of the conflict of interest inherent in controlled business, and ignore altogether the issue of the unsophisticated purchaser for whom consent is a dead letter. Title companies differ as to their willingness to assume certain insurance risks. Therefore competition between title companies may exist, even in states such as Pennsylvania where rate differences normally do not exist. It would seem that full disclosure under the ethical rules should involve disclosure of such possible differences in coverage, and of the fact that the title insurance policy referrer has a financial interest in referring coverage only to his contracted company. Where appropriate, disclosure should also convey that title coverage is not required for consummation of the real estate transfer. Professors Hofflander and Shulman imply, however, that disclosure would not lead to an informed choice by the public because even knowledgeable purchasers often rely on the real estate professionals for the selection of title companies and ancillary services. This reliance is due to the relatively small monetary interest involved in purchase of the title policy and the understandable reluctance of the buyer to do anything which might tend to impede the transaction.<sup>96</sup> Consequently, while disclosure may be sufficient to comply with ethical requirements in the case of the sophisticated purchaser, it cannot serve to eliminate the anticompetitive market effects of reverse competition and controlled business.

The rationale underlying the percentage approach is that most controlled agencies do not maintain the facilities or employees necessary to secure fifty or sixty percent of their business from the general public and render title and closing services in such cases.<sup>97</sup> Furthermore, in many states the demographics of the title insurance business mitigate against an absolute ban. Title insurance is not uniformly available throughout some states. In Pennsylvania, for example, it is commonly used in urban areas such as Philadelphia and Pittsburgh and their suburban counties.<sup>98</sup> In the remaining fifty counties, however, title insurance is much less common.<sup>99</sup> There was testimony before the Pennsylvania Insurance Commission that an absolute ban on such companies would effectively prevent the development of title insurance agencies. The argument was that prohibiting investment in these

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96. Hofflander & Shulman, *supra* note 1, at 437-38; *Hearings, supra* note 2, at 50 (statement of J. William Cotter, Jr.).

97. See *Hearings, supra* note 2, at 36-41 (statement of Fred B. Fromhold).

98. See *id.* at 38-39, 42-43 (statement of Fred B. Fromhold); *id.* at 60 (statement of Robert C. Dean).

99. While twenty-five companies may be authorized to do title insurance business in the state, in many counties only a few, if any, companies have arrangements to write policies. See *Hearings, supra* note 2, at 39, 43-44 (statement of Fred B. Fromhold); Pennsylvania Title Insurance Rating Bureau, *Rates for Title Insurance in Pennsylvania Area One* (1977).

companies by those most likely to be knowledgeable and interested in real estate transactions, would restrict the availability of title insurance.<sup>100</sup> The percentage regulation approach also has the advantage of permitting sophisticated purchasers to choose to do business with a lawyer or realtor-controlled company in the instances when it offers lower cost, faster service or more comprehensive protection.

Some commercial title companies and bar-related title companies cooperate with controlled agencies by performing the search, document preparation, loss elimination and closing services that a full-service agency is normally paid to perform. Yet the controlled agency receives the same commission it would earn if it had performed these services itself.<sup>101</sup> One result of controlled business is higher title insurance rates, as the title companies increase their rates to cover the extra costs they incur in rendering these extra services to the controlled agency.<sup>102</sup> Such extra costs are contrary to the public interest and provide another compelling reason for the regulation of controlled business by either a blanket ban or a percentage limitation.

The pervasive nature of reverse competition and the failure of most states to provide ethical restraints necessitates regulation of controlled title agencies and companies if free competition among title companies and agencies is to be preserved in the typical real estate transaction.<sup>103</sup> If left unchecked, real estate professionals—realtors and lawyers—will essentially be able to exclude from the residential title insurance market all agencies except their own, and all title companies except those which they own or which are willing to do business through their controlled agencies.<sup>104</sup> Of necessity, however, the differences from state to state in real estate settlement practices and the definition of unauthorized practice prevent any generalization as to which regulatory approach—a blanket ban or a percentage limitation—is prefer-

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100. To forbid persons who control placement of title insurance business to own or manage title insurance agencies "would cripple the title insurance agency system in Pennsylvania by preventing the only persons with an interest in the business, knowledge of it, and the available capital from forming title agencies. . . . Competition would be constrained. . . . Consumers would face even fewer alternatives . . ." *Hearings, supra* note 2, at 67 (statement of Robert C. Deann).

101. *Id.* at 31, 36; Michigan Bureau of Insurance, *In re Lawyers Title Ins. Corp., Lincoln Title Agency Co., Wayne-Oakland Title Agency, Inc., and Interstate Title, Inc., Notice of Opportunity to Show Compliance* 7-8 (Apr. 4, 1979).

102. *Hearings, supra* note 2, at 26, 35 (statement of Fred B. Fromhold); *id.* at 47-48 (statement of J. William Cotter, Jr.).

103. Stringent enforcement of ethical prohibitions against conflict of interests and dealing with a client to one's own benefit would reduce controlled business referrals from a lawyer to his controlled companies to an unusual rather than routine occurrence, and would eliminate the need for this state regulation of lawyer-controlled companies. Consequently, in those states where lawyers have put their own house in order, *see* note 69 *supra* and accompanying text, the state regulation of lawyer-controlled companies advocated herein should not be necessary.

104. *Hearings, supra* note 2, at 31-32 (statement of Fred B. Fromhold); *id.* at 46-49 (statement of J. William Cotter, Jr.).

able. Each state's regulation must be tailored to its local conditions, not the least of which is the local bar's tolerance of the conflicts inherent in controlled business.

One justification asserted for the establishment of bar-related or other lawyer-controlled title insurance companies or agencies is the unwillingness of commercial title companies to issue title insurance based on the lawyer's examination and certificate of title.<sup>105</sup> In those states where a title company or agency may legally conduct the entire real estate transaction without participation of counsel, such a practice could, as the proponents of lawyer-controlled companies contend, effectively price the lawyer out of the real estate market. Consequently, state action to restrict the growth of controlled title companies should always be accompanied by regulations requiring the commercial companies to adopt written specific standards for approved attorneys and to accept business from any attorney meeting those standards at the approved attorney rate.<sup>106</sup> Neither lawyers nor commercial title companies should be permitted to exclude the other from real estate transactions.

#### CONCLUSION

The reverse competition which characterizes the market for title insurance affords lawyers and other real estate professionals the power to control the placement of title insurance business. Increasingly, lawyers as well as realtors are capitalizing on reverse competition by establishing controlled title insurance companies or agencies. The lawyer who is both the principal in a title insurance company or agency and counsel for the purchaser in a real estate transaction, however, places himself in a situation where he: (1) conducts a lay business, the sale of title insurance, in addition to his legal practice and enters into business dealings with his legal clients for his own profit; and (2) represents parties with directly conflicting interests, the purchaser and seller of title insurance policies, in the same transaction.

Ethical self-regulation of lawyer-controlled title companies and the resulting conflict of interests has been unsatisfactory, both from the point of view of protection of the public and from the point of view of guidance to members of the bar. One result has been an apparent double standard, which largely prohibits lawyers from serving as realtors or life or property insurance agents in transactions in which they represent a client, while permitting lawyers who participate in controlled title companies to recommend and issue policies to their clients for profit. The ethics opinions permitting these practices also imply that routine disclosure and consent will obviate the inherent conflict,

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105. *Id.* at 60 (statement of Robert C. Dean).

106. *E.g.*, proposed regulation 23 Pa. Code § 125.6 (on file with the *Fordham Law Review*).

while judicial explications of the doctrine of informed consent imply that such consent may frequently not be obtainable. The ethics opinions also fail to consider the judicially-imposed requirement of fairness in business dealings, such as the sale of property or policies, by an attorney to his client.

Dissatisfaction with the insufficiency of ethical regulation has resulted in calls for regulatory action by the states and their insurance commissioners. State regulation is justified, not merely because of the insufficiency of existing ethical constraints but also because of the increase in cost to the public and the specter of monopolization which results from controlled title companies or agencies.