

MINUTES

COMMITTEE: Ethics Committee

DATE: October 4, 2001

2. CHAPTER 9, RULE 6 AND APPENDIX 3: WHETHER PROPER FOR LAWYER TO ACT FOR PURCHASER, MORTGAGEE AND TITLE INSURER

The Committee was asked whether it is proper for a lawyer to act on a simple conveyance for the purchaser of real estate, the mortgagee and a title insurer.

The insurer is now offering in British Columbia a program whereby both a purchaser of real property and the purchaser's lender can obtain the services of a lawyer for the purchase of the property. In addition, the insurer provides title insurance to both the purchaser and the lender. The fee for both the lawyer's services and title insurance is a fixed fee of \$619 plus taxes and disbursements that the purchaser pays to the lawyer.

The program works in this way: A mortgage customer who advises the lender that he or she wishes to purchase title insurance and receive legal services through a fixed fee contract can designate a particular lawyer to act. The insurer will then approach that lawyer and determine whether that lawyer is prepared to act for the purchaser, the lender and the insurer on terms acceptable to the insurer. If the purchaser does not know of a lawyer the insurer will suggest a lawyer who has agreed to act on these matters, generally.

Some of the obligations a lawyer acquires to the insurer by agreeing to act under the program are the following:

- The insurer sets the price the lawyer can charge.
- The insurer may require the lawyer to automate the lawyer's office in accordance with the insurer's requirements.
- The lawyer must collect program charges, including fees of the insurer for title insurance.
- The insurer is not responsible for any of the lawyer's fees.
- The lawyer must forward registration documents to the insurer within 2 days of registration.
- The lawyer must inform the insurer of any special risks.
- The lawyer must give advice to the clients concerning the title insurance policy.

The lawyer who has agreed to act represents the purchaser and the lender in the usual way, but represents the insurer's interests as well. At the conclusion of the representation the lawyer bills the client for \$619 plus taxes and disbursements. From that amount the lawyer pays disbursements and applicable taxes, and then forwards \$200 to the insurer. The insurer accepts

about \$104 to pay for title insurance for the purchaser and lender and remits the remaining approximately \$96 to the lawyer for the lawyer's services to the insurer.

It was the view of the Committee that Appendix 3 of the *Professional Conduct Handbook* does not permit a lawyer to act for a title insurer in addition to either or both of the purchaser and mortgagee. Appendix 3 is an exception to the rules set out in Chapter 6 of the *Professional Conduct Handbook* that prevent lawyers from acting for clients who are adverse in interest and which would ordinarily prevent lawyers from acting for multiple parties to a real estate transaction. The usual rule in Chapter 6 has been modified in the case of real estate matters to reduce the costs that separate representation of all parties would require, and because simple real estate transactions unfold in predictable ways that generally permit lawyers to avoid conflicts. In the Committee's view the sale, purchase and mortgage of real property is a "real property transaction" contemplated by Appendix 3. However, a contract to insure the title cannot be said to be part of the real property transaction. It was the Committee's opinion that such a contract is a contract of insurance that falls outside the real estate exception to the conflict rules permitted by Appendix 3.

In the Committee's opinion, lawyers must be free to give advice to purchasers and lenders concerning the appropriateness of title insurance for any individual real property transaction. While it may be a good idea for purchasers and lenders to insure the title to property in some circumstances, there will be other situations where the cost of title insurance may not be justified. If lawyers were to act for a title insurer along with a purchaser or lender they would not be positioned to give advice concerning that issue to the purchaser and lender because of a conflict between the interests of those clients and the interests of the title insurer.