Enduring Ethics Opinion #182
Real Estate Transactions Involving Title Insurance Companies Owned in Whole or Part by Attorneys
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In Advisory Opinion 182, the Professional Ethics Commission addressed the issue of whether or not an attorney providing legal services to a client may refer the client to a title insurance company in which the attorney has an ownership interest. In Advisory Opinion 179, the Commission previously determined that an attorney involved in structuring and closing a real estate transaction could receive escrowed funds in the name of a title company in which he or she held a proprietary interest, without violating the then-effective IOLTA provisions of the Code of Professional Responsibility, as long as the lawyer complied with Bar Rule 3.2(h) (Responsibilities Regarding Law-Related Services). Following issuance of that opinion, the Commission was asked to expand upon its analysis to address more broadly the Code’s application to transactions involving title insurance companies in which an attorney held an ownership interest.

As a result, in Advisory Opinion 182, the Commission concluded that Advisory Opinion 179 should not be construed to preclude an attorney from providing legal services in connection with a real estate transaction, while also referring the client to a title company owned by the lawyer or his or her law firm. It further concluded that the Code of Professional Responsibility, including IOLTA requirements, apply to law-related services provided by the lawyer-owned title insurance company. With full disclosure to the client, the Code was found to be inapplicable to law-related services of a lawyer-owned title company when the lawyer was not simultaneously providing legal representation to the client. In instances in which the Code applied, the Commission determined that Maine Bar Rule 3.12(d) could prohibit the corporate structure of
the title company, and that Rule 3.12(a) could prohibit the lawyers from sharing fees that derive from title work with any non-lawyer shareholders.

Finally, as an example, the Commission noted that a title insurance company simply selling a product like an insurance policy would be sufficiently distinct from the provision of legal representation in a real estate transaction to avoid application of the Code. It should be noted that Maine Rules of Professional Conduct, Rule 5.7 now contains both a definition of law related services, and direction regarding the notice required by an entity providing such services that are distinct from the provision of legal services.

The applicable terms of Maine Rule of Professional Conduct, Rule 5.4 are substantially identical to Maine Bar Rule 3.12 in the context of this question. The provisions of Rule 5.4 addressing fee sharing, and a lawyer’s business ownership in concert with non-lawyers appear verbatim in to former Maine Bar Rule 3.12. In accord with current Rule 5.4, the Commission concludes that Advisory Opinion 182 remains both relevant and applicable to real estate transactions involving title insurance companies owned in whole or in part by attorneys.