Enduring Ethics Opinions: Opinion #179 - Lawyer Providing Title Insurance Law-Related Services - By Anne Marie Storey, Esquire - Professional Ethics Commission

In Professional Ethics Opinion 179, issued July 18, 2002, we discussed whether an attorney would violate former Maine Bar Rule 3.2(h) by structuring and closing real estate transactions to receive escrowed funds in the name of a title company - in which the attorney had a proprietary or ownership interest - with the attorney retaining the net interest on the escrowed funds rather than following the IOLTA provisions.

We now update that opinion and find that the substantive conclusions in Opinion 179 remain intact. Under MPRC 5.7(a), a lawyer:

shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services... if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Rule 5.7 then defines "law-related services" in subsection (b) as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

The Rule seeks to address the concern that a person receiving law-related services from a lawyer or an entity controlled by a lawyer might not understand that no attorney-client relationship is established and the protections afforded by such a relationship do not exist. Accordingly, if the lawyer fails to take the necessary safeguards, the Maine Rules of Professional Conduct will apply.

Structuring and closing real estate transactions are services that might reasonably be performed in conjunction with the provision of legal services and are in substance related to the provision of legal services. However, such service would not be prohibited as unauthorized practice of law when provided by a nonlawyer. Consequently, structuring and closing real estate transactions are "law related services" and an attorney would be subject to the Maine Rules of Professional Conduct unless certain safeguards are followed: the services must either be provided in a setting that is distinct from the lawyer's provision of other legal services, or, where the services are provided by an entity controlled by the lawyer (individually or with others), reasonable measures must be taken to assure that the person receiving the services knows that the services are not legal services and that a client-lawyer relationship does not exist. For example, the lawyer should inform the person receiving services prior to entering into a service agreement and in language the person can understand that no attorney-client relationship is being established. The lawyer has the burden of proving that reasonable measures have been taken, so...
it is best to have the disclosure in writing and signed by the person.

There may be circumstances where there are no reasonable measures possible, in which case the Maine Rules of Professional Conduct will apply. Nevertheless, if proper safeguards are reasonably possible and adhered to, the Maine Rules of Professional Conduct will not apply to the lawyer with respect to that transaction and interest on escrowed funds need not be disposed of in accordance with the IOLTA provisions.