ETHICS ISSUES AND CONFLICTS OF INTERESTS IN THE REPRESENTATION OF TITLE INSURANCE COMPANIES AND THEIR INSURED

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I. Introduction.

Regardless of whether they represent or are buyers or sellers, lenders or borrowers, virtually all real estate attorneys and their clients routinely use the products and services provided by title insurance companies. Title insurance company products and services include (i) underwriting and issuing title insurance policies (which also may contain standard and/or specialized endorsements providing additional coverage to the insured party(ies)), (ii) providing construction and/or other escrow services in connections with construction, purchase or financing transactions, and (iii) defending itself and its insured against claims made by third parties relating to property insured by the title insurance company (to the extent that those claims are covered by the terms of the title insurance policy). In addition, title companies often must defend themselves against claims made by its insureds under the terms of title insurance policies issued by the title company in favor of the insured.

Although sometimes handled by in-house counsel, the claims litigation work and other legal work (e.g., space leases and general corporate work) generated by title insurance companies make the companies attractive clients for law firms. However, just as with any other potential client, the opportunities to represent title insurance companies also can create potential conflicts of interest issues. In addition to the usual conflict of interest issues (e.g., the need to obtain conflict waivers when counsel is representing one client directly adverse to another client in a given matter), representing title insurance

companies and their insured in an adversarial proceeding against a third party can create conflict of interest problems in the event the interests of the title insurance company and the insured diverge.

This article offers a brief examination of the following potential conflicts of interest situations faced by an attorney representing a title insurance company and its insured where:

1. a title insurance company and its insured are existing clients of outside counsel in unrelated matters and outside counsel is asked to represent one party in a matter that would create a positional conflict against the other party;

2. an attorney seeks to represent a title insurance company and its insured against a former client of the attorney;

3. outside counsel is representing both the title insurance company and its insured in a matter; and

4. an affiliate of a title insurance company and the title company's insured both are existing clients of counsel in unrelated matters, and counsel wants to represent the insured an adversarial proceeding against the affiliate of counsel's title company client.

II. Positional Conflicts Affecting Two Current Clients: Determining How to do the "Right Thing".

Sometimes clients retain outside counsel to represent them in a proceeding that, if determined in favor of the clients would create case law or a new legislation that is directly adverse to the position of another client. An example of such a positional conflict would occur if a firm that represents both title insurance companies and persons/entitles that purchase title insurance agreed to represent an insured under a title policy (where neither the title insurance company issuing the policy nor any affiliated title insurance company is a client of the law firm) in a coverage dispute challenging a longstanding interpretation of a ALTA form title insurance policy provision. If the result of that proceeding could be to establish new precedent against the interests of the title insurance industry, then is it ethical for counsel to take on the representation?

Rule 1.7 ("Conflicts of Interest: Current Clients") of the American Bar Association Model Rules of Professional Conduct (the "Model Rules") provides some, but not complete, guidance regarding how the law firm should evaluate whether to represent a client in a potential positional conflict situation. Rule 1.7 provides:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to

another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

Regarding the hypothetical set forth in the first paragraph of this Part II, Rules 1.7(a)(2) and 1.7(b)(1) of the Model Rules seem to indicate that the law firm could undertake the representation if the firm (i) thinks that obtaining a successful result in the case would not create a "significant risk" of "materially" limiting the law firm's ability to represent its title insurance company clients, and (ii) believes that its involvement in the proceeding would not prohibit it from representing its title company clients or its insured clients in future matters. The definitions of "significant" and "materially" often depend on the precise nature of the issues in dispute and are open to interpretation. A law firm

facing this decision may decide how to proceed based on some or all of the following criteria:

2. An evaluation of existing relevant ethics rulings in the jurisdiction in which the proceeding will take place.

3. Whether the firm has in place consistent policies that give clear guidance in the current situation.

4. Whether the firm willing to approach its title insurance company clients and its other client for conflict waivers, notwithstanding the lack of clarity regarding whether the firm is required to obtain waivers.

5. An evaluation of whether to take the representation based on what is in the firm's best short- and long-term economic interest.

6. Which client's billing attorney has the most influence over the firm's conflict resolution decision making process.

III. Representing Current Clients Against a Former Client: The Conflicts Line Gets Brighter.

Imagine a scenario where (i) counsel is asked to defend a title insurance company and its insured in an action brought by a former client of the firm and (ii) counsel previously represented the client in a similar matter against another party[2]. Upon initial impression, the firm should be celebrating the new business opportunity the case

[2] This scenario certainly is within the realm of possibility, given that law firms use matter expertise gained in prior representations as marketing tools.

represents; however, upon review of the Model Rules, counsel may be prohibited from undertaking the engagement.

Rule 1.9(a) of the Model Rules provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially similar matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." As with many conflicts issues, counsel's ability to represent both the title company and its insured (in the absence of informed consent by the former client) will depend on careful analyses of the terms "substantially similar" and "materially adverse" in comparing the prior representation to the proposed new matter.

IV. Representing Both the Title Company and their Insured: Determining Who is Your Client.

When the coverages afforded by the terms of its title insurance policy require a title insurance company to defend its insured against a title claim, the title company likely will retain counsel to represent both it and its insured. This can be a sound and cost-effective practice to the extent that the interests of the title insurer and its insured are aligned; however, conflicts of interests can arise should the respective interests of the two parties diverge.

When the title insurance company retains outside counsel to represent both itself and its insured in a matter, counsel's engagement letter for the matter should (i) be executed by both the title company and the insured, and (ii) clearly state what party (if any) counsel will continue to represent in the event that circumstances cause the title

company and the insured to retain separate during the course of the matter. Not only must counsel keep both the title insurance company and the insured informed on a regular basis as to developments in the matter, so that all parties can make informed decisions regarding potential conflicts, it is incumbent upon counsel to affirmatively identify potential conflicts of interests as the matter proceeds. In the event the title company and its insured become adversaries, unless otherwise specifically provided for in the engagement letter, under the provisions of Rule 1.7 of the Model Rules counsel will not be able to represent the title insurer against the insured (or vice versa) without the informed consent of the other party.[3]

V. Counsel Beware: The *Commonwealth* Case.

In Commonwealth Land Title Ins. Co. v. St. Johns Bank & Trust Co., No. 4:08-CV-1433 CAS (E.D. Mo. 2009), Commonwealth and St. Johns engaged in litigation regarding a claim made by St. Johns under a mortgagee title insurance policy issued by Commonwealth. Polsinelli Shugart PC represented St. Johns in the litigation. Commonwealth filed a motion to disqualify the Polsinelli firm from the case due to a conflict of interest under applicable Missouri law.

At the commencement of the litigation in 2008, the Polsinelli Shugart firm did not exist. In February 2009, Polsinelli Shalton Flanigan and Suelthaus PC merged with Shugart Thompson & Kilroy PC to become Polsinelli Shugart PC. At the time of the merger, Commonwealth and its related companies were clients of the Polsinelli Shalton

[3] As a practical matter, the provisions of Rule 1.6 (Confidentiality of Information) of the Model Rules may effectively prohibit counsel from representing one party against the other in a dispute arising between the title company and its insured over the handling or settlement of a title claim.

firm in matters unrelated to the St. Johns litigation (Commonwealth and its related companies became part of the Fidelity National Title Group in December 2008). At the time of the Polsinelli Shugart merger, the Shugart Thompson firm was representing St. Johns in the litigation against Commonwealth. Subsequent to the creation of the Polsinelli Shugart firm an at the time of Commonwealth's motion to disqualify the firm, that firm represented affiliates of Commonwealth in matters unrelated to the St. Johns litigation.

The Polsinelli Shugart firm argued that because it was representing Commonwealth's sister companies, but not Commonwealth, in matters unrelated to the St. Johns litigation the law firm should not have to withdrawn from its representation of St. Johns. Commonwealth's argument for withdrawal of Polsinelli Shugart from the St. Johns case centered on the law firm's knowledge of the common litigation procedures and practices implemented and utilized by all title insurance companies within the Fidelity National group of companies (including centralized oversight of litigation).

The court held that, under the applicable Missouri conflict of interest rules, for purposes of determining whether a conflict of interest exists, the Fidelity Title group of companies (including those title insurance companies then represented by Polsinelli Shugart) should be treated as a single client. Given that determination, the court found that a concurrent conflict of interest did exist and, as a result, disqualified Polsinelli Shugart from the St. Johns litigation. The lesson for counsel from this case is to be cognizant of the likelihood that a court will consider affiliates of a client part of the firm's "client group" for purposes of determining whether a conflict of interest exists, irrespective of whether the law firm has performed or is performing work for any of those

client title company affiliates. The court's decision would seem to suggest that law firms should adopt a conservative approach in determining the existence of conflicts of interest.

VI. Conclusion.

While the discussion above in this article focuses on title insurance companies and the relationship with their insureds, the conflict issues are matters of general applicability that relate to similar fact patterns faced by counsel on a daily basis. Excessive caution may be the best approach to determining whether to proceed with a client representation in the face of possible conflicts of interest. As both law firms and their client rosters continue to expand, managing conflicts becomes an even more time consuming and important task. Attorneys must use their best efforts to reach fair and defensible results in determining whether conflicts of interests exist and can waived; our colleagues and our clients deserve no less.