



ISBA Opinion 10-02 Reins in Real Estate Brokers

Under ISBA Ethics Opinion 10-02, a lawyer may not agree to use a realtor's captive title insurer to the exclusion of others "as a condition of receiving referrals from the real estate company." This is good for real estate lawyers' bottom line, the author contends.

I would like to think that I have genuine empathy for the practicing lawyer. While it is true that I have spent literally my entire career in the relatively secure environment of a successful corporation, I nevertheless recognize and appreciate that ATG members own the company and that I work for the members.

While the lawyers at ATG do not actively practice law, we are duty bound to understand your practices.

In my 29 years at ATG, I have learned that the average practicing lawyer is (1) bright, (2) hard-working, (3) devoted, (4) ethical, and (5) charitable. At the same time, I have also learned that lawyers are (1) underpaid, (2) overworked, (3) stressed out, and (4) not adept at the traditional business disciplines of marketing, accounting, and management.

It is in these latter that I have observed the lawyer to be at greatest risk. Here is an example:

Many real estate lawyers market their real estate practices almost exclusively to brokers. In turn, the law firm is economically dependent on brokers for referrals.

That dependence, in my estimation, has resulted in brokers assuming a position of control in the relationship with the lawyer. The broker feels free

to dictate the fee that the lawyer may charge. In some circumstances, the broker is emboldened even to dictate the lawyer's conduct.

It is fair to say that the average fee for a "simple" residential real estate closing in the Chicago Metropolitan area is under \$500. It is evident that without the fees that may be garnered by providing title and other services, the legal fee that lawyers charge in this essential area of their practice

is not adequate to sustain their business. It is this "loss leader" business model that puts the lawyer at risk.

For many years, ATG owned an interest in the Minnesota Fund. At that time, the rural Minnesota lawyers still enjoyed a significant role in the real estate transaction. In Minneapolis, lawyers were sometimes in the deal, sometimes not.

In Minnesota, brokers began setting up captive title companies in the early 1980s. By the end of the decade, broker-owned and -controlled title companies were the primary delivery system of title services in the Minneapolis market and the lawyers were gone.

Several ATG directors and I sat on the board of the Minnesota Fund. We were very concerned about a similar proliferation of broker-controlled business in the Chicago area. We found comfort, however, in the fact that in Chicago, unlike in Minneapolis, our culture was such that buyers and sellers routinely used lawyers to represent their interests at closing. We surmised that this fact would likely discourage brokers from drawing a line in the sand with the lawyers who were so firmly entrenched.

But we were wrong.

Shots across the bow

The first shot across the bow came in February 2000 when Koenig & Strey dispatched its infamous memo, "Closing Myth #1." That memo asserted the proposition that you did not need a lawyer to conduct a real estate closing. The motive behind the memo was thought to be a desire to get the lawyer out of the way to assure Koenig could capture the title work.

That memo resulted in a lawsuit by the Illinois Real Estate Lawyers Association that was quickly and decisively settled in favor of IRELA. Thus began John O'Brien's path to the ISBA presidency.

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What a horrible irony that the brokers who dictated an irrationally low legal fee were now taking away the only source of business that made real estate practice profitable.

But the stakes changed beginning in 2002 when some brokers who coveted the idea of forming a captive title company concluded that to succeed in capturing that business, they would have to convince the lawyer to get out of the way using more subtle tactics. Two business models evolved. Both operated under the proposition that the broker controlled the referral of legal business and that legal business would only be referred to lawyers who were willing to allow the broker to control the title insurance.

In one business model, lawyers were not allowed to participate as a title agent. In those cases, the lawyer simply deferred to the broker's captive title company (in exchange for the referral of the client). In the other, brokers set up title ventures wherein the lawyer would act as an agent (again for the deals referred by the broker) for the title entity owned by the broker.

Over the past five years, we have received dozens of complaints from lawyers, as have IRELA and ISBA. The typical phone call goes, "I used to receive 25 referrals a year from Blackacre Real Estate Company. They recently came to me and demanded that I use their captive title company. When I refused, I was blacklisted."

Or, "I was recently approached by Greenacre Real Estate Company to become their agent. I was told that in order to continue to receive referrals from Greenacre, I would need to become a title agent for their captive company. When I refused, I was blacklisted."

Or, sadly, "Sorry. I caved. My eldest is starting college and our baby needs braces. What can I do?"

The Faustian bargain represented by

these business models was a real shock to the system. Lawyers found themselves in a position where the brokers were dictating the conduct of the lawyer to the point where they were completely abrogating not only their ability to practice law, but to survive in their practices. What a horrible irony it had become that these brokers who dictated an irrationally low legal fee were now taking away the only source of business that made it profitable.

"A broker cannot dictate your conduct"

In October 2009, the Illinois State Bar Association (ISBA) issued an ethics opinion that represents a major step in the right direction.

ISBA Opinion 10-02 provides that a lawyer may not enter into a reciprocal referral arrangement with a real estate company that would require the lawyer to use exclusively the real estate company's affiliated title insurer for the lawyer's clients as a condition of receiving referrals from the real estate company. In other words, a broker cannot dictate your conduct. According to the opinion, a lawyer may not agree to a broker requirement that the lawyer exclusively use the broker's captive company. The opinion interprets new Illinois Rule of Professional Conduct 7.2(b)(4), which is identical to an ABA Model Rule.

We hope that this will clear the path toward eradicating these terrible practices.

Get better at the business of practicing law

The opinion, while helpful, is only

the beginning. It is a wake-up call to the profession that the practice of law should not be strictly dependent on those we perceive to be potential sources of business. To achieve that, lawyers must implement the following changes.

1. *Develop better business skills*, including the essentials of marketing, accounting, and management practices. Some years ago, we conducted CLE programs, low-cost and free CLE programs, on how to market your law practice. We were stunned at the lack of interest on this topic. I submit that it should be of vital interest.

2. *Charge reasonable fees* for the services you provide.

3. *Raise your public profile* so consumers go directly to lawyers and we are not dependent on others for referrals.

Let's work together

These are daunting times for the real estate lawyer. A depressed housing market has resulted in unprecedented government regulation, which makes the practice more complex and difficult.

All the more reason to take a step back and re-examine our practices. The lawyer service organizations you support are ready to help you achieve your goal of maintaining a rewarding and profitable practice.

We are blessed to have John O'Brien leading the ISBA as we face these challenges. You will be asked in the coming months to join us to declare an end to the days of marginalization. It will be the first step of many on the pathway to a more rewarding practice. ■

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