ETHICS ADVISORY OPINION

13-03

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Law Firm has been approached by a local real estate brokerage company ("Real Estate Agency") to form a partnership to serve as a title insurance agency ("TIA") under the following scenario:

A. Law Firm rents space next to Real Estate Agency.

B. Law Firm and Real Estate Agency create a separate limited liability company (the "LLC") to act as the TIA.

C. The TIA writes the title insurance on each real estate closing transaction in which Law Firm is chosen for the closing by Real Estate Agency's customers.

D. The TIA then splits the agency's portion of title insurance premiums between Law Firm and Real Estate Agency in accordance with their respective ownership interests in the LLC.

Questions Presented:

1. Can Law Firm rent office space from Real Estate Agency in order to be considered one of Real Estate Agency's "preferred attorneys"?

2. Can Law Firm and Real Estate Agency form a partnership to act as the TIA in order to split the agency's portion of the title insurance premiums generated by real estate closings involving Law Firm and Real Estate Agency's customers?

Summary:

As to Question 1: There is no ethical prohibition on the Law Firm renting office space from the Real Estate Agency in order to be considered one of the Real Estate Agency's "preferred attorneys"; provided the rental agreement calls for commercially reasonable terms including a fair market rental amount.

As to Question 2: Yes, Law Firm and Real Estate Agency may form a partnership to act as the TIA and to split the agency's portion of the title insurance premiums generated by real estate closings involving Law Firm and Real Estate Agency's customers.

Opinion:

I. As to Question 1: Rule 7.2(c) of the SCRPC reads in relevant part as follows: "A lawyer shall not give anything of value to a person for recommending the lawyer's services…." There are three exceptions to the general rule of 7.2(c); however, those exceptions are not relevant to the facts presented. Comment 6 to Rule 7.2 provides a useful explanation of the general prohibition created by Rule 7.2(c), "Lawyers are not permitted to pay others for channeling professional work."

In the instant case, if the rental agreement between Law Firm and Real Estate Agency calls for commercially reasonable terms including a fair market rental amount to be paid by Law Firm, then Rule 7.2(c) would not apply since Law Firm would not be "giving anything of value" to Real Estate Agency. (see, e.g. Connecticut Informal Ethics Opinion No. 01-12 which reads, in relevant part, "the rent to be paid to your firm from Company A is fair market value rent so you are not providing Company A any special benefit or payment for recommending your firm…. Under these facts, we see no violation of Rule 7.2.(c)."") Furthermore, it is questionable as to whether the proposed renting of office space constitutes "giving" at all on the part of Law Firm "for recommending [Law Firm's] services" in the sense that Rule 7.2(c) seeks to prohibit. It should also be noted that Real Estate Agency likely has its own independent business reasons for the proposed leasing arrangement. In summary, the Committee believes that these facts suggest an appropriate mutually beneficial arrangement between Law Firm and Real Estate Agency rather than a lawyer's payment to others "for channeling professional work" which Rule 7.2(c) prohibits. The Committee does, however, caution Law Firm that its opinion is based on the requirement of commercially reasonable terms, including fair market rent. The absence of such commercially reasonable terms, if such absence benefits Real Estate Agency, would likely dictate a different result under Rule 7.2(c).

II. As to Question 2: Nothing in the SCRPC prohibits Law Firm from entering into a partnership or other business arrangement with non-lawyers for the purpose of operating a title insurance agency and sharing in the economic benefits of the same. There is, of course, a prohibition on Law Firm's formation of a partnership with a non-lawyer if any of the activities of the partnership consists of the practice of law (Rule 5.4(b)). Additionally, there is a prohibition on Law Firm sharing legal fees with non-lawyers (Rule 5.4(a)), subject to certain exceptions not applicable to this situation.

The Committee believes that the issuance of title insurance commitments and title insurance policies, while primarily done by lawyers in South Carolina as a matter of custom and practice, does not constitute the practice of law. Title insurance is regulated by the South Carolina Department of Insurance, and the requirements to become a licensed title insurance agent in

South Carolina do not include a license to practice law. The prohibition of Rule 5.4(b) simply does not apply to the TIA since none of the TIA's activities constitute the practice of law. The Committee also notes that SCRPC Rule 5.7 specifically anticipates that lawyers will provide "law related services" and will do so through entities "distinct from that through which the lawyer provides legal services." See Comment 4 to Rule 5.7. Comment 9 to Rule 5.7 is particularly instructive in the instant case – it reads, in relevant part, "A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law related services include providing title insurance…." The Committee brings to Law Firm's attention the applicability of Rule 5.7 to the services provided through the TIA and the requirements Rule 5.7 imposes on Law Firm.

As to the issue of fee-splitting prohibited by Rule 5.4(a), title insurance premiums and title insurance related charges such as commitment fees, proforma policy fees, and endorsement charges are not legal fees, and hence, not subject to Rule 5.4(a).

The Committee also notes, by way of information, that the TIA will most likely constitute a "controlled business arrangement" subject to Section 8 of the federal Real Estate Settlement Procedures Act ("RESPA") and encourages Law Firm to consult HUD's Statement of Policy – 1996 - 2 and any other relevant guidance as to RESPA issues.

To summarize as to Question 2, the Committee believes that, (i) the TIA constitutes an appropriate arrangement through which Law Firm may provide law related services as anticipated and endorsed by Rule 5.7 and its comments, subject to the requirements of Rule 5.7; (ii) the prohibition of Rule 5.4(b) is not applicable to the TIA, subject, however to the admonition that Law Firm should be careful to insure that the activities of the TIA do not include the practice of law; and (iii) the prohibition of Rule 5.4(a) does not apply to title insurance premiums and title insurance related charges.