

SOUTHERN TITLE INSURANCE CORP.

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To: Southern Title Agents and Approved Attorneys
and recent attendees to our seminars where this issue was discussed

RE: New Tennessee Rules of Professional Conduct effective March 1, 2003

HOW WILL THE NEW RULES AFFECT REAL ESTATE SETTLEMENTS IN TENNESSEE?

As with any NEW set of rules, regulations or laws, guidance on proper application only comes with use over time. Nevertheless, as of March 1, 2003, lawyers in Tennessee are operating under new Rules of Professional Conduct (“RPC”). With the full disclaimer that we don’t profess to be experts on the new ethics rules, we offer the following discussion in an ongoing effort to assist our agents and approved attorneys in conducting their real estate closings while attempting to stay in compliance with the new RPCs. Although the ethics rules changes would initially appear to only affect lawyer agents, it is submitted that these changes could also impact the operation of non-lawyer agencies.

Transactional attorneys have long been faced with issues such as “How do I maintain a level playing field in a business where I am competing with non-attorneys who are performing the same closing activities that I perform?” and “Who is/are my client/clients?”. The new rules may provide some real assistance to transactional attorneys as well as guidance for non-lawyer agencies. Applying the new rules to lay corporations may help them comply with the law that applies to them and avoid the potential allegations that they are engaging in the unauthorized practice of law. The first portion of these materials will describe the effect of the rules on lawyers, and the latter section will comment on how the rules affect lay operations whether owned by attorneys, non-attorneys, or both. However, it is suggested that both lawyers and non-lawyers read the entire article since the issues may affect both.

There are at least two common organizational approaches lawyers have traditionally employed to handle a real estate closing practice. The attorneys who handle their closings through a lawyer owned, but separate closing entity, should focus on RPC 5.7. The attorneys who handle their closings as a major or minor part of their law practice will be particularly interested in RPC 2.2. Both RPCs require a certain level of client disclosure, which in some cases is required to be in writing and probably should be in all cases. At the end of the article, general drafts of selected

required disclosures are provided as examples as a starting point for drafting forms that meet your particular circumstances.

**RPC considerations for those lawyers who
operate a lawyer owned/co-owned, separate entity, Title Company**
RPC 5.7

Under the ethics rules and opinions that were in effect prior to March 1, if you were a lawyer and operated a title company, a flower shop or even an automobile repair shop, you were still required to adhere to all the same ethical rules and standards that lawyers operated under in general law practice. Many felt that restrictions and prohibitions, (such as those involving solicitation of business, necessity to only disburse funds after receipt of ‘good funds’, complying with interest on trust accounts and advertising limitations), placed them at a severe disadvantage when competing with their non-lawyer owned/controlled competitors. While this may be true to some extent, UT Professor Carl Pierce, one of the authors of the new rules, suggests that, while non-attorneys are not bound by the Tennessee Rules of Professional Conduct, they are bound by the laws of agency which may place a “comparable burden” on all non-attorneys handling transactions with multiple agency/principal relationships such as occurs in a real estate closing transaction. So, even though the playing field may not be as uneven as originally perceived, the new rules map out a scenario that allows the lawyer who wants to operate a “law related service” and better compete with the non-attorney operations . You would still be constrained by the fiduciary obligations imposed under the laws of agency, just not limited or controlled by the RPCs that apply to lawyers. The RPC that addresses this issue is as follows:

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), 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) By a separate 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 of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes 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 non-lawyer.

It appears that DISCLOSURE and DISTINCT or SEPARATE operations may be the keys for the transactional attorney who wishes to conduct a law practice and own, or own in conjunction with others, a real estate settlement company. Care must be taken to fully and effectively disclose the relationship and to document to parties to the real estate transaction that those services that are being performed by the real estate settlement company are not “legal services” and do not enjoy

the attorney/client relationship and privilege. Any referral activity, either from the law practice to the real estate settlement company or from the real estate settlement company to the law firm, should be with full disclosure of the relationship of the law practice and the settlement company. In several recent seminars of this topic, Professor Carl Pierce also suggests that the disclosure note that comparable services are available from non-related firms or companies. While the RPC does not map out an easy route, it appears that 1) separation of office and operations, telephone system, staff, etc. and 2) adequate disclosure may enable the transactional attorney to operate a law related business, separate and distinct from the practice of law, and not be “shackled” by the limitations and restrictions imposed by the rules that apply to attorney conduct.

It appears that the emphasis on the issue of disclosure is designed to avoid confusion on the part of the attorney’s client and the company’s customer. Since some title or settlement companies in Tennessee are operated by non-lawyers, it seems plausible that a customer of a non-lawyer operated title company might be similarly confused and assume that he/she is receiving traditional legal services and could expect his/her dealings to be held in confidence and entitled to those protections expected in an attorney/client relationship. As such, it appears that non-lawyer owned real estate settlement agencies may have an equal duty to inform (and document) its customers that, while settlement services may be law related, their services are being provided by non-lawyers which do not carry the protections afforded by the attorney/client relationship. An argument could be made that the failure to disclose this information may result in the non-lawyer engaging in the unauthorized practice of law by providing “law related services” under circumstances where the customer reasonably believes legal services are being provided.

An appropriate disclosure by a law firm referring a transaction to a related title agency under 5.7 should most probably be in writing to document specifically the services to be performed. It is difficult to draft a single document which would work equally well under all possible situations. Disclosure should be adequate to set forth the firm and company relationship. Some suggest that disclosure should include alternative firms/companies so that a client/customer could opt to not employ the related firm/company if they so chose. A disclosure first provided at the settlement table on the day the sales contract expires may not provide a reasonable alternative; rather it should be provided at the earliest stage reasonably possible in the settlement process. The form could be drafted based on the unique situation of your particular lawyer-owned or co-owned title agency, but any ‘fill-in the blank’ form must be completed with enough detail to be specific enough to satisfy the 5.7 disclosure requirements.

When the transaction is begun by initial contact with the law firm, the law firm should issue a 5.7 disclosure. When the RPC 5.7 disclosure by the law firm is delivered, understood, agreed to and executed by the customer, the title entity should then recognize that it is not free to operate without ‘ethical standards’. As a non-lawyer provider of ‘law related services’ the title agency is operating under the fiduciary responsibilities imposed under the laws of agency when dealing with multiple clients. A disclosure by the title agency (and consent by the parties) to the existence of multiple principals is necessary to appropriately handle the transaction between multiple parties.

When the transaction is begun by initial contact with the separate title agency, it appears that a

single disclosure could state that it is not providing ‘legal services’ and that, with consent, it will represent multiple principals (i.e. buyer, seller, lender, title underwriter, etc.).

To restate, a lawyer’s 5.7 disclosure should not ‘double’ as a disclosure suggested for the separate lay title agency; however, the separate title agency’s disclosure might incorporate the language necessary for both disclosures when the transaction is initiated at the title agency rather than the law firm. A discussion of the RPC 2.2 disclosure requirement follows.

**RPC considerations for a lawyer who
handles real estate closings as a part of a traditional law practice**
RPC 2.2

This is an equally common scenario for lawyers and the new RPC 2.2 provides the ‘at the table’ lawyer some real guidance to help keep the lawyer from squirming when someone asks the hard questions “Who are your clients?” or more importantly “Does everyone at the closing reasonably think that you are their lawyer?”. There is a real concern that many buyers, sellers and perhaps others at the table believe that the closing lawyer is their lawyer and they are entitled to all the protections accompanying a traditional attorney-client relationship. For the first time we have a rule that provides a roadmap to allow the real estate closing attorney to provide his/her services and eliminate the risk of multiple parties at the closing table each feeling that they have exclusive professional representation.

RPC 2.2 recognizes that some lawyers aren’t always in traditional adversarial situations. This rule addresses the scenario of a lawyer as he or she acts as an ‘intermediary’, helping multiple parties accomplish a common goal. The RPC 2.2 states:

Rule 2.2 Lawyers Serving as an Intermediary between Clients

- (a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.***
- (b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:***
 - (1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;***
 - (2) the lawyer’s representation of each of the clients, or the lawyer’s relationship with each, will not be adversely affected by the lawyer’s responsibilities to other clients or third persons, or by the lawyer’s own interests;***
 - (3) the lawyer consults with each client about:***
 - (i) the lawyer’s responsibilities as an intermediary;***

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and

(3) shall consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

Again, DISCLOSURE may be the key! The rule indicates the disclosure must be in writing. For the lawyer who desires to proceed as an intermediary, representing multiple clients, in the closing of a real estate transaction, a full written disclosure is required. Rule 2.2 does not place the lawyer in the position of a 'neutral' as in an alternate dispute resolution. The Rule establishes him or her as an 'intermediary'. In order to act as an intermediary the lawyer must:

1. Reasonably believe that the lawyer can handle the matter on terms compatible with the

best interests of each client with little risk of material prejudice if the multiple impartial representation is unsuccessful, and

2. Reasonably believe that the representation of each client will not be adversely affected by responsibilities to any other client or the lawyer's own interest, and
3. Consult with each client about the lawyer's role as intermediary, and
4. Obtain each client's consent in writing to the lawyer's role as intermediary, and
5. If in the course of the transaction, a client requests that the lawyer withdraw, or revokes the lawyer's authority to disclose to other clients in the transaction information necessary to keep each client fully informed or if any of items 1-4 above are no longer satisfied, then the lawyer must withdraw from all capacities involving the transaction.

Attached to these materials are sample disclosure forms authored by Southern Title personnel, (not reviewed or sanctioned by the authors of the new rules nor by the Tennessee Supreme Court), which may serve as a starting point in the thought process for those lawyers who wish to handle real estate closings in a 2.2 intermediary role. To the extent that any agent or approved attorney wishes to use all or to adapt any part of these draft forms, you are permitted by Southern Title to do so. For our existing agents and approved attorneys, these forms, in both Word and WordPerfect format for easy editing and modification, may be found on our "Agent Support Center" website at www.stichome.com. Once you have logged into the site, go to the "Insurance Forms" button, then go to your desired word processor subdirectory and look for "TN New RPCs" for a full copy of the new rules and the forms attached to this article.

Laws of Agency considerations for:
(a) non-lawyers providing 'law related services' or
(b) non-lawyer owned entity providing 'law related services' or
(c) lawyer owned, but RPC 5.7 compliant, separate entity that provides real estate closing
service

Before focusing on real estate title closers, I want you to look at how the Realtor profession handles the issue of someone attempting to work in transactions where they may end up "representing" both the seller and the buyer. Most of us are familiar with the requirements imposed on Realtors to both disclose a 'dual agency' and obtain written consent of the parties. The Board of Realtors require Realtors who are in the position to be providing services to multiple parties to have the parties sign a written disclosure, printed in a certain sized font, executed within a set number of hours of the first contact and have that form retained in the file to insure that everyone understands that the obligations of the Realtor do not run solely to either party. These concepts, and the established set of disclosure forms and procedures, arise because Realtors are subject to the laws of Agency.

The laws of Agency place similar burdens on non-lawyers who close real estate transactions. While this article is not intended to cover the laws of Agency, that body of law generally leads

one to an obvious conclusion. Any non-lawyer who conducts real estate closings and acts at the direction of multiple parties involved in the closing is an agent. General agency law holds that agents are fiduciaries and owe their principals a duty of loyalty and obedience. As a result, any closing agent must face the difficult questions of “Who is/are my principal(s) to whom I owe duties?” and “Does everyone assume that I am their agent?” Restatement of Agency, Section 392 specifically addresses this issue:

An agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.

Although the laws of Agency do not prohibit an agent having multiple principals, it does clearly impose a duty “... to disclose to each, all facts which he knows or should know which would reasonably affect the judgment of each in permitting such dual agency,....”. This duty gives rise to requirements similar to the 2.2 disclosure and consent that is now required of lawyers representing multiple parties.

Furthermore, in light of the Supreme Court’s adoption of RPC 5.7, the Court apparently feels that there is a substantial risk of a consumer of ‘law related services’ (i.e. closing and document preparation services) being confused and assuming that they are receiving ‘legal’ services with the full protections of duties imposed on lawyers under the RPCs. It therefore seems that the (a) non-lawyer closer, (b) non-lawyer owned entity or (c) the lawyer owned, but RPC 5.7 compliant, title entity needs to make a disclosure that clarifies that the parties are not dealing with a law firm and no legal services are being generated. It is suggested that this disclosure may be part of the disclosure discussed above seeking to secure consent to represent multiple parties.

Sample forms

Attached to these materials are sample disclosure forms authored by Southern Title personnel, (not reviewed or sanctioned by the authors of the new rules nor by the Tennessee Supreme Court), which may serve as a starting point in the thought process for those non-lawyers, or lawyer owned, but RPC 5.7 compliant separate title entities, who wish to handle real estate and represent multiple parties. To the extent that any agent or approved attorney wishes to use all or to adapt any part of these draft forms, you are permitted by Southern Title to do so. For our existing agents and approved attorneys, these forms, in both Word and WordPerfect format for easy editing and modification, may be found on our “Agent Support Center” website at www.stichome.com. Once you have logged into the site, go to the “Insurance Forms” button, then go to your desired word processor subdirectory and look for “TN New RPCs” for a full copy of the new rules and any forms attached to this article.

Conclusion

Lawyers should become familiar with all of the Tennessee Rules of Professional Conduct. There are many new changes and this article only focuses on the two discussed above. Similarly, non-lawyer agents should become familiar with the Laws of Agency beyond the limited discussion

contained herein. It is our goal to keep you apprised of issues that affect your day to day operations. This article is not offered as an underwriting guideline or requirement of our company. It is provided to help you formulate your own procedures and decide on how to best operate your business.

(LAWYER) SELLER/BUYER DISCLOSURE AND CONSENT TO INTERMEDIARY REPRESENTATION AND INCLUDING THE STAFF OF THE _____ LAW FIRM

Rule 2.2 of the Tennessee Rules of Professional Conduct requires certain disclosures and written consent from clients when a lawyer is asked to, and reasonably believes that the lawyer can, provide impartial legal advice and assistance to two or more clients in the same transaction. Please consider the following:

1. A primary obligation of a lawyer representing a single client is to keep in confidence matters that occur between the lawyer and client. If you choose for me to represent you in the same transaction, I must disclose to each of you any information that I believe to be necessary for me to act fairly and impartially to assist you in accomplishing the common objective of closing your real estate transaction. In order for me to act as counsel for each of you, we must be open, candid and non-adversarial as we work together to accomplish a common objective. As to any third party, anything you tell me in confidence will be kept confidential but as between clients in this transaction, I have a duty to be open and candid with each client.
2. A lawyer's role is to be an advocate for the client advancing the interest of the client wherever possible even to the detriment of any other party. As an intermediary, my role will be to close this transaction in accordance with the sale contract and with local custom and practice to the extent that any matter should arise that is not specifically covered by the contract. Of course, as buyer and seller you can agree to anything that is lawful regardless of custom and practice. My role will be to help facilitate the transaction as much as I can relying on my experience and knowledge of real estate closings.
3. I know of no reason at this point that I cannot act fairly and impartially in this matter. If either of you want an advocate to represent you, you should decline to consent to this representation and seek separate counsel. If you consent, in the unlikely event that a matter does arise which cannot be resolved by open and candid discussion, each of you may then need to employ counsel to represent you and I could not act as counsel for either of you. Further, anything you tell me in confidence that may affect any other client that I represent in this matter, I may be required to disclose during the course of this transaction or in the event a dispute arises.

4. You should be aware that I have other client obligations in this matter with clients with whom I may also have a working relationship for transactions other than this transaction as follows:

A. The lender for the buyer will make a loan only under specific written instructions by which I must agree to abide in order for the lender to fund this transaction. The lender is my client to the extent that I must comply with those instructions even though you are paying the fee for those services.

B. I am an agent or approved attorney for the title insurance underwriter which will insure title in this transaction where title insurance is required or requested. A commission from that title insurer is paid to me, my firm, or a company with which I am affiliated and I have a duty to advise that insurer if a title risk becomes known to me for which that insurer has a right to determine whether or not or under what conditions the insurer will insure the title.

An advantage to you in my acting as an intermediary can be a saving in money, time and controversy.

If you wish for me to do so, by signing this form, you consent to my acting as an intermediary in closing this _____ day of _____, 20__.

_____, Seller _____, Buyer
_____, Seller _____, Buyer

(LAWYER)

**BORROWER DISCLOSURE AND CONSENT TO
INTERMEDIARY REPRESENTATION, INCLUDING THE STAFF, OF
THE _____ LAW FIRM**

Rule 2.2 of the Tennessee Rules of Professional Conduct requires certain disclosures and written consent from clients when a lawyer is asked to, and reasonably believes that the lawyer can, provide impartial legal advice and assistance to two or more clients in the same transaction. Please consider the following:

1. If you choose for me to represent you in this transaction, I must disclose to you that I have other client obligations in this matter with clients with whom I may also have a working relationship for transactions other than this transaction as follows:

A. The lender for the buyer will make a loan only under specific written instructions by which I must agree to abide in order for the lender to fund this transaction. The lender is my client to the extent that I must comply with those instructions even though you are paying the fee for those services.

B. I am an agent or approved attorney for the title insurance underwriter which will insure title in this transaction where title insurance is required or requested. A commission from that title insurer is paid to me, my firm, or a company with which I am affiliated and I have a duty to advise that insurer if a title risk becomes known to me for which that insurer has a right to determine whether or not or under what conditions the insurer will insure the title.

2. A primary obligation of a lawyer representing a single client is to keep in confidence matters that occur between the lawyer and client. I have a duty to each client in this transaction to disclose any information that I believe to be necessary for me to act fairly and impartially to assist you in accomplishing the common objective of closing your real estate loan transaction. In order for me to act as counsel for each of you, we must be open, candid and non-adversarial as we work together to accomplish a common objective. As to any third party, anything you tell me in confidence will be kept confidential but as between clients in this transaction, I have a duty to be open and candid with each client.

3. A lawyer's role is to be an advocate for the client advancing the interest of the client wherever possible even to the detriment of any other party. As an intermediary, my role will be to close this transaction in accordance with the loan application, loan commitment and loan closing instructions furnished by the lender. Of course, as borrower and lender you can agree to anything that is lawful. My role will be to help facilitate the transaction as much as I can relying on my experience and knowledge of real estate loan closings.

4. I know of no reason at this point that I cannot act fairly and impartially in this matter. If you want an advocate to represent you, you should decline to consent to this representation and seek separate counsel. If you consent, in the unlikely event that a matter does arise which cannot be resolved by open and candid discussion, you may then need to employ counsel to represent you and I could not act as counsel for you. Further, anything you tell me in confidence that may affect any other client that I represent in this matter, I may be required to disclose during the course of this representation or in the event a dispute arises.

An advantage to you in my acting as an intermediary can be a saving in money, time and controversy.

If you wish for me to do so, by signing this form, you consent to my acting as an intermediary in closing this loan transaction on this ____ day of _____, 20__.

_____, Borrower

_____, Borrower

**(NON-LAWYER) BORROWER DISCLOSURE AND CONSENT TO
AGENCY REPRESENTATION AND REAL ESTATE LOAN CLOSING BY THE STAFF OF
_____, CLOSING AGENCY**

This Closing Agency is not a law firm and does not provide legal advice. However, under the laws of agency there are certain facts that you should know and consent to in order for this closing agency to act as agent for more than one party in the same transaction. Please consider the following:

1. This closing agency will be representing other agency obligations in this matter with principals with whom this agency may also have a working relationship for transactions other than this transaction as follows:

A. The lender for the buyer will make a loan only under specific written instructions by which this closing agency must agree to abide in order for the lender to fund this transaction. The lender is a principal of this agency to the extent that I must comply with those instructions even though you are paying the fee for those services.

B. I am an agent for the title insurance underwriter which will insure title in this transaction where title insurance is required or requested. A commission from that title insurer is paid to me, my firm, or a company with which I am affiliated and I have a contractual duty to advise that insurer if a title risk becomes known to me for which that insurer has a right to determine whether or not or under what conditions the insurer will insure the title.

2. A primary obligation of an agent representing a single principal is to keep in confidence matters that occur between the agent and principal. As an agent representing multiple parties in the same transaction, this agency has a duty to deal openly and candidly with each principal in this transaction.

3. My role will be to help facilitate the transaction as much as I can relying on my experience and knowledge of real estate loan closings. I know of no reason at this point that I cannot act fairly and impartially in this matter. If you want an advocate to represent you, you should decline to consent to this representation and seek legal counsel of your choice to represent you as your advocate. If you consent, in the unlikely event that a matter does arise which cannot be resolved by open and candid discussion among the principals, you may then need to employ legal counsel to represent you and I could not then act as your agent. If an issue arises during the course of closing this transaction for which you determine that you need legal advice, you will need to secure the services of a lawyer. In no event should you consider any statement or action of this closing agency to be providing legal counsel since only a lawyer is permitted in this state to provide legal counsel to a client.

An advantage to my acting as a multiple closing agent can be a saving in money, time and controversy.

If you wish for me to do so, by signing this form, you consent to my acting as agent for you, the lender and the title insurer this ___ day of _____, 20__.

_____, Borrower

_____, Borrower