

Is the red tape worth it?



By **Ralph J. Schumann**
Law Offices of Ralph J. Schumann

Widespread unemployment. Devastating economic crises at all levels. A tanking housing market, with no quick-fix solution in sight.

In the midst of all this, with solo practitioners such as myself questioning whether real estate remains a viable practice area, enter proposed Rule 5.7 of the Proposed Rules of Professional Conduct, creating a category of “law-related services” and a proposed Comment to Rule 1.8 dictating that the “sale” of title insurance to a client falls into the same category as the sale of “investment services.”

Part of an ABA Model Rule proposal that has been kicking around for several years, the proposed Rule and Comment would require a real estate practitioner to treat the provision of title insurance for a client as a “business transaction,” triggering extraordinary additional steps.

The proposed Rule would include the provision of title insurance within its new category of “law-related services” (which, by definition, do not constitute the practice of law), yet would incongruously define the work of an attorney completing blanks on a standard form real estate contract as “not the practice of law.”

No longer would it suffice to provide the already required standard disclosure form — the DS-1 form (“Disclosure Statement: Controlled Business Arrangement”) required by the Illinois Department of Financial and Professional Regulation (IDFPR).

Practitioners would be required to have the client get an independent opinion regarding the wisdom of having the real estate practitioner provide title insurance, and then document in writing that the independent opinion was, in fact, obtained, before proceeding with the transaction.

Never mind that IDFPR long has been satisfied that the proper use of the DS-1 form is sufficient. Never mind that the client is not contemplating a “discretionary” purchase here — the already signed contract *requires* the client to obtain title insurance.

Never mind that attorneys have been doing abstracts of title for generations with no problem.

Never mind that the small flat fee charged by most practitioners makes it unlikely that a client will spend money for an independent opinion on the wisdom of having the lawyer handle the title insurance and clear problems to close the deal smoothly. That’s why the client *hired* the real estate lawyer, after all. Apart from needing title insurance to satisfy standard contract requirements, purchasing it really does not cross the average consumer’s mind.

The imagined ills are adequately avoided by timely issuance of the DS-1 form (available at www.irela.org), which alerts a client that: an attorney arranging the issuance of title insurance has a financial interest in doing so; there are “frequently other settlement service providers available with similar services;” and he is “free to shop around to determine that [he is] receiving the best services and the best rate for these services.”

At the time I testified at the Illinois Supreme Court Rules Committee hearing on the proposed Rule, the majority of the members of the committee seemed unaware that the DS-1 form is already required to be given before issuance of any policy of title insurance.

With no demonstrated problem with the provision of title insurance in Illinois, what we have here is a failure to communicate that the system just “ain’t broke.” Due to competi-

tion, rates for title insurance are fairly standardized. A practitioner might try to take advantage of a client, but the Rules of Professional Conduct that we lawyers live by more than adequately deal with such overreaching.

Is providing title insurance like encouraging a client to invest in an attorney’s car wash or horse farm business?

These and similar examples were trotted out (*sorry*) by proponents of the new rule. They miss what is going on in the trenches, where practitioners are trying to serve clients in difficult circumstances. The non-discretionary nature of the title insurance purchase makes it unlike the car wash or horse farm. Moreover, at least 20 other states agree, and have declined to adopt the proposed model rule.

Real estate practitioners keep closing costs down by acting as watchdogs in transactions. In other states where attorneys are not involved, closing costs are much higher.

Bankrate.com says Illinois consumers benefit from one of the lowest rates of settlement costs, including attorney fees, in the country. What happens with mortgage loan products and loan terms with no attorneys involved? Significantly, many former subprime loan “specialists” are currently reinventing themselves as FHA loan specialists, with consequences that HUD is just not equipped to deal.

Do we think the fine print suddenly will get bigger, or the “gotcha” clauses suddenly will get friendlier?

If the proposed Rule and Comment are adopted as proposed, real estate practitioners likely will ask whether all the extra red tape is worth it, and may well decide it’s just easier to drop real estate as a practice area. ■

rjs@SchumannLaw.com