

## A Lawyer's Unwavering Duty: Ensuring the Quality of Title Insurance Products and the Integrity of the Process, for the Client's Benefit



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### Lawyer Groups Urge Regulators to Take Action to Protect Consumers from Harm

The issues and challenges the real estate bar faces on a daily basis are so compelling that IRELA, AREA, and ATG are collaborating to provide unified leadership to the real estate bar on how to respond. We offer these thoughts to ensure your clients are protected.

The three authors have the privilege of leading real estate lawyer advocacy groups. That work has brought us considerable personal satisfaction and gratitude. Coming from that perspective, we see two challenges that could pose an existential threat to fair competition and the protection of our clients:

1. The emergence of programs that offer real estate salespeople the opportunity to make money as title agents—even where the vast majority of real estate salespeople lack the training and skill to perform these services.
2. A small minority of the real estate bar who are not zealous in their representation of their clients, some of whom are offering “free” or deeply discounted legal fees while obfuscating the fact that they are earning title fees or charging “junk fees.”

IRELA, AREA, and ATG are actively addressing these issues through a variety of initiatives:

1. **Public Relations:** Engaged a public relations firm to assist in educating clients and potential clients about the essential role of real estate lawyers for the benefit of both the public and real estate brokers. Through this engagement, we will provide members of the real estate bar with easy-to-use tools and messaging for their websites and social media platforms. The main goal is to clarify and reinforce the message about the critical role lawyers play in the title examination and conveyancing process and widely distribute it to the real estate community. The collective voice of our constituents is vast enough to impact perception among real estate agents and consumers.

2. **Regulatory Intervention:** Hired counsel in Chicago and Washington, D.C. to present a case for regulatory intervention.
3. **Legislation:** Facilitated the formation of a group of key stakeholders to advance legislation for the benefit of consumers who are buying/selling homes.

## Six Guiding Principles

After many discussions, we have adopted the following six principles to guide the work of the three groups to address the existential threats facing the profession and the harm it could cause their clients.

**Principle One:** The Illinois Supreme Court made it clear that, “Drafting and attending to the execution of instruments relating to real-estate titles are within the practice of law, and neither corporations nor any other persons unlicensed to practice the profession may engage therein.” *Chicago Bar Association v Quinlan and Tyson* 34 Ill. 2nd 116 (1966)

**Principle Two:** Consumers benefit from utilizing attorneys in real estate transactions.

**Principle Three:** Certain real estate-agent controlled title businesses in the Chicago area negatively impact consumers and competition. The frequency is increasing, and the impact is significant.

**Principle Four:** Consumers and lawyers should inquire whether certain practices are in compliance with the Real Estate Settlement Procedures Act (RESPA) and other laws and regulations governing the title industry.

**Principle Five:** Public harm arises when a real estate agent also acts as a title agent where the agent lacks the requisite skill and training to perform that work.

**Principle Six:** Lawyers should provide services to clients that meet or exceed ever-changing client expectations.

### ***Should a real estate agent be a title agent?***

There has been a steady emergence of title service entities and underwriters signing-up real estate agents to become title agents. Based upon information and belief, these companies may be engaged in the illegal payment of unearned fees for the referral of title business, setting up sham affiliated businesses, and deploying Reciprocal Trading or “Pay to Play” practices, in violation of Section 8 of RESPA.

Further, in 1966, the Illinois Supreme Court decided the controlling case about the level of expertise required to examine title. “**Drafting** and attending to the execution of instruments relating to **real-estate titles** are within the **practice of law**, and neither corporations nor any other **persons unlicensed to practice** the profession may engage therein. *Chicago Bar Association v. Quinlan and Tyson*, 34 Ill. 2d 116 (1966)

Title examination is complex and has significant implications for purchasers of the insured property. It is incumbent on real estate lawyers to ensure that the title insurance received by their clients has been examined by one who has the requisite training, experience, and authority to engage in the practice of title examination and assurance.

Consumer Financial Protection Bureau (CFPB) guidance on this subject is also clear and well defined:

### **Core Title Services**

*To receive additional compensation as a title agent for this transaction, that person must provide his client with core title agent services for which they assume liability, and which includes at a minimum, the evaluation of the title search to determine insurability of the title, and the issuance of a title commitment where customary, the clearance of underwriting objections, and the actual issuance of the policy or policies on behalf of the title company. A person may not be compensated for the mere re-examination of work performed by a 3rd party. Under section 8(c)(1)(B), referral fees or splits of fees may not be disguised as title agent commissions when the core title agent work is not performed. See CFPB Appendix B to Part 1024 — Illustrations of Requirements of RESPA.*

### **Affiliated Business Arrangements (AfBAs)**

AfBAs are only proper where, among other things, the consumer is not required to use the affiliated business and the affiliated business only receives a return on ownership interest and not compensation in any other form.

The abusive business practices of these new agency models negatively impact the real estate industry and the consumers it serves by increasing closing costs and limiting choice. These practices represent a significant and growing problem for consumers in the Illinois real estate market.

Illinois is an “attorney-closing state” where home sellers and buyers routinely hire lawyers to represent their interests in real estate transactions. In Illinois, the seller selects the title insurance provider as the seller has the contractual obligation to provide title insurance to the buyer. Historically, lawyers wrote “title opinions” for their clients to evidence marketable title. In most transactions today, the seller’s attorney provides title services including examination of title history, prepares the title commitment, executes title clearance tasks, and issues the title insurance policy.

On information and belief, some of these companies illegally pay unearned fees and set up sham-controlled businesses with local licensed real estate salespersons (“real estate agents”). They solicit business from real estate agents by promising the real estate agents they will be paid thousands of dollars per transaction for being a “title agent.” The examination of title is a complex process that requires a law degree or years of on-the-job training and experience. Few if any real estate agents have any training or education in real estate law

or title examination. Contrary to the consumer protections codified in RESPA, the real estate agents recruited are not required to perform any actual compensable title services. This can be expected given that most real estate agents lack the education and experience to perform title work. The title agency programs consist of nothing more than payment of referral fees to real estate agents who steer consumers to purchase title services.

**In some cases, a buyer's attorney who has the temerity to refuse to accept a title product examined by a real estate agent is met with threats, sometimes followed by a cease-and-desist letter from a law firm seeking to intimidate these often solo or small firm practitioners.**

We are also seeing what we believe to be sham affiliated business arrangements (AfBA) under the Real Estate Settlement Procedures Act.

On information and belief, title agencies recruit real estate agents to sign up as "title agents," however those real estate agents perform no actual services in exchange for fees paid to them by the agency. Instead, those agents are paid for nothing more than the referral itself, rather than for, "services actually performed in the issuance of a policy of title insurance," in direct contravention of RESPA Sections 8(b) & 8(c).

Alarmingly some companies push real estate agents to require lawyers to abandon their independent judgment in the selection of title services on behalf of their clients, explicitly conditioning continued client referrals on the lawyer's acquiescence to their business scheme. Lawyers who refuse to comply are blacklisted and the referrals disappear. If they agree, the flow of client referrals continues.

Some go further by pressuring the lawyer to co-conspire with the real estate agent in steering consumers to the title captive offering secret and illegal fee-splitting payments to both the lawyer and agent who agree to do so, again in violation of RESPA Section 8(c).

### **What can we do?**

**The CFPB, IDFPB, and Attorney General must take action to protect Consumers from further harm.**

The Department of Housing and Urban Development (HUD) originally had jurisdiction over RESPA enforcement. The administration and enforcement of RESPA has since passed to the CFPB pursuant to the Dodd-Frank Act. Pursuant to its authority under RESPA Section 8(g)(2), we urge the CFPB to investigate the violations described above and the title agencies engaging in them and bring actions to enjoin those violations.

Section 8 of RESPA prohibits giving a thing of value in exchange for the referral of title business. The referral arrangements discussed above between real estate agents, title agencies, and lawyers directly violate that prohibition, including both prohibited referral schemes and the payment of unearned fees to parties who provide no services in exchange for same. These anti-consumer business models stifle market competition

and the ability for consumers to freely shop for title services, as well as discourage independent counsel to advocate on the consumer's behalf.

Beyond the significant harm to consumers caused by companies that ignore RESPA's prohibitions, these business models also represent a growing threat to independent legal representation, which members of our organizations provide to consumers, thus imperiling the integrity of Illinois real estate market. Due to their significant dependence on agent referrals, some lawyers inevitably will feel compelled to accept the referral arrangement offered by the real estate agent and/or captive title company to maintain a sustainable real estate practice. Those arrangements seek to force lawyers to abdicate their duty to exercise independent judgment on behalf of the client, instead agreeing in advance to steer their clients to a title agency that pays unearned fees to the real estate agent, or which are secretly split between the lawyer and the agent. That conduct puts the lawyer in conflict with their client, which, as the Illinois State Bar Association concluded in Ethics Opinion 10-02, violates the Illinois Rules of Professional Conduct.

The CFPB and state agencies must act, or the problems cited herein will only grow. The lack of heretofore regulatory intervention has created a "Wild West" landscape where unscrupulous title agencies proliferate and routinely violate the consumer protections codified in RESPA without fear of regulatory intervention. The result is an anti-competitive business environment in which consumers are denied choice and title insurance costs have skyrocketed.

### **The Illinois Legislature must adopt amendments to the Illinois Title Insurance Act.**

Today anyone over 18 can be a title agent and there is little to no enforcement of illegal conduct. Bad actors must be prosecuted. The vast majority of occupational licenses issued by the State of Illinois require proof of requisite skill and knowledge to perform the functions of the job at hand. Even for occupations that handle tasks far less complex and with significantly less potential to do harm to the public such as, dog groomer, nail technician or food handler require that the person applying for the license demonstrate they have a basic understanding of the tasks they will be performing pursuant to the licensing for which they are applying.

**We must establish and adhere to best practices for our profession:** A rising tide lifts all boats. We stand ready to give you the tools to be the very best you can be.

**The public and real estate professionals must be educated on the important role of lawyers in real estate transactions.** Consumers of real estate services need protection when entering the largest financial transaction of a lifetime. Surrounded by service providers that each have their own competing interests, the consumer is a "babe in the woods" usually unable to understand the potential pitfalls. The lawyer is the only party who, by virtue of their involvement in the transaction, is truly a fiduciary advocating on the clients' behalf. Consumers and real estate professionals must be educated on the key role a lawyer plays in insulating the

parties from liability, ensuring that the transaction is closed correctly, and ensuring that there are no expensive and time-consuming surprises. Through our efforts, we intend to make those messages clear.

We are here for you as we navigate these challenges. Collectively we have a storied history of facing adversity head-on and succeeding. We look forward to working with all of you as we build a brighter future for the profession and the public we serve.

