IMPORTANT NOTICE ON TITLE INSURANCE DISCLOSURES

In a recent, but undated Memorandum from the Office of Bar Counsel, it was proposed that providing title insurance in connection with a real estate closing is subject to Rule 1.8(a) of the Mass. Rules of Professional Conduct. The practical implications of this innovative interpretation of the Rule are that:

1. The terms of the transaction must be fully disclosed in an understandable manner to the client in writing;
2. the client must be advised in writing sufficiently in advance of the closing of the desirability of seeking the advice of independent counsel and given a reasonable opportunity to do so; and
3. the client must give “informed consent” in writing to the “essential terms of the transaction” and the lawyer’s role “including whether the lawyer is representing the client in the transaction.” In the view of Bar Counsel, the “essential terms of the transaction” include disclosure of the portion of the title premium received by the attorney.

The March 7 issue of “BBO Sign Posts” warns that:

Whether it’s the sale of title insurance or any other business transaction with a client, lawyers who fail to comply with the disclosure and consent provisions of Mass.R.Prof.C 1.8(a) risk disciplinary action. . . . Among other things, Rule 1.8 requires that the terms of the transaction be objectively fair and reasonable, that lawyers make full disclosure of the terms in writing, that they advise the client of the desirability of seeking independent counsel, and that they obtain the client’s informed consent in writing.

In a recent Admonition issued to a member of the Association, Bar Counsel said that the attorney

did make certain disclosure to her clients . . . with regard to the sale of title insurance. For example, the closing Disclosure indicated that she and [the title insurance company] were jointly receiving the fee for a title insurance product. Additionally, she obtained her clients’ written consent as to the advisability of seeking ‘independent advice’ with respect to title insurance. However, these disclosures were not fully compliant with Rule 1.8, including, because they did not clearly and fully set forth the essential terms of the transaction in writing; they did not explain in writing the lawyer’s role in the transaction; and they did not mention specifically the advisability of seeking independent *legal* advice.

While REBA and its Ethics Section do not agree with the novel interpretation of the Rule which is contrary to well-established practice in Massachusetts, it appears that this issue has been adopted by Bar Counsel as an enforcement priority, we advise our members to take reasonable efforts to comply.

We therefore suggest that you provide your clients with a disclosure along the following lines at the earliest opportunity in the progress of any transaction, whether it be an engagement letter or a letter of initial contact in which you inform the client of the basic transaction information (this can be cut and pasted into your own document):

SAMPLE TITLE INSURANCE DISCLOSURE

Date: \_\_\_\_\_\_\_\_\_\_\_ 2023

As part of your real estate transaction, if there is a lender you will be required to pay the premium cost of a title insurance policy which insures the lender against losses it may incur as a result of title problems that may affect its ability to realize on its collateral in the event of default. This policy insures only the lender in the amount of the mortgage until the loan is paid off, usually as a result of a refinance or sale of the property. This policy provides you with no benefits but makes it possible for the lender to sell your loan on the secondary market. You may also be offered the opportunity to obtain an Owners policy of title insurance, which will insure you as owner of the property against covered title issues that may arise at any time for as long as you own the property. This policy will normally be in the amount of the purchase price in the event of a purchase, or in the amount of the appraised value of the property in the event of a refinance. Because the potential duration of the Owners policy is longer than the life of the loan, and the higher amount of coverage, there is an additional premium cost for the Owners’ policy, but, if there is a loan which is closed at the same time, you will receive a credit for the premium payable on the policy insuring the lender.

In addition to being the settlement agent for the transaction, we are an agent for the title insurance company providing the policies of title insurance, and for title and administrative services that we provide in connection with both the required and optional title insurance policies we receive, as a commission, an amount equal to 70 to 80% of the premium. The actual amount of the premiums (including our commission) will be stated in your Settlement Statement or CD. You are advised that the portion of the premium received by us as agent does not affect to cost to you. If you have any questions with regard to the foregoing, you are advised to seek independent legal advice from an attorney of your choice. In addition, please be advised that, if this transaction involves a mortgage loan on the property, our client, with regard to the mortgage transaction is the lender and not the buyer.

Please sign and date below to acknowledge you understand and agree to the foregoing.

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Buyer/Borrower #1 Buyer/Borrower #2