

ETHICS OPINION

RO-94-01

In-house counsel for banking company conducting real estate closings-division of fees with nonlawyers and possible unauthorized practice of law problems

QUESTION:

**Re: "Corporation A's Ownership of Corporation
and Activities Stemming Therefrom**

Pursuant to our phone conversation of January 3, 1994, I am hereby setting forth a query regarding the above-referenced corporations and their attorneys on staff being in compliance with Alabama Code of 1975 §34-3-6 and the Alabama Rules of Professional Conduct. I will set forth the corporate structure of the title company and the title company's proposed business plan as it pertains to Alabama before setting forth the particular queries.

Corporation B is the wholly owned subsidiary of Corporation A. Furthermore, Corporation A is the wholly owned subsidiary of ABC Bank which is a wholly owned subsidiary of ABC Bankshares, Inc. Corporation A is a mortgage banking company which originates and services first mortgages predominately in the southeast. In connection with the origination of the loan, a closing occurs whereby the mortgagor executes various documents to effectuate the assurance of the validity of the debt and security for the debt. Currently, Corporation A uses various approved closing agents throughout the State of Alabama to close its mortgage transactions. Through the acquisition of Corporation B, it is desirous to perform the same function that third-party closing agents have customarily performed in the past. Corporation B is a Tennessee corporation qualified to do business in Alabama and Georgia. The primary purpose is to issue title insurance to an affiliated company, XYZ Bank, and its mortgagors. From its original offices in Tennessee, Corporation B has set up an office in Anytown, Alabama for the purposes of expanding the corporation into Alabama. Both the President and Assistant Legal Officer of Corporation B are licensed attorneys in the State of Alabama.

The proposed business plan for Corporation B as it pertains to Alabama will be to write and issue title insurance for Corporation A mortgages for the markets in several Alabama cities. Such title insurance policies will cover originations,

refinances, and foreclosures. As of this date, no outside or third-party business is contemplated for purposes of issuing title insurance.

In addition to the above title insurance business, Corporation B would like to provide real estate purchase/sale and refinance closing services to Corporation A's customers. The business plan as of this point contemplates the preparation of all documents needed to conduct real estate closings within the State of Alabama. Such documents would include deeds, conveyances and mortgages. The preparation of all documents in connection with the closing would be conducted in Anytown, Alabama under the supervision of the two licensed attorneys with Corporation B and transmitted electronically to Corporation B branch personnel throughout the state. In addition, Corporation B will issue the title insurance on the subject property upon authority by the purchaser of such insurance.

The branch personnel's responsibilities will be mainly to obtain the signatures of the buyers and sellers within the transaction and to notarize such signatures if necessary. Furthermore, branch personnel will assist in the preparation of documents which would not affect or relate to secular rights, as provided in Code of Alabama 1975 §34-3-6(3). That is, non-lawyer personnel for Corporation B will (or could) assist in 'preparing abstracts of title, certifying, guaranteeing or insuring titles of real property.' Moreover, closing services will be strictly for Corporation A customers only and no third-party services are contemplated at this time. In the event of questions by the parties during the closing which would require an answer giving legal advice or expressing opinions as to the effect of the legal documents, the Corporation B branch personnel will be under strict instructions to stop the closing and to call the attorneys in the home office for direction and/or a response. Furthermore, pursuant to the opinion expressed in the Coffee County case, preparation of documents and/or choice of forms to be used in closing such transaction will be supervised by the attorneys on staff at Corporation B. Revenues generated by such activity will be from title insurance premiums and closing fees. Title insurance premiums charged will be customary to the guidelines set forth by the title insurance underwriters. Closing fees will be consistent with Alabama Rules of Professional Conduct Rule 1.5(a)(3), in that such fees will be charged which are customarily charged in the locality for similar legal services.

The issues presented to you for an opinion include:

- a. Under the logistical scenario set forth above, would Corporation B, based on branch personnel activities,

- be conducting the unauthorized practice of law?
- b. Per my conversation with you, is Corporation B as a corporation, profiting from its attorneys practicing law? If so, what statute or rule would it be violating?
 - c. What additional clarifications would you need to express an opinion on this matter?
 - d. What, if any, additional issues does the Alabama State Bar see in this scenario which would question whether Corporation B is in compliance with the Alabama Code. Would the attorneys on the staff of Corporation B be in violation of the Alabama Rules of Professional Conduct or otherwise be subject to imposition of discipline by the Alabama State Bar.”

ANSWER QUESTION A:

As long as all legal documents used in closings are prepared by licensed attorneys or under their direct supervision, there is no unauthorized practice of law inherent in this aspect of your proposed operations. However, if these documents are, in some fashion, prepared with the assistance of nonlawyers, the supervising attorney must review every aspect of the document and be professionally responsible for the final product. A mere cursory reading of already completed documents would not be sufficient direct supervision. This would apply to documents drafted in whole and pre-printed legal forms. To the extent legal documents are prepared with the assistance of nonlawyers, the extent of their involvement must be disclosed to customers.

Title opinions, reports, or certificates for which Corporation B charges the customer can only be issued by licensed attorneys. While nonlawyers may assemble information from public records, only an attorney can draw legal conclusions about the status of a particular title. If a title abstract is only being used in house by Corporation B in making a decision to insure, then nonlawyers can draft them.

ANSWER QUESTION B:

If Corporation B charges for the preparation of legal documents to be used at a real estate closing, two problems arise. First of all, Corporation B is engaging in the unauthorized practice of law because in-house counsel are employees of the Corporation (B) and it is the entity which is charging and collecting for legal work traditionally handled by private lawyers and law firms. Similarly, the lawyers doing the work are splitting legal fees with an entity not organized for the practice of law. This violates Rule 5.4(a).

ANSWER QUESTIONS C & D:

Under *Coffee County Abstract and Title Company v. Norwood*, 445 So.2d 852 (Ala. 1983), nonlawyers can conduct the actual closings. A layman may not take the place of an attorney and must only perform ministerial functions. Under no circumstances should a layman conducting a closing give or attempt to give "legal advice" to a customer. A disclaimer should be given about the layman's inability

provide any legal advice. In his special concurring opinion in *Coffee County*, Chief Justice Torbert stated:

"I agree with the Tennessee Court's handling of this issue. If the parties to the transactions raise a legal question at the closing, the title company should stop the proceeding and instruct them to consult their attorneys. As long as the closing involves only those steps outlined above a title company should be permitted to conduct closings, and such conduct is the unauthorized practice of law." (emphasis added)

You apparently envision that when a legal question comes up at a closing a call will be placed to in-house counsel at Corporation B's home office "for direction and/or a response". Counsel employed by Corporation B owe their first allegiance to that company. In-house counsel will have no attorney/client relationship with the customers. Corporation B's legal employees cannot give legal advice to third parties when Corporation B has an interest in the transaction.

In conclusion, your proposal involves the unauthorized practice of law when Corporation B prepares legal documents and gives legal advice at closings for pecuniary gain. Having in-house lawyers participate in the process does not cure this problem. Corporation B is making money from the practice of law.

MLM/vf

1/19/94