

## **WHY CHOOSE AN INDEPENDENT TITLE AGENT?**

By Robert B. Holman, Esq.

Founder of Ohio Association of Independent Title Agents  
Secretary of National Association of Independent Land Title Agents

When a politician receives money or a special gift for favoring one constituent over another, that politician, by accepting the money or gift in exchange for the favor, commits a crime. There is little sympathy for this situation. Bribes and kickbacks are the unfortunate understory to our political establishment. Nevertheless, bribes and kickbacks are still illegal.

Considering the above scenario, it is not surprising to know that bribes and kickbacks are illegal and unethical in nearly every other professional industry, as well. Lawyers and judges may not accept nor provide kickbacks in their employment. Doctors are not different. If a doctor were to prefer a particular course of treatment for a patient on the sole basis of the fact that he was being paid by a drug company to do so, all of us would be shocked at the outrageous nature of that conduct. After all, impairing the independent judgment of our professionals, whether as politicians, doctors or lawyers, is considered to be unethical and, in most cases, illegal.

As a society, we want our professionals to be free from improper influences that may contribute to conflicts of interest. We establish licensing standards and ethical rules to highlight the barriers between proper and improper conduct. Those standards and rules are there for a reason to prevent conflicts of interest and to preserve the impartiality of the professional's judgment.

Title insurance agents are professionals, too. They are required to become licensed in order to issue title insurance policies and have various ethical codes that profess impartiality, but often times deliver something much less desirable. The failure to provide enforceable ethical standards to the title insurance industry is a subject for another article. The current construction of hodge-podge ethical standards within the title insurance industry and the fact that there is no real force behind those standards makes the terms "ethical title agent" an unfortunate oxymoron. For the purpose of this discussion, suffice it to say that title insurance agents and the title insurance industry overall, have woefully failed in their pursuit of the ethical "high ground."

Why is that? Well, quite simply, you cannot commit to real impartiality unless you effectively remove or otherwise control the source of your conflict. Unfortunately for the title insurance industry, the source of our conflict is the same source that pays the bills. Thus, the industry has been faced with what it perceives to be its eternal conundrum: clean up the business and reduce your revenues OR leave the business to its own devices and reduce your profits. Rather than draw the line at reducing the conflict, the title insurance industry has drawn the line at reducing impartiality for the sake of business.

The choice to reduce impartiality has come at an extreme cost to the industry and to consumers alike. Lacking impartiality, more real estate transactions close with title defects than ever before. With more conflict, there has been more real estate related litigation, not less. With the growth of referral source participation in the title insurance industry, there have been more claims, not less. The underlying purposes of title insurance have begun to disappear from the landscape as the industry searches for its identity.

Where did we go wrong? Well, I can think of two places. First, title agents failed to recognize the importance of their ability to control the real estate transaction through the value of title insurance. Banks need us in order to function. Real estate firms rely upon our expertise to dictate the ground rules for closing a real estate transaction. Mortgage companies rely upon our ability to insure higher risk loans on account of our underwriting savvy. Title agents are necessary cogs in the wheel. Remove the impartiality element from these business relationships and there is no longer an impediment to these referral sources doing the work for themselves with disastrous consequences for all.

Second, the title insurance industry became the province of the weak and the ill informed. There are too many referral sources in our industry that see title insurance as a means to an end. Those folks want to make a profit quickly and pass the risk to someone other than themselves. The lesson is eerily similar to the causes of the Great Recession of 2008.

Referral sources and short term profiteers now control much of the title insurance industry from top to bottom. Compounding matters is the fact that there is little variation at the top of the title insurance food chain that would impede referral source participation in our business. The title insurance industry is dominated by four publicly traded national underwriters who control over 90% of the national market share for title insurance business. The same four publicly held national underwriters control nearly all of the leadership positions within the land title associations and title advocacy groups, thereby positioning themselves to have direct access to public policymakers at the local, state and national levels. The agenda that is pushed across the country is underwriter centered, not agent centered. The underwriters have direct operations, referral source partnerships and interested shareholders to protect. Remaining impartial to the title insurance process is no longer central to their agenda. Creating sustainable control through market domination is.

There once was a real opportunity to preserve the future of the title insurance industry, but much has been lost in the last thirty years to greed, undue influence and consolidation in the title insurance industry. That "trifecta" has quite simply overwhelmed title agents of all stripes. There is no greater example of the conflict of interest problem that plagues the title insurance industry other than controlled business arrangements (CBAs) or affiliated business arrangements (AfBAs).

Controlled business arrangements are entities that consist of ownership by banks, mortgage companies, real estate firms, homebuilders and developers in the business of title insurance. In 1980, the American Land Title Association® published the following quote:

**"[C]ontrolled business arrangements are as harmful as the payment of outright kickbacks prohibited by Congress under Section 8 of RESPA. The American Land Title Association® clearly and unequivocally oppose[s] controlled business arrangements, and HUD should issue regulations to eliminate the problem."**

Referral sources are permitted under RESPA to own financial interests in real estate settlement service providers, such as title insurance agencies, without the requirement of becoming licensed to do so. In other words, while these referral sources cannot be licensed as banks or real estate companies to issue title insurance, they can own a financial interest in the title insurance agency and receive monthly stock dividends derived from the title insurance commissions as though they are "passive" investors in these entities.

The purported "passive" nature of these investments is just that purported. Referral sources that participate in CBAs ostensibly control every element of the settlement service provider through which they share ownership. Every detail is designed to maximize profit for the participating referral source and to reduce the title agent's ability to control the work. Thus, the biggest casualty of the CBA is impartiality.

Moreover, the legal landscape which analyzes whether stock dividends are not impermissible "things of value" under RESPA is changing. A recent Ohio federal court held that stock dividends may be impermissible "things of value" under federal law. The Ohio Association of Independent Title Agents (OAITA) has also filed a declaratory judgment action against the Ohio Department of Insurance (ODI) to invalidate what it perceives as improperly promulgated rules which permit CBAs in contravention of Ohio statutes that suggest the opposite. Another Ohio federal court recently held that HUD's 1996-2 Policy Statement concerning sham CBAs is unconstitutionally vague thereby challenging the very premise of the ODI's position on CBAs.

Simply put, change is in the offing on these issues which, in turn, begs the question asked in the title to this piece. Why should you choose an independent title agent or why should you remain one?

No matter what criticism is lodged on behalf of whatever organization, corporation or person within the real estate settlement community, none of the problems expressed herein are irreversible. In Ohio, the CBA question may be answered with the legal pen. Nationally, it might take more than that. Nevertheless, it starts with the simple notion that you cannot be impartial to the title insurance process if you are controlled by a referral source. Thus, when a title insurance agent whose primary source of revenue is derived from title insurance commissions splits a stock dividend with a referral source partner, they lose the impartiality commonly found in our business. Call it "passive ownership" or "silent investment" or whatever fancy term you wish, the fact remains that CBAs create an appearance of impropriety. In a world where perception is reality and professionals are thought to exercise professional discretion and judgment, there is no other way around the problem. You either accept the responsibilities of your profession or you place yourself at its judgment. When you give someone money in return for them sending you their business, you are inexorably conflicted whether you do a good job at it or not.

According to the National Association of Independent Land Title Agents® (NAILTA), an independent title agent is defined as follows:

**“Any individual or entity authorized and licensed to issue title insurance policies and/or to conduct real estate closings and is not controlled by, whether directly or indirectly, a title insurance company/underwriter, bank, mortgage company, mortgage broker, real estate firm (including agents and brokers), builders, developers, appraisers, surveyors, any subsidiaries thereof, or by any other referral source and/or does not share, split, give or receive stock dividends and/or distributions of profits with a title insurance company/underwriter, bank, mortgage company, mortgage broker, real estate firm (including agents and brokers), builders, developers, appraisers, surveyors, any subsidiaries thereof, or by any other referral source.”**

By definition, an independent title agent is one who is free from the referral source conflict of interest. In essence, they are impartial. As a professional, this is fundamental. In the absence of an administrative body to enforce ethical violations of the industry or to enforce rules against the impermissible practice of illegal business conduct, there is only you and your own ethos. If being impartial matters in this under regulated environment, it must start with every individual title insurance agent on their own.

By definition, an independent title agent is one who is free from the referral source conflict of interest. In essence, they are impartial. As a professional, this is fundamental. In the absence of an administrative body to enforce ethical violations of the industry or to enforce rules against the impermissible practice of illegal business conduct, there is only you and your own ethos. If being impartial matters in this under regulated environment, it must start with every individual title insurance agent on their own.

Why remain independent? This is simple and unfortunately a stark reality. The further away from impartiality a title agent gets, the less likely it is that title insurance agents will remain separate from their referral source masters. In truth, the conflict question does not end at the settlement table. It threatens to permeate throughout the industry at every level. Thus, it is important that title insurance agents remember that what they sell is important to not only the consumer, but also to the referral source. Without you, they would have the unfortunate condition of having to do it themselves. Considering the liability, this is not an attractive option.

Be proud of your independence and be protective of your product. With no one else on the wall watching out for us, it comes down to you and each one of your referral sources you keep at arms length.

For more information about the independent title agent or associations solely designed to help independent title agents and agencies, please contact me at (800) 344-7445 or [rholman@generaltitlco.com](mailto:rholman@generaltitlco.com).

To read more about NAILTA, visit our website at [www.nailta.org](http://www.nailta.org).

To read more about OAITA, visit our website at [www.oaita.org](http://www.oaita.org).

