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ATTORNEY AT LAW — EXAMINATION, TITLE TO REAL PROPERTY—OPINION FORWARDED TO TITLE INSURANCE COMPANY—REQUEST OF CLIENT TO PROCURE POLICY OF INSURANCE—NO EMPLOYMENT OR COMPENSATION BY TITLE INSURANCE COMPANY—ATTORNEY NOT REQUIRED TO BE LICENSED—SERVICE NO VIOLATION OF SECTION 3905.01 RC.

SYLLABUS:

Where an attorney at law, at the request of his client, examines the title to real property, and subsequently issues an opinion which is forwarded to a title insurance company at the request of his client in order to procure a policy of insurance, and where the attorney at law is neither employed nor compensated by the title insurance company, such attorney at law is performing legal services for his client and is not in violation of Section 3905.01, Revised Code, which provides that "no person shall procure, receive, or forward applications for insurance unless he is a resident of this state and duly licensed by the superintendent of insurance."

Columbus, Ohio, December 29, 1955

Hon. August Pryatel, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"In view of Section 3905.01 of the Revised Code, may an attorney at law participate in the following procedure without being licensed by the Superintendent of Insurance?

"A client who either owns, or proposes to lend money on, real property requests an attorney to obtain a policy of title insurance insuring the client's (or the prospective mortgagor's) title to said property to be free and unencumbered. After conducting an examination the attorney issues his opinion on the title and forwards it to a particular title insurance company. A policy of title insurance is thereafter issued. The insured did not contact the title insurance company in any way or complete any formal application for title insurance. The attorney is compensated only by the insured and not by the title insurance company.

"Under these facts has the attorney received or forwarded an application for insurance within the meaning of Section 3905.01 of the Revised Code of Ohio, and therefore must be licensed by the Superintendent of Insurance?"

Section 3905.01, Revised Code, is the recodification of Section 644, General Code. The provision in question was enacted by the 82nd General Assembly in the form of House Bill No. 399. The title of the act found in 107 Ohio Laws, 698, is as follows:

"An Act to amend section 644 of the General Code, and to supplement said section 644 by the enactment of additional sections to be known as sections 644-1, 644-2, 644-3, 644-4, 644-5, relating to the licensing of insurance agents, solicitors and brokers, and to repeal said original section 644."

That section commenced, and still reads, as follows:

"No person shall procure, receive, or forward applications for insurance unless he is a resident of this state and duly licensed by the superintendent of insurance. * * *"

The sentence immediately following the above-quoted portion of the statute, provides that after an *insurance company* has given written notice of its appointment of a person to act as its agent, the superintendent (if he is satisfied as to certain enumerated qualifications,) shall issue a license to the appointee.

Thus, the prohibition against a person's forwarding applications for insurance without being duly licensed by the Division of Insurance, is part and parcel of the very statute which details the method whereby a license to act *for an insurance company* may be obtained.

Viewing Chapter 3905, Revised Code, in its entirety, I believe it becomes readily apparent that the legislature was concerned primarily with

the licensing of individuals who act as agents for insurance companies and who are compensated by such companies for procuring applications for insurance. Your attention is directed to Section 3905.05, Revised Code, which prohibits an insurance company from paying commissions to any person not licensed in accordance with Section 3905.01, Revised Code. This section was enacted in 1917 as part of the licensing act here under consideration.

To quote merely the first sentence of Section 3905.01, Revised Code, which is rather sweeping and general in terms, does not, in my opinion, adequately reflect the legislative intent in enacting that provision. It is stated in 50 American Jurisprudence, Section 306, page 293, that:

> "The purpose of a statute is to be gathered from the whole act. In determining such purpose, resort may be had, not only to the context, but to the structure and scheme of the act, and in some cases, to its historical background or legislative history."

That this statute is directed at those individuals who are employed by insurance companies as their agents, becomes clearer by reason of the fact that prior to 1917, the only provision in the law relative to the licensing of insurance agents was directed solely at those persons who "procure, receive, or forward applications for insurance in any company or companies *not organized under the laws of this state.*" See 97 Ohio Laws, 411. The amendment of this statute in 1917 was, among other things, for the purpose of requiring licenses of those persons who are agents of *domestic* insurance companies.

The facts recited indicate that an attorney is performing a legal service for his client in a real estate transaction involving the client's property. In so doing, the attorney, if he is the agent of anybody, is the agent of his *client* in procuring insurance.

An attorney who examines a title and renders a professional opinion thereon, does so as an attorney and counselor at law, duly licensed to practice his profession in this state. He holds himself out as an attorney or counselor at law, and the mere fact that subsequent to his opinion following an examination of the abstract of title to a particular piece of property, a title insurance company issues a policy of title insurance to his client, does not in and of itself make the attorney an insurance agent.

It is further stated that the attorney is compensated only by his client and not by the title insurance company. This fact, although possibly not

determinative of the question, is of considerable importance since the typical insurance agent necessarily operates either on a salary or commission basis, paid by the insurance company.

There is another facet of this problem as raised by the facts which merits mention, and that is that there is no showing that an actual application for insurance is filled out and submitted by anyone. I would call your attention to the following statement in Couch, Cyclopedia of Insurance Law, Section 521, at page 1488:

> "Although an application for insurance is a mere proposal, until accepted, it is, when written, an offer, controlled largely, if not exclusively, so far as any propositions stipulated therein are concerned, by the insurer. Again, applications are usually printed forms handled by agents to whom they have been entrusted, and who are held out to the public as possessing, and who do possess, full power to do all things necessary and requisite in relation thereto."

In short, the practices and procedures generally utilized by insurance companies in taking applications for insurance should be accorded some weight, inasmuch as the trade itself has aided the law in arriving at some kind of an understanding or definition of the term "forwarding an application."

In passing it may be well to observe that violation of Section 3905.01, Revised Code, may result in the imposition of criminal penalties upon the violator. While Section 3905.99, Revised Code, which is the criminal penalty section found at the close of the chapter here under consideration, fails to impose any penalty for the violation of Section 3905.01, Revised Code, it will be recalled that Section 3901.99 (B), Revised Code, provides:

> "Whoever violates any law relating to the superintendent of insurance, or any insurance law of this state, for the violation of which no penalty is otherwise provided in the Revised Code, shall be fined not more than one thousand dollars or be imprioned not more than six months or both."

It is a fundamental and well-established principle of statutory interpretation that a strict construction is to be accorded to penal statutes. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. See 37 Ohio Jurisprudence, Statutes, Section 420.

Accordingly, it is my opinion that where an attorney at law, at the request of his client, examines the title to real property, and subsequently issues an opinion which is forwarded to a title insurance company at the request of his client in order to procure a policy of title insurance, and where the attorney at law is neither employed nor compensated by the title insurance company, such attorney at law is performing legal services for his client and is not in violation of Section 3905.01, Revised Code, which provides that "no person shall procure, receive, or forward applications for insurance unless he is a resident of this state and duly licensed by the superintendent of insurance."

Respectfully,
C. WILLIAM O'NEILL
Attorney General