

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 667 (8-94) 6/3/94

Topic: Referral fees

Digest: Attorney may accept a referral fee from a mortgage broker for referring client to broker, provided client consents to arrangement after full disclosure, all proceeds thereof are credited to client if the client requests attorney to do so, the aggregate attorney's fees are not excessive, and attorney exercises independent professional judgment on behalf of client.

Code: Canons 2, 5; DR 2-106(A), 5-107(A)(2); EC 2-21, 5-1

QUESTION

May an attorney accept a fee from a mortgage broker for referring a real estate client to that broker?

OPINION

The Committee does not render opinions on questions of law and, thus, does not opine on whether the proposed arrangement violates any statute or regulation. If the proposed arrangement violates any law (see, e.g., RESPA, 12 U.S.C. §§2601 et seq. [proscribing kickbacks and unearned fees for the referral of business incident to a real estate settlement service involving a federally related mortgage loan]), it perforce would be unethical. N.Y. State 595 (1988); N.Y. State 576 (1986). For the purpose of the following analysis, the Committee assumes that the attorney lawfully may accept a referral fee from the mortgage broker and that the proposed arrangement otherwise is free from any taint of illegality.

The relevant provisions of the Lawyer's Code of Professional Responsibility are set forth under Canons 2 and 5. EC 2-21 states that "[a] lawyer should not accept compensation or anything of value incident to the lawyer's employment or services from one other than the client without the knowledge and consent of the client after full disclosure." See N.Y. State 461 (1977). DR 5-107(A) (2) states that "[e]xcept with the consent of the client after full disclosure a lawyer shall not . . . [a]ccept from one other than the client anything of value related to his or her representation of or employment by the client." In the present case, the attorney would be accepting from a person other than the client (the mortgage broker) a thing of value (the referral fee) incident to representation of the client in a real estate purchase. Thus, before accepting the referral fee, the attorney must obtain the consent of the client after full disclosure.

Full disclosure by the attorney must include a description of (1) the entire arrangement with the mortgage broker, (2) how the mortgage obtained from the mortgage broker compares with other available types of mortgages known to the attorney, and (3) other alternative services available to the client. See N.Y. State 595 (1988); N.Y. State 576 (1986); N.Y. State 107 (1969).

In addition, the attorney must remit the referral fee to the client if the client so desires. See N.Y. State 595 (1988) ("Indeed, the referral should be accompanied as well with a notice stating the client's entitlement to receive any appropriate credit of a non-service related fee or disbursement related to the abstract company's role in the transaction."); N.Y. State 461 (1977) ("Where compensation is offered to the lawyer simply by virtue of the fact that he enjoys the confidence and trust of his client and is thereby in a position to employ others in his client's affairs, overriding principles of equity and the very nature of the lawyer's office would seem to require that any funds secured by the lawyer be credited to his client."); N.Y. State 107 (1970) ("[i]n the event that the

client desires that any commission paid to the attorney be remitted to the client, the attorney must do so"); cf. N.Y. State 621 (1991); N.Y. State 576 (1986); N.Y. State 351 (1974).

Even with client consent, however, the attorney is not entitled to receive amounts from the transaction that would in the aggregate constitute an excessive fee. DR 2-106(A); N.Y. State 576 (1986); see N.Y. State 621 (1991).

Canon 5 of the Code requires an attorney to "exercise independent professional judgment on behalf of a client." EC 5-1 explains that:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

The attorney should carefully examine his or her conduct and be especially wary of any influences which may serve to dilute professional loyalty or independence. The attorney's desire to earn a referral fee in addition to legal fees may taint the attorney's advice to a client on whether the terms, conditions, interest rate or other provisions of the mortgage recommended by the mortgage broker are in the best interests of the client. If the attorney concludes that it is not in the best interests of the client to accept the mortgage product recommended by the mortgage broker, the attorney must have no hesitancy in advising the client not to accept such from the mortgage broker.

Thus, the acceptance by the attorney of a referral fee from the mortgage broker is proper only where the client consents after full disclosure, the attorney remits the referral fee to the client if the client requests the attorney to do so, the aggregate fees received from the transaction by the attorney are not excessive, and the attorney exercises independent professional judgment on behalf of the client.

CONCLUSION

For the reasons stated above and subject to the qualifications noted above, the question is answered in the affirmative.