

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 694 - 8/25/97 (3-97)

Topic: Conflict of interest; solicitation by real estate broker; dual representation of purchaser and lender.

Digest: Improper for attorney to participate in "Home Buyers Program."

Code: DR 2-103(A), DR 2-103(C), DR 5-101(A), DR 5-105(A) and DR 5-105(C)

QUESTION

May an attorney participate in a program operated by a real estate broker in which prospective home purchasers are offered reduced closing costs by permitting an attorney selected by the broker to represent both the lender and the purchaser?

OPINION

A licensed real estate brokerage firm ("Broker") and its affiliate, a licensed mortgage banker ("Lender"), are marketing a home buyer's program ("Program") which, as described, "streamlines the financial and legal aspects of the closing process." A prospective purchaser ("Purchaser") first deals with the Lender to become pre-qualified for a mortgage loan, and the Broker shows homes to the Purchaser. If the Purchaser's bid on a home is accepted, the Program offers, among other things, the services of an attorney ("Attorney") to represent both the Purchaser and the Lender. The legal fee for this dual representation is the sole responsibility of the Purchaser. The Attorney has agreed to accept a fixed fee, as a condition of participating in the Program, that is substantially less than the aggregate amount the Purchaser would customarily pay for legal services if Purchaser instead paid for his or her own attorney and, as is typically required, additionally paid the legal fee of the Lender's attorney.

Third-Party Solicitation

The first issue we address is whether the marketing of the Program by Broker constitutes an unethical third-party solicitation. With exceptions not here relevant, DR 2-103(C) provides:

A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or

associate, or any other affiliated lawyer as a private practitioner, other than by advertising or publicity not proscribed by DR 2-101....

The Program brochure plainly markets the Program as reducing closing costs and minimizing inconvenience and delay. An important element of the Program touted to achieve these ends is the Purchaser's acceptance of the Attorney, selected by Broker, to represent both Lender and Purchaser. By seeking admission into the Program, Attorney is in effect "requesting" Broker to "recommend" or "promote" Attorney's services. In fact, the brochure does just that, as it comments positively on the qualifications of the participating attorneys.

Consequently, this aspect of the Program contravenes DR 2-103(C).¹

Conflict Of Interest

The Attorney's participation in the Program must also be scrutinized from the conflict of interest perspective. DR 5-105(A) and (C) provide that attorneys may not represent multiple clients with differing interests unless

it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

"Differing interests" are defined by the Code to include "every interest that will adversely affect either the judgment or the loyalty of the lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest." Code, Definitions, Par. 1.

Although we have observed that the "differing interests" inherent in the dual representation of a mortgagor and a mortgagee does not create a *per se* ethical

¹ In addition, DR 2-103(A) prohibits soliciting business in violation of any statute or court rule, and New York's Judiciary Law in § 479 generally prohibits the soliciting of business on behalf of an attorney. Whether Broker's conduct in marketing the Program and distributing the brochure, or whether Attorney's participation in the Program constitute violations of Section 479 are questions of law on which we do not opine. Similarly, we do not opine as to whether and to what extent First Amendment considerations might restrict the application of Section 479 and permit the solicitation of clients by way of written material, such as the Program brochure. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916 (1988); *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 97 S. Ct. 2691 (1977); *Von Wiegen v. Comm. on Prof'l Standards*, 63 N.Y.2d 163, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371 (1995); but see *In re Alessi*, 60 N.Y.2d 229, 469 N.Y.S.2d 577 (1983), *cert. denied*, 465 U.S. 102 (1984) and *Greene v. Grievance Comm. for Ninth Judicial Dist.*, 54 N.Y.2d 118, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982) (both cases upholding against First Amendment challenge disciplinary action taken against attorneys who solicited business by way of mailings to real estate brokers). Any association by the Attorney with an illegal solicitation scheme would, of course, be unethical. N.Y. State 576 (1986).

constraint, and such dual representation may be permissible depending upon the particular circumstances if accompanied by full disclosure of the relevant facts and express consent by both clients, see N.Y. State 199 (1971); N.Y. State 576 (1986); N.Y. State 162 (1970) and N.Y. State 8 (1965), those opinions do not control the outcome here. In this case, the Attorney in the Program has not only divided his or her loyalty between the Lender and the Purchaser, but as a practical matter has a strong interest in the success of the Broker. The Attorney has been accepted, approved, promoted and recommended by the Broker, and the Attorney continues to participate in the Program at the Broker's sufferance. Thus, DR 5-101(A) is implicated, and must be complied with. That Rule provides:

Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

Although the "obviousness" test of DR 5-105(C) does not appear in the text of 5-101(A), this Committee has consistently interpreted 5-101(A) to impose such a requirement. See N.Y. State 660 (1994); N.Y. State 635 (1992); N.Y. State 619 (1991); N.Y. State 595 (1988). We believe the personal financial incentive for the Attorney to use his or her influence over the Purchaser to secure an enforceable contract of sale and to close the transaction is sufficiently great that it is not at all obvious that the Attorney can adequately represent the interests of the Purchaser and Lender as well. Accordingly, the Attorney's DR 5-101(A) conflict cannot be cured by consent. See N.Y. State 621 (1991) (lawyer may not refer real estate client to abstract company owned by lawyer); N.Y. State 208 (1971) (lawyer for a real estate client may not also act as a broker in the same transaction). The relationship between the Attorney and the Broker at issue here goes well beyond the mere acceptance of repeated referrals from a broker that N.Y. State 467 (1977) found did not constitute a *per se* violation of DR 5-101(A).

The language of the Court of Appeals in a related context is apt here:

The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale are examples of the conflict potential to be protected against.

Greene v. Grievance Comm. for Ninth Judicial District, 54 N.Y.2d at 129, 444 N.Y.S.2d at 889.

We conclude, therefore, that the Attorney's participation in the Program involves an impermissible conflict of interest.

CONCLUSION

An attorney may not ethically participate in a home buyer's program such as that described in this Opinion.
