



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 845 (10/14/10)

Topic: Lawyer/real estate broker sharing her brokerage commission with lawyers who refer buyers or sellers.

Digest: A lawyer who is also a real estate broker may ethically offer to share her broker's commission with attorneys who refer buyers or sellers to her if either (a) the referring lawyer is not representing the buyer or seller in the real estate transaction, or (b) the referring lawyer is representing the buyer or seller in the real estate transaction but remits or credits the referral fee to the client and obtains the client's informed consent to the potential conflict arising from the referral fee.

Rules: 1.0(a) 1.7, 1.8(f), 8.4(a).

FACTS

1. An attorney has recently decided to work as a real estate broker, but has not given up her New York law license. She desires to advertise that she will pay a percentage of her broker's commission to attorneys who refer buyers or sellers to her. In the past, she has received similar letters from other attorneys, but she is unsure if it such offers are ethically acceptable.

QUESTION

2. May a licensed lawyer who is also a real estate broker (but is acting solely as a broker in any real estate transaction) ethically advertise that she will share her broker's commission with attorneys who refer buyers or sellers to her?

OPINION

3. The Committee assumes for purposes of this analysis that (a) the inquiring attorney is functioning solely as a real estate broker, not as a lawyer, in the real estate transactions in question, and (b) if the inquiring attorney offers any legal services in other matters, they will be distinct from the non-legal services which she renders as a real estate broker, and (c) the attorney will comply with Rule 5.7 of the New York Rules of Professional Conduct (the "Rules"), effective April 1, 2009, if it is applicable.

A. Communications to Other Lawyers Are Not “Advertisements”

4. As a preliminary matter, an advertisement that an attorney places solely in her capacity as a real estate broker, with no intention of attracting legal business, is not an “advertisement” within the meaning of Rule 1.0(a) of the New York Rules of Professional Conduct. Rule 1.0(a) provides as follows:

“Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

5. Here, since the purpose of the inquiring attorney’s communications offering to share her brokerage commissions is not “the retention of the lawyer” as a lawyer, the broker’s communication lacks an essential element of an “advertisement” under Rule 1.0(a). Also, the attorney proposes to direct her referral fee offer to other lawyers, and Rule 1.0(a)’s definition of “advertisement” expressly excludes “communications to ... other lawyers.”

B. Referral fees to lawyers who represent the buyers or sellers in the transaction

6. The Committee’s jurisdiction is limited to interpreting and applying the Rules. 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 state or federal law or regulation, it perforce would be unethical. N.Y. State 667 (1994); N.Y. State 595 (1988); N.Y. State 576 (1986). For purposes of this opinion, however, the Committee assumes, with respect to substantive law outside the Rules of Professional Conduct, that an attorney lawfully may accept a share of a real estate brokerage commission, that a real estate broker may lawfully pay a share of her commission to a lawyer as a referral fee, and that the proposed arrangement otherwise is legal.

7. Rule 8.4(a) provides that a lawyer shall not “violate or attempt to violate the Rules of Professional Conduct, [or] knowingly assist or induce another to do so...” We therefore focus our analysis on whether another attorney’s *receipt* of the referral fees that the inquiring attorney proposes to pay would violate the Rules of Professional Conduct. If so, then the inquiring attorney’s payment of such fees would “assist or induce another” (the receiving lawyer) to do so.

8. This Committee has often opined that a lawyer cannot act as a lawyer in the same transaction in which a lawyer acts a real estate broker because of the possible conflict between the client’s interest and the lawyer’s own personal interest. *See, e.g.*, N.Y. State 752 (2002); N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 208 (1971). “The rationale is that the broker’s interest in closing the transaction interferes with the lawyer’s ability to render independent advice with respect to the transaction.” N.Y. State 752 (2002). Thus, acting as both a lawyer and broker in a real estate transaction was a nonconsentable conflict under DR 5-101(A) of New

York's former Code of Professional Responsibility, which prohibited a lawyer from accepting or continuing employment if the exercise of professional judgment on behalf of a client "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents...."

9. The successor to DR 5-101(A) is Rule 1.7(a)(2), which prohibits representation if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This prohibition applies in the circumstances before us unless, per Rule 1.7(b)(1) and (b)(4), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and the client gives "informed consent, confirmed in writing."

10. In this Committee's opinion, under Rule 1.7 it remains a nonconsentable conflict for an attorney to act as both a lawyer and broker in the same transaction. That leads to the question whether a lawyer who could not act as counsel in a real estate transaction may nevertheless receive a share of the broker's commission in that transaction.

11. This Committee opined in N.Y. State 745 (2001) that a lawyer who is disqualified from a matter on nonconsentable conflict of interest grounds may not receive a referral fee for referring that matter. *Cf.*, Nassau County 89-33 (N.Y.L.J., Dec. 4, 1989, at 7, col. 1) (mortgage broker prohibited from paying a commission to an attorney, whom the broker would denominate as an "associate" broker, if the associate broker would also represent the client in the real estate transaction).

12. Rule 8.4(a) says that a lawyer shall not "knowingly assist or induce another" to violate the Rules of Professional Conduct, so an attorney functioning as a real estate broker is prohibited from paying a referral fee or partial commission to a referring attorney if the attorney-broker knows that the referring attorney's acceptance of the payment would breach these Rules. *See, e.g.*, Nassau County 93-3 (N.Y.L.J., March 28, 1994, at 8, col. 4) (an attorney has an affirmative duty to report the misconduct of another lawyer who has undertaken to act as a lawyer and real estate broker on the same transaction).

13. Accordingly, under Rule 8.4(a), if the inquiring lawyer/broker knows that the referring attorney will simultaneously represent the buyer or seller in the real estate transaction *and* keep a share of the real estate brokerage commission, the inquiring attorney may not share her brokerage commission with the referring attorney.

C. Referral fees to lawyers who represent buyers or sellers in the transaction but remit or credit the referral fee to the client

14. The next question is whether a lawyer/broker may properly pay referral fees where the attorney receiving the referral fee is (or will be) acting as a lawyer for the

referred brokerage client in the same real estate transaction but the receiving attorney agrees to remit or credit the referral fee to the client.

15. In N.Y. State 753 (2002), we explained the rationale for the ban on an attorney serving as both a real estate broker and a lawyer in the same real estate transaction: “a lawyer should not have a personal stake in the advice rendered, and the broker who is paid if the transaction closes cannot be fully independent in advising the client as a lawyer.” If the lawyer receiving the referral fee will remit or credit the full amount to the client, that will largely remove the receiving attorney’s “personal stake” but it will not entirely negate the potential for conflict. Even if the lawyer remits or credits the referral fee to the client, the attorney will still have an incentive to refer real estate clients to a broker who pays a referral fee (*i.e.*, shares her commission) because the referral fee (in effect a reduced real estate brokerage commission) will enable the attorney to offer potential clients a reduced brokerage fee (or an equivalent cash payment or credit) for utilizing the attorney’s services, thus attracting more business to the attorney.

16. In N.Y. State 682 (1996), we noted that our prior opinions have allowed an attorney to receive a referral fee from providers of non-legal services or products for referring clients if (a) the client consents after full disclosure, (b) the legal fee and the referral fee together do not constitute an excessive fee for legal services, and (c) the attorney remits the referral fee to the client if the client so requests. In these opinions, the referral concerned a product or service that was “fairly uniform among providers” and either was (1) “required in an objectively determinable quantity incident to the legal services performed by the attorney” (*e.g.*, a mortgage and title insurance in connection with a real estate transaction), or (2) was “unconnected with any particular legal services” (*e.g.* certificates of deposit). These conflicts were consentable because “the fungible nature of the products or services and the objectively determinable amount at issue insulate the client from any ill effects from the attorney’s conflicting interest.”

17. On the other hand, N.Y. State 682 also noted two prior opinions stating that the attorney’s receipt of a referral fee or other financial interest in a transaction with the client was “absolutely forbidden” where the interests of the attorney and client were in such direct conflict that a client could not give meaningful consent to the conflict transaction. The conflict in those opinions was that the attorney’s remuneration “varied according to the quantity of the product or service . . . purchased by the client, which was itself based upon the attorney’s legal advice” See N.Y. State 682 (1994) (investment advice); N.Y. State 671 (1994) (life insurance); N.Y. State 619 (1991) (life insurance). The prospect of a commission might tempt the attorney to give the client different (and inferior) legal estate planning advice due to the attorney’s financial interest. Thus, N.Y. State 682 explained and extended the analysis in N.Y. State 671 as follows:

[N]o meaningful consent is available to permit an attorney to retain life insurance referral fees. The services of an investment advisor, similar to life insurance carriers, vary substantially among different providers. Also like life insurance, the amount of the product or services required – *i.e.*, the amount of money entrusted to the investment advisor – is not objectively determined by the transaction, presenting the potential that the attorney might increase the

referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interests.

Accordingly, disclosure and consent would not cure the direct and substantial conflict between the client's and lawyer's interests inherent in accepting a referral fee from the investment advisor, even where the client is offered the choice to claim the referral fee and the attorney purports to exercise independent judgment in framing his or her initial recommendation to consult an investment advisor. Clients view recommendations of other professionals as part of their representation by their lawyers, and expect that lawyers will act as trusted fiduciaries in such matters.

18. We think the present situation – real estate brokerage – falls somewhere in between “fairly uniform” products and services like title insurance and certificates of deposit (where receiving a referral fee in connection with client work is routinely consentable as long as the referral fee is remitted to the client), on the one hand, and highly variable products and services like life insurance and investment advice (where receiving a referral fee is nonconsentable even if the referral fee is remitted to the client), on the other hand. While the quality of real estate brokerage services varies among providers, the services are “required in an objectively determinable quantity incident to the legal services performed by the attorney” because a client typically employs only one broker per transaction, commissions are relatively standard, and the size of the broker’s commission depends on the price of the home the client purchases. Moreover, although a referral fee gives the lawyer a financial incentive to refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers.

19. Therefore, this Committee believes that a real estate lawyer may ethically accept a referral fee with the client’s informed consent, including a reminder that the client is free to choose a real estate broker other than the one her lawyer recommends. (“Informed consent” is defined in Rule 1.0(j) to include the lawyer’s communication of “information adequate for the person to make an informed decision,” including “the material risks of the proposed course of conduct and reasonably available alternatives.”) As a corollary, a lawyer/broker may pay a share of her commission to a lawyer who refers a buyer or seller if the referring lawyer obtains her own client’s informed consent and remits or credits the commission to that client.

20. There is one more step. The lawyer/broker (the inquirer here) must confirm that the referring attorney will remit or credit the fee or commission to the client. This should be readily ascertainable and does not threaten privileged communications between the referring lawyer and her client. However, because of practical difficulties and the danger of intruding on the attorney-client relationship, the lawyer/broker need not confirm the referring attorney’s compliance with the disclosure and consent requirements, (This point is further explained below in the last paragraph before our conclusion.)

D. Referral fees to lawyers who do not represent the referred clients in the transaction

21. The final question is whether a lawyer/broker may properly pay referral fees to an attorney who refers clients on real estate transactions in which the referring attorney will not be representing the client. We are not aware of any New York ethics opinion addressing this precise issue, but several other jurisdictions have considered whether a lawyer may generally accept a referral fee from a person providing a non-legal product or service to a referred client. The results have been inconsistent. Many of the conflicting authorities were collected in Pennsylvania Opinion 2000-100, 2000 WL 567996, which concluded as follows:

[T]he Rules permit a lawyer to accept a referral fee from a service provider, provided that the lawyer is scrupulous in determining under the particular circumstances that payment of the referral fee will not impact the lawyer-client relationship or the lawyer's exercise of independent professional judgment and that the client consents to the arrangement on the basis of full disclosure and consultation.

22. In N.Y. State 764 (2003), this Committee approved an attorney's acceptance of an earnings credit against bank charges based upon balances held in the attorney's IOLA account as long as the attorney made full disclosure to the client and obtained the client's informed consent, even though the earnings credit "may well influence the attorney's decision as to where client's trust funds should be deposited, and that decision would have a direct and adverse financial impact upon the client if an IOLA account is chosen." The Committee's conclusion was based on the language of former DR 5-107(A)(2) and EC 2-21. That language is now contained, with little change, in Rule 1.8(f), which provides, in relevant part, as follows:

A lawyer shall not accept ... anything of value related to the lawyer's representation of the client, from one other than the client, unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
- (3) the client's confidential information is protected as required by Rule 1.6.

23. We believe that N.Y. State 764 remains applicable under Rule 1.8(f). Thus, assuming that the requisites set forth in Rule 1.8(f) are met, a lawyer attorney may ethically accept referral fees or commissions from non-legal service providers in matters where the lawyer is not representing the client.

24. As a real estate broker, an attorney generally is not ethically obligated to affirmatively monitor the details of compliance of the attorneys from whom the lawyer/broker receives referrals. In particular, the lawyer/broker is not expected to monitor whether referring attorneys make full disclosure to, and obtain informed consent from, their clients. Ordinarily, therefore, it would not be a violation of Rule 8.4(a) for the inquiring attorney to offer and pay referral fees to attorneys for client referrals if the referring attorneys will not actually be representing the clients in the real estate transactions at issue.

25. However, an attorney cannot ignore obvious violations, see, Rule 1.0(k) (“knowledge may be inferred from circumstances”), so if the inquiring attorney knows that a referring attorney has not obtained informed consent from that client regarding the referral to the lawyer/broker, then the lawyer/broker should (a) withhold the referral fee until the referring attorney cures the violation, or (b) refuse the referral, or (c) take other appropriate remedial steps so that she does not assist another lawyer in violating the Rules of Professional Conduct.

CONCLUSION

26. Because the inquiring attorney is still a licensed attorney, Rule 8.4(a) prohibits her from assisting another lawyer in conduct that would violate the Rules of Professional Conduct. Accordingly, whether the inquiring attorney may share her real estate commissions with referring attorneys depends on whether the referring lawyer would be violating the Rules by accepting the referral fee.

27. An attorney is prohibited from simultaneously representing a client in a real estate transaction and receiving a portion of the brokerage commission (*i.e.*, a referral fee) from a real estate broker to whom the attorney refers a client, unless the attorney remits or credits the referral fee to that client. An attorney functioning as a real estate broker (such as the inquiring attorney) is therefore prohibited from knowingly paying a referral fee or sharing a commission without confirming that the commission will be remitted, or equivalent credit given, to the referring attorney’s client.

28. However, an attorney functioning as a real estate broker is not prohibited from paying a referral fee or sharing her real estate commission with an attorney who refers her clients to the lawyer/broker if the referring attorney will not be representing the client in the real estate transaction at issue.

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