



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 ◊ PH 518.463.3200 ◊ www.nysba.org

Committee on Professional Ethics

Opinion 886 (11/15/11)

Topic: Ancillary business organizations; conflict of interest

Digest: A lawyer with a substantial investment in a closely held real estate brokerage firm is precluded from representing a party to a real estate transaction in which the brokerage firm is acting as broker

Rules 1.7, 5.7

QUESTION

1. May an attorney with a substantial passive investment in a closely held nonlegal business entity that offers real estate brokerage, asset management and property management services represent a buyer, seller or lender in a transaction in which that nonlegal entity is serving as a broker?

OPINION

2. The inquirer seeks to establish a closely held nonlegal entity to provide brokerage, asset management and property management services to investors with a focus largely on multi-family apartment assets. The inquirer contemplates a substantial and significant investment in the nonlegal entity but does not contemplate taking an active role in the management or operation of the entity. Inquirer intends to offer legal services to clients of the entity, and particularly services in purchase, sale and lease transactions in which the affiliated nonlegal entity is serving as a broker. The inquirer's firm would be one of several law firms from which clients of the nonlegal entity would be free to choose. The legal services would be offered only after full written disclosure of the inquirer's interest in the nonlegal entity.

3. A lawyer or a law firm may provide nonlegal services, themselves or through a separate entity, to clients or other persons. New York Rules of Professional Conduct (the "Rules") 5.7; see N.Y. State 752 (2002), N.Y. State 753 (2002) and N.Y. State 755 (2002). Whether the nonlegal services provided by the lawyer or law firm, or a separate entity in which they have an interest, are subject to the Rules depends upon whether

such services are separate and distinct from any legal services that the lawyer or law firm may provide and, if so, whether the client “could [not] reasonably believe that such

nonlegal services are the subject of a client-lawyer relationship.” *Id.*. The client will be presumed to believe that such nonlegal services are the subject of a client-lawyer relationship unless (i) the lawyer or law firm has advised the client in writing that such services are not legal services and that the protections associated with a client-attorney relationship do not obtain or (ii) the lawyer’s or law firm’s interest in the separate entity providing such services is *de minimis*. *Id.*.

4. In all instances, however, the lawyer’s services *qua* lawyer are subject to the Rules. In N.Y. State 752, we opined specifically that the application of the personal interest conflict rule found in DR 5-101(A), a precursor of Rule 1.7, to a lawyer seeking to serve in the dual roles of lawyer and broker, *inter alia*, survived the adoption of DR 1-106, the direct predecessor of Rule 5.7. We here reaffirm our opinion in N.Y. State 752 and hold further that, in our opinion, Rule 1.7 applies with undiminished force in circumstances where a lawyer’s conflicting personal interest arises from a separate, nonlegal business or activity permitted by Rule 5.7.

5. Thus, absent informed consent, a lawyer may not provide legal representation to a person or entity if a substantial risk exists that the lawyer’s personal interests arising from a permitted separate, nonlegal activity will affect the lawyer’s professional judgment on behalf of that person or entity. Rule 1.7. Informed consent is dependent upon, *inter alia*, the lawyer’s reasonable belief that the lawyer will be able to provide competent and diligent representation. *Id.*

6. As noted in N.Y. State 752, however, we have opined on a number of occasions over an extended period of time that, because of the strong financial interest of a lawyer who serves as a broker in the outcome of the brokerage effort, the roles of broker and lawyer in the same transaction are incompatible and not subject to consent by the client. N.Y. State 752 and Opinions cited therein. That a lawyer’s or law firm’s participation in a separate brokerage business is limited largely or wholly to that of investor, with little or no management or operational activity, does not alter that result. It is the personal financial interest arising from the investment that creates the personal interest conflict that is the subject of Rule 1.7.

CONCLUSION

7. For the reasons stated, a lawyer with a substantial passive investment in a separate, closely held nonlegal entity that offers real estate brokerage, asset management and property management services may not represent a buyer, seller or lender in a transaction in which such separate nonlegal entity is serving as a broker.

(40-10)