



Committee on Professional Ethics

Opinion 919 (4/13/12)

Topic: Dual Practice; Conflict of Interest

Digest: A lawyer may not act as an attorney for any party to a real estate transaction in which the lawyer is acting as a broker. A lawyer who is employed part time by a real estate office as a broker may be able to serve as a party's attorney even if a member of that real estate office is acting as a broker for one of the parties, but the lawyer must comply with Rule 1.7. If the lawyer will materially benefit from the closing based on his employment at the broker's office or is personally involved with the transaction at that office, then his representation of a party to the transaction is *per se* prohibited.

Rules: Rule 1.7(a) & (b)

FACTS

1. The inquirer is a practicing attorney licensed in New York State. In addition, he is a "part-time associate broker with a small office of a nationally recognized real estate office." Neither the inquirer nor any of his family members have any ownership interest in the real estate company.

QUESTION

2. The inquirer poses two related questions:

A. May a lawyer serve as a real estate broker for the buyer or seller and also serve as that party's attorney at the closing?

B. May a lawyer serve as a party's attorney at a real estate closing if the lawyer is asked to handle the closing by a member of the lawyer's real estate office who is serving as broker for one of the parties?

OPINION

Question A: Serving as attorney and broker in the same transaction

3. The answer to the first question is no. A lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer or the lawyer's spouse is acting as a broker, because the dual role creates a conflict between the interests of the client and the interests of the lawyer. *See, e.g.*, N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 291 (1973); N.Y. State 244 (1972); N.Y. State 208 (1971). The conflict is nonconsentable (*i.e.*, non-

waivable), meaning that the prohibition cannot be overcome through disclosure and client consent. *See* N.Y. State 208.

4. “The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.” N.Y. State 753 (2002). We continue to adhere to that view under the New York Rules of Professional Conduct (the “Rules”). *See* Rule 1.7(a)(2), (b)(1); N.Y. State 845 (2010) (opining that “under Rule 1.7 it remains a nonconsentable conflict for an attorney to act as both a lawyer and broker in the same transaction”).

5. We reached the same result in N.Y. State 244, where the real estate broker was not the lawyer personally but rather was the lawyer’s spouse, because of the “intimate relationship, including financial” between husband and wife. *See also* N.Y. State 291 (“Even though the lawyer personally does not own or have an interest in the real estate agency but his spouse owns or has such interest, it would be improper ... for the lawyer to receive a legal fee in such circumstances”).

Question B: Attorney works for broker but is not serving as broker in the transaction

6. The answer to the second question is more complex, and we have not precisely addressed it before. In N.Y. State 340 (1974), we concluded that the *per se* prohibition against serving as lawyer and broker in the same transaction applied where the attorney’s spouse was a salesperson, rather than an owner, in the brokerage agency. We reasoned that the “intimate relationship and economic interests of husband and wife are inseparable; the acts of one directly affecting the other.” Thus, we opined that a lawyer could not represent a party to a real estate transaction in which the lawyer’s spouse participated as a broker, even with the client’s consent after full disclosure. We noted, however, that there would not be “any impropriety in the attorney representing customers of the brokerage firm which employs the spouse *where the spouse has not participated in and will not benefit from the transaction*” (emphasis added).

7. Our analysis in N.Y. State 340 is relevant here, but the inquirer’s scenario is slightly different. We analyze it under the current Rules. The most relevant provision is Rule 1.7(a)(2), which governs personal conflicts of interest. Unless a lawyer satisfies the elements of the exception in Rule 1.7(b), Rule 1.7(a)(2) prohibits a lawyer from representing a client “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.”

8. Thus, if a reasonable lawyer would conclude that there is a significant risk that the inquirer’s professional judgment in representing a client in a real estate transaction would be adversely affected by the inquirer’s personal interest in maintaining a favorable employment relationship with the real estate office – or by any other personal interest arising out of the inquirer’s employment at that office – then the inquirer may not represent that client unless permitted by the exception in Rule 1.7(b).

9. Under Rule 1.7(b), a lawyer who has a conflict under Rule 1.7(a) may nonetheless represent the client in the matter when certain conditions are met, including these:

“(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ... and
“(4) each affected client gives informed consent, confirmed in writing.”

10. Here, the inquirer has no ownership interest in the real estate company that is serving as a broker in the transaction at issue, but he is employed there. Consequently, the success of the real estate company in closing real estate transactions in which the inquirer represents a party may affect the inquirer’s own economic interests. For example, the salary or bonus that the inquirer receives from the real estate office may increase based on an annual measure such as profitability or the number of closings completed. Furthermore, the legal advice that the inquirer provides to his client in a transaction in which his employer is involved will almost certainly have a direct impact on the economic interests of the real estate company because the company will not receive a commission unless the sale closes.

11. These risks are magnified if the real estate company repeatedly refers matters to the inquirer. *See* N.Y. State 467 (1977) (noting that “the position of the lawyer who accepts repeated referrals may be somewhat more fraught with temptation to avoid the strictures of the Code than one who does not”). The inquirer is asking about matters that would be referred by brokers in his office, so this inquiry involves those magnified risks. The risks also increase as the size and importance of the transaction increases, because a larger deal results in a larger commission to the broker’s office.

12. Thus, a lawyer may have a personal stake in the legal advice rendered to a client who is represented by a broker of the real estate company, and in some cases the lawyer may benefit materially from advising the client to close the transaction. If the lawyer will materially benefit from the closing, or is personally involved with the transaction at the broker’s office, then the situation is analogous to that in N.Y. State 340. In such a case, the lawyer could not reasonably believe that he could be able to provide competent and diligent representation to his client, so a *per se* prohibition would apply. The fact that a lawyer personally (instead of his spouse) would benefit makes the conflict even more perilous than the conflict in N.Y. State 340.

13. Even if the lawyer himself will not materially benefit, the totality of the lawyer’s personal interests might still pose a “significant risk” that his judgment in representing the client at the closing will be “adversely affected” within the meaning of Rule 1.7(a)(2). In this case, however, we know little about the inquirer’s relationship with the real estate company, and we know nothing about the size or importance of the transactions at issue. We are not in a position to determine the level of risk.

14. The inquirer must determine, in light of all of the facts and circumstances, whether there is a significant risk that his professional judgment will be adversely affected by his own interests as an employee of the real estate company that is serving as broker for the inquirer’s client in the transaction. If so, then the inquirer may not represent a client in that transaction unless the conditions in Rule 1.7(b) are satisfied. The threshold question under Rule 1.7(b)(1) is whether

the inquirer reasonably believes that despite the conflict, he can provide competent and diligent legal representation to the client in the real estate matter. If so, then he must obtain the client's informed consent to the conflict, confirmed in writing, per Rule 1.7(b)(4). If he does not reasonably believe that he can provide competent and diligent legal representation to the client, or if the client refuses to consent, then the inquirer must decline the representation.

15. Thus there are three possibilities. If there is no significant risk that the inquirer's professional judgment in representing a client in a real estate transaction would be adversely affected by his personal interests, then Rule 1.7(a)(2) does not apply and the inquirer may accept the representation without obtaining the client's consent. If such a significant risk is present, then Rule 1.7(a)(2) does apply and the inquirer must comply with Rule 1.7(b). However, if the inquirer will materially benefit from the closing or is personally involved with the transaction at the real estate office, then there is a *per se* non-waivable conflict.

CONCLUSION

16. A lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer is acting as a broker. That conflict is nonconsentable.

17. A lawyer who is employed by a real estate office as a broker may be able to serve as a party's attorney at a closing even if another member of his real estate office is acting as a broker for one of the parties, provided that the lawyer is not involved with the sale of the property at the broker's office and will not materially benefit from the transaction based on his employment at that office. If the lawyer is involved as a broker or will materially benefit, then the representation is *per se* prohibited. If the lawyer will not materially benefit based on his employment at the broker's office but there is a significant risk that his personal interests will adversely affect his professional judgment on behalf of the client, the lawyer may not represent the client unless he complies with Rule 1.7(b).

(6-12)