



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1013 (8/1/2014)

Topic: Dual Practice; Conflict of Interest

Digest: An attorney who works as a broker at a brokerage firm cannot represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act as a broker for the brokerage firm to purchase the property.

Rules: Rules 1.7(a) & (b).

FACTS

1. The inquirer, who is an attorney, is also working as a broker at a brokerage firm that wishes to purchase a property. The owner of the property is in foreclosure proceedings.

2. The inquirer desires to represent the defendant owner in foreclosure proceedings for the purpose of preventing the foreclosure so the brokerage firm where he works as a broker can purchase the property. The inquirer concedes that he would be “the broker and attorney on the same property at the same time,” but contends that “the roles would be played in two different manners[:] One as attorney in litigation with the lien holder, and one as broker for the prospective purchasing brokerage.”

QUESTION

3. May an attorney who works as a broker at a brokerage firm represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act for the brokerage firm in its purchase of the property?

OPINION

4. We have concluded in a legion of opinions that 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 919 (2012); 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). This conflict is not waivable, so the prohibition cannot be overcome through disclosure and client consent under Rule 1.7(b). *See* N.Y. State 919; N.Y. State 208. “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 919 (2012) (quoting N.Y. State 753 (2002)).

5. The facts presented by this inquiry demand the same analysis and the same result; a nonconsentable conflict arises in the situation posed by the inquirer. As in situations where an attorney acts as both a real estate broker and an attorney, an inherent conflict of interest arises when the lawyer represents the defendant owner in mortgage foreclosure proceedings with the intention of thereafter purchasing the property as broker for a prospective purchaser. A “reasonable lawyer would conclude” that where an attorney representing a defendant owner in a mortgage foreclosure proceeding plans to subsequently purchase the property as a broker for a prospective purchaser, “there is a significant risk that the lawyer’s professional judgment on behalf of [the] client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” Rule 1.7(a)(2). This is due to the fact that any outcome in the mortgage foreclosure proceeding in which the plaintiff lender obtains the property, even if that is the best possible result for the client, will thwart the attorney’s plan to broker the purchase of the property from the client.

6. Furthermore, we conclude that the inquirer cannot “provide competent and diligent representation” to the defendant owner in the mortgage foreclosure proceeding, as required by Rule 1.7(b)(2), because his judgment will be inherently tainted by his desire to subsequently broker the purchase of the property from the client, which will necessarily be contingent on the outcome of the foreclosure proceeding. Therefore, the inquirer’s conflict cannot be cured by the client’s informed consent under Rule 1.7(b)(4).

CONCLUSION

7. An attorney who works as a broker at a brokerage firm cannot represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act as a broker for the brokerage firm to purchase the property.