



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

Opinion 1015 (8/4/2014)

Topic: Dual practice; conflict of interest; nonlegal services

Digest: Lawyer who is also a real estate broker may represent the seller of real property and act as broker in same transaction if the lawyer's fee as a broker is fixed and non-refundable and any conflict is properly waived. Broker services that are not distinct from legal services are subject to the rules of legal ethics.

Rules: 1.5(a); 1.7; 5.7

FACTS

1. The inquirer is both a lawyer and a licensed real estate broker. He proposes to provide certain broker services to sellers of real estate and then, if a buyer is found, also to provide legal services to the seller in the resulting transaction. The broker services would be compensated in a flat fee paid in advance rather than in a commission-based payment contingent upon closing.

2. The inquirer has provided two examples of the proposed arrangements. One example is that he would charge a fixed non-refundable fee of \$300 for listing the property on the local multiple listing service ("MLS"), and the client would be advised that such listing would be the only service provided.¹ In the other example, the inquirer would charge a fixed non-refundable fee of \$1,500 for all services normally provided by a broker for a seller. Even this larger amount would typically be less than the traditional broker's fee.²

3. In both examples, the inquirer would also represent the seller as the seller's lawyer in connection with the sale. Although the flat-rate broker fees would be lower than standard commission-based fees, the inquirer would not on that account charge more for his legal services than he charges other law clients for similar services.

¹ This is in effect a listing for sale by owner ("FSBO"). However, if the seller wants the property listed on an MLS, the seller needs to engage a broker who is a participant in that MLS. The MLS arrangements, by providing for a commission to a broker representing the ultimate buyer, encourage brokers for prospective buyers to show the property. Typically the MLS listing form, signed by the seller and the seller's broker, sets forth the compensation of the seller's broker and the compensation of the buyer's broker, if any, to be paid by the seller. The inquirer is a participant in the local MLS.

² We understand that there is some variation in fee arrangements depending on the transaction and the area of the State. Sometimes the seller's broker is paid a contingent fee of 6%, split equally with the buyer's broker so that each receives 3% of the selling price. In other cases the commission percentage and the split may be a bit different. But under any of the variations, the \$1,500 fixed broker's fee would in most instances be significantly less than a traditional percentage-based fee.

QUESTION

4. May a lawyer who is also a licensed real estate broker act as the lawyer for a seller of real property and also act as the seller's broker if the lawyer's compensation as broker is a fixed non-refundable fee not contingent on the closing of the sale?

OPINION

5. The New York Rules of Professional Conduct (the "Rules") generally prohibit a representation in which there is a significant risk that the lawyer's personal interests would have an adverse effect on the lawyer's exercise of professional judgment.³

6. We have opined on numerous occasions that 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. *See, e.g.*, N.Y. State 1013 ¶1 (2014); N.Y. State 933 ¶7 (2012), N.Y. State 919 ¶3 (2012) (citing 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 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 1013 ¶1 (2014) (quoting N.Y. State 753 (2002) and N.Y. State 919 (2012)).

7. The risk that legal judgment would be adversely affected is heightened by the common circumstance that the broker's contingent fee will be substantially greater than the fee of the lawyer representing the seller. Indeed, given the usual fee arrangements, we have found the risk so great that "[t]he conflict is nonconsentable (*i.e.*, non-waivable), meaning that the prohibition cannot be overcome through disclosure and client consent" under Rule 1.7(b). N.Y. State 919 ¶3; *see* Rule 1.7(b)(1) (providing that conflict is nonconsentable if the lawyer cannot "reasonably" believe that the lawyer will be able to provide competent and diligent representation to the affected client).

8. However, these prior opinions were based on the premise of contingent brokers' commissions; we have not previously addressed the kind of broker's fee proposed in this inquiry. If a fee for broker services is not contingent on the transaction being closed and is non-refundable, then there is no reason to believe that the lawyer's professional judgment would be adversely affected by the lawyer's interest in that broker's fee. The reasoning in our prior opinions thus does not apply to the current inquiry.

9. On the facts of the current inquiry, however, there may still be a conflict of interest arising from considerations other than the lawyer's interest in the broker's fee.

³ Rule 1.7(a)(2) provides that "a lawyer shall not represent 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" unless the conflict is waivable and properly waived pursuant to Rule 1.7(b).

When a lawyer or law firm provides both legal and nonlegal services in the same matter ... , a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise.

Rule 5.7, Cmt. [5A]; *see* N.Y. State 958 ¶17 (2013) (citing opinions holding that Rule 1.7 applies with undiminished force when lawyer's conflicting personal interest arises from a separate, permitted nonlegal business). For example, a lawyer representing a real estate seller who also engages the services of a real estate broker may have occasion to advise his client as to whether the broker services are being well performed. When, as proposed in the inquiry, the lawyer performs the broker services as well, there can be the kind of personal-interest conflict described in the Comment. This leads to the question whether such a conflict would be consentable.

10. The nonconsentability of the conflicts discussed in our prior broker opinions was based on fee considerations not present here. As to the current inquiry, if the lawyer believes that he will be able to provide competent and diligent legal representation to a particular seller, we do not see anything in the facts presented that would preclude that seller's proper waiver of the conflict.⁴ If the seller gives informed consent confirmed in writing, as required by Rule 1.7(b)(4), then the inquiring lawyer may undertake the representation.

11. We referred in paragraph 9 to the lawyer's provision of nonlegal services – here, acting as a broker – because it bears on whether the lawyer has a conflict of interest in the concurrent provision of legal services. But an analysis of the inquirer's ethical obligations also requires consideration of the ways in which nonlegal services can themselves be subject to the rules of legal ethics. Rule 5.7 sets forth the responsibilities regarding nonlegal services, which are defined as “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.” Rule 5.7(c).

12. We understand that the services of a real estate broker may include pricing the house, market analysis, and advice on how to present the house and highlight desirable amenities. The broker may participate in marketing the house with for-sale signs, internet and newspaper advertising, direct-mail flyers, showings, an MLS listing to interest other brokers, and determination of factors such as annual utility costs and local school facts. The broker may also handle offers, counter-offers and contingency issues, up to final price negotiations, and keep a paper trail from initial offer to final closing. These are all services that both lawyers and nonlawyers may lawfully provide. Thus, as noted in N.Y. State 933 ¶8 (2012), broker services are nonlegal services within the meaning of Rule 5.7.

13. Different parts of Rule 5.7 apply to different situations. To determine which provision applies when a lawyer provides both legal and nonlegal services to a client, it is necessary to consider whether the nonlegal services “are distinct” from legal services being provided to that

⁴ *See* Rule 1.7(b)(1) (precluding waiver if belief in ability to provide competent and diligent representation would be unreasonable); Rule 1.7(b)(2) (precluding waiver when representation is prohibited by law); Rule 1.7(b)(3) (precluding waiver when one client asserts claim against another).

client. *See* Rule 5.7(a)(1), (2); Rule 5.7, Cmt. [1] (“Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other.”). If they are not distinct, then the lawyer is subject to the Rules of Professional Conduct “with respect to the provision of both legal and nonlegal services.” Rule 5.7(a)(1).

14. In the arrangements proposed here, the inquiring lawyer would provide legal and nonlegal services to a client from the same office and in the very same matter. Some of the potential nonlegal services, such as price negotiation, are ones also commonly performed by lawyers. Moreover, it appears that the client would communicate with the inquirer in the same way, and perhaps in the same conversations, for the provision of legal and nonlegal services. Possibly the contemplated legal and nonlegal services could be structured so as to keep them distinct.⁵ But that has not been attempted here. Under the facts as presented, the inquirer’s broker services to a client would *not* be distinct, for purposes of Rule 5.7, from the legal services to that client. *Cf.* N.Y. State 860 (2011) (legal and nonlegal services not distinct “where the law firm provides both grant writing services and tax advice or other legal services related to the grant application”).

15. Because the nonlegal and legal services would not be distinct, nonlegal broker services would be subject to all ethical protections “that ordinarily accompany a client-lawyer relationship,” such as “the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence.” Rule 5.7, Cmt. [1]. Moreover, the prohibition of excessive fees in Rule 1.5(a) applies not only to legal fees, but also to the lawyer’s overall compensation for the transaction, when there are legal and nonlegal services that are not distinct. *See* N.Y. State 958 ¶14 (2013).

CONCLUSION

16. A lawyer may represent a seller of real property while also representing the seller as broker if (a) the services as broker are for a fixed non-refundable fee that is not contingent on the closing of the transaction, and (b) any conflict is properly waived. If the legal and broker services are not distinct, then the provision of broker services is subject to the rules of legal ethics, and the combined fees for legal and broker services may not be excessive.

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⁵ For example, it could count toward a conclusion of distinct services if the lawyer performs all broker services at an office away from the law office and with a different company name, staff, and telephone number. If the services are distinct and the lawyer advises the client in writing that the broker services “are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services,” then the broker services would not be subject to rules of legal ethics, with some exceptions. Rule 5.7(a)(2), (4); *see* Rule 5.7, Cmt. [4] (noting that some rules, “such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation” and thus govern even the provision of distinct nonlegal services).