



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

Opinion 1117 (4/4/17)

Topic: Conflict of interest; serving as lawyer and broker in same real estate transaction

Digest: A lawyer who receives a broker's commission in a real estate transaction may not also serve as the lawyer for the buyers, even if the buyers are long-time clients and friends and have requested both kinds of services

Rule: 1.7(a) & (b)

FACTS

1. The inquirer is an attorney and licensed real estate broker. A married couple, long-standing clients and friends of the inquirer, seek to buy real estate and have asked the inquirer to represent them as both broker and attorney in that real estate purchase.
2. The inquirer proposes to serve in both of those capacities in the real estate transaction. As broker, the inquirer would receive a brokerage commission from the seller (which we assume would be a percentage of the sale price of the real estate). As attorney, however, the inquirer would provide the requested legal services pro bono, because the buyers have limited resources.

QUESTION

3. May a lawyer who is serving as a broker in a real estate transaction also provide pro bono legal services to the buyers in that transaction?

OPINION

4. The general provisions on conflicts of interest are set forth in Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). A lawyer with a conflict of interest under Rule 1.7(a) may not represent a client unless the conflict is waivable and is properly waived by the client under Rule 1.7(b). One kind of conflict, a "personal interest" conflict, arises when 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." Rule 1.7(a)(2).
5. Such personal interest conflicts are generally present when a lawyer provides brokerage services as well as legal services in the same real estate transaction. 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 also 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). In N.Y. State 753 (2002), we explained our reasoning:

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.

See also N.Y. State 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

6. Moreover, while many conflicts may be waived by the client, that is not the case when a lawyer serves as both broker and attorney. “[T]he personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer’s responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client.” N.Y. State 933 ¶7 (2012).

7. This per se rule that serving as both broker and attorney in a real estate transaction creates a non-consentable conflict does not apply in certain situations involving non-standard arrangements for broker compensation. For example, the per se rule does not apply when the broker is to be compensated by a flat fee not dependent on the closing of the transaction,¹ or when the broker credits the full amount of the brokerage commission to the client.² But here, as we understand the inquiry, the broker compensation would be the usual kind of commission and would be retained by the inquirer. Accordingly, this matter is subject to our longstanding per se rule, and the conflict is non-consentable.

8. The fact that the inquirer would provide the legal services pro bono does not change this conclusion. See N.Y. State 916 (2012) (“A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting as broker”). Indeed, underlying the per se rule is the materiality of a standard brokerage commission. See N.Y. State 1015 ¶7 (2014) (“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.”). When the amount of the legal fee is zero, the relative importance of the brokerage fee becomes even greater, and so does the risk it poses to the lawyer’s independent legal judgment, because the only way the lawyer can make money in this scenario is to close the real estate transaction and obtain the broker’s commission.

9. Seeking to avoid application of the per se rule discussed above, the inquirer asserts certain distinctions from the facts of our prior opinions. The inquirer points out that the provision of both kinds of services would result from a request by the clients, who are long-time clients and friends of the inquirer, rather than from the attorney’s suggestion. The inquirer also notes that the brokerage commission would be paid by the seller and would result in no financial burden to the inquirer’s clients.

10. We do not think that these distinctions change the result. The lawyer’s interest in the commission is the same no matter who suggested the provision of brokerage services and no matter who pays that commission. The fact that the broker’s commission will be paid by the seller rather than by the lawyer’s client (the buyer) does not diminish the risk of an adverse

impact on the lawyer's independent professional judgment. A large commission is a large commission.

11. In N.Y. State 1043 (2015), we rejected the argument that the benefit to the client from receiving free legal services eliminates the conflict. There, the inquirer represented an estate in the sale of real property through a real estate broker the lawyer had recommended to the executors. The broker later offered to pay the lawyer a referral fee (25% of the broker's commission), which the lawyer proposed to accept in lieu of charging legal fees to the estate for services rendered in the real estate transaction. We disapproved, saying:

The disabling conflict that [our prior] opinions identify is a lawyer's pecuniary interest in the broker's commission , which irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf. That the estate beneficiaries may benefit from the arrangement does not remedy this circumstance, any more than a lawyer/broker's waiving a legal fee, which is also of benefit to the client, can do so.

12. Conceivably the friendship between the lawyer and the clients could be so strong as to serve as an adequate counterweight to the lawyer's interest in the commission, but the test in the Rules does not turn on so subjective an assessment. Rather, it turns on these objective standards: whether "a reasonable lawyer" would find a significant risk that personal interests would compromise professional judgment, and whether the actual lawyer "reasonably" believes there will be competent and diligent representation. We continue to believe that application of these objective standards supports the per se rule set forth in our prior opinions that renders a conflict such as this one non-consentable.

CONCLUSION

13. In a real estate transaction, even when a lawyer provides pro bono legal services at the request of clients who have long been clients and friends of the lawyer, the lawyer may not also serve in that transaction as a broker compensated by commission. The conflict cannot be cured by the client's consent because it is non-consentable.

(5-17)

¹ The per se rule of a nonconsentable conflict applies whenever the brokerage services are compensated in the usual way, as a commission contingent on the transaction being closed. We have also considered the context of an alternative fee arrangement in which when brokerage services are compensated by a fixed and non-refundable fee, not contingent on closing. We found that such a fee arrangement did not give rise to a conflict, and while there could be other foreseeable conflicts in such a situation, those other conflicts could be subject to waiver by informed consent. N.Y. State 1015 ¶¶ 8-10 (2014).

² When a lawyer who is also acting as a real estate broker remits or credits the entire brokerage fee to the client, then the brokerage fee typically would not give rise to the kind of personal-interest conflict described above. See N.Y. State 845 part C (2010) (a lawyer who will be compensated as a broker may share part of her brokerage commission with a referring lawyer who represents a buyer or seller in the transaction if the referring lawyer remits or credits the referral fee to the client).