

New York State Bar Association
Committee on Professional Ethics

Opinion 1150 (4/30/2018)

Topic: Solicitations and Referrals: Spouses in Related Businesses

Digest: A lawyer's spouse engaged in a non-legal business related to the lawyer's practice area may for ethics purposes be equated to the lawyer in certain circumstances. Thus, a real estate lawyer whose spouse is a real estate broker may receive referrals from the broker/spouse only if the broker/spouse is not involved in the real estate transaction and the broker/spouse fully complies with the rules governing lawyer solicitations. A real estate lawyer may refer clients to a broker spouse only if the lawyer is not involved in the real estate transaction and may be required, in some instances, to obtain informed consent from the referred client, confirmed in writing.

Rules: 1.7(a)(2); 1.7(b), 1.8(e), 1.8(i), 7.3(a)(1); 7.3(b), 8.4(a).

FACTS:

1. The inquirer is a transactional real estate attorney whose spouse is a real estate broker. The couple wishes to refer matters to each other. In some circumstances, the inquirer would refer clients to the spouse as a broker; in others, the broker/spouse would recommend the inquirer to represent a party in the closing of a real estate transaction. The inquirer understands that the inquirer and broker/spouse may not participate in their respective roles in the same real estate transaction.

QUESTIONS:

2. The inquirer poses three questions:

- (a) May a real estate attorney accept referrals from a broker/spouse who has no personal involvement in the real estate transaction?
- (b) May a real estate attorney refer business to a broker/spouse if the attorney does not represent any party in the real estate transaction?
- (c) May a real estate attorney representing a client in the sale of property refer the selling client to the broker/spouse in connection with the client's rental of an apartment in which the real estate attorney does not represent the selling client?

OPINION

3. The inquirer recognizes that a lawyer may not represent a party to a real estate transaction if the attorney's spouse is involved in the transaction. This is consistent with a view

we have long held. *See* N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 244 (1972), *modified on other grounds* in N.Y. State 340. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the “Rules”) provides that a lawyer may 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.” The reach of a “lawyer’s own financial, business, property or other personal interests” extends to the “financial, business, property or other personal interests” of the lawyer’s spouse.

4. Such is the teaching of N.Y. State 855 (2011). There, the issue was whether a personal injury lawyer could permissibly refer a client to a litigation financing company in which the lawyer’s spouse owned a controlling financial interest. We concluded that a lawyer could not ethically do so. We reasoned that a lawyer is not allowed (with exceptions inapplicable there) to subsidize a client’s litigation, Rule 1.8(e), nor permitted to acquire a proprietary interest in a litigation, Rule 1.8(i). *Id.* ¶¶ 4-7. Thus, we said, under the Rules, the lawyer could not personally own an interest in the litigation financing company to which the lawyer referred clients for funding. *Id.* ¶ 5; *see* N.Y. State 1145 ¶¶ 13-20 (2018) (a lawyer may not refer clients to a litigation funding firm in which the lawyer is a direct and substantial investor). The unifying interest that marriage entails persuaded us that, if the lawyer could not directly violate Rules 1.8(e) and 1.8(i), then the lawyer could do not so indirectly with a an entity owned by a spouse. Accordingly, in interpreting Rule 1.7(a)(2), we consider any referral relationship between a lawyer and a lawyer’s spouse to implicate the lawyer’s own “financial, business, property or other personal interests.” *See* N.Y. State 855 ¶¶ 11-12.

5. N.Y. State 855 relied, as we do here, on Rule 8.4(a), which forbids a lawyer a lawyer “to violate or attempt to violate” a Rule “through the acts of another.” N.Y. State 855 ¶ 12. Rule 8.4(a) is of particular importance on the subject of the inquirer’s first question -- the proposed broker/spouse’s referral of parties to the inquiring lawyer.

6. Rule 7.3 regulates solicitation and recommendation of professional employment. Rule 7.3(b) defines “solicitation” to mean, in part, “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients,” the “primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.” Rule 7.3(a)(1) specifically forbids a solicitation “by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.” In any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach. Thus, for instance, the exception for persons who may be contacted in person or in real time – such as former or existing clients – refers to the inquirer’s former or existing clients, not those of the broker/spouse. Likewise, Rule 7.3 sets forth other provisions on solicitations – such as recordkeeping and filing – for which the lawyer/spouse must assure compliance. By reason of Rules 1.7(a) and 8.4(a), these regulations apply to the actions of the broker/spouse as if done by the lawyer/spouse.

7. Whether a particular advertisement is a regulated solicitation “initiated by or on behalf of a lawyer” turns on the facts and circumstances of the communication. Rule 7.3(b) “makes an important distinction between communications initiated by the lawyer and those initiated by a

potential client.” N.Y. State 1049 ¶ 8 (2015); *see* Rule 7.3, Cmt. [2] (“A ‘solicitation’ means any advertisement” that is “initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client”). A spectrum exists, on one end, between an unprompted question by a person on whether the broker/spouse knows any real estate lawyers, and, on the other, the broker/spouse’s unprompted recommendation of the lawyer/spouse as a lawyer to handle a real estate transaction. *See* N.Y. State 1049 ¶ 17 (a web posting “directed to, or intended to be of interest only to, individuals” referring to a particular incident “would constitute a solicitation under the Rules”); N.Y. State 1014 ¶¶ 8, 10 (2014) (a current client’s recommendation of a lawyer to a person in need of legal services, made without the lawyer’s participation or knowledge, is not a solicitation “initiated by or on behalf of the lawyer”).

8. The inquirer’s second and third questions are really the same: May a lawyer refer a client to the lawyer’s broker/spouse to act in a real estate transaction in which the lawyer is not representing the referred client? The Rules set forth no categorical ban on the lawyer making such a referral. Nevertheless, the lawyer owes ongoing duties of care and loyalty to an existing client, including the duty to exercise independent professional judgment on the client’s behalf. Not every client request for a referral, no matter how unrelated to the subject of the lawyer’s representation of the client, invariably occasions these duties of care and loyalty. Rather, in our view, whether a lawyer’s referral of an existing client to a non-lawyer service provider implicates these duties depends on the circumstances. If, for example, a meaningful relationship is present between the subject matter of the lawyer’s representation of the client in a particular matter and the nature of the referral the client seeks, then we believe that the client has a reasonable right to expect that, in making the referral, the lawyer will exercise independent professional judgment on the client’s behalf. It follows that the duty to exercise independent professional judgment requires an assessment whether any conflict of interest may burden that judgment.

9. In the current inquiry, we believe that the client could reasonably believe that the subject matter of the lawyer’s representation of the client and the client’s referral request are not so attenuated as to release the lawyer from the duties of care and loyalty to the client. In our view, a reasonable lawyer could well conclude that referring a client to a broker/spouse creates a significant risk that the lawyer’s own “financial, business, property or other personal interests” will adversely affect the exercise of professional judgment in making the referral. We believe, however, that this conflict is subject to waiver by the referred client upon informed consent, confirmed in writing, pursuant to Rule 1.7(b). The requirement of consent is not onerous. The lawyer needs to disclose, at a minimum, the marital relationship with the broker/spouse, and the possibility that, if retained, any commission the broker/spouse earns in the matter could benefit the referring lawyer. This disclosure may be oral. The requirement that consent be “confirmed in writing” – which may be written by either the lawyer or the client, by email or other form of written communication – need acknowledge only that, pursuant to the requisite disclosures, the client agrees to waive any conflict.

CONCLUSION

10. A lawyer who is engaged in a transactional real estate practice and whose spouse is a real estate broker may receive client referrals from the lawyer’s spouse provided that the broker/spouse is not involved in the real estate transaction and the lawyer assures that the

broker/spouse fully complies with rules governing solicitation by lawyers. A real estate lawyer may refer a client to a broker/spouse provided that the lawyer does not represent the client in the real estate transaction and, if the circumstances suggest a conflict, the lawyer obtains the informed consent of the referred client, confirmed in writing.

(40-17)