New York State Bar Association
Committee on Professional Ethics

Opinion No. 1161 (01/04/2019)

TOPIC: Confidential Information: Lawyer's duty to preserve and to make adequate disclosure in seeking client consent to disclosure

DIGEST: When a lawyer rather than a broker prepares a real estate contract, the lawyer may not disclose the contract to the broker without the client's informed consent, which must include disclosure of any personal, financial, or business interest of the lawyer in responding to the broker's request for disclosure of the information.

FACTS

1.   The inquirer is a New York real estate transactional lawyer. We are informed that, in contrast to many areas in New York, the custom in the locale where the inquirer principally practices is for the lawyer, rather than (as elsewhere in the State) the broker, to prepare the contract of sale. The inquirer represents a selling client in a pending residential real estate transaction in which the client's broker has now requested a copy of the signed contract between the buyer and the seller. The inquirer expresses concern about complying with this request absent client consent, and also because the inquirer frequently encounters this broker in other real estate matters and does not wish the broker to learn what the inquirer depicts as provisions uniquely of the inquirer's design.

QUESTIONS

2.   The inquiry raises two questions:

        (a)   When a lawyer rather than a broker prepares the contract of sale in a real estate transaction in which a broker is also involved, may the lawyer disclose the contract to the broker without the client's consent?

(b)   When a lawyer has a personal, financial, or business interest in not disclosing a real estate contract to the client's real estate broker, does a conflict of interest arise in the event that the lawyer seeks client consent to disclose the contract?

OPINION

3.   Rule 1.6(a) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer "shall not knowingly reveal confidential information" unless, among other things, the client gives informed consent. The same Rule defines "confidential information" to mean "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential." We have characterized this duty of confidentiality as "one of the lawyer's principal obligations" under the Rules. N.Y. State 1125 ¶ 3 (2017.)

4.   Two exceptions appear in Rule 1.6(a). One is if disclosure is permitted under circumstances set out in Rule 1.6(b), none of which apply to this inquiry. The other is if the disclosure "is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." We have no factual basis on which to conclude that these factors apply in the circumstances presented. In the absence of such facts, we assume that the sale contract is confidential information, the sanctity of which the inquirer must preserve absent the client's consent.

5.   The inquirer may not bury the broker's request. Rule 1.4(a)(1) says that a lawyer "shall promptly inform the client of," among other things, "any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules."   Rule 1.0(j) defines "informed consent" to mean "the agreement by a

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person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." "The extent of the information needed and the risks to be addressed will vary both with the nature of the information being disclosed and the sophistication" of the client. N.Y. State 1059 ¶ 15 (2015); *see* N.Y. State 1061 ¶ 19 (2015) (facts and circumstances determine the adequacy of disclosure).

6.   We decline to speculate here whether a dispute over the broker's fee is latent in the broker's request for the real estate contract, except to observe that this potential may be part of a lawyer's duty to meet the adequacy test of disclosure under Rule 1.0(j). In light of the inquirer's own admitted personal, financial, and business reason for resisting disclosure to the broker, however, we believe that the inquirer's own interests implicate Rule 1.7(a)(2), which arises when a significant risk exists that such interests will "adversely" affect the lawyer's "professional judgment on behalf of a client." That a lawyer may wish for the lawyer's own sake to decline to disclose the real estate contract to the broker, when disclosure may be in the client's interest in the matter in which the lawyer represents the client, is a conflict within the meaning of Rule 1.7(a)(2). This conflict may be subject to informed consent under the standard set out above if, nevertheless, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the client, Rule 1.7(b)(1), but we cannot imagine the lawyer complying with Rule 1.7 without adequate disclosure of the lawyer's own stake in advising the client whether to provide informed consent to disclosure of the contract.

CONCLUSION

7.   When a lawyer rather than a broker prepares a contract of sale in a real estate transaction, a copy of which the broker has requested, the contract is confidential information that the lawyer is obliged to protect absent informed client consent. The adequacy of informed consent depends on the facts and circumstances of each case, but a lawyer's own personal, financial, or business interest in resisting disclosure creates a conflict of interest, subject to waiver, which the lawyer must disclose to the client in seeking consent to disclosure of the confidential information.

(14-18)