



Committee on Professional Ethics

Opinion 1237 (02/01/2022)

Topic: Conflict of interest and referral fees; serving as lawyer on a real estate transaction referred by real estate broker associated with lawyer's real estate agency

Digest: A lawyer may not accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company will split the brokerage commission earned on the real estate transaction, regardless of whether the attorney agrees to waive in favor of the real estate clients the portion of the real estate commission due to his real estate agency.

Rules: 1.7(a)(2); 1.7(b); 7.2(a)

FACTS:

1. The inquirer, an attorney and real estate broker, is an owner and principal of a real estate company, separate from his law practice, that offers real estate brokerage services. At this time, the only other brokers associated with the real estate company are his mother and a friend. Historically, the real estate company has performed real estate brokerage services primarily for family and friends. The attorney has not performed legal services on matters for which he has earned a brokerage commission. Where the attorney has performed legal services in relation to a sale on which he was also a broker, he has waived any brokerage commission in favor of the client.
2. Another real estate agent is considering leaving that agent's current real estate brokerage agency to join the attorney's real estate company. This real estate agent is more active than the brokers currently associated with the lawyer's real estate company. The real estate agent and the real estate company will split the commissions earned as a result of brokering real estate transactions in accordance with a pre-agreed percentage breakdown.
3. At his current agency, the real estate agent refers some of his real estate clients to the attorney, by including the attorney's name alongside the names of other attorneys. After associating with the attorney's brokerage firm, the real estate agent would like to continue referring potential clients to the attorney to perform legal services.

QUESTIONS:

4. May a lawyer accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company owned by the attorney will split the brokerage commissions earned on the real estate transaction?
5. If not, may the lawyer accept the referral if his real estate company were to waive in favor of the real estate clients the portion of the real estate commission due to his real estate company, while allowing the associated real estate broker to keep his agreed share of such commissions?

OPINION:

6. The general provisions addressing conflicts of interest relating to current clients are set forth in Rule 1.7 of the New York Rules of Professional Conduct (the “Rules”). A lawyer with a conflict of interest as defined by Rule 1.7(a) may not represent a client unless the conflict is both waivable and properly waived by the client under Rule 1.7(b).

7. Rule 1.7(a)(2) defines a “personal interest” conflict as arising 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.”

8. Our opinions have consistently concluded that a conflict arises when a lawyer acts as a lawyer and a broker in the same real estate transaction. They have also concluded that such conflicts are per se non-waivable. N.Y. State 1043 (2015) (“we have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services”); N.Y. State 1177 (2017) (“A lawyer who receives a broker’s commission in a real estate transaction may not also serve as the lawyer for the buyers [without charging for the service], even if the buyers are long-time clients and friends and have requested both kinds of services.”). We have reasoned that, where a lawyer acts as both broker and lawyer in the same transaction, “the broker’s personal and financial interest in closing the transaction interferes with the lawyer’s ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a)” That is because “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 916 (2012); see also N.Y. State 933 ¶7 (2012) (“the 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 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

9. As owner of the real estate company offering real estate brokerage services, the inquirer has a financial interest in the brokerage commissions that associated brokers generate and split with that real estate company. Our prior opinions make clear that the lawyer cannot also provide legal services with respect to real estate transactions that generate a commission for the real estate company. The arrangement would convey upon the lawyer a financial interest in the real estate transactions that would interfere with the lawyer’s ability to be fully independent in giving legal advice to the clients. It would therefore constitute a per se non-waivable conflict as in our prior opinions noted above.

10. Citing N.Y. State 1208 (2020), the inquirer asks whether the same result would adhere if his real estate company were to waive in favor of the real estate clients the portion of the real estate commission due to his real estate company, while allowing the associated real estate broker to keep his agreed share of such brokerage commissions.

11. The issue in Opinion 1208 was whether an attorney could accept referrals for real estate closings from her paralegal who was also a real estate broker. Because the attorney had no financial interest in the paralegal-broker’s commission, we concluded that the referrals “did not trigger the per se non-waivable conflict that was present in N.Y. State. 916 and N.Y. State 1043.” Accordingly, the appropriate inquiry was whether or not, under the particular facts and circumstances, a referral by the paralegal-broker created a “significant risk that the lawyer’s interest would be adversely affected by the lawyer’s own financial, business, property or other personal interests.” If a significant risk did not exist, then no Rule 1.7(a)(2) conflict arose. If a substantial risk did exist, then the attorney could accept the referral only upon satisfying the

exceptions set forth in Rule 1.7(b), including informed written client consent.

12. In Opinion 1208, the real estate clients would owe the same amount in commission regardless of whether the inquiring attorney, or some other attorney, provided legal services in connection with the closing. By contrast, under the fact pattern described here, any clients of the real estate broker who choose to avail themselves of the inquirer's legal services in connection with a referred real estate transaction will receive a discount to the real estate commission they owe with respect to the referred real estate transaction.

13. The inquirer's proposal to waive the real estate company's portion of the commission owed by the real estate clients implicates Rule 7.2(a), relating to "Payment for Referrals." With certain exceptions not implicated here, Rule 7.2(a) provides that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." In exchange for the real estate broker's referrals, the inquirer proposes to provide the real estate broker with the ability to charge the clients who hire the inquirer a lower commission without a corresponding reduction in the amount the broker will earn as a commission. Because this ability to charge a lower commission constitutes "something of value" that is given in exchange for a referral, the arrangement would violate Rule 7.2(a).

14. In N.Y. State 845 part C (2010), the question was whether 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 obtains informed client consent and remits or credits the referral fee to the client. In considering the question, we acknowledged that "the attorney will . . . have an incentive to refer real estate clients to a broker who pays a referral fee (i.e., shares her commission)" even where the lawyer remits or credits the referral fee to the client "because the referral fee (in effect a reduced real estate broker commission) will enable the attorney to offer potential clients a reduced brokerage fee (or an equivalent cash payment or credit) for utilizing the attorney's services, thus attracting more business to the attorney." We nevertheless approved the payment of part of the brokerage commission in exchange for recommending the broker – where accompanied by informed client consent and a remittance of the commission to the client – because, "although a referral fee gives the lawyer a financial incentive to refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers." ¶ 18.

15. In N.Y. State 845 part C (2010), the attorney was able to offer a reduced fee as a result of referring business to a real estate broker. By contrast, the inquirer here posits a circumstance where the attorney is enabling the real estate broker to enjoy the possibility of enhanced business prospects resulting from a reduced brokerage commission in connection with referrals to the attorney. Our opinions have indicated that the former is acceptable, at least under certain circumstances. See N.Y. State 845 part C. Rule 7.2(a) makes clear that the latter is not.

CONCLUSION:

16. A lawyer may not accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company will split the brokerage commission earned on the real estate transaction, regardless of whether the attorney agrees to waive in favor of the real estate clients the portion of the real estate commission due to his real estate agency.

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