



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

Opinion 1252 (01/11/2023)

Topic: Referral Fees

Digest: A licensed attorney who only provides nonlegal services to real estate clients may receive referral fees from a third-party investment advisor.

Rules: 1.7, 1.8, 5.7

FACTS:

1. The inquirer is a member of the New York State bar but does not engage in the practice of law. Instead, the inquirer works as a real estate broker.
2. A financial advisor has approached the inquirer and offered to pay referral fees to the inquirer for any clients that the inquirer refers to the advisor.

QUESTION:

3. May the inquirer accept referral fees from the investment advisor?

OPINION:

4. At bottom, the inquiring lawyer asks whether the vast number of opinions this Committee has issued concerning the permissibility of referral fees apply to her because the inquirer does not engage in the practice of law but instead works as a real estate broker. In general, those decisions have found the receipt of referral fees from third party service providers to be permissible only where the personal conflict of interest for the lawyer receiving such fees can be overcome through disclosure to the client and obtaining the client's consent. See N.Y. State 1086 (2016) (collecting opinions). We have often found that the conflict is "so great that disclosure to and consent from the client will not cure the conflict." See *id.* However, our starting point here is whether the New York Rule of Professional Conduct (the "Rules") apply to the inquirer with respect to the receipt of referral fees.

5. A lawyer's provision of nonlegal services to clients is addressed in Rule 5.7. Because the inquirer is not providing any legal services, thereby eliminating the need to differentiate between the provision of legal and nonlegal services, see Rule 5.7(a)(1) & (2), the only potentially applicable provision is Rule 5.7(a)(3) which provides that:

A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject

to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

6. Although we do not think clients of a real estate broker would typically believe they are subject to a client-lawyer relationship, Rule 5.7(a)(4) provides that the lawyer must simply inform the client in writing that that the services are not legal services, and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services to eliminate any presumption that the services are legal in nature.

7. In that case, the lawyer is excused from complying with the Rules dependent upon the existence of a representation or a client-lawyer relationship, such as Rules 1.7 and 1.8 concerning conflicts of interest, although the lawyer is still subject to certain Rules that apply regardless of whether the lawyer is representing a client. See Rule 5.7, Cmt. [4] (Rules 1.9 (prohibiting misuse of confidences or secrets of former clients), 8.3 (requiring reporting of certain misconduct) and 8.4 (prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct) apply to lawyers “irrespective of the existence of a representation”). Therefore, the inquiring lawyer may accept referral fees from a third party investment advisor.

CONCLUSION:

8. A lawyer who only provides nonlegal real estate broker services to clients may accept referral fees from a third party investment advisor.

(13-22)