



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

Opinion 1273 (08/28/2024)

Topic: Referral of real estate matters to lawyer from real estate broker who is also employed by lawyer as an associate

Digest: A lawyer may accept real estate clients referred by an associate in the lawyer's firm who is also a licensed real estate broker, provided the lawyer does not share legal fees or real estate commissions with the broker/associate and the lawyer obtains the client's informed consent, confirmed in writing.

Rules: 1.0(j), 1.7(a) and (b)

FACTS:

1. The inquirer has an associate who is also a real estate broker. The broker/associate would like to refer her real estate clients to the inquirer for legal representation in real estate matters and the inquirer would like to accept those referrals. The inquirer would not pay the broker/associate a referral fee for any matter in which the broker/associate was working as a realtor, and the inquirer would not receive any portion of any real estate commissions that the client paid to the broker/associate.
2. The inquirer states that referrals from the broker/associate would represent only a small part of the inquirer's law practice revenue and that clients would be advised of the employer/employee affiliation between the inquirer and the broker/associate.

QUESTIONS:

3. May the inquirer accept real estate clients referred to him by the broker/associate for legal representation in matters in which she is serving as a realtor?

OPINION:

4. In New York, a lawyer may not serve as both a realtor and a lawyer in the same real estate transaction. As the Committee wrote in 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." Opinion 1043 explained that "where the lawyer acts as both broker and a 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) . . .'" *See also* N.Y. State 1015 (2014); N.Y. State 916 (2012); and N.Y. State 933 (2012).

5. In N.Y. State 1237 (2022), where a lawyer who owned a real estate company planned to split the brokerage commission earned on a real estate transaction with the real estate agent, we reaffirmed our view that a lawyer may not act as a lawyer and a broker in the same real estate transaction. In Opinion 1237 we wrote: “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” because of the inherent tension between a lawyer’s duty to render independent advice to the client, on one hand, and the lawyer’s personal interest receiving a broker’s fee, which is earned only upon closing of the transaction, on the other hand. That tension renders the conflict unwaivable (*i.e.*, non-consentable). See N.Y. State 1237 (2022), ¶ 8. Thus, returning to the present inquiry, neither the inquirer nor the broker/associate could act as both lawyer and broker on any matter referred to the inquirer by the broker/associate.

6. Referrals from real estate brokers to lawyers are not barred in all situations, however. For example, in N.Y. State 1208 (2020), this Committee opined that a lawyer was permitted to receive referrals from her paralegal who was also a licensed real estate broker, where the lawyer made full disclosure of her (the lawyer’s) personal interest conflict to the client and obtained the client’s informed consent, confirmed in writing, as required by Rule 1.7(b). Opinion 1208 noted that the ethical concerns in prior opinions “primarily derived from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal service.” Opinion 1208 observed that “[t]his rationale applies as long as the lawyer has a financial interest in the real estate broker’s commission whether or not the lawyer is acting as a broker.” N.Y. State 1208 ¶ 6 (*citing* N.Y. State 1043). In Opinion 1208, the Committee determined that the lawyer “had no financial interest in the broker’s commission,” and therefore, the *per se* non-waivable conflict that was present in N.Y. State 916 and N.Y. State 1043 because of the lawyer’s interest in the broker’s commission in those situations was not triggered. But Opinion 1208 advised lawyers to be mindful about maintaining professional independence even if they had no interest in the broker’s commission, and cautioned the lawyer not to permit the paralegal to “direct or regulate any advice rendered to the referred real estate client.” N.Y. State 1208 ¶ 11.

7. Here, the inquirer asks whether an associate who is also a real estate broker may refer real estate matters in which the associate is acting as a realtor but not as a lawyer. The inquirer would obtain informed client consent from the affected clients, would not allow the broker/associate to participate in the legal work on real estate matters the associate referred to the lawyer, and would not share real estate commissions or legal fees with the broker/associate in referred matters. The inquirer believes that referrals from the broker/associate are unlikely to constitute a significant portion of the inquirer’s law practice or to generate significant income.

8. The test for determining whether the conflict is consentable turns on the significance of the likely brokerage revenue to the lawyer and whether such revenue will affect the lawyer’s independent professional judgment. As we noted in Opinion 1208, “a disabling personal financial conflict of interest is likely to arise if the paralegal refers enough matters to the inquirer that those referrals, in the aggregate, constitute a significant portion of the fees earned in the inquirer’s practice as a whole.” N.Y. State 1208 ¶8. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the “Rules”) provides that (absent a client’s informed consent, confirmed in writing) a lawyer should 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.” If there is such a personal interest conflict, Rule 1.7(b) provides that the lawyer may nonetheless represent the client in the transaction if the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation,” the representation is not prohibited by law, and the client “gives informed consent, confirmed in writing.” Rule 1.7(b)(1), (2) and (4).

9. Rule 1.0(j) defines “informed consent” as follows:

“Informed consent” denotes the agreement by a 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 adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

See also Rule 1.0, Comment [6] (explaining “informed consent”).

10. Comment [18] to Rule 1.7 elaborates on “informed consent” by stating:

Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. . . .

11. We conclude that the conflict of interest arising from the broker/associate’s referral of a matter to the inquirer is consentable under these circumstances, and thus Rule 1.7 permits the conflict to be waived by the client if the lawyer obtains the client’s informed consent, confirmed in writing, per Rule 1.7(b)(4).

CONCLUSION:

12. A lawyer may accept real estate clients referred by an associate in the lawyer’s firm who is also a licensed real estate broker, provided the lawyer does not share legal fees or real estate commissions with the broker/associate and the lawyer obtains the client’s informed consent, confirmed in writing.

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