

Lawyers and Real Estate Commissions

Real Estate In-Depth March, 2011

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This column has previously addressed the inability of a lawyer to receive brokerage compensation in any transaction in which the lawyer is also functioning as counsel to any of the parties. On April 1, 2009 New York's Code of Professional Responsibility for attorneys was replaced by the New York Rules of Professional Conduct which are patterned after the American Bar Association's Model Code of Ethics. The new Rules provide methods by which an attorney can obtain the informed consent of the parties and thereby resolve conflicts of interest. Many attorneys thought that the new Rules would permit an attorney to act as both broker and lawyer in a real estate transaction. The New York State Bar Association's Committee on Professional Ethics recently issued Opinion 845 which reaffirmed the prior Rule, that an attorney may not, even with the consent of all parties, receive compensation as both the lawyer and the broker in the same transaction.

Realtor Interaction with Attorneys

Realtors have sometimes been asked to offer compensation to attorneys when the attorney refers a client or customer to the Realtor. Realtors have no ethical constraint or restriction on doing so. An attorney has the right under Section 442-(f) of the Real Property Law to act as a broker in a transaction. That does not make the attorney a licensed real estate broker. It simply permits the attorney to receive a brokerage commission. Many attorneys, suffering through difficult economic times, have elected to also obtain licenses as a real estate broker. Obtaining a real estate license allows the attorney to hold himself or herself out as a licensed real estate broker and to have associates (salespersons) affiliated with the firm.

While there is no prohibition against the Realtor sharing a commission with an attorney whether or not the attorney is a licensed real estate broker, some attorneys are unaware of their own ethical duties to not function as both broker and attorney in the same transaction. It is useful therefore to understand the history of the applicable Ethics Opinions to which attorneys must adhere.

Bar Association Ethics Opinion No. 208 - Acting as a Lawyer and Broker in the Same Transaction

This Opinion, dated November 22, 1971, acknowledged that a lawyer is permitted to engage in the real estate business while continuing to practice law. As for functioning as a lawyer in real estate transactions in which the lawyer also receives brokerage compensation, however, the opinion stated:

"A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable

probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client”.

Accordingly, this Opinion affirmed that a lawyer should not act in a dual capacity in such transactions.

Bar Association Ethics Opinion No. 340 - Lawyer's Spouse

This 1974 Bar Association Ethics Opinion addressed whether it was proper for a lawyer whose spouse is a real estate salesperson working on a strictly commissioned basis, to represent one of the parties in a real estate transaction in which the lawyer's spouse participated as a salesperson. The question asked was whether or not full disclosure and informed consent was sufficient. The Opinion concluded that the nature of the intimate relationship between the husband and wife and their economic interests are inseparable. The representation by the attorney of clients or customers in transactions in which the spouse acts as a salesperson, therefore, is ethically not permissible for the attorney.

This Opinion also noted that if an attorney's spouse works for a particular firm as a salesperson, the attorney could represent buyers or sellers in transactions in which the attorney's spouse has not participated and will receive no benefit from the transaction.

Bar Association Ethics Opinion No. 493 - Solicitation of Legal Business

Until 1977 lawyers were not permitted to advertise. As a result of the decision by the United States Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), it became clear that lawyers were permitted to advertise and doing so was not unethical. This decision resulted in radical changes to ethics rules applicable in each state and also resulted in changes in New York giving attorneys permission to conduct a law practice and a real estate brokerage firm from the same office. Lawyers, however, were cautioned that they were still barred from soliciting employment as a lawyer as a result of contacts made in the context of another business or profession (e.g., real estate brokerage). This prohibition emanates from Section 479 of the New York State Judiciary Law which states in part:

“It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a

business so to solicit or procure such business, retainers, or agreements.”

Bar Association Ethics Opinion No. 845 - Application of New Rules of Professional Conduct

The most recent opinion issued by the Committee on Professional Ethics addressing this subject is dated October 14, 2010. It arose from an inquiry made by an attorney after the effective date of the new Ethics Rules. The facts detailed in this Opinion were as follows:

“An attorney has recently decided to work as a real estate broker, but has not given up her law license. She desires to advertise that she will pay a percentage of her broker’s commission to attorneys who refer buyers or sellers to her. In the past, she has received similar letters from other attorneys, but she is unsure if such offers are ethically acceptable.”

The decision of the Committee on Professional Ethics provided the following guidance:

1. An advertisement that an attorney places in her capacity as a real estate broker, with no intention of attracting legal business, is not an “advertisement” within the meaning of New York’s Rules of Professional Conduct. Since the attorney is not seeking to be retained as a lawyer, the Opinion indicates that such an advertisement would be permitted.
2. Under the new Rules of Professional Conduct an attorney continues to be prohibited in the State of New York from acting as both an attorney and broker in the same transaction. The Opinion states in part:

“...in this Committee’s Opinion, under Rule 1.7 it remains a nonconsentable conflict for an attorney to act as both a broker and lawyer in the same transaction.”

3. In addressing the inquiry of the attorney regarding the payment of referral fees to other lawyers the Opinion states:

“...under Rule 8.4(a), if the inquiring lawyer/broker knows that the referring attorney will simultaneously represent the buyer or seller in the real estate transaction and keep a share of the real estate brokerage commission, the inquiring attorney may not share her brokerage commission with the referring attorney.”

4. The Ethics Opinion then addressed whether the attorney could function as a referring attorney, receive a referral fee and act as a lawyer for one of the parties provided that the attorney remits or credits the brokerage referral fee to his or her client. The Committee concluded that the real estate lawyer may ethically accept a referral fee with the client's informed consent, "including a reminder that the client is free to choose a real estate broker other than the one her lawyer recommends." Moreover, the real estate broker lawyer paying the referral fee must confirm that the referring attorney will remit or credit the fee or commission to the client. In other words, the attorney cannot act as counsel and also retain the brokerage referral fee.
5. When the lawyer to whom a referral fee will be paid is not representing any of the clients in the transaction, the Committee concluded that, "a lawyer may ethically accept referral fees or commissions from non-legal service providers in matters where the lawyer is not representing the client."

Conclusion

This latest opinion of the New York State Bar Association's Committee on Professional Ethics confirms that even with informed consent in writing, under the new Rules of Professional Conduct effective April 1, 2009, dual representation as a lawyer and broker remains nonconsentable and impermissible.

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