New York State Bar Association

Committee on Professional Ethics

Opinion 738 – 4/16/01

Topic: Conflict of interest: referral of clients to title abstract company owned by attorney's spouse

Digest: Improper for attorney to refer real estate client to title abstract company in which the attorney's spouse has an ownership interest for other than purely ministerial work

Code: DR 5-101(A), 5-105(C)

QUESTION

May an attorney who represents clients engaged in real estate matters refer those clients to a title abstract company in which the attorney's spouse has an ownership interest?

OPINION

In N.Y. State 595 (1988), this Committee opined that it was ethically permissible for a law firm to refer real estate clients to a title abstract company in which the firm had an ownership interest "for purely ministerial abstract work," provided the clients gave "an advance, informed consent after full disclosure of the nature of the abstract company's fee structure and the law firm's proprietary interest in the abstract company," and the referral was accompanied by "a notice stating the client's entitlement to receive any appropriate credit for a non-service related fee or disbursement related to the abstract company's role in the transaction." Where, however, the abstract company rendered the additional service of preparing a title report or serving as an agent for the title underwriter, we concluded that "a prohibited conflict of interest arises that may not be cured by the consent of those concerned with the transaction." In N.Y. State 621 (1990), we adhered to the result reached in N.Y. State 595 and clarified and amplified the reasons why the conflict inherent in the dual roles as attorney and principal in an abstract company preparing a title report or acting as agent for the

title underwriter was not curable by appropriate disclosure, informed consent and some appropriate credit against the legal fee.

For the reasons stated in N.Y. State 595, as clarified and amplified in N.Y. State 621, we now adhere to the same *per se* result where the abstract company to which a lawyer refers real estate clients for preparation or procurement of a title report and policy is owned by the attorney's spouse.[1]

We note at the outset that the "obviousness" test of DR 5-105(C) – which this Committee read into the closely analogous conflict of interest proscribed by DR 5-101(A) – has now been replaced by a "disinterested lawyer" test that has been expressly incorporated in both DR 5-105(C) and DR 5-101(A). Under DR 5-101(A), as amended in 1999, a client's informed consent after full disclosure is insufficient to cure a conflict of interest where "the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests," unless "a disinterested lawyer would believe that the representation of client will not be adversely affected thereby."

The gravamen of the conflict enunciated in our prior opinions was that the dual roles of attorney and owner impermissibly "require a law firm, which as a principal in the abstract company prepares a title report showing exceptions in title and recommending whether a title insurance policy will be issued, to negotiate these issues, as counsel for a party in the underlying transaction, with itself." N.Y. State 595, at 6. In our view, a "disinterested lawyer" would believe that the conflict inherent in those dual roles would adversely affect the representation of the real estate client for the same reasons the conflict would not pass muster under the prior "obviousness" test imported into DR 5-101(A). *See* N.Y. State 731 (2000)(noting that notwithstanding replacement of the "obviousness" test with the "disinterested lawyer" standard, "the essential analysis is unchanged").

Turning now to the precise question before us, we held in N.Y. State 208 (1971) that a lawyer for a real estate client could not also act as a broker in the same transaction, notwithstanding prior disclosure and client consent. We reached the same *per se* result in N.Y. State 244 (1972), where the real estate broker *was the lawyer's spouse* because of the "intimate relationship, including financial" between husband and wife. In N.Y. State 291 (1973), we again held that where a lawyer *or spouse* has an interest in a brokerage agency, the lawyer could not accept both a legal fee and a brokerage commission from the same client in connection with the same transaction "for the reasons stated in N.Y. State 244 (1972)."

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[1] As we noted in footnote 3 to N.Y. State 621, it is not feasible for this Committee "to prescribe different ethical rules for the variety of ownership, organizational and operational structures that may characterize abstract companies and the differing clients they serve. "

In N.Y. State 340 (1974), we reached the same *per se* result where the attorney's spouse was a salesperson, rather than an owner, in the brokerage agency, reasoning as follows:

> The intimate relationship and economic interests of husband and wife are inseparable; the acts of one directly affecting the other. The representation by the attorney of customers of the spouse's brokerage firm has been disapproved. N.Y. State 244 (1972). For the same reasons the representation by the attorney of customers of the spouse salesperson is disapproved.

In N.Y. State 493 (1978), we cited with approval and continued to adhere to the view expressed in the above four opinions "that a lawyer cannot act in that capacity on behalf of any party to a real estate transaction in which the lawyer *or his spouse* has acted as broker . . ." (emphasis added).

In the criminal field, we held in N.Y. State 654 (1993) that the district attorney could not represent the People in the same case in which the district attorney's spouse represents a defendant. While criminal cases implicate Canon 9 considerations of fairness and the appearance of fairness to a greater extent than civil cases "[b]ecause the criminal justice system pits the power of the state against an individual on pain of loss of liberty or even life" (N.Y. State 654, at 1), the reasoning of N.Y. State 654 was grounded upon the same rationale as the brokerage commission cases, to wit:

> The professional and financial success of one spouse necessarily benefits the other. N.Y. State 340 (1974); *see also* ABA 340 (1975). Where a client's interest conflicts with that of the lawyer's spouse, or the spouse's client, we previously have analyzed the situation as involving a possible conflict with the lawyer's self-interest under DR 5-101(A) and as creating a potentially impermissible appearance of impropriety under Canon 9. *E.g.*, N.Y. State 583 (1987); N.Y. State 493 (1978) (lawyer may not represent party to real estate transaction in which lawyer's spouse was the broker); N.Y. State 409 (1975) (assistant district attorney and assistant public defender spouses cannot be adversaries in the same case); N.Y. State 378 (1975) (defense lawyer and probation officer who are spouses may not be involved in same criminal case); N.Y. State 368 (1974) (assistant county attorney and spouse may not be adversaries in the same case).

While N.Y. State 654 was also grounded upon DR 9-101(D) (added to the Code in 1990), which proscribes certain representations where the lawyers on both sides are related as parent, child, sibling or spouse, we pointed out in the opinion that "DR 9-101(D) provides a more explicit textual basis in the Code for

the above-cited opinions that, prior to its enactment, the Committee based on DR 5-101(A) and Canon 9." Indeed, the inclusion of "spouse" in the relationships proscribed by new DR 9-101(D) reinforces the continued viability of our prior opinions on the spousal conflicts in the brokerage commission cases.

In short, the fact that the title abstract agency to which a lawyer refers a real estate client is owned, in whole or in part, by the lawyer's spouse, does not insulate the lawyer from the reach of N.Y. State 595 and N.Y. State 621.

CONCLUSION

An attorney may not refer a real estate client to a title abstract company for other than ministerial title work where the lawyer's spouse has an ownership interest in the abstract company.

(7-01)