



Committee on Professional Ethics

Opinion 867(5/31/11)

Topic: Simultaneous representation of lender and seller in residential real estate transaction

Digest: Different lawyers in the same law firm may not represent the lender and the seller in a residential real estate transaction unless the lawyers each satisfy the requirements of Rule 1.7 and other applicable Rules.

Rules: 1.0(e) & (f), 1.4, 1.6, 1.7, 1.10

QUESTION

1. Do the New York Rules of Professional Conduct that took effect on April 1, 2009 permit different lawyers in the same law firm to represent both the mortgage lender and the seller in a residential real estate transaction, or does such representation instead present a non-waivable conflict of interest?

OPINION

2. Rule 1.7 (“Conflict of Interest: Current Clients”) addresses the limited circumstances under which one lawyer may represent multiple clients in the same transaction. Rule 1.7 serves the combined functions of DR 5-101 and DR 5-105 of the former New York Code of Professional Responsibility (the “Code”), but Rule 1.7 contains more detail and requires that client consent be confirmed in writing. Rule 1.7 provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

3. This Committee previously addressed whether a lawyer may represent both a lender and seller in the same transaction. In N.Y. State 611 (1990), issued under the former Code, we concluded:

A lawyer may not represent the lender and the seller in a real estate transaction unless after weighing the specific facts and circumstances the lawyer is satisfied that it is not likely that the interest of these parties will differ and unless both clients consent after full disclosure of the implications of multiple representation.

4. Other opinions under the Code also concluded that a lawyer may sometimes represent more than one party to a real estate transaction. *See, e.g.*, N.Y. State 438 (1976) (allowing joint representation of lender and borrower with their informed consent if a disinterested lawyer would believe the lawyer can competently represent both); N.Y. County 615 (1973) (allowing representation, with informed consent, of buyer and seller who had already agreed upon the principal terms and conditions of sale); N.Y. State 162 (1970) (allowing lawyer to represent both buyer and seller with their consent if their interests are not actually or potentially differing); N.Y. State 38 (1966) (representation of buyer and seller “should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it”). Under the new Rules, our view of dual representation of a lender and seller in non-litigated real estate transactions remains unchanged. We now analyze the specific situation presented here.

A. Do the clients have “differing interests” under Rule 1.7(a)(1)?

5. Before accepting the dual engagement, the lawyers for each party must assess whether their prospective clients have “differing interests.” The phrase “differing

interests” is defined in Rule 1.0(f) as “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.” Comment [8] to Rule 1.7 provides general guidance on determining whether dual representation would involve the lawyer in representing “differing interests”:

[8] Differing interests exist if there is a significant risk that a lawyer’s exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer’s other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer’s professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

6. Even where it may appear that there is a unity of interest or a common objective between the seller and the lender in a relatively simple real estate transaction and no direct negotiations will take place between the seller and the lender, the representation will usually involve the lawyer in representing “differing interests.”¹ As we noted in N.Y. State 611, a conflict might arise where the seller would want to close the sale but the lender might decide it has no obligation to make the loan.

B. Is the conflict consentable under Rule 1.7(b)?

7. If a conflict based on differing interests exists under Rule 1.7(a)(1), then the lawyer must determine whether the conflict is consentable under Rule 1.7(b). A concurrent conflict of interest is consentable if (1) the lawyer reasonably believes that he or she can provide “competent and diligent representation” to each client affected by the conflict; (2) the representation is “not prohibited by law”; and (3) the lawyer will not be required to assert “a claim by one client against another client” that the lawyer represents in the same litigation or proceeding before a tribunal. We have no reason to believe that the dual representation would be “prohibited by law,” and representation in a real estate transaction will not require the lawyer to assert any claims in litigation.

¹ Because we conclude that there are *always* differing interests under these circumstances, it is not necessary to analyze the second prong of Rule 1.7(a)(2), *i.e.* whether the lawyer’s personal interests likewise create a conflict. In other settings, however, conflicts may arise from a lawyer’s personal interests rather than from differing interests.

However, we must assess the element in Rule 1.7(b)(1): whether the lawyer can reasonably believe that he or she can provide competent and diligent representation to both parties. Comment [28] to Rule 1.7 provides valuable guidance on this element. It provides, in relevant part:

Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them.

8. Another source of guidance is N.Y. City 2001-2, which said that lawyers contemplating dual representation in a transaction should consider multiple factors, including the following:

1. The nature of the conflict. In a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer's independent professional judgment is significantly mitigated. . . .
2. The likelihood that client confidences or secrets in one matter will be relevant to the other representation. . . . To the extent that neither client's confidential information could be used to its disadvantage in the conflicting representation or to the advantage of the other client, this concern is not implicated. . . .
3. The ability of the lawyer or law firm to ensure that confidential information of the clients will be preserved. [S]creening and the establishment of other information control devices may be appropriately offered by the lawyer or demanded by the client as a condition of the client's consent. . . .
4. The ability of the lawyer to explain, and the client's ability to understand, the reasonably foreseeable risks of the conflict. . . . [T]he sophistication of the client is a factor that must be considered in determining the effectiveness of client consent to a transactional conflict. . . .
5. The lawyer's relationship with the clients. . . . [T]he lawyer [must] be able to represent both clients with equal and undiminished vigor. . . .

9. Regarding the factor of sophistication (factor # 4 above), N.Y. City 2001-2 stated that "sophisticated corporate and institutional clients can consent to conflicts which

might be non-consentable in cases involving unsophisticated lay clients who are not represented by independent counsel in connection with the consent.” Nevertheless, we have imposed some limits on dual representation even with respect to sophisticated clients. See *e.g.*, N.Y. State 823 (2008) (lawyer cannot continue to represent either joint client in a litigation if their strategies significantly diverge); N.Y. State 807 (2007) (the fact that buyer and seller each sought independent counsel to represent them in negotiations against the other reflected a level of adversity that could not be waived when, unbeknownst to buyer and seller, the attorneys they separately approached turned out to be associated in the same firm).

10. Lawyers at the same firm should be especially cautious before agreeing to represent two parties to a residential (as opposed to commercial) real estate transaction, even if the interests of the two clients are generally aligned and the potential for litigation or disclosure of confidences seems small. The typical seller in a residential real estate transaction is relatively unsophisticated when compared to the institutional lender who, by its size, power, and business potential to the law firm, may have an inherently stronger relationship with the lawyer.² This imbalance could interfere with the lawyer’s ability to provide competent and diligent representation to each affected client, implicating Rule 1.7(b)(1). *Cf.* Rule 1.7, cmt. [33] (“each client in the common representation has the right to loyal and diligent representation”).

11. The factor of confidentiality is especially important in determining whether simultaneous representation of the lender and seller is permissible. Confidentiality is governed by Rule 1.6 (“Confidentiality of Information”). Under Rule 1.6(a), a lawyer representing the seller in a real estate transaction has a duty of confidentiality to the seller. If concerns arise regarding the acceptability of title, or environmental problems, or any condition of closing, then Rule 1.4 (“Communication”) may obligate the lawyer to advise the lender of the facts giving rise to those concerns, but Rule 1.6(a) may prohibit the lawyer from disclosing that information to the lender absent the seller’s informed consent. The opposing mandates of Rule 1.4 and Rule 1.6 may thus create an irreconcilable conflict of interest. For example, the lawyer cannot recommend that the seller disclose environmental problems with the property simply to please the lender, but the lawyer cannot recommend that the lender close the loan without learning about those problems. When a lawyer must disclose one client’s confidential information to another client in order to represent the second client competently and diligently, but the disclosure is prohibited because the first client will not consent and no exception to the duty of confidentiality applies, then the conflict is ordinarily non-waivable because the lawyer cannot provide competent and diligent representation to each client. See N.Y. City 2005-2 (the “critical question is whether the representation of either client would be impaired”).

C. Has the lawyer obtained each client’s informed consent, confirmed in writing?

12. Where a lawyer has determined under Rule 1.7(b)(1) that the conflict arising from a multiple representation is consentable, Rule 1.7(b)(4) requires the lawyer to obtain

² If the lawyer or law firm anticipates repeat business from the lender but not from the seller, for example, the lawyer must carefully determine whether the expectation of future business from the lender creates a significant risk that the lawyer’s professional judgment on behalf of the residential seller will be adversely affected by the lawyer’s own financial interests. If so, a conflict would be triggered under Rule 1.7(a)(2) as well.

each affected client's "informed consent, confirmed in writing," after full disclosure of the implications of the multiple representation. Informed consent is defined in Rule 1.0(j) to denote "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."

13. As an integral part of obtaining informed consent, the lawyer should explain the implications of the multiple representation for the attorney-client privilege and the lawyer's duty of confidentiality to each client under the Rules. When obtaining informed consent, lawyers should advise clients – unless the parties have an explicit understanding to the contrary – that information gained in the representation may not be privileged if a dispute later arises between the parties, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000), and that the lawyer may be forced to withdraw from one or both representations if a dispute arises between the two clients, see Rule 1.7(a)(1), or if either client will not allow the lawyer to convey confidential information material to the other client's matter, see Rule 1.7, cmt. [27] ("lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other"); Rule 1.7, cmt. [31] ("as part of the process of obtaining each client's informed consent, the lawyer should advise each client that ... the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other").

14. Each client's consent must be confirmed in writing. Rule 1.0(e) gives a lawyer a choice of three methods: (1) the lawyer may obtain a writing from the client to the lawyer confirming that the client has given consent; (2) the lawyer may promptly transmit a writing to the client memorializing the client's oral consent; or (3) the lawyer may obtain confirmation directly from the client in a statement on the record in a proceeding before a tribunal. Here there is no proceeding before a tribunal, but either of the first two methods of confirming consent will suffice.

D. May different lawyers from the same firm represent the lender and the seller?

15. The specific question here is not whether *one* lawyer may represent both the lender and the seller in the same residential real estate transaction, but rather whether *different* lawyers at the same law firm may represent both the lender and the seller in that transaction. The analysis that applies to different lawyers within a law firm who seek to represent two parties to a residential real estate transaction parallels the analysis that applies to one lawyer seeking to represent two parties in the same transaction. The imputation rule under the New York Rules of Professional Conduct, Rule 1.10(a), provides that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8, or 1.9. However, Rule 1.10(d) states that a disqualification by imputation "may be waived ... under the conditions stated in Rule 1.7." Those conditions include the informed consent of each client. The law firm therefore must first determine whether the two proposed clients have differing interests under Rule 1.7(a)(1) or if there is a significant risk that the lawyer's judgment will be adversely affected by the lawyer's personal interests under Rule 1.7(a)(2). Either situation will create a conflict.

16. If there is a conflict, lawyers in the same firm must not undertake the dual representation unless the representation complies with Rule 1.7(b). If, after carefully weighing the facts and circumstances of the particular transaction, both lawyers in the firm reasonably believe that they can provide competent and diligent representation to their respective clients despite the differing interests between the clients, if the dual representation is not prohibited by law, and if the lawyers obtain informed consent from each client confirmed in writing, the representation of the lender and the seller by different lawyers in the same law firm is permitted. Otherwise, it is not.

CONCLUSION

17. Different lawyers at the same law firm may not represent both the mortgage lender and the seller in a residential real estate transaction except in the very limited circumstances where the lawyers can satisfy their obligations to each client under Rule 1.7 and other applicable Rules.

(25-09)