



## Committee on Professional Ethics

Opinion 916 (3/27/12)

**Topic:** Lawyer's provision of free legal services when lawyer is also broker in a real estate transaction.

**Digest:** A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting as broker, even if the lawyer advises the party that the party may retain separate counsel.

**Rules:** 1.7(a)

### QUESTION

1. The inquiring lawyer asks whether a lawyer may serve as a real estate broker in a transaction, and be paid for that service, while also offering free legal services on contract and other legal matters in the same transaction with the disclosure that the client is free, if the client so chooses, to retain a separate attorney to represent the client in the transaction. For the reasons set forth below, our answer is no.

### OPINION

2. In N.Y. State 752 (2003), we wrote:

“In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker “because of the possible conflict between his client's and his own personal interest.” N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success).”

3. The rationale of these opinions is that the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction consistent with the principles now embodied in Rule of Professional

Conduct 1.7(a). Otherwise put, the problem primarily stems not from the fee the lawyer receives from rendering purely legal advice, but from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal services. In our judgment, that financial interest would create an influence that informed consent cannot relieve. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981); N.Y. State 619 (1991). *See also* N.Y. State 595 (1988); N.Y. State 621 (1991); N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

4. Accordingly, an offer of free legal services on top of the non-legal services a lawyer proposes to render does not remedy the ill at the heart of our prior opinions. A client's natural attraction to the cost-saving involved in the lawyer's proposal only fortifies our concern. A lawyer rendering free legal services, whether *pro bono publico* or as an appendage to non-legal services the lawyer is also providing, owes the client a duty of rendering independent professional judgment. That duty does not allow the lawyer to represent the client when a reasonable lawyer would find a significant risk that the lawyer's professional judgment would be adversely affected by the lawyer's personal financial interests. The more likely a client is to want or need legal services free of charge, the more important is the protection of assuring the exercise of independent professional judgment unburdened by conflicting personal interests. Advising the client that the client could hire another lawyer – the functional equivalent of an effort at consent that we have found wanting in these circumstances – does not eliminate the problem animating our opinions.

## **CONCLUSION**

5. A lawyer may not offer to provide free legal services in a real estate transaction in which the lawyer is acting and being paid as the broker, even if the lawyer/broker advises that the client has the option to retain separate counsel.

(58-11)