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New York State Bar Association
Committee on Professional Ethics

Opinion 933 (9/7/12)

Topic: Dual practice; real estate broker; law office.

Digest: A lawyer may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as lawyer and broker in the same transaction.

Code: Rules 1.6 (a) and (c) 5.7, 5.8, 7.1, 1.7(a),

QUESTIONS

[1] May a lawyer ethically practice law and conduct a real estate brokerage business in the same premises?

[2] May a lawyer who is also engaged in a real estate brokerage business conduct a joint mailing of greeting cards, business cards, refrigerator magnets and the like to a combined list of law clients, brokerage clients, general business contacts and other names without differentiation of the source.

FACTS

[3] Inquirer is an attorney practicing alone in his residence, from which he also conducts a real estate brokerage business in the form of a limited liability company of which inquirer is the sole member but not the sole employee. The brokerage entity does not pay any rent to the inquirer.

OPINION

[4] In a departure from prior opinions and due to the decision of the United States Supreme Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this committee opined in N.Y. State 493 (1978) (*i.e.*, under the Code of Professional Responsibility) that "a lawyer may conduct his law practice and a real estate brokerage business from the same office . . . ." In *Bates*, the Supreme Court held that lawyer advertising enjoys a First Amendment protection, thereby effectively eliminating many traditional prohibitions of lawyer advertising. Prior opinions of this Committee that a lawyer could not ethically conduct a law practice from the same office in which the lawyer or the lawyer's spouse conducted a real estate brokerage had been premised on

the perceived impropriety of lawyer advertising. *Id.* In the light of *Bates*, this Committee overruled those prior opinions to the extent that they held to the contrary.

[5] Nothing in Rule 5.7 of the Rules of Professional Conduct, which governs the provision of non-legal services by a lawyer or law firm directly or through an entity that the lawyer or law firm owns or controls or with which the lawyer or law firm is otherwise affiliated, and which, therefore, governs the inquirer's situation, suggests a different conclusion.

[6] On the same basis, we see no ethical objection to inclusion in the same mailing envelope a greeting card, business card, refrigerator magnet or other token of that sort that indicates that the sender is both a lawyer and a licensed real estate broker, or two of whatever the lawyer may send, one from the lawyer as lawyer and one as proprietor of the brokerage, *provided* that the information is truthful and is neither deceptive nor misleading. *See* Rule 7.1; N.Y. State 493, *supra*; New York State 487 (1978). *See also*, *Ibanez* v. *Florida Dep't of Business and Professional Regulation*, 512 U.S. 136 (1994).

[7] Three cautionary reminders are in order. First, while a lawyer may conduct a legal practice and a brokerage business from the same premises, a lawyer may not ethically serve both as lawyer for a party to a real estate transaction and also as broker in the same real estate transaction. Rule 1.7(a) states in pertinent part that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (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." In many circumstances, fully informed client consent may enable a lawyer to proceed with a representation, notwithstanding a personal conflict. This Committee has opined repeatedly, however, most recently in N.Y. State 919 (2012) and in N.Y. State 752 (2002) following the adoption of the rules addressing the responsibilities of lawyers and law firms providing non-legal services to clients or other persons (then DR 1-106 and now Rule 5.7), that the personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client.

[8] Second, we note the provisions of Rule 5.7, which are applicable to brokerage services provided by a lawyer. If the brokerage services provided to a particular brokerage client are not distinct from legal services provided to that same client, albeit in different matters, or could be perceived by that client to be the subject of a client-lawyer relationship, those brokerage services will be subject to the Rules of Professional Conduct. Moreover, "it will be presumed that the person receiving [the brokerage] services believes" them to be the subject of a client-lawyer relationship "unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services . . . ." *Id*.

[9] Finally, paragraph b of Rule 5.7 enjoins a lawyer not to allow any non-lawyer with whom the lawyer is associated in a brokerage business to "direct or regulate" the lawyer's professional judgment in rendering legal services" or to cause the lawyer "to compromise [the lawyer's] duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services."

CONCLUSION

[10] For the reasons stated, and subject to the cautions hereinabove set forth, the questions posed are answered in the affirmative.

(47-10)