



New York State Bar Association
Committee on Professional Ethics

Opinion 952 (12/17/12)

Topic: Concurrent representation of lender and buyer in residential real estate closing; payment of buyer's legal fees by lender

Digest: Lawyer may not represent both lender and buyer in residential real estate transaction if part of a series of such transactions in which lawyer regularly represents that lender and lender regularly pays the buyer's legal fees.

Rules: 1.7(a), 1.7(b), 1.8(f)

FACTS

1. A lawyer regularly represents a certain lender in residential real estate transactions. In each transaction, the lawyer charges the lender a fee of \$450 for closing services. The lawyer also typically offers to represent the buyer (the borrower of the mortgage loan) on written consent of both clients, charging the buyer a fee of \$275 for that service. The lender has proposed, as a promotion, to provide legal representation to potential borrowers as to closing services in such transactions for a \$25 fee. The lender would run newspaper and radio advertisements to promote that offer, and the advertisements would not mention the lawyer or the lawyer's law firm by name. The buyer would pay the lender \$25 toward the legal fee, and the lender would add \$250 of its own and give the total of \$275 – the usual fee for representing the buyer – to the lawyer. The lender would also pay the lawyer's \$450 fee for representing the lender.

QUESTION

2. On the above facts, may the lawyer ethically represent both the lender and the buyer and accept payment from the lender for the \$275 in legal fees the lawyer otherwise would have charged the buyer, with the buyer having paid only \$25 to the lender for such services?

OPINION

3. The first question is whether it would violate ethical rules for the lawyer to represent both the lender and the buyer in connection with the closing of the residential real estate transactions at issue.

4. Rule 1.7(a)(1) of the New York Rules of Professional Conduct provides that “a lawyer shall not represent a client if a reasonable lawyer would conclude that ... the representation will involve the lawyer in representing differing interests.” Rule 1.7(a)(2) precludes representation where “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.”

5. Rule 1.7(b) provides, however, that notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if four conditions are met. Two of the conditions are that the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and that “each affected client gives informed consent, confirmed in writing.” (The other two conditions would not be at issue in the context of this inquiry.) The quoted provisions of Rule 1.7 include defined terms.¹

6. In a typical residential real estate transaction, the interests of the lender and the buyer, who also is the borrower from the lender, overlap in important ways. Both are interested in obtaining good title and protecting the buyer’s interests as against the seller. Moreover, the terms of a loan may not be effectively negotiable in the setting of a residential real estate transaction. Thus, representation of the buyer and the lender may often be less problematic than representation of those two parties in the setting of a highly negotiable commercial real estate deal.

7. To say that interests overlap, however, is not to say that they coincide. The lawyer who represents a residential buyer and lender is representing differing interests if only because the buyer is executing a note and a mortgage in favor of the bank. Moreover, while the scope of negotiation between buyer and lender may be limited, those parties may have different interests as to issues to be negotiated between buyer and seller. The buyer may have a greater interest in the way such issues are resolved, while the lender’s interest may be simply to close the transaction. We have long seen representation of buyer and lender as raising a conflict, even if sometimes a consentable one. *See, e.g.*, N.Y. State 753 (2002) (lawyer may not represent buyer and lender when negotiation may be needed, but otherwise dual representation may be permissible upon fully disclosing risks and obtaining knowing consent) (citing opinions).

8. On the facts of this case, we believe that a conflict would arise for a second reason as well. The inquiring lawyer regularly represents the lender and may well be eager to maintain that relationship and income stream. The lawyer would thus have a personal business interest in advancing the lender’s cause, which would seem to create a significant risk that the lawyer’s professional judgment on behalf of the buyer would be adversely affected by that personal business interest. *See* N.Y. State 867 at n.2 (2011) (similar consideration when representing lender and seller).

¹ Rule 1.0(f) defines “differing interests” to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client...” Rule 1.0(q) defines “reasonable lawyer” in this context as “a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.” Rule 1.0(r) provides that a lawyer “reasonably believes” some matter when “the lawyer believes the matter in question” and “the circumstances are such that the belief is reasonable.”

9. It appears that the proposed joint representation would, therefore, give rise to a conflict of interest both under Rule 1.7(a)(1), because of the prospect of representing different interests, and under Rule 1.7(a)(2), given the risk that the lawyer's personal interests would cause him to favor one client over another.

10. The next question is whether this concurrent conflict of interest may be waived with informed consent under Rule 1.7(b). Under one condition of the waiver provision quoted in paragraph 5 above:

“Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, such a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”

Rule 1.7, Cmt. [15]. Here, waiver is available only if the lawyer reasonably believes that he or she could competently and diligently represent both lender and buyer concurrently.

11. Some of our precedents have recognized the possibility of representing a mortgagor and mortgagee, in appropriate circumstances, on consent of both. N.Y. State 438 (1976) (under prior Code of Professional Responsibility, attorney for lender could “represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met”); N.Y. State 199 (1971) (under Code, consentable “only if it is obvious that [the lawyer] can adequately represent the interest of each”); *see also* ABA Inf. 643 (1963). These opinions, however, reveal little about what would constitute appropriate circumstances in which a lawyer could reasonably expect to represent both lender and buyer adequately.

12. One of our precedents, after noting generally that a lawyer may “sometimes” represent more than one party to a real estate transaction, goes on to consider the case of two lawyers at the same firm representing lender and seller. On the question of consentability, the opinion notes:

“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. 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).”

N.Y. State 867 ¶10 (2011) (citation and footnote omitted).

13. The typical buyer in a residential real estate transaction, like the typical seller, would likely be relatively unsophisticated when compared to the institutional lender. This consideration is a factor weighing against the consentability of the conflict in representing lender and buyer, just as it weighed against the consentability of representing lender and seller in N.Y. State 867.

14. The current inquiry presents even stronger factors against consentability. It would be an understatement to say that the lender carries a greater “business potential” for the inquiring lawyer. It is clear from the inquiry that the inquiring lawyer intends to represent the lender on a regular basis, and hopes to gain far more in fees from that lender than from any individual buyer. Even in an individual transaction, the inquiring lawyer’s fee for services to the lender is substantially larger than the fee for services to the buyer. Moreover, the lender proposes to pay not only its own fee, but also most of the fee for the services to the buyer, and it proposes to tout this arrangement in a promotional campaign so as to attract buyers in larger numbers. Each of these features could only increase the lender’s importance as a client to the inquiring lawyer.

15. Given the proposed arrangements, a lawyer could not reasonably believe that he or she could competently and diligently represent both the lender and the buyer in the transaction. The conflict is therefore nonconsentable.²

16. The inquiry also addresses the permissibility of the proposed arrangements for payment of the lawyer’s fees. Rule 1.8(f) governs the circumstances in which lawyer who represents a client may accept compensation from a third party. Such arrangements are permissible only if they meet certain conditions including informed consent and freedom from interference with the lawyer’s independent professional judgment. The proposed arrangement could raise questions under this rule for reasons similar to those that lead to our conclusion of a nonconsentable conflict. Additional questions yet may arise from the proposal to have the buyer pay the legal fee not to the lawyer, but rather to the lender, which will “provide” representation. *See* N.Y. Jud. Law § 495 (corporations may not furnish attorneys or counsel or render legal services). We need not reach any of these questions, however, in light of our conclusion that under the circumstances of the inquiry, the lawyer may not represent both buyer and lender.

CONCLUSION

17. In a series of residential real estate transactions involving the same lender, which generates business by paying most of the buyers’ legal fees as well as its own, it would be a

² Another ethics committee, having occasion to consider a similar question under the prior Code of Professional Responsibility, reached a similar conclusion:

“The differing interests of a purchaser and a lender in the same real estate transaction typically cannot be adequately represented by the same attorney. As in situations where an attorney acts as both a real estate broker and an attorney, an inherent conflict of interest arises when the attorney’s fee depends upon the closing of the transaction. An attorney representing a lender and a purchaser cannot best serve the interest of the purchaser if the attorney’s judgment is tainted by his incentive to earn a fee from the lender, which is often contingent on closing. It is also readily apparent that the lender and the purchaser may sometimes have significantly differing interests in the details and structure of the transaction. As a result, the lawyer’s loyalty will be divided, affecting his independent judgment on behalf of the purchaser client or lender client”

Nassau County 98-10 (citations omitted). The committee found that the differing interests of the two clients “cannot be readily reconciled” and that in a typical real estate transaction, the conflict is not consentable. We do not reach that general question, but address only the facts presented by this inquiry.

nonconsentable conflict of interest for a lawyer, who regularly represents the lender in these transactions, also to represent the buyers.

(28-12)