



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1208 (11/16/2020)

Topic: Solicitation and Referral of Real Estate Matters by Real Estate Broker Employed by Lawyer as Paralegal

Digest: A lawyer who has no financial interest in the commission generated by a real estate transaction may accept referrals for real estate closings from her paralegal who is also a real estate broker, provided such referrals will not present a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests. However, if a significant risk exists, then the lawyer may accept the referral only if the lawyer satisfies the exceptions set forth in Rule 1.7(b), including informed client consent. The lawyer must also ensure that the paralegal's conduct complies with Rule 7.3 governing attorney solicitation whenever the paralegal recommends or refers a client to the lawyer.

Rules: 1.7(a)(2); 1.7(b); 5.3(a); 5.4(c); 7.3(a)(1); 7.3(b); 8.4(a)

FACTS

1. The inquirer is a transactional real estate attorney. She employs a paralegal who is also a real estate broker. The paralegal wants to refer his real estate clients to his attorney/employer to represent them in real estate closings. As a real estate broker, the paralegal will earn a percentage of the sale price only if the transaction closes. The attorney has no financial interest in the commission that the paralegal/broker will receive. Rather, the attorney will charge a legal fee to the real estate client on the same basis that she bills other real estate transaction clients. The paralegal will not assist his employer in those closings and will not provide any paralegal services relating to real estate transactions that he has referred.

QUESTIONS

2. May a lawyer who has no financial interest in the closing of a real estate transaction accept a referral of a real estate closing from the lawyer's paralegal, who is also a real estate broker, where the paralegal will earn a brokerage commission upon the closing of the transaction but will not provide any legal services relative to that transaction?

3. Would the paralegal's referral or recommendation of real estate clients to the lawyer constitute improper solicitation?

OPINION

Independent professional judgment: Rules 1.7 and 5.4

4. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the “Rules”) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that “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. In N.Y. State 1043 (2015), we noted that “we have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services.” In N.Y. State 916 (2012), we explained that where a lawyer acts as both broker and a lawyer in the transaction, “the broker’s personal and financial interest in closing the transaction interferes with the lawyer’s ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a)...” *See also* N.Y. 919 (2012) (quoting from N.Y. State 753 (2002) and stating, “The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.”).

6. In these prior opinions, the ethical concerns primarily derived from “the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal service.” N.Y. State 1043. “This rationale applies as long as the lawyer has a financial interest in the real estate broker’s commission whether or not the lawyer is acting as a broker.” *Id.* Here, however, the inquirer has no financial interest in the broker’s commission, and thus does not trigger the *per se* non-waivable conflict that was present in N.Y. State 916 and N.Y. State 1043. If the inquirer had a financial interest in the commission, then representing the client in the closing would be impermissible.

7. Given that the inquirer lacks any financial interest in the broker’s commission, the question is whether referrals of these real estate matters by the inquirer’s paralegal are so significant to the inquirer’s practice financially, or to the inquirer’s relationship with the paralegal personally, that these financial or personal considerations would create a conflict of interest under Rule 1.7(a)(2). In other words, are the lawyer’s financial and personal interests likely to adversely affect the inquirer’s professional judgment regarding each transaction? In terms of Rule 1.7(a)(2), would the inquirer be seriously tempted to close a transaction referred by the paralegal in order to keep the paralegal incentivized to keep the referrals flowing, even if it would be in the client’s interest not to close the transaction? In N.Y. State 919 (2012), we explained that even where a lawyer himself will not materially benefit from the consummation of a real estate transaction, “the totality of the lawyer’s personal interests might still pose a ‘significant risk’ that his judgment in representing the client at the closing will be “adversely affected” within the meaning of Rule 1.7(a)(2).”

8. Here, a disabling personal financial conflict of interest is likely to arise if the paralegal refers enough matters to the inquirer that those referrals, in the aggregate, constitute a significant portion of the fees earned in the inquirer’s practice as a whole. *See* N.Y. State 919 (2012) (lawyer’s receipt of multiple referrals from a brokerage office where lawyer was employed part time “magnified risks” of a personal interest conflict); *see also* N.Y. City 2014-1 (2014) (expressing concern that the proposed referral arrangement could create the risk of “divided loyalties” if the

lawyer was “dependent” on the referring third-party for “case referrals and legal fees.”). Thus, we cannot assess the level of risk that the referral arrangement here poses to the lawyer’s exercise of independent professional judgment. We do not know whether those referrals are material to the inquirer’s total fee income, and we do not know whether the inquirer’s personal and professional relationship with the referring paralegal might increase the risk that the lawyer’s independent professional judgment on behalf of the referred real estate clients would be compromised. For example, are the referrals from the paralegal a major source of profit for the inquirer? Is the paralegal a trusted and valuable key employee with respect to paralegal services unrelated to their referral relationship?

9. Unlike the *per se* non-waivable personal interest conflict that occurs whenever a lawyer has a financial interest in the consummation of a real estate transaction, however, personal interest conflicts are fact-specific and require us to assess all of the circumstances. In each case the lawyer must evaluate whether a reasonable lawyer would conclude that his or her other business or personal interests will pose a “significant risk” of adversely affecting the lawyer’s judgment in the matter on behalf of a client. Absent such a significant risk, the lawyer has no personal interest conflict, Rule 1.7(a)(2) does not apply, and the inquirer may accept the representation without the client’s consent. *See* N.Y. State 919 (2012). Conversely, if such a significant risk does exist and Rule 1.7(a)(2) does apply, then the inquirer cannot accept the referred matter unless the conflict is consentable and the inquirer obtains the client’s informed consent, confirmed in writing, per Rule 1.7(b).

10. Specifically, Rule 1.7(b) permits a lawyer who has a personal interest conflict under Rule 1.7(a) to represent a client when: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “(4) each affected client gives informed consent, confirmed in writing.” If these requirements can be satisfied, the lawyer can accept the representation.

11. Even if the inquirer complies with Rule 1.7 and accepts the referral, the inquirer should also be mindful of the obligation to maintain professional independence. The inquirer must not allow the referring paralegal to direct or regulate any advice rendered to the referred real estate client. *See* Rule 5.4(c) (“unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer’s professional judgment in rendering such legal services”).

Restrictions on solicitation by the paralegal: Rules 5.3, 7.3, and 8.4

12. This inquiry also raises a significant question of improper solicitation. Rule 7.3 regulates solicitation and recommendations of professional employment. Rule 7.3(a)(1) explicitly prohibits in-person or telephone contact or real time or computer accessed communication unless the recipient is “a close friend, relative, former client or existing client.” Rule 7.3(b) defines “solicitation,” in part, as “any advertisement *initiated by or on behalf of the lawyer* or law firm that is directed to, or targeted at, a specific recipient or group of recipients, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive of which is pecuniary gain.” (Emphasis added.)

13. Rule 7.3(b) distinguishes between communications initiated by the lawyer and those initiated by a potential client. *See* N.Y. State 1049 ¶ (2015) (“A response invited by the potential

client does not constitute ‘solicitation’”); N.Y. State 1150 ¶ 7 (2018) (“The definition of ‘solicitation’ in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client”). Thus, if real estate clients merely ask the paralegal/broker to recommend a lawyer to represent them in real estate transactions, and the paralegal responds by referring them to the inquirer, that practice would not run afoul of Rule 7.3(b). Conversely, if the paralegal on his own initiates “unprompted” recommendations of the inquirer to handle the real estate transactions, it would violate Rule 7.3(b).

14. Moreover, Rule 8.4(a) provides that a lawyer must not “knowingly assist or induce another” to “violate or attempt to violate the Rules of Professional Conduct,” and a lawyer must not “do so through the acts of another.” In other words, if the Rules prohibit a lawyer from doing something directly, then the lawyer cannot do it indirectly through someone acting on the lawyer’s behalf or because of the lawyer’s direction or inducement. Thus, if the inquirer assists, directs, or induces the paralegal to solicit real estate clients for the inquirer in a manner that violates Rule 7.3(a)(1), then the lawyer would be violating Rule 8.4(a). *See* N. Y. State 1150 (2018) (where lawyer’s spouse who was also a real estate broker wanted to refer her real estate clients to her husband (the inquiring lawyer), “any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach.”).

15. Finally, the inquirer has a duty under Rule 5.3(a) “to ensure that the work of non-lawyers who work for the firm is adequately supervised, as appropriate.” If the paralegal engages in solicitation that would violate Rule 7.3 if done by a lawyer, then under certain circumstances Rule 5.3(b) may hold the inquirer responsible for the paralegal’s conduct.

CONCLUSION

16. A lawyer who has no financial interest in the commission generated by a real estate transaction may accept referrals for real estate closings from her paralegal who is also a real estate broker, provided such referrals will not present a significant risk that the lawyer’s professional judgment on behalf of the client will be adversely affected by the lawyer’s own financial, business, property or other personal interests. However, if a significant risk exists, then the lawyer may accept the referral only if the lawyer satisfies the exceptions set forth in Rule 1.7(b), including informed client consent. The lawyer must also ensure that the paralegal’s conduct complies with Rule 7.3 governing attorney solicitation whenever the paralegal recommends or refers a client to the lawyer.

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