

A New Opinion on an Old Rule

On April 4, 2017, the New York State Bar Association Committee on Professional Ethics issued Opinion 1117,¹ wherein the Committee provided additional guidance to attorneys that may, from time to time, also serve their clients as real estate brokers.



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Although the Committee on Professional Ethics has issued numerous opinions relating to attorneys acting as real estate brokers, Opinion 1117 specifically addresses whether a lawyer serving as a broker earning a commission in a real estate transaction

may still provide legal services to the purchasers in that same transaction if the legal services provided are rendered pro bono and free of charge.

The Attorney and Broker

The inquiring attorney (the “Inquirer”) in Opinion 1117 presented the following facts to the Committee:

- The Inquirer is both an attorney and a licensed real estate broker.²
- Long time clients and personal friends (“the Purchasers”) of the Inquirer are looking to purchase property and have requested that the Inquirer serve as their real estate broker and attorney.³
- The Inquirer, as the Purchasers’ real estate broker, would receive a brokerage commission from the seller (assumed to be a percentage of the sale price of the real estate for the purposes of the Opinion).⁴
- In consideration of the Purchasers’ limited financial resources, the Inquirer has agreed to render its legal services pro bono.⁵
- Generally, a lawyer receiving a broker’s commission in a real estate transaction may not also serve as a lawyer in the same transaction.⁶ The Committee on Profession Ethics has opined on numerous occasions 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.”⁷ Such dual representation gives rise to a personal conflict of interest under Rule 1.7 of the New York Rules of Professional Conduct (the “Rules”).

Rule 1.7

According to Rule 1.7, “a lawyer shall 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.”⁸ Restated simply, a lawyer shall not represent a client where the attorney’s personal interest may conflict with the best interest of the cli-



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ent—an issue that can arise when an attorney serves as both attorney and commissioned real estate broker, and the attorney’s personal stake in the matter (i.e., the real estate commission) may potentially adversely affect the attorney’s professional judgement.

Non-Consentable Conflict

Rule 1.7, however, further provides that a conflicted attorney may still represent a client if, inter alia, the affected client gives informed consent in writing.⁹ Although an affected client may be willing to waive the conflict and provide informed consent on the basis of trust or belief that the attorney can competently and diligently represent the client notwithstanding the personal conflict, such conflicts cannot be consented away. In particular, the Committee acknowledged that because a broker’s fee is typically “substantially greater”¹⁰ than that of a lawyer, there is heightened risk that a practitioner’s professional judgment could be adversely affected. Therefore, the Committee ruled that such a conflict is “nonconsentable” (non-waivable), meaning that the prohibition cannot be overcome through disclosure and client consent.¹¹

An Exception to the Rule

Despite the non-waivable nature of an attorney’s personal conflict when representing a client as both attorney and real estate agent, the Committee on Professional Ethics has carved out a particular exception in prior Ethics Opinions that can allow an attorney to ethically serve as a client’s legal counsel and commissioned real estate broker. For example, in Opinion 1015, the Committee considered a situation in which an attorney, who was also a licensed real estate broker, proposed serving as both attorney and real estate broker for a seller of real property, subject to the condition that the commis-

sion for the broker services rendered would be a fixed, non-refundable fee that was not contingent on the sale of the client’s property.¹² Under these conditions, the Committee opined that so long as the attorney’s clients provided informed consent to any other potential conflict arising under the Rules, the inquirer could serve in both roles without conflict because the non-contingent nature of the broker’s commission reasonably rendered the risk of the attorney’s professional judgment being adversely affected by its personal interest in the broker’s commission non-existent.¹³

The facts presented by the Inquirer in Opinion 1117 are easily distinguishable from those present in Opinion 1015. Unlike Opinion 1015, in which the Committee found “no reason to believe that the lawyer’s professional judgment would be adversely affected by the lawyer’s interest in that [non-contingent] broker’s fee,”¹⁴ the Inquirer’s potential real estate commission is still contingent on the closing of title for the real property and thereby creates a non-consentable conflict. To wit, under the facts provided, the Inquirer’s potential real estate commission becomes all the more important as the potential real estate commission is the Inquirer’s sole stream of revenue in the transaction because the Inquirer proposes to render its legal services pro bono to the Purchasers. This greatly increases the risk that the Inquirer’s professional legal judgment may be adversely affected, as a reasonably attorney would conclude that the Purchasers’ interest in the transaction could be subject to the Inquirer’s own financial interest in making sure the transaction closes to ensure compensation.¹⁵

The Test

The other facts presented by the Inquirer were otherwise unmovable to the Committee. The fact that the

Purchasers requested the Inquirer act as both attorney and real estate broker for the transaction does nothing to mitigate the risk that Inquirer’s professional legal judgement may be adversely affected by the Inquirer’s potential real estate commission.¹⁶ Moreover, this is precisely why such a conflict is non-waivable.

Similarly, even though the real estate commission to be earned by the Inquirer would be paid by the seller, at no cost to the Purchasers, the risk of the Inquirer’s personal conflict would not be mitigated, because the risk that the Inquirer’s legal judgment could still be adversely affected by the contingent nature of the commission would be present, regardless of which party pays the commission.¹⁷ Although the Committee acknowledged that the Inquirer’s existing longtime relationship with the Purchasers as both friends and clients could serve as “an adequate counterweight to the lawyer’s interest in the commission,” the Committee noted that to consider whether an attorney’s existing relationship with a client is an “adequate counterweight” is simply too subjective to render the conflict waivable upon the purchasers’ consent.

Ultimately, the test in the Rules is based upon the objective standards of whether: (i) “a ‘reasonable lawyer’ would find a significant risk that personal interest would compromise professional judgment;” and (ii) “whether the actual lawyer ‘reasonably’ believes there will be competent and diligent representation.”¹⁸ When reviewed under these objective standards, the Committee’s distinctions of the scenarios presented in Opinion 1015 and Opinion 1117 are clear. Unlike Opinion 1015, in which the attorney removed the threat to professional judgment by agreeing to a fixed non-contingent commission, the Inquirer’s professional judgment may still be compromised by the Inquirer’s financial interest in making sure the transaction closes so that the Inquirer may collect its real estate commission.

Accordingly, a lawyer receiving a broker’s commission in a real estate transaction, contingent upon the closing of said transaction, may not also serve as a lawyer, even in a pro bono capacity, as this creates a personal interest conflict under Rule 1.7 that a client cannot waive by consent.

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¹ New York State Bar Ass’n Comm. on Prof’l Ethics Op. 1117 (2017).

² *Id.* at ¶ 1.

³ *Id.*

⁴ *Id.* at ¶ 2.

⁵ *Id.*

⁶ See New York State Bar Ass’n Comm. on Prof’l Ethics Op. 1117 (2017) at ¶ 5.

⁷ *Id.* (citing New York State Bar Ass’n Comm. on Prof’l Ethics Op. 1015 (2014) (quoting New York State Bar Ass’n Comm. on Prof’l Ethics Op. 753 (2002) and citing later opinions)).

⁸ Rule 1.7(a)(2).

⁹ See Rule 1.7(b).

¹⁰ New York State Bar Ass’n Comm. on Prof’l Ethics Op. 1015 (2014) at ¶ 7.

¹¹ *Id.* at ¶ 7 (citing New York State Bar Ass’n Comm. on Prof’l Ethics Op. 919 (2012) at ¶ 3).

¹² *Id.* at ¶¶ 1-3.

¹³ *Id.* at ¶ 8.

¹⁴ *Id.*

¹⁵ New York State Bar Ass’n Comm. on Prof’l Ethics Op. 1117 (2017) at ¶ 8.

¹⁶ See *id.* at ¶ 10.

¹⁷ See *id.*

¹⁸ *Id.* at ¶ 12.