

Ethics Opinion Rejects Real Estate Broker Referral Fees

BY LAZAR EMANUEL

Nassau County Bar Association, Committee on Professional Ethics. Opinion No. 01-9:

Facts: A real estate broker writes a letter soliciting buyer and seller referrals from lawyers in exchange for a fee. The letter also suggests that the lawyers may be able to receive an additional fee by referring client-buyers to a mortgage company affiliated with the real estate broker.

Query: May an attorney accept a fee from the real estate broker or from a mortgage broker for referring a client?

As is customary, the Committee offered no opinion on the question of law whether the acceptance of a referral fee by the lawyer would violate any statute or regulation. The Committee limited its discussion to an interpretation of DR 5-101(A) and EC 5-1.

After amendment in 1999, DR 5-101(A) now provides:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

EC 5-1 reads as follows:

The professional judgment of a lawyer shall be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

These provisions compel the opinion that a disinterested lawyer could not reasonably believe that the representation of a client would not be adversely affected by the attorney's participation in a brokerage fee, especially since the fee is likely to be contingent on the title or mortgage closing. Meaningful client consent is difficult to get when the lawyer's benefit from the brokerage transaction may be greater than the potential legal fee. Accordingly, a lawyer may not accept a referral fee from a real estate broker or mortgage broker if the lawyer represents the client, directly or indirectly, in connection with the same transaction, whether or not the client consents.