

Lawyer and Broker at the Same Time?

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Someone who buys or sells real estate often hires a broker as well as a lawyer. The lawyer gets legal fees. If the deal closes, the broker gets a commission, paid by one party to the transaction or another. Once in a while, someone suggests that a party's lawyer can also act as a real estate broker in the transaction, collecting a brokerage fee and legal fees, perhaps discounting one or the other as a result. It's said to be a win-win for the client, who gets the same bundle of services for less money. Plus the transaction might go more smoothly because the kitchen has fewer cooks in it.

The rules of legal ethics have always prohibited this type of arrangement, on the basis that lawyers should give their clients objective and unbiased advice, without trying to earn a contingent fee payable only if the transaction closes. In the extreme case, a lawyer should feel totally free to tell the client to walk away from the deal, if it's a bad deal as a legal matter. The lawyer might not do that if it will cost the lawyer a huge brokerage commission.

Within just the last few months, the New York State Bar Association's Committee on Professional Ethics reaffirmed the traditional prohibition on lawyers acting as brokers at the same time. The committee quoted an earlier ruling, where the committee had said the prospect that a lawyer might earn a brokerage commission "irredeemably interferes with the lawyer's distinct obligation to exercise independent professional on the client's behalf." So it's totally prohibited and that's the end of the discussion.

That's certainly consistent with my own personal views on the matter. I would not feel right if I acted as a lawyer for someone—with the potential to "blow the deal" if I thought necessary—while also hoping to earn a big brokerage fee from the same deal.

What if the facts were different? Suppose I had greater confidence in my own objectivity, and my own ability to give unbiased professional legal advice even though I stood to gain or lose a brokerage commission? What if my client wanted me to get compensated on that basis, perhaps because we do a lot of deals together; the client has tremendous confidence in me; the client gets a discount on all my legal fees by letting me earn brokerage commissions; and over the long run the client thinks – rightly or wrongly – it will produce equally good or better results if the lawyer has a personal interest in whether deals close? And let's also suppose the client is an intelligent and very sophisticated investor, who fully understands the arguments against having lawyers act as brokers in the same transaction, but still wants to proceed.

Let's further suppose that I fully disclose all the risks of this arrangement in writing, and spend an hour explaining them to the client, yet the client still wants to proceed.

Ordinarily, lawyers can handle most conflicts of interest by measures like those suggested in the previous paragraph: full disclosure plus a client's fully informed waiver of the conflict. According to the ethics committee, though, those measures just don't work in the context of a lawyer also acting as a broker in the same transaction. No amount of disclosure, no amount of fully informed consent, can solve the problem. It's a nonwaivable conflict.

To put it another way, the ethics committee has so much wisdom and knowledge that its judgment on this matter automatically always supersedes the judgment of mere clients and lawyers, even fully informed and highly sophisticated clients and lawyers in commercial real estate transactions. The ethics committee knows best. Their knowledge supersedes any private negotiations and resolution of the lawyer-client relationship. Clients just aren't smart enough to understand and make their own decision.

That approach would certainly make sense if the clients were, let's say, nursery school children with no business sense, experience, or sophistication. In the context of commercial real estate players and their counsel, though, it seems excessive. Why should this conflict be any less waivable than practically every other conflict known to lawyers? Aren't the ethics people drawing too bright a line?

Rule makers in this situation often favor a strict rule for one important reason. They worry that if the rule has gradations and exceptions, then the people involved will take advantage of those gradations and exceptions to the point where they consume the rule. But that situation arises all the time, whenever rules call for some exercise of judgment and consideration of all the surrounding circumstances. And if a fully informed, intelligent, and capable commercial real estate client wants to have their lawyer also act as their broker, they ought to have that right.

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