REAL ESTATE ETHICS UPDATE 2017

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This outline is submitted to briefly describe and deal with current topics of interest in ethics and professionalism. Note that this outline contains references to the Judiciary Law, the New York Rules of Professional Conduct (the Rules or RPC), formerly the New York Attorney's Code of Professional Responsibility (the Code or DR), case law and bar association advisory opinions. However, this is not an exhaustive list of every case, opinion, or rule in each area discussed, but merely a basis for discussion.)

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[2] The Rules of Conduct were enacted effective on April 1, 2009 and can be found at 22 N.Y.C.R.R. §1200 or at the website of the Office of Court Administration at www.nycourts.gov. Prior to that time, the predecessor to the Rules, the Code of Professional Responsibility was in effect. Thus, this outline discusses both as most of the Disciplinary Rules were adopted as Rules (RPCs) and the applicable case law in some instances was also used to promulgate Rules.

Uniform Disciplinary Procedures

In 2015, hearings were held around the state before the Chief Judge's Commission on Statewide Attorney Discipline (appointed by former Chief Judge Jonathan Lippman). All bar associations and other interested parties were invited to testify. The Commission studied the lawyer disciplinary process's lack of uniformity between the four Departments. The new rules can be found at 22 NYCRR Part 1240 and are entitled "Rules for Uniform Disciplinary Matters". They are slated to go into effect on October 1, 2016.

Recordkeeping Requirements

1. **Files and Recordkeeping** - Generally, there are certain court rules as well as Rules of Conduct which require attorneys to maintain certain administrative and financial records. However, depending upon the nature of the attorney's practice, there may be additional requirements dictated by statute in their practice area, and/or the needs of the client.

   - ***CLE***
     - **22 N.Y.C.R.R. § 1500.13** requires an attorney to retain certificates of Attendance for each course for four (4) years.
   - ***Recordkeeping***
     - **NY Rule 1.15** (formerly DR 9-102(D)) requires that accurate and contemporaneous records which are to be maintained for seven(7) years after the transaction including:

       - bank account records for all IOLA, escrow, or special accounts including checkbook registers, checkbook stubs, canceled checks, deposit items and transfer items;
       - retainer and compensation agreements;
       - disbursement of funds documents;

- closing statements;
- OCA Retainer and Closing Statements (discussed below);
- billing records; and,
- any other records pertaining to financial transactions.

- ***Escrow Rules***

  - **Judiciary Law § 497 and 22 N.Y.C.R.R. § 1200.46, Rule 1.15 (**formerly DR 9-102) set forth the specifics for maintenance of escrow and IOLA accounts. They also provide the rules for acting in a fiduciary capacity as escrow agents when holding the funds of clients and/or third parties.

- ***Prohibition Against Commingling*.**

  - **Rule 1.15** (formerly DR 9-102(A)) provides that an attorney must separate their own funds from client funds.

- ***Disputed funds***

  - **Rule 1.15** (formerly DR 9-102(B)(4) requires an attorney to maintain disputed funds for a client or a third party until dispute is settled - no self-help!

- ***Client Property & Rendering of Accounts***

  - **Rule 1.15** (formerly DR 9-102(C)) requires the attorney to return client property or render an accounting to a client upon the client's request.

- ***Related Escrow Rules***

  - **22 N.Y.C.R.R. § 1300.** The "Bounced Check Rule". 22 N.Y.C.R.R. § 1300 provides that when a check issued by an attorney on an IOLA or escrow account is dishonored, the bank is required to send notification

of the bounced check to the Attorney's Fund for Client Protection which acts as a clearinghouse for all bounced check notifications. The attorney has ten (10) days to demonstrate that the check was returned due to bank error. If there is no error, the notification is automatically sent to the grievance authorities in the department where the attorney maintains an office. Thereafter, an investigation is initiated and the grievance authorities will subpoena the attorney's bank account records for at least six months prior to the bounced check. Sanction will depend on a number of factors including, *inter alia*, whether the funds were converted, whether there was harm to a client and the attorney's disciplinary history.

- **Random Audits - 22 N.Y.C.R.R. § 603.15 1st Dept.; 22 N.Y.C.R.R. § 691.12 2nd Dept**. provide that the disciplinary authorities have the power to issue a subpoena and review an attorney's or law firm's financial books and records. A complaint is not required as a basis for initiation of the investigation.

- **RULE 8.4 (b)-(d)** (formerly DR 1-102(A) (4) & (8) ***Conduct which constitutes dishonesty, fraud, deceit, or misrepresentation and which adversely reflects on their fitness to practice law***.

2. **Conversion** - In addition to the foregoing violations, attorneys who convert client funds to their own use will be charged with conduct which constitutes dishonesty, fraud, deceit, or misrepresentation and which adversely reflects on their fitness to practice law which may result in disbarment.

- ***Case Law***

i. Intentional, Venal Use of Escrow Funds

- Matter of Maruggi, 112 A.D.3d 180 (1st Dep't 2013). Attorney disbarred for intentional conversion of escrow funds, fraudulent execution of a deed and other conveying documents, misrepresentations to and failure to

cooperate with the DDC's investigation. Attorney did not present any exceptional mitigating circumstances.

- Matter of Tanella, 104 A.D.3d 94 (2d Dep't 2013). Attorney disbarred following investigation alleging 26 charges of misconduct, including, *inter alia*, mishandling of client funds, failure to maintain required bookkeeping records, failure to safeguard funds entrusted to him as a fiduciary, allowing non-attorneys to exercise control over his law practice, sharing fees with non-attorneys, deceiving clients and third parties regarding settlement negotiations, accepting cases which he was not qualified to handle, serial neglect of client matters, and giving false and misleading testimony to the Grievance Committee, with no mitigating circumstances.

- Matter of Edward Wildove, 105 A.D.3d 1246 (3rd Dept. 2013). Attorney interimly suspended pending consideration of charges that he is guilty of professional misconduct immediately threatening the public interest because he admittedly converted more than $30,000 of his clients' funds for his personal use and his continued access to such funds, constitutes conduct immediately threatening the public interest. He later resigned. See, Matter of Wildove, 108 A.D.3d 1010 (3rd Dept. 2013)

- Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013). Attorney suspended for two years for, *inter alia*, misuse of his IOLA account, including commingling a client's personal and business funds, conversion of client funds, and helping a client to avoid tax liens and judgments.

- Matter of Kennedy, 99 A.D.3d 75 (1st Dep't 2012). Attorney disbarred for intentional conversion of escrow funds held for a real estate transaction, namely by using funds in his IOLA account, belonging to the buyer, amounting to $155,000 over a two-year period. The lawyer's expectation of receiving fees and his intention to make restitution were not considered extraordinary mitigating circumstances sufficient to rebut disbarment.

- Matter of Alejandro, 65 A.D.3d 63 (1st Dep't 2009). Attorney disbarred for a pattern of egregious and continuing misconduct, prior disciplinary history, and 36 current charges, including serial neglect of client matters, failure to promptly return unearned legal fees and pay judgments owed to clients, misuse of escrow account to avoid creditors, submission of a false billing statement, falsely assuring clients that legal work had been performed, and giving false statements and sworn testimony to the Departmental Disciplinary Committee.

- Matter of Oswald, 46 A.D.3d 1327 (3rd Dept. 2007). Attorney disbarred based on multiple violations and egregious misconduct including *inter alia,* conversion of client funds to his own use; failure to return client funds; failure to obey a court order to pay child support; failure to comply with the Court's rules in domestic relations matters.

- Matter of Sheehan, 48 A.D.2d 163 (1st Dep't 2007). Attorney disbarred for intentional conversion of client funds from escrow, making disbursements from the escrow account by debit memos instead of checks payable to a named payee, making misleading statements to the court and the Committee, failing to cooperate with the Committee's investigation, and failing to file retainer and closing statements with the OCA.

- Matter of Balok, 2 A.D.3d 887 (3rd Dept. 2003). Attorney disbarred for using $23,883.55 of client funds to cover his law office payroll for two-week period, to satisfy personal mortgage and to pay real estate taxes on building that he owned.

- Matter of Farrington, 270 A.D.2d 710 (3rd Dept. 2000). Attorney disbarred after an interim suspension based on his default and charges of misconduct including, *inter alia,* conversion of funds held on behalf of two clients); failure to promptly notify a client of receipt of funds and to account for funds; engaging in conflict of interest by accepting investments and a

loan from a client without advising the client of the benefits and importance of obtaining independent counsel or other disinterested advice before entering the transactions; neglect of legal matters entrusted to him by two clients; , failure to respond to communications from said clients; failure to cooperate with the Committee; failure to comply with the rules of this Court requiring respondent to reimburse petitioner for stenographic expenses; and failure to file an affidavit of compliance with the order suspending him.

ii. *Unintentional Use of Escrow Funds*

- Matter of Kalathara, 123 A.D.3d 81(2d Dept 2014)Attorney suspended for one year failing to safeguard client funds and failure to maintain proper bookkeeping records arising out of the defalcations of one of his employees because he failed to maintain appropriate vigilance over his escrow account and failed to report his employee to the authorities. The Court issued the suspension despite the facts that there were no warning signals; he did not participate in his employee's defalcations; he successfully recovered the majority of his clients' funds; his cooperation with Grievance Committee's investigation; remedial actions to safeguard his account to prevent future escrow violations; and his unblemished disciplinary record.

- Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013). Attorney suspended for two years for, *inter alia*, misuse of his IOLA account, including commingling a client's personal and business funds, conversion of client funds, and helping a client to avoid tax liens and judgments.

- Matter of Peter J. Galasso, 94 A.D.3d 30 (2nd Dept. 2012); *Leave to appeal granted by, Stay granted by* 19 N.Y.3d 832 (2012*); Motion granted by* 19 N.Y.3d 833 (2012); *Motion granted by, in part* 19 N.Y.3d 981 (2012);

Affirmed in part and modified in part by, Remitted by 19 N.Y.3d 688 (2012); *Adhered to, On rehearing at* 956 N.Y.S.2d 189 (2nd Dep't, 2012); *Motion granted by* 20 N.Y.3d 1055 (2013). Attorney failed to properly supervise his firm's bookkeeper (his brother), who, over a three year period, misappropriated client funds totaling $4,501,571. The Court of Appeals sustained nine of ten charges, but dismissed one charge relating to failure to cooperate and remanded the case back to the Appellate Division which adhered to its original decision.

- Matter of Langione, 131 A.D.3d 199 (2d Dept 2015). This case is related to the Galasso case cited above. Langione was suspended for six months because he likewise failed to ensure that his client funds were properly maintained and failing to supervise and oversee the actions of the firm's bookkeeper brother who transferred over $4 million from a client's escrow account to his own use as well as the firm's accounts for the firm's use. However, the Court imposed a lesser sanction because he, inter *alia*: was less responsible for a large escrow fund: was not "unjustly enriched" by the bookkeeper's defalcations; and attempted to make restitution to his clients from his own funds. "…the Court of Appeals held that an attorney's obligation to safeguard funds is not controlled "solely by the contractual language of the escrow agreement, but also by a fiduciary relationship" (id.). With respect to the Baron funds, we recognize that the respondent—a signatory to the account, with an attendant fiduciary obligation—was not Baron's attorney, or the designated escrow agent. To the extent that this particular escrow account was maintained in an independent, interest-bearing escrow account, due to its size and the anticipated duration of the escrow obligation, the respondent had a lesser responsibility toward the funds than his partner, Peter Galasso, who was the attorney, as well as the designated escrow agent… However, with respect to the invasion of other escrow funds, which belonged to the respondent's clients (e.g. the Carroll Estate, Adele Fabrizio, and Theresa Halloran), the respondent's

level of responsibility was greater. Had the respondent properly fulfilled his fiduciary obligations with respect thereto, red flags would have alerted him to irregularities at a time when ongoing thefts by Anthony Galasso could have been prevented or ameliorated."

See also, Galasso, Langione & Botter LLP v. Anthony P. Galasso and Signature Bank, et. al., 53 Misc.3d 1202(A), 2016 Misc. LEXIS 3312, 2016 NY Slip Op 51308(U) (Supreme Court, Nassau County; Index Nos. 010038-07, 19198-07, 014211-07 and 001510-09; September 19, 2016)civil action by Firm against bank in which the Court found that the bank was not liable under the UCC for actions by Anthony Galasso because he had apparent authority to act on behalf of the law firm.

- Matter of Parsons Reul, 57 A.D.3d 1091 (3rd Dept. 2008). Attorney was initially subject to a two year suspension due to escrow transgressions, which suspension was stayed, subject to her provision of a full accounting clients' funds from her closed escrow account to the Committee via quarterly reports by a certified public accountant confirming that she is maintaining her new escrow account in accordance with the applicable provisions of the attorney disciplinary rules, and proof that she took and passed the Multistate Professional Responsibility Examination within the suspension period. The stay was extended for an additional year due to two overdrafts in respondent's escrow account based on the deposit of client's retainer check into the 's escrow account, which check was returned for insufficient funds and re-deposited within days and overdrafts remedied; no conversion of client funds was alleged.

- Matter of Rothenberg, 143 A.D.2d 479 (3rd Dept.1988). Attorney suspended for two years after repeatedly allowing his escrow account balance to fall below the amount that he was required to maintain for clients and using the funds for his own personal purposes; although he

unsuccessfully argued that he was not guilty of conversion because his clients were ultimately repaid, the court recognized the following factors in mitigation: he was under a great deal of stress due to family and business problems; he sought counseling concerning these matters; all of his respondent's clients were made whole; and he was forthright and cooperative with the Committee when questioned regarding the improper use of his escrow account.

- Matter of Ford, 287 A.D.2d 870(3rd Dept. 2001). Attorney suspended for two years (which suspension was stayed) based on inter alia, his non-venal conversion of client funds by allowing escrow balance to continuously fall below the amount that he was required to maintain for clients over 2 1/2 years; making disbursements from the escrow account before corresponding deposits were credited or for which no corresponding deposit had been made; making withdrawals from the escrow account on behalf of clients exceeding the amount of the corresponding deposits; failing to deposit adequate funds into the es-crow account to cover service charges resulting in numerous withdrawals from the account using client funds; a conflict of interest by representing both the sellers and purchasers in a real estate transaction; neglecting the real estate matter ; failing to promptly account for funds that he held in escrow after the closing; mistakenly depositing client funds into his personal account; failure to properly title his escrow account; and failure to maintain an IOLA account or other interest bearing account for the deposit of client funds. Notably the court refused to find that referral of real estate clients to his title abstract company constituted a conflict of interest.

- Matter of Muller, 117 A.D.3d 133 (4th Dept. 2014). Attorney Censured despite his misappropriation of client funds in relation to the settlement of a medical malpractice action by causing his law firm to receive an additional legal fee from the settlement proceeds previously earmarked for

a Medicare lien based on the following mitigating factors: his unblemished disciplinary history after 30 years of practicing law; his cooperation with the disciplinary investigation; the aberrational and non-venal nature of the misconduct; and that his misappropriation resulted from his failure to research the applicable laws and regulations regarding the satisfaction of Medicare liens.

3. **Misuse of IOLA or Trust Accounts** - An attorney cannot use IOLA account for personal purposes even if there are no client funds in the account.

   - ***Case Law***
     - Matter of Silva, 28 A.D. 3d 11 (App. Div. 1st Dep't 2006) Attorney suspended for keeping personal funds in escrow account to conceal them from IRS

     - Matter of Liddy, 276 A.D. 2d 100 (2nd Dept. 2000). Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs to avoid creditors

     - Matter of Betancourt, 232 A.D.2d 9 (1st Dept.1997). Attorney suspended for three years for, *inter alia*, neglect of client matters and misuse of IOLA account to avoid creditors

     - Matter of Connolly, 225 A.D.2d 248, (2nd Dept. 1996) motion for leave denied, 225 A.D.2d 1997). Attorney disbarred for, *inter alia*, conversion of client funds, neglect of client matters and misuse of IOLA account to avoid creditors

4. **Disputed Funds** - An attorney holding funds is a fiduciary to both parties and therefore, cannot unilaterally remove escrow funds in the event of a dispute. The attorney must either close the transaction, or resolve the dispute with the parties'

written consent, or deposit the funds with the court as a stakeholder under CPLR § 1006.

- Matter of Tartaglia, 20 A.D.3d 81 (2d Dept June 13, 2005) Appeal denied by *In re Tartaglia*, 5 NY3d 711 (2005) Attorney suspended for five years due to his unilateral withdrawal of part of the downpayment in a real estate sale, and when the buyers sued, he withdrew additional funds to hire an attorney to defend him and his clients. The Court noted his prior history, his failure to cooperate and his failure to acknowledge his misconduct when issuing the sanction.

Division of Fees

1. **New York Rules of Professional Conduct**

   a. ***22 NYCRR §1200.12 NY RULE 1.5(g) (formerly DR 2-107)***

   - Sets forth rules governing the division of fees among attorneys. Under no circumstances may an attorney divide fees with a non-attorney (22 NYCRR §1200.17). Essentially, an attorney may divide fees with another attorney who is not an associate or partner in the same firm only if the division is proportionate to the services performed or the attorneys both assume joint responsibility for the legal services; the client's consent to the retention of both attorneys and to the proportion of fees each attorney receives is confirmed in writing, and the total fee does not exceed reasonable compensation for all services.

   b. ***Case Law***

   - Parker Waichman Alonso, LLP v. Ajlouny, 76 AD3d 961 (2nd Dep't. 2010). Fee sharing agreement unenforceable if not in compliance with the Code of Professional Responsibility.

- Hirsh v. Bashian & Farber, LLP, 79 AD3d 971 (2nd Dep't. 2010) Attorney may not recover a fee that is impermissible under the Code of Professional Responsibility.

- Matter of Harrison, 282 A.D. 2d 176 (2nd Dep't. 2001). Attorney suspended for one year for, *inter alia,* falsely holding himself out as a partner with another attorney and for improperly dividing fees with another attorney.

- Matter of Kuslansky, 230 A.D. 2d 104 (2nd Dep't. 1997). Attorney censured for, *inter alia,* improper fee splitting with another attorney.

Conflicts of Interest

1. New York Rules of Professional Conduct

a. Rule 1.7 (Current Clients) provides:

- An attorney may not represent clients with differing interests
- An attorney may not represent a client if there is a significant risk that he attorney's professional judgment on behalf of a client will be adversely affected by the attorney's own financial, business, property or other personal interests.
- Conflicts may be waived if the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and there is no direct adversity before a tribunal.

2. Case Law

- Matter of Cappellini, 90 A.D. 3d 10 (4th Dept. 2011). Attorney censured for using altered documents to complete a real estate transaction and for representing both buyer and seller without written consent.

- Matter of Ferraro, 91 A.D.3d 121 (2011), 934 NYS 2d 211 (2nd Dept. 2011). Attorney suspended for two years because he represented the seller and the buyer in the same real estate transaction and failed to disclose the conflict.

- Matter of Woitkowski, 84 A.D. 3d 15 (2nd Dept. 2011). Attorney suspended for two years for *inter alia,* operating a law office representing buyers and sellers in residential real estate transaction and procuring title abstract and insurance services for those clients from his title abstract company without disclosing his interest in the title company.

Advertising, Referrals and Solicitation

1. New York Rules of Professional Conduct

Rule 7.1

- Governs advertising and is extremely detailed. The rule outlines what information may be included, what methods and media, including websites, are permissible and filing requirements for advertisements. All advertisements must be truthful.

Rule 7.2

- Prohibits payment for referrals, and expressly permits referrals to a non-legal business in a contractual relationship permitted by Rule 5.8. (See 22 NYCRR §1205.5)

Rule 7.3

- Governs solicitation, which is advertising aimed at a target audience, and prohibits in person or real-time solicitation unless the recipient is a friend, relative or client. The rule outlines content and filing requirements for solicitations.

Rule 7.4

- Addresses identification of Specialty and Practice. Essentially attorneys may not hold themselves out as specialists, and may not say they specialize in any particular area of practice unless the specialty has been certified (other than USPTO practice). Real estate practice is not a specialty in New York. If attorneys are certified in other jurisdictions, a statement of such must include a disclaimer.

Rule 7.5

- Is extremely detailed and outlines what must be included, and may not be included in professional notices, letterheads and signs, including websites.

2. Case Law

- Matter of Alessi, 60 N.Y. 2d 229 (1983). The Court determined that the prohibition against attorneys advertising by direct mail to real estate brokers was a constitutionally valid regulation of commercial speech since brokers' interests might be more closely entwined with attorneys' interests rather than with clients' interests.

- Matter of Greene, 54 N.Y2d 118 (1981). The Court held that an attorney's letter to real estate brokers listing the attorney's qualifications was tantamount to asking the brokers to solicit business for the attorney and was violative of the Disciplinary Rules prohibiting solicitation.

- Hayes v. State of NY Atty. Grievance Committee for the Eighth Judicial District, 672 F.3d 158 (2d Cir. March 5, 2012). The Court reversed the lower Court's findings and held that Rule 7.4 of the New York Rules of Professional Conduct, codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.53(c) (1) (2011) ("Rule 7.4"), [1] which requires a prescribed disclaimer statement to be made by attorneys who state that they are certified as a specialist is unconstitutionally vague.

Ethics Opinions Relating to Real Estate Transactions

Conflicts of Interest

- **NYSBA No. 1105** (2016) Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

- **NYSBA No. 1103** (2016) Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation of Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).

- **NYSBA No. 1070 (2015)** In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption,

including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the attorney's file on the matter, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request for the file unless the requester authorizes disclosure to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

- **NYSBA No. 1085** (2016) When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary, depending on circumstances, for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties. A lawyer's duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

- **NYSBA No. 1060** (2015) Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a

lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

- **NYSBA No. 1043 (2015)** A lawyer may not accept, as a referral fee, a portion of a real estate broker's commission in lieu of charging a fee to the lawyer's client. A lawyer may not accept a referral fee consisting of a portion of a real estate broker's commission in place of charging a fee to the lawyer's client, even with a client's informed consent.

- **NYSBA No. 1033 (2015)** Where a prospective buyer makes an offer for real property and is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by the same amount, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.

- **NYSBA No. 1030 (2014)** If a law firm with a new name partner is either the same firm (with a new name) or a legal successor to the business and property of the original firm, and the firm (i) makes all necessary corporate filings, and (ii) takes all steps with the bank that maintains its trust account necessary to reflect any changes taking place under the Business Corporation Law and the firm's constituent documents, then the firm may (1) continue to use its old letterhead while the remaining stock is being depleted and (2) continue to use the trust account and the checks used to draw upon it (although it would be desirable to indicate the change in firm name on the old checks).

- **NYSBA No. 1022** (2014)(Modifies N.Y. State 882) A lawyer may participate in a real estate transaction where the form TP-584 reports the full (gross) sales price, and the form RP-5217 reports the sale price as the price net of

the seller's concession, and neither form discloses that the purchase price was grossed up prior to application of the seller's concession, even though this will result in a different sale price on the two documents. Neither document is misleading within the meaning of this Committee's prior opinions on seller's concessions because the forms are completed in accordance with their instructions and the lack of disclosure will not result in foreseeable negative consequences.

- **NYSBA No. 1015 (2014).** Attorney/real estate broker may represent the seller of real property and act as broker in same transaction if the broker's fee is fixed and non-refundable and any conflict is properly waived. Broker services that are not distinct from legal services are subject to the rules of legal ethics.

- **NYSBA No. Opinion 1013 (2014).** Attorney who works as a broker at a brokerage firm cannot represent an owner of property in foreclosure proceedings for the purposes of preventing the foreclosure and allowing the attorney to subsequently act as a broker for the brokerage firm to purchase the property.

- **NYSBA No. 976 (2013).** A law firm may not enter into an exclusive contractual agreement with a marketing company to provide clients with forensic mortgage analysis as well as legal services, to pay the company for referred clients, or to share legal fees with the company.

- **NYSBA No. 952 (2012).** Attorney may not represent both lender and buyer in residential real estate transaction if part of a series of such transactions in which attorney regularly represents that lender and lender regularly pays the buyer's legal fees.

- **NYSBA No. 919 (2012).** Attorney may not act as an attorney for any party to a real estate transaction in which the attorney is acting as a broker. An

attorney who is employed part time by a real estate office as a broker may be able to serve as a party's attorney even if a member of that real estate office is acting as a broker for one of the parties, but the attorney must comply with Rule 1.7. If the attorney will materially benefit from the closing based on his employment at the broker's office or is personally involved with the transaction at that office, then his representation of a party to the transaction is *per se* prohibited.

- **NYSBA No. 886 (2011).** An attorney with a substantial investment in a closely held real estate brokerage firm is precluded from representing a party to a real estate transaction in which the brokerage firm is acting as broker.

- **NYSBA No. 882 (2011).** All documents in a real estate transaction where the sales price has been increased by the amount of a "seller's concession" must disclose that fact. See NYSBA 817.

- **NYSBA No. 867(2011).** Different attorneys in the same law firm may not represent the lender and the seller in a residential real estate transaction unless the attorneys each satisfy the requirements of Rule 1.7 and other applicable Rules.

- **NYSBA No. 845 (2010).** Attorney who acts as real estate broker may share her broker's commission with referring attorneys as long as the referring attorney is not representing a party in the transaction or the referring attorney remits the referral fee to the client and obtains the clients informed consent to the referral fee.

- **NYSBA No. 817 (2007).** Participation in residential real estate transaction that includes a "seller's concession" and "grossed up" sale price is prohibited unless the transaction is entirely lawful, the gross-up is disclosed in the transaction documents and no parties are misled to their detriment.

- **NYSBA No. 807 (2007**). A part-time associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.

- **ABCNY Formal Op. No. 2006-1 (2006).** A law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients. See DR 5-105(C). "Blanket" or "open-ended" advance waivers, and advance waivers that permit the law firm to act adversely to the client on matters substantially related to the law firm's representation of the client should be limited to sophisticated clients, and the latter advance waiver also conditioned on meeting the tests articulated in ABCNY Formal Opinion 2001-2, including that (a) the waiver be limited to transactional matters that are not starkly disputed and (b) client confidences and secrets be safeguarded.

- **NYSBA No. 755 (2002).** Provisions of DR 5-104(A) relating to business transactions with a client should not apply to attorney's recommendation that client employ a distinct attorney-owned business where attorney takes steps to insure that client understand that protection of attorney client relationship does not apply to non-legal service.

- **NYSBA No. 753 (2002).** Where a client represented by attorney/ancillary business owner, the rules applicable to personal conflicts of interest and transactions between clients and lawyers continue to apply after promulgation of DR 1-106. Under those rules, attorney owning mortgage brokerage and

title abstract businesses may not, even with informed consent, represent buyer or seller and act as mortgage broker in the same transaction or act as title abstract company with respect to non-ministerial tasks. Attorney may with the client's consent after full disclosure, act as abstract company with respect to purely ministerial abstract work and may, with informed consent, represent the lender in the same transaction in which the attorney's mortgage company acts as, but may not represent the lender in transactions in which the attorney's title abstract company acts in other than a ministerial capacity. Under certain circumstances, with informed consent, the attorney may represent both the buyer's lender and the seller in the same transaction or, where not required to negotiate terms, the buyer's lender and the buyer in the same transaction.

- **NYSBA No. 752 (2002).** Attorney owning or operating an ancillary business may not provide both legal and non-legal services in the same transaction, even with the consent of the client.

- **NYSBA No. 738 (2001).** Attorney may not refer client to title abstract company owned by attorney's spouse. (Nos. 595, 621)

- **NYSBA No. 731 (2000).** Attorney may not compensate employees for soliciting clients to engage attorney's real estate brokerage firm where attorney represents the lender.

- **ABCNY Formal Op. No. 1996-3(1996).** A lawyer's representation of, or retention of an adversary attorney, with or without the consent of the clients being represented by the respective attorneys, depends upon an analysis of the particular facts and circumstances, including: (a) the intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries' relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work

currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms.

NOTE: Modifies N.Y. City 502 (1939); N.Y. City 307 (1934).

- **NYSBA No. 621 (1991).** Attorney may not refer client to abstract company in which attorney has an ownership interest.

- **NYSBA No. 611 (1990).** Attorney should not represent both seller and lender in same transaction except under unusual circumstances and must withdraw if actual conflict arises.

- **NYSBA No. 595 (1988).** Law firm may not refer client to title abstract company owned by law firm except for purely ministerial title searches.

- **NYSBA No. 493 (1978).** Attorney may use same office for law practice and brokerage business but cannot solicit business in violation of the rules.

- **NYSBA No. 438 (1976).** Attorney cannot represent mortgagor and mortgagee without consent after full disclosure.

- **NYSBA No. 351 (1974).** Attorney may represent a client in a real estate transaction and also act as title examiner and agent for Title Company in same transaction only with consent and full disclosure including fee arrangements.

- **NYSBA No. 340 (1974).** Attorney may not represent client where real estate salesperson is attorney's spouse, but may accept client from brokerage firm employing spouse if spouse not involved in transaction.

- **NYSBA No. 291 (1973).** Attorney may not accept both legal fee and brokerage commission from same client in same transaction if spouse has interest in brokerage agency

- **NYSBA No. 244 (1972).** Attorney should not share office with spouse's brokerage firm and should not represent client in transaction involving spouse's firm. Attorney should not permit spouse's brokerage firm to recommend attorney.

- **NYSBA No. 208 (1971).** Attorney may not act as attorney and broker in the same transaction because of clear, probably unconsentable, conflict.

- **NYSBA No. 162 (1970).** Attorney may represent both buyer and seller only when there is no actual conflict and there is complete disclosure and consent.

- **NYSBA No. 38 (1966).** Attorney may not represent both buyer and seller of real estate property when clear conflict exists.

- **NY County Attorneys Op. 685.** An attorney may not act as both attorney and real estate broker in the same transaction, even with the consent of the client.

Escrow

- **ABCNY Formal Opinion No. 2015-3 (2015).** An attorney who learns that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud. In addition, because Internet-based trust account scams

may harm other firm clients, an attorney who receives a request for representation via the Internet has a duty to conduct a reasonable investigation to ascertain whether the person is a legitimate prospective client before accepting the representation. Attorney who discovers he has been defrauded in a manner that results in harm to other clients of the law firm, such as the loss of client funds due to an escrow account scam, must promptly notify the harmed clients.

- **NYSBA No. 998 (2014).** Attorney who learns of fraudulent conduct of parties in a real estate transaction, including delivery of a fraudulent check in payment of the fee of buyer's attorney, may not disclose attempted or completed fraud unless necessary to withdraw a representation by the attorney is still being relied upon; to the extent necessary to collect the fee; or where required by other law.

- **NYSBA No. 996 (2014).** Client funds in an escrow account may not be shielded from attorney's creditor by transferring them to an escrow account held by the attorney's counsel.

- **NYSBA No. 993 (2013).** The requirement to disclose a "grossed up" real estate purchase price is triggered when the purchase price has in fact been grossed up in connection with a seller's concession.

- **NYSBA No. 946 (2012).** The Rules of Professional Conduct do not prevent a lawyer from distributing settlement proceeds to a third person at the request of the lawyer's client.

- **NYSBA No. 907 (2012).** Attorney may agree to make an anonymous donation on behalf of a client, and must protect the confidentiality of the identity of a client when asked by the client to do so, provided the request does not involve the lawyer in prohibited conduct.

- **NYSBA No. 827 (2008).** Attorney may cooperate with outside audit of client's billings, nor to pay a percentage of gross billing to the auditor directly from firm account, at the direction of the client.

- **NYSBA No. 737 (2001).** Attorney may not issue check from escrow account drawn against a check that has not been deposited or has not cleared.

- **NYSBA No. 710 (1998).** Attorney who serves as escrow agent may not release funds to client except as provided in escrow agreement, absent authorization by all parties. Where escrow agreement is silent, attorney may not release funds over objection of other party. An attorney may resign as escrow agent, but provision must be made to protect funds in escrow.

- **NYSBA No. 575 (1986).** Attorney should request instructions from parties to transaction about placing real estate deposit funds in interest bearing escrow account.

- **NYSBA No. 532 (1980).** Attorney may not keep interest earned on funds during escrow.

- **NYC 2002-2 (Ass'n of the Bar of the City of N.Y.).** Attorney must pay interest on escrow funds to client where retainer agreement did not address interest.

2. **Other**

- **NYBSA No. 1110 (2016)** A lawyer may organize and participate in online webinars and live seminars for non-lawyers on topics within the lawyer's fields of competence, publicize the same by individual invitation, social media or other lawful means, and following a webinar or seminar discuss representation with webinar/seminar participants, all subject to compliance

with applicable rules on advertising and solicitation as discussed in the body of this opinion.

- **NYSBA No. 1109 (2016)** A New York lawyer may use a fully-loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon disclosure of the relative merits of the payment method, follows the client's instructions.

- **NYSBA No. 1104 (2016)** A lawyer may secure legal fees for Medicaid and estate planning services by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

- **NYSBA No. 1101 (2016)** If the content of the lawyer's website and of the page reached by a link therein comply with the advertising rules, a lawyer may place a link on a law firm website to a page describing the lawyer's separate status as a real estate broker. The lawyer, however, should also be mindful of the restrictions of Rule 5.7(a) on ancillary businesses.

- **NYSBA No. 1100 (2016)** An attorney may not use the term "Accredited Estate Planner®" on the attorney's website or business cards. The issuer of the designation is a private organization and its AEP program has not been approved by the ABA for the purpose of accrediting specialization as required by Rule 7.4(c)(1).

- **NYSBA No. 1033 (2013).** When a prospective buyer of real property is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by the same amount, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.

- **NYSBA No. 1020 (2014).** A lawyer in a transaction may post and share documents using a “cloud” data storage tool depending on whether the particular technology employed provides reasonable protection to confidential client information and whether the lawyer obtains informed consent from the client after advising the client of the relevant risks.

- **NYSBA No. 1019 (2014).** A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.

- **ABCNY Formal Op. No. 2014-3(2014).** Where a client previously granted an attorney advance authorization to charge the client's credit card account for the amount of the attorney's bills, but the client later disputes all or part of a particular bill, the attorney may not thereafter charge the client's credit card account for the disputed portion of the bill.

- **ABCNY Formal Op. No. 2010-1(2010).** Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions.

- **NYSBA No. 950 (2012).** Law firm that retains electronic copies of mail may destroy the original paper mail, except when it finds that particular items must be retained in paper form, if it follows reliable procedures to identify and retain those particular items.

- **NYSBA No. 933 (2012).** An attorney may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as attorney and broker in the same transaction.

- **NYSBA No. 916 (2012).** An attorney may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the attorney is acting as broker, even if the attorney advises the party that the party may retain separate counsel.

- **NYSBA No. 892 (2011).** The fact that the sales price in a residential real estate transaction has been "grossed-up" must be expressly disclosed in the transaction documents containing the sales price in addition to the amount of the "seller's concession."

- **NYSBA No. 882 (2011).** If the sales price in a residential real estate transaction has been "grossed-up" in exchange for a "seller's concession," all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession.

- **NYSBA No. 864** (2011) Out-of-State attorney may share legal fees with New York attorney only if the arrangement complies with Rule 1.5(g) of the Rules of Professional Conduct.

- **NYSBA No. 806 (2007).** New York attorneys may share fees with foreign attorneys where educational, training and ethical standards are comparable and the firms comply with NY Rule 1.5 (g) (formerly DR 2-107.)

- **NYSBA No. 741 (2001).** An attorney may not participate in a business network that requires reciprocal referrals.

- **NYSBA No. 677 (1995).** Attorney may delegate attendance at a real estate closing to a paralegal if tasks are merely ministerial.

- **NYSBA No. 651 (1993**). Legal referral service offered by bar association may require attorneys to remit a percentage of fees earned from referrals.

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