

Top 5 Real Estate Attorney No-No's in New York

Andrew Lieb

You may have read in the news about attorneys who stole their clients' money, lost their license and went to jail. Yes, managing escrow money gets attorneys in trouble the most often. However, there are many other red flags that you should watch out for when selecting legal representation for your real estate transaction. Here is a list of the top five real estate attorney no-no's that go beyond theft, and which every client should be mindful of when seeking representation.

- 1. Dual Agent Representation Restriction:** Clients need to be sure that their attorney is only acting as their attorney when seeking representation. In fact, attorneys are ethically precluded from representing both parties in a real estate transaction. The buyer and the seller must be independently represented or, instead, represent themselves (this is called *pro se*) in the transaction. An attorney cannot even have his legal fee paid for by the other side of a transaction (the buyer paying the seller's attorney is not permitted).
- 2. Brokering while Lawyering Preclusion:** Interestingly, a lawyer can legally act as a real estate broker without a real estate brokerage license in the State of New York pursuant to real estate license law. However, an attorney cannot so act ethically while simultaneously representing a party to a real estate transaction in a legal capacity due to attorneys' ethics rules. This ethical prohibition extends to both the attorney's spouse and other members of the attorney's law firm where one acts as a real estate broker and the other acts as a transactional attorney in the same transaction. The rationale for this ethical rule is that an attorney who acts as a real estate broker will be motivated to close the transaction in order to receive the brokerage commission, which is typically only paid at closing, while a real estate transactional attorney is required to maintain an independence necessary to advise a client not to proceed with a given transaction or course of negotiations. Simply stated, an attorney's financial benefit cannot cloud his professional judgment. Clients need to be sure to have different professionals serving as their real estate broker and transactional attorney when buying and selling real estate. While collaboration between these professionals is in a client's best interest, commingling of fees certainly is not.
- 3. Prohibition on Taking Kickbacks:** Not only should an attorney not act as a real estate broker while also providing legal representation in a transaction, such attorney is also ethically precluded from sharing in a referral fee from a real estate broker for sending the buyer or seller to the broker in the first place. Still further, an attorney shouldn't accept monies incident to referring a mortgage broker/banker, surveyor, insurance broker, stager, title insurer or any other third-party to their client (i.e., these recommendations are part of the fee for representation). The key is that attorneys must have no incentive in the transaction beyond looking out for their client's best interest.

4. **The Violation of Sharing Confidences:** Attorneys have blanket confidentiality as to their client's secrets, and absent a fraud on a tribunal (i.e., court), an attorney needn't disclose any of those confidences. However, the act of an attorney sharing your confidences with a third-party service provider waives a client's right to claim privilege if such attorney is asked about any confidences by anyone including a Judge. Additionally, certain third-party service providers actually have a statutory obligation to affirmatively disclose client confidences to a client's detriment (i.e., a seller's real estate broker must disclose all facts known to the agent materially affecting the value or desirability of property and a buyer's real estate broker must disclose all facts known to the tenant's ability and/or willingness to perform a contract to rent or lease landlord's property). So, attorneys should obtain their client's informed consent prior to sharing any information with anyone beyond the client about the transaction, except information concerning the fact that a contract was signed or information necessary for the scheduling of a closing because such sharing is required to effectuate the representation (i.e., you can't have a closing unless the lender and title company know to show up).
5. **Being the Deal Killers:** Old-school attorneys often wrongfully operate from an outdated attorneys' ethics rule known as the means-end test. Thereunder, a client could identify the end goal of the representation and a lawyer could effectuate obtaining such goal under any means the lawyer deemed fit pursuant to the lawyer's complete discretion and control. As a result, many a lawyer would smell risk in a transaction and kill the deal as this tactic minimized all exposure to suit for malpractice or otherwise. In 2009, New York adopted new attorneys' ethics rules, called The Rules of Professional Conduct, which modifies the means-end test into client informed consent. Thereunder, it's not the attorney's job to kill a client's deal. Instead, it's the attorney's job to advise their client of the risks and benefits of each proposed course of action and then, to ask the client to make an informed choice.

Today, transactional lawyers should be using informed consent letters throughout a real estate transaction. In fact, the real value of an attorney in a real estate transaction is to provide the client with the requisite know-how to make smart choices (e.g., should a buyer close with escrow if their walk-through discovers water in the basement; or should a buyer purchase a house without a certificate of occupancy; or should a seller permit a pre-possession agreement with the purchaser; or should a seller accept an attorney escrow check rather than a bank check in accepting payment). In every possible scenario there is not a one-size-fits-all right answer that works across the board and, instead, clients' decisions should be modified based upon their unique circumstances once they are advised of and understand risk. Still further, the best transactional attorneys not only advise their clients about the law, but also provide guidance about the best practice in business in order to empower their clients to make smart choices. This way, a top attorney's job is to help his client make money.

Adapted from this [Dan's Papers](#) article.