

## **REBA Ethical Standard No. 4**

### **Attorney Acting in Dual Capacity as Attorney and Real Estate Broker**

An attorney shall not act as both attorney for a party in a real estate transaction and as a real estate broker to a party in the same transaction.

#### *Comment*

Attorneys have an ethical duty to represent their clients “zealously within the bounds of the law.” MASS. R. PROF. C. 1.3. Fulfillment of this duty requires that services be provided “unencumbered by any competing allegiances.” *Commonwealth v. Downey*, 65 Mass. App. Ct. 547, 549-50 (2006). See also MASS. R. PROF. C. 1.7. If an attorney’s own personal interests or the interests of an existing client are reasonably likely to adversely affect the attorney’s representation of the client, the attorney must decline the representation even if the client would consent to the conflicted representation. MASS. R. PROF. C. 1.7. Whether the client’s interests are likely to be adversely affected must be scrutinized from the viewpoint of a “disinterested lawyer.” See MASS. R. PROF. C. 1.7, *cmt.* [5] (Although “[a] client may consent to representation notwithstanding a conflict[,] . . . when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client’s consent.”); Restatement (Third) of the Law Governing Lawyers, § 122, *cmt.* [g(iv)] (“In general, if a reasonable and disinterested lawyer would conclude that . . . the affected client[] could not consent to the conflicted representation because the representation would likely fall short[,] . . . the conflict is nonconsentable.”).

An attorney who undertakes to provide legal representation to a party to a real estate closing (either the lender, seller, or buyer) in the same transaction in which he is serving as a real estate broker, has a conflict of interest which is reasonably likely to adversely affect the attorney’s ability to zealously advocate on behalf of his client. In the role of real estate broker, the attorney anticipates receiving a commission only if the transaction is consummated. Thus, as broker, the attorney has a financial interest in the consummation of the transaction. Although the lender, seller, and buyer all presumably are interested in seeing the transaction consummated, each of them are interested in ensuring the transaction is completed in accordance with their own individual objectives. The individual objectives of the parties have the potential to derail the transaction thereby depriving the broker of a commission.

The broker’s personal financial interest in the transaction creates a conflict that may be likely to adversely impact his ability to zealously advocate for his client “unencumbered by any competing allegiance.” A truly disinterested lawyer would not recommend that a client retain as his attorney the very same person who has a personal financial interest in the transaction, whether directly or indirectly, particularly when there is no shortage of reasonably available alternatives.

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