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Avoiding Conflicts in Multiple Representations in Real Estate Deals

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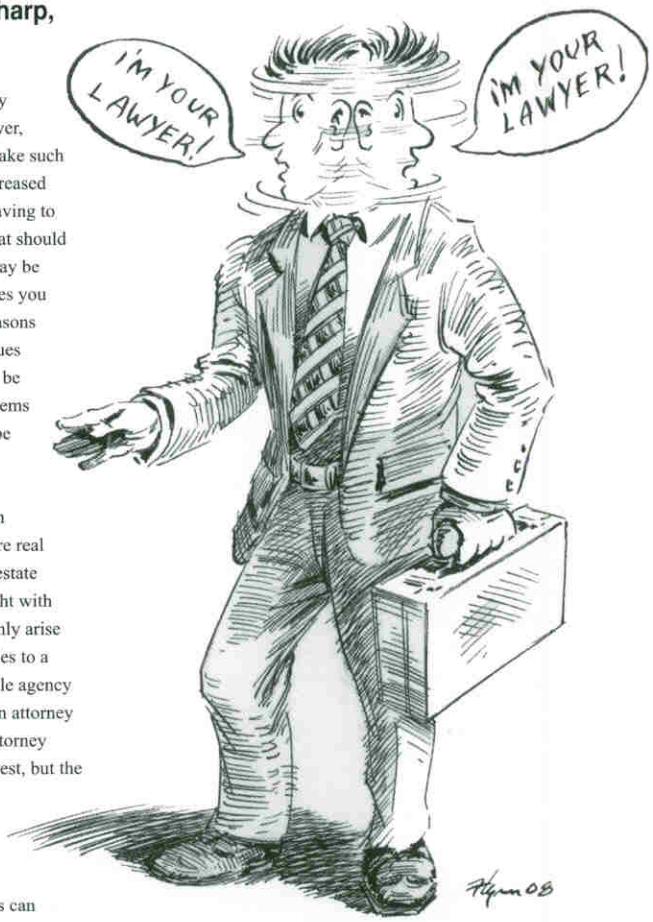

The allure of joint or multiple representation may appear to be, especially to an inexperienced lawyer, an attractive prospect. The opportunity to undertake such representation, and with it the prospect of an increased fee and the ease of undertaking a task without having to negotiate with another lawyer, is a temptation that should be resisted or at least carefully assessed. This may be difficult to do, especially if your client encourages you to undertake dual representation for the same reasons to economize on attorney fees and to resolve issues with greater perceived ease.[i] The temptation can be especially great where the transaction at issue seems simple and the interests of the clients appear to be aligned at least initially. However, the potential hazards of the joint representation are sizable.

One of the more enticing areas of the law in which to suggest or accept dual representation are real estate transactions, in particular residential real estate transactions. Deceptively simple, they are fraught with potential conflicts of interests. Conflicts commonly arise when an attorney is asked to represent both parties to a real estate transaction, or to also represent the title agency or mortgagee involved in a transaction. When an attorney either represents more than one interest or the attorney believes he is representing only one party's interest, but the other party reasonably or unreasonably believes that the attorney is acting on his behalf too, an opportunistic or genuinely meritorious claim, lawsuit or grievance may not be far behind.

Potential conflicts in real estate transactions can arise in myriad ways, from the sale price and the terms of payment to the description of the property and the provisions in the general warranty deed. These types of potential conflicts have led some courts to condemn dual representation in real estate transactions much in the same way as dual representation is condemned in divorce actions[ii]. For example, the state of New Jersey has prohibited attorneys from representing both the buyer and the seller in complex commercial real estate transactions.[iii]

In *Homa v. Friendly Mobile Manor, Inc.*, 612 A.2d 322, 327 (Md. 1992), the court found that a conflict of interest was "inherent" in a relationship between a buyer and seller. In *Homa*, the attorney represented the defendant corporate seller of mobile home parks. A buyer for a mobile home park was found and before the sale went through, the attorney discussed becoming an investor in and consultant to the buyer. He later became an investor in the buyer and attended a meeting of all investors. Additionally, his son was employed by the buyer. In this case, the perils of the conflict of interest were obvious; every dime he saved for his client would later come out of his pocket. The attorney's clients did not know about his relationship with the buyer. The court held that the attorney was liable for fraud and breach of the legal services contract because he breached his fiduciary duties to the client. Both compensatory and punitive damages were awarded to the client.

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Spring 2009 National Legal Malpractice Conference
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Defending Liberty
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Avoiding Conflicts

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Disclosure of Conflicts of Interest in Real Estate Transactions

In New York, two clients, the buyer and seller of property, with potentially competing interests in a real estate transaction, agreed to have the same attorney represent them, and ratified the dual representation by written acknowledgment and release. The court held that claims of attorney malpractice based on plaintiff's contention that the lawyer defendants failed to provide the proper advice to plaintiff as an individual client, were nevertheless not foreclosed. See, *Swift v. Ki Young Choe, et. al.*, 242 A.D. 2d 188, 674 N.Y.S. 2d 17 (N.Y. App. Div.1998).

If faced with dual representation, you must discuss all potential conflicts and explain why it is in your client's best interest to hire separate counsel. One court has held that to satisfy the requirement of full disclosure by a lawyer before undertaking to represent two conflicting interests, it is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them.[vi] If your client consents, you must still be wary because if you failed to explain all ramifications or the client did not comprehend the ramifications, then the client's consent may be based on a mistaken understanding or false underlying assumptions.

Further, the discussion of the existence of a conflict does not relieve you of your duty to warn or advise your clients of problems that can arise. You may think that the disclosure of a potential (and even waivable conflict) means that you can advance one party's interest over the other, but it does not. If you think that the representation creates a non-waivable conflict or if you cannot manage the conflicting interests, you should not undertake the representation. If a conflict arises during the representation, and you cannot manage it, you should withdraw from the representation of the clients.

Liability to Third Parties

An attorney in a real estate transaction may be asked to represent both sides in a transaction by a client especially in situations where one of the parties is a lender or title agency. A danger in undertaking such dual representation is that the traditional immunity afforded to attorneys from claims brought by non-clients may not apply. In *Westport Bank and Trust Co. v. Corcoran, Mallin and Aresco, et. al.*, 221 Conn. 490, 605 A.2d 862 (Conn.1992), the Supreme Court of Connecticut decided a case where an attorney was ordered by his client, pursuant to the attorney-client agreement, to perform a title search and issue a title opinion letter to the client's lender. The attorney performed the search but failed to find a second mortgage in the chain of title. As a result, plaintiff's mortgage was actually the third mortgage and not the second mortgage on the property as the title opinion letter represented.

The issue in *Westport Bank* before the court was whether a lender could hold an attorney liable for negligent title search and subsequent issuance of an erroneous title opinion letter to the lender, when the same attorney represented the borrower. The defendant attorney argued that the general rule affording attorneys immunity from claims brought by a third party prohibited the lender from bringing the suit. The plaintiff claimed that the public policy rationale to protect an attorney's loyalty was not present in this case because both parties had the same goal to determine that there was no encumbrance on the property. The court agreed with the lender and held that the attorney could be held liable for negligence.[v]

In the above case, the important distinction was that the borrower and lender had similar interests due to the type of the transaction and thus the relationship was not likely to become adversarial. However, in many cases, an unforseen conflict can arise after undertaking the representation, exposing the attorney to liability to a party other than his client. This is not to say that a potential conflict must always preclude an attorney from representing a buyer and lender simultaneously, but that, as always, attorneys must continue to evaluate the interests of each client in dual representation situations to determine whether the potential for conflict may arise.

Although it may seem as if dual representation in real estate transaction may be a simple, cost saving proposition, the potential pitfalls in such an undertaking cannot be glossed over by wishful thinking. Not only can an attorney compromise his or her duties to a client, but the attorney may create a duty to a third party that the attorney did not contemplate. Any attorney planning to undertake such representation should research applicable rules in the state relating to potential liability to third parties and conflicts of interests perform a proper and thorough conflict analysis and reevaluate the potential for a conflict of interest throughout the representation.

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i. Roland A. Paul, one of the two original drafters of the model Rules, stated the advantages of one attorney representing two or more parties in *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A. J. 93 (1976). He pointed out that dual representation cuts down on legal fees and avoids the time consuming negotiation process. In a residential real estate transaction, for example, the value of the property in question may not justify paying two attorneys.

ii. See, *In re Wagner*, 599 N.W.2d 721, 726 (Iowa 1999) (A lawyer's simultaneous representation of a buyer and a seller in the same transaction is a paradigm of a conflict of interest.); *Bell v. Clark*, 670 N.E.2d 1290 (Ind. 1996) (punitive damages awarded where attorney represented both a real estate limited partnership and general partner).

iii. *Baldasarre v. Butler*, 132 N.J. 278, 296 (N.J. 1993)

iv. *In re Boivin*, 533 P.2d 171, 174 (Or. 1975) citing, Wise, Legal Ethics 77 (2d ed 1970); Patterson and Cheatham, The Profession of Law 232, 235 (1971).

v. If the attorney represented the seller and suit was brought by the buyer, or vice versa, then that would be an adversarial situation and the traditional immunity would apply. See, 1 Mallen & Smith 7:7 (2008), citing, *Fox v. Pollack*,181 Cal. App. 3d 954, 226 Cal. Rptr. 532 (1st Dist. 1986); *Adams v. Chenowith*, 349 So. 2d 230 (Fla. Dist. Ct. App. 4th Dist. 1977).

Textbook for Teaching about Lawyer Professional Liability Released

Newly released from Thomson West is ***Legal Malpractice Law: Problems and Prevention*** described as a practical, problem-oriented text designed for use in elective courses on Legal Malpractice, Professional Liability, Advanced Legal Ethics, or Advanced Torts, or in required Professional Responsibility classes that want to focus more on malpractice than on discipline. Each chapter includes explanatory text that relies on recent cases, code provisions, statutes, and commentary. The problems, including many that are based on actual controversies, deal with liability concerns that practitioners encounter. The book integrates malpractice prevention lessons. Relevant ethics rules are discussed. For more information go to www.westacademic.com and refer to ISBN 978-0 31417-084-2

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