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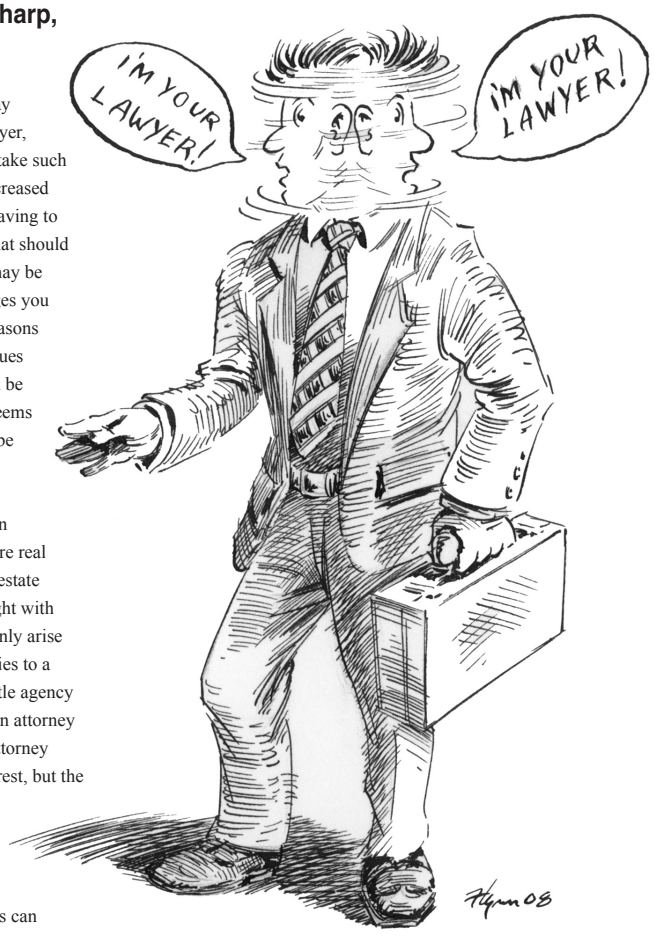
lpl Advisory

A newsletter from The ABA Standing Committee on Lawyers' Professional Liability

Avoiding Conflicts in Multiple Representations in Real Estate Deals

by Catherine Fazio, Gallagher Sharp, Cleveland, OH



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.

(continued on page 2)

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September 3-5, 2008

Fall 2008 National Legal Malpractice Conference
The Palace Hotel
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Defending Liberty
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Avoiding Conflicts

(continued from page 1)

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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Dollars & Good Sense: How Your Underwriter Views Your Law Firm Website

by Todd E. Cusano, Esq., Darwin Professional Underwriters, Inc.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court paved the way for lawyers to advertise their services. Even in 1977, Justice Blackmun foresaw "the special problems of advertising on the electronic broadcast media." *Id.* at 385. Although it is doubtful Justice Blackmun had the *World Wide Web* in mind, the explosion of internet use in the 1990's forced law firms to adapt to this new "electronic broadcast media." Even old guard law firms found themselves developing websites. Today, nearly every mid-sized and large law firm has a website, with small and solo practices not far behind.

A recent study of professional services websites ranked the target audiences of these firms. The study specifically included law firms.[i] The overwhelming target audience was *prospective clients* (62%), followed by *existing clients* (24%) and *potential employees* (11%). Coming in last were *investors/industry analysts*, which presumably included underwriters. Not surprisingly, the study concluded "that many professional service firms today view their websites as important marketing and sales tools – tools whose importance is only increasing."[ii]

The typical law firm website, therefore, is designed for prospective clients, not professional liability underwriters. The resulting product is essentially an electronic brochure that combines the elements of print and multi-media designed to attract new sources of revenue to the firm. The majority of websites merely present a digital version of the typical print brochure distributed at traditional marketing meetings, although some websites have become sophisticated online resources for firm members and their clients.

Law firms are continuing to recognize the value of websites. They are reacting by increasing budgets for website design and crafting long term marketing plans around the anticipated use of their website. Fortunately, many of the marketing techniques used to enhance a website's ability to attract new clients also serve to educate underwriters about the firm they are evaluating.

Many lawyers' professional liability applications ask for a law firm's website address and whether the website is used to convey legal advice.[iii] Even though the websites are principally designed for prospective clients and not for industry analysts (i.e. underwriters), law firms ought to consider the implications a website has on their underwriter. As part of the due diligence process, an underwriter may visit a firm's website and pour over the pages of information. That review will assist in the underwriter's analysis of:

- Area of practice descriptions
- Recent matters handled, verdicts or transactions
- List of representative clients
- Attorney biographies
- Presentations/Lectures/Published Articles
- Press Releases/Media Reports

Websites stamp an impression in the mind of an underwriter that an application cannot. Thus, the areas listed above give life to a static application. Above all

else, an underwriter will look for consistency between the application and the website. An underwriter verifying the areas of practice, number of firm attorneys or branch locations could be skeptical if the application and website are not consistent.

For example, a law firm's website may list an area of practice that has no accompanying gross revenue on its application. Although there may be a rational explanation for doing so, underwriters are typically wary of firms that "dabble" in practice areas outside of their recognized areas of expertise. Law firms marketing themselves as capable of handling *any* legal issue may also be willing to take on *any* paying work, even if that greatly enhances the probability of a malpractice claim. This alone may prevent a law firm from receiving terms from a carrier. On the other hand, a website consistent with the application that presents essential firm information in an organized format is likely to leave a favorable impression. With a *favorable* impression, an underwriter is better inclined to release *favorable* terms.

As noted, underwriters may spend a significant amount of time reviewing the practice area descriptions on a firm's website. Applications only typically ask for a percentage of gross billings devoted to each particular area, but do not ask for a description of the work undertaken.

Oftentimes, this is best conveyed by listing representative matters handled by the firm. Generic practice descriptions that could apply to any law firm, or descriptions loaded with superlatives about how "diligent", "experience" or "respected" a firm is offer little to an underwriter, or even prospective clients. Absent complete information, an underwriter is not likely to release competitive terms, or even terms at all, when presented with a new prospect.

If a website provides a list of representative clients and/or recent cases-verdicts-transactions, law firms must assure that it provides an accurate representation of the firm. If, for example, a firm only lists its largest verdicts for its largest clients, the firm may leave an impression that that is the only type of work it undertakes. Not only does this skew the firm in the eyes of an underwriter, but it may scare away prospective clients.

Similarly, law firms must assure that their client list remains up to date and accurate, as an underwriter may draw adverse conclusions based on outdated information. An underwriter's terms may reflect a perceived higher exposure, for example, if a website continues to list former clients that are currently being investigated for fraud or are in bankruptcy. In short, websites that provide representative matters and/or client lists should be regularly updated, perhaps in anticipation of their annual LPL application process.

In addition to those items already mentioned, law firm websites should also consider including:

- A history of the firm
- Descriptions of any firm-wide professional affiliations
- Copies of Press/Media Releases
- Links to articles published by firm members
- Listing of seminars/presentations conducted by firm members
- Listing of any branch offices and ancillary entities

In summary, websites are valuable tools for underwriters. When evaluating a potential new account, the impact of a law firm's website may determine how competitive an underwriter's terms will be, or whether terms are even offered. Even when renewing an existing account, law firms should consider that an underwriter may put some value on a firm's website that may impact renewal terms. Law firms that foster communication between firm management and/or administration and their information technology professionals are best positioned to have a website that is up-to-date, accurate and informative. With a thorough website, law firms place themselves in a win-win situation – they are better positioned to draw in prospective clients while assisting underwriters in evaluating the firm.

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i *See* The Bloom Group, *The Effectiveness of Professional Service Websites – A Research Study on Websites as Lead Generators* (May 2006), at http://www.bloomgroup.com.

ii *Ibid.*

iii This article does not address the legal and/or ethical issues that arise when using the internet to attract clients or convey legal advice. Law firms are encouraged to review current caselaw, Rules of Professional Conduct and local ethics opinions and bar opinions. *See generally* David A. Grossbaum, *Don't Get Caught In The Internet – The Opportunities of the Internet Come with New Risks for Lawyers*; Anthony E. Davis and David J. Elkanich, *eLawyering and Technology in Law Practice: Risk – Or Risk Management Solution?* For additional information on these articles, please contact Attorney David Grossbaum at dgrossbaum@hinshawlaw.com.

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2008 Levit Essay Winner Announced

Shira Foreman, an associate at Cahill, Gordon & Riendell in Manhattan, is the winner of the 2008 Levit Essay Competition. The award is named for the late Bert W. Levit, distinguished co-founder of the San Francisco law firm of Long & Levit LLP.

The winner receives a cash prize of $5,000 and an all-expense paid trip to the Spring 2008 National Legal Malpractice Conference in Boston.

The annual award competition, open to law students and young lawyers, is co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and Long & Levit LLP. The writing competition encourages original and innovative research and writing in the area of legal malpractice law, professional liability insurance and loss prevention. This year's award-winning essay on the application of a statutory mediation privilege to evidence at trial can be found at www.abalegalservices.org/lpl

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