

**ETHICAL ISSUES INVOLVING RESIDENTIAL REAL ESTATE
TRANSACTIONS**

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For many consumers, the purchase of a home is the largest and most important investment they will make in their lifetime. Attorneys play a pivotal role in guiding buyers and sellers through a process that is emotionally charged and often highly regulated by both state and federal regulations. The process is full of ethical dilemmas and attorneys must appropriately represent their clients' interests and handle themselves with a great deal of professionalism. The American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") represent the mandatory minimum standard of conduct required by attorneys, without being subject to disciplinary action. Below are two hypotheticals involving a residential real estate transaction, discussion points and application of relevant rules.

HYPOTHETICAL I

NORMAL DAY AT THE OFFICE

Casey Counsel, represents the buyer in a residential real estate transaction. Casey has a written engagement letter acknowledging her representation of the buyer. Casey will

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review the title work for the transaction, prepare the deed and conduct the closing which includes explaining all of the necessary lender documents to the purchaser. The sales contract has an addendum that indicates that the settlement agent was chosen by the purchaser and that seller may have independent counsel. Casey Counsel will also act as the settlement agent. She mailed a letter to the seller acknowledging her representation of the buyer and that she will conduct the closing. The letter included a disclosure of the cost involved for preparing the deed of conveyance, other related settlement documents, and information that the seller has the opportunity to hire independent counsel if they desire. On the date of the closing, seller shows up without independent counsel and Casey Counsel prepared the deed and other necessary documents for the transaction.

DISCUSSION

1. Does Casey Counsel represent the buyer?
2. Does she represent the seller?
3. Assuming Casey also represents seller, would the representation of seller be ethical if she had not sent the seller a letter disclosing her representation of the buyer?
4. Has the client truly consented by just not responding and appearing at closing without representation?
5. How should Casey Counsel/settlement agent handle the multiple representation issues?

ANSWERS

1. Yes, there is an express contract for the representation of the buyer.
2. Several states have addressed this ethical dilemma with varying resolutions. Casey has not made any express contract to represent the seller. Buyer also has not consented to Casey's representation of seller. It can be argued, however, in some jurisdictions that representation is implied if Casey proceeds to prepare the deed on behalf of seller and charges the seller a fee for the preparation at the time of closing. ABA Model Rule 1.5 (b). ABA Model Rule 1.2 provides that a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. ABA Model Rule 1.2 (c) provides that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (*Pickus v. Virginia State Bar*, 232 Va. 5, 15 348 S. E.2d 202 (1986) (when only one attorney is involved in a settlement, that attorney represents all of the parties involved)).
3. No. Casey must provide disclosure of her representation of the buyer to the seller. ABA Model Rule 1.7(b) (4) provides that "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: each affected client gives informed consent,

confirmed in writing.” Comment [2] goes further to say “resolution of a conflict of interest problem under this rules requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.”

4. See answer to #3.
5. She must properly disclose her representation to both clients and receive their consent to the multiple representation. Again, the pertinent legal authority regarding this issue is ABA Model Rules 1.7 (a) & (b).

HYPOTHETICAL II

THE DAY CONTINUES

During closing, buyer and seller are in a huge dispute regarding the status of several repair items noted on the home inspection list that the seller agreed to fix in the sales contract. The buyer and seller are unable to reach an agreement and have asked Casey Counsel/settlement agent to assist them with resolving their dispute as best possible at the closing table. The closing is completed but neither the buyer or seller is happy with the outcome. Seller takes it a step further and calls Casey Counsel a week later and asks her to represent him in his dispute against the buyer.

DISCUSSION

1. Can Casey answer any questions regarding the dispute on behalf of the buyer and/or seller during the closing?
2. Can she represent either party in their dispute after closing? What if they both consent to Casey representing the seller?
3. What if the buyer calls Casey to represent him in another transaction after Casey's representation of seller in his dispute against buyer in this transaction?
4. Can Casey purchase investment property from the seller in a separate transaction at a discounted price?
5. Could Casey prepare the deed for this purchase?

ANSWERS

1. ABA Model Rule 1.7 prohibits her from representing either client in a way that would adversely affect the other client.
2. It is unethical for Casey to subsequently represent either party against the other regarding the transaction unless the adverse party consents after full disclosure. Casey should inform the buyer and seller of this rule at the outset of the transaction.
3. No. Comment [1] to Rule 1.7 states, “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interest.” Also see, Comment [7] to ABA Rule 1.7 states “directly adverse conflicts can also arise in transactional matters
4. In order to purchase the investment property from the seller at a reduced price, Casey must first conclude that the transaction would be fair and reasonable to the client. Rule 1.8 (a)(1). This requirement alone would seem to bar the transaction. In addition, Casey would need seller’s consent, in writing, after full and adequate disclosure and a reasonable opportunity for seller to consult with independent counsel. Rule 1.8 (a)(2). Comment [1] to Rule 1.8 states “A lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer

participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.”

5. No. Rule 1.8 prohibits Casey from preparing the deed.

APPLICABLE RULES

ATTORNEY/CLIENT RELATIONSHIP

- **ABA Model Rule 1.2 (c) Scope of Representation and Allocation of Authority Between Client and Lawyer**

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- **ABA Model Rule 1.5 (b) Fees**

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

CONFLICTS OF INTEREST/MULTIPLE REPRESENTATION

- **ABA Model Rule 1.7 Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

▪ **Conflicting Interest of Clients or Potential Clients May Give Rise To Ethical Violations In The Following Examples**

a. Concurrent representation: Concurrent representation of clients with adverse interests without both clients' consent and after full disclosure and if the lawyer can adequately represent the interest of each. The ethical obligations of members of the same law firm are imputed to one another;

b. Former clients: a lawyer may not represent any person or entity whose interests are adverse to those of a former client in the same or a substantially related matter unless both clients consent after full disclosure.

c. Multiple representation: multiple representation of clients in the same or substantially related matter is prohibited without consent of all clients after full disclosure of the existing or potential conflicts.

d. Aggregate settlement of claims: aggregate settlement of claims may not be made without full disclosure and consent.

▪ **ABA Model Rules 1.8 (a) Conflicts of Interest: Current Clients: Specific Rules**

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

VIRGINIA RULES

▪ **Virginia Rules of Professional Conduct 1.2 Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

▪ **Virginia law provides several theories of when the attorney client relationship starts.**

1. Express Formation which is how most attorney-client relationships are formed by contract with a written engagement letter. *Chippenham Manor, Inc. v. Dervishian*, 214 Va. 448, 450 (1974).

2. Implied Formation that does not require formalities. The relationship can arise from an oral agreement or from the conduct of the parties involved. *Commonwealth Land Title Ins. Co. v. Tanner*, 36 Va. Cir. 463, 464 (1995).

3. Services as a Settlement Agent. *Pickus v. Virginia State Bar*. 232 Va. 5, 15 (1986) (when only one attorney is involved in a settlement that attorney represents all of the parties involved).

▪ **Virginia Rules of Professional Conduct 1.7 Conflicts of Interest**

A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless;

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

OTHER CONCEPTS OF PROFESSIONALISM

One of the central issues in ethics study is why lawyers are held in low esteem by the public. A key factor is lack of professionalism. One of the qualities of professionalism is a sense of giving or selflessness. To the extent that lawyers are viewed as greedy and selfish, rather than giving, caring and selfless, the reputation of the profession suffers. This is why pro bono services are so important - not only do they meet community needs, but they are necessary to revitalizing the professionalism of the law.

OBLIGATION TO PROFESSION

Aspirational goals to consider:

1. Maintaining vigilance over the integrity of the system of justice;
2. Seeding to change outmoded or improper law or procedures;
3. Espousing causes and changes which a lawyer conscientiously believes to be in the public interest;
4. Seeking to support the appointment of qualified and fit judges;
5. Cooperating in the disciplinary system to ensure that those lawyers practicing are fit to do so;

6. Supporting the organized bar as it strives to regulate and improve the profession.

OBLIGATION TO SOCIETY

1. Pro bono services. VA Rule 6.1, Comments [2] through [6] define the categories of pro bono services:

[2] Pro bono services in poverty law consist of free or nominal fee professional services for people who do not have the financial resources to compensate a lawyer. Private attorney's participation in legal aid referral programs are typical examples of "poverty law." Legal services for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel, would also qualify as "poverty law," provided the free or nominal fee nature of any such legal work is established in advance.

[3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect rights of individuals in which society has an interest. Professional services for victims of discrimination based on race, sex, age or handicap would be typical examples of "civil rights law," provided the free or nominal fee nature of any such legal work is established in advance.

[4] Free or nominal fee provision of legal services to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information would be examples of "public interest law."

[5] Training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs would be

examples of “volunteer activities designed to increase the availability of pro bono legal services.”

[6] Service in any of the categories described is not pro bono publico if provided on a contingent fee basis. Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential. Accordingly, services for which fees go uncollected would not qualify.

2. The privilege to practice law carries with it the clear and distinct responsibility to ensure that legal services are available to those who cannot afford them.
3. Lawyers who are unable to represent clients directly because of conflicting positions, such as lawyers employed by the judicial system or the government, can nevertheless utilize their legal training and skills in civic matters of social or public interest or in charitable endeavors.
4. Lawyers should also participate in educational activities.
5. Representation of clients on pro bono basis can take the form of doing cases free, or on a reduced fee basis, or where attorney’s fees may be available by statute, but where attorneys are otherwise donating substantial time in the expectation of not being fully reimbursed.

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