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Ethical, Statutory, and Regulatory Conflicts of Interest in Real Estate Transactions.

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ETHICAL, STATUTORY, AND REGULATORY CONFLICTS OF INTEREST IN REAL ESTATE TRANSACTIONS

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I. INTRODUCTION

A lawyer in the American legal system is called upon to perform a

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variety of functions for his or her client. An attorney may serve as advisor, advocate, negotiator or as an intermediary. Lawyers engaged in a real estate practice most often act as advisors and negotiators. The Preamble to the American Bar Association's Model Rules of Professional Conduct describes a lawyer's responsibility as follows:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . .As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.[1]

When an attorney's loyalties are divided, he or she may have difficulty fully discharging these responsibilities and a conflict of interest may result. The effect of the conflict depends on its nature and the applicable ethical standards in the jurisdiction. In a real estate practice, ethical conflicts of interest can arise when an attorney enters into an attorney-client relationship with more than one party in a single transaction. Ethical conflicts can also arise when a lawyer represents interests adverse to former or existing clients. In addition, laws and rules governing lending institutions and title insurers proscribe certain activities that would give rise to legal conflicts of interest.

Although it may be said that all parties to a real estate transaction have a common interest in closing the transaction, each party has distinct interests which may or may not be adequately protected if one lawyer represents more than one party. In the typical real estate transaction, there may be a seller, buyer, lender(s), title insurer, trustee, real estate agent(s), mortgage broker(s), tenant(s), lien claimant(s), as well as attorneys for many of the foregoing. If any of the parties are corporations or partnerships, the interests of the organization and the individual officers, directors, shareholders, partners, or venturers must also be protected.

A lawyer who undertakes to perform legal services for more than one of the parties to the transaction, or a lawyer who has a business interest in some aspect of the transaction, must carefully examine the potential for a conflict of interest before agreeing to represent the client. If a conflict of interest exists, or it appears that one might arise during the course of the representation, the lawyer has two options.

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1. MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE, SCOPE AND TERMINOLOGY (1984), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 1 (1985 ed.).

First, representation may be declined altogether, or second, if the lawyer determines that representation of the conflicting interests will not impair his or her independent professional judgment on behalf of either client, the attorney may undertake the representation. Simply believing that there will be no impairment of independent professional judgment is not sufficient in and of itself. The lawyer must advise and fully disclose the nature of the conflict to all the parties involved in the transaction, and each must give his or her informed consent to the representation. Preferably, such disclosure and consent should be in writing. If an actual conflict subsequently arises, withdrawal is necessary if the lawyer can no longer exercise independent professional judgment or if continued representation might jeopardize confidences and secrets of the client.

This article examines the standards of professional conduct regarding conflicts of interest and suggests means of avoiding conflicts through disclosure, consent and screening. Additionally, this article identifies other conflicts of interest in real estate transactions which arise by operation of law or administrative rule.

II. STANDARDS OF PROFESSIONAL CONDUCT

The three primary sources for standards of professional conduct are: (1) the individual state Codes of Professional Responsibility,[2] (2) the American Bar Association's (ABA) Model Code of Professional Responsibility (Model Code),[3] and (3) the ABA Model Rules of Pro-

2. *See* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (R. Metsky 3d ed. 1985). This four volume series is organized by state. For each state, the materials are organized in the following manner: (1) state table of contents; (2) state code of professional responsibility; (3) state bar formal and informal ethics opinions; and (4) full-text state supreme court and court of appeals cases, as well as applicable federal court decisions. This series is an excellent source to consult when comparing and contrasting the individual states' Codes of Professional Responsibility.

3. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) (adopted by the House of Delegates of the American Bar Association on August 12, 1969), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985). The Code is comprised of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:300 (1985). The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived. The Ethical

fessional Conduct (Model Rules).[4] The Disciplinary Rules (DR) and Ethical Considerations (EC) under Canons 4, 5 and 9 of the Model Code and the Texas Code of Professional Responsibility (Texas Code), and Rules 1.7, 1.8, 1.9 and 1.13 of the Model Rules are most applicable to conflicts of interest.[5] Although the Model Rules have been adopted in only a few states, they provide additional guidelines for evaluating actual or potential conflicts of interest.[6] The Model Rules attempt to more fully address deficiencies which have become evident with time and practice under the Model Code.[7] In addition to judicial decisions on attorney conflicts of interest in real estate transactions, ethics opinions issued by state and local bar associations are a

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Considerations are aspirational and represent the objectives toward which every member of the profession should strive. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in nature. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *See id.* § 1:300.

4. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983) (adopted by the House of Delegates of the American Bar Association on August 2, 1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 1 (1985 ed.).

5. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 5, 9 (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:302 (1985); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9, 1.13 (1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 8-14 (1985 ed.).

6. As of August 1985, four states, New Jersey, Arizona, Minnesota, and Montana have adopted the Model Rules. *See* ABA STATUS REPORT ON CONSIDERATION OF MODEL RULES OF PROFESSIONAL CONDUCT (July 4, 1985).

7. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9, 1.13 (1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 8-14 (1985 ed.). Rule 1.7 provides generally that an attorney shall not represent a party if that party's interests are directly adverse to an existing client's interests or to the attorney's personal interests. *See id.* at 8. Rule 1.7 seeks to clarify DR 5-105 (A) by imposing a directly adverse standard for evaluating multiple representation conflicts. *See id.* at 9 (analyzing changes between Model Code and Model Rule provisions). Rule 1.8 prohibits an attorney from entering into business or other transactions with or for a client which could injure the client's interests. *See id.* at 9-10. Rule 1.8 is a more detailed prohibition on attorney-client transactions than was DR 5-104. *See id.* at 10-11 (discussing and comparing Model Rules with Model Code). Rule 1.9 prohibits an attorney from representing a party whose interests are substantially related to and materially adverse to a former client's interests. *See id.* at 11. Rule 1.9 had no counterpart in the Model Code. *See id.* at 11. Rule 1.13 sets forth specific ethical requirements for an attorney working for or representing an organization. *See id.* at 13. There was no similar provision in the Model Code. *See id.* at 14. The drafters of the Model Rules specifically sought to clarify the duties of an attorney in an attorney-client relationship. *See* MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE, SCOPE AND TERMINOLOGY (1984), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 1 (1985 ed.). *See generally* Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 74 (1983) (discussing alterations contained in Model Rules and attorneys' obligations to be familiar with both Model Code and Rules).

primary source for interpretation of these conflicts of interest standards.[8]

A. *Representation of Multiple Clients in a Single Transaction*

The most typical conflict of interest in a real estate transaction is the situation in which an attorney represents more than one party to a transaction. The general standard of practice in multiple representation situations may be stated as follows: a lawyer may represent multiple parties in a particular matter if: (1) the lawyer believes that such representation will not adversely affect his or her ability to exercise independent professional judgment as to the interests of each client; and (2) if all clients consent to the representation after full disclosure of the potential conflicts.[9] The following cases are examples of multiple representation conflicts in real estate transactions.[10]

In *Dillard v. Broyles,*[11] a Texas attorney represented both the buyer and seller in a residential real estate transaction and was named trustee in the deed of trust securing the buyer's promissory note to the seller. When the buyer subsequently defaulted on the note, the attorney sent a notice of acceleration and notice of trustee's sale to the buyer. The property was sold by the trustee. In a suit to set aside the foreclosure sale, the buyer alleged the attorney was guilty of fraud by virtue of his dual representation in connection with the initial closing.

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8. *See* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1985). This looseleaf service contains both formal and informal ethics opinions reprinted in full text. State and local ethics opinions are also contained in digest form. *See id.*

9. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (C) (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985); *see also* Hechenberder v. Western Elec. Co., 570 F. Supp. 820, 823 (E.D. Mo. 1983) (lawyer may represent multiple clients if he can adequately represent each and each consents after full disclosure of conflict); Peaslee v. Pedco, Inc., 388 A.2d 103, 107 (Me. 1978) (lawyer should not undertake representation unless each can be adequately represented and express consent has been obtained after full disclosure); *In re* Dolan, 384 A.2d 1076, 1079-80 (N.J. 1982) (multiple representation prohibited unless each client can be adequately represented and each client consents after being adequately informed of the conflict). *But see In re* Jans, 666 P.2d 830, 833 (Or. 1983) (never proper for lawyer to represent clients with conflicting interests even with disclosure and consent). For an overview of the general ethical considerations of multiple representation, see Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 75-81 (1983).

10. For a collection of other cases discussing conflicts of interest in real estate transactions, see Annot., 68 A.L.R. 3d 967 (1976).

11. 633 S.W.2d 636 (Tex. App.—Corpus Christi 1982, no writ).

The trial court exonerated the attorney from any improper action.[12] The Corpus Christi Court of Appeals affirmed the judgment of the trial court, holding that the attorney's representation of both parties to the transaction was neither improper nor unethical.[13] The court held that an attorney may represent both the buyer and seller when the attorney has first disclosed the conflict and then obtained the parties' consent to proceed.[14] The *Dillard* court further determined that the attorney-client relationship between the attorney and the buyers had terminated upon the closing of the initial sale; therefore, the attorney breached no ethical duty to the buyer in conducting the trustee's sale.[15]

In *Grundmeyer v. McFadin,*[16] an attorney represented both parties to an earnest money contract involving approximately 130 acres of raw land. In a suit for cancellation of the earnest money contract, the sellers alleged that the attorney's dual representation rendered the contract invalid and void. The trial court judgment, however, held that there was no evidence that the attorney ever actually represented the proposed buyers.[17] On appeal the Tyler Court of Civil Appeals also concluded that the attorney was not representing the sellers; therefore, conflict of interest could not arise.[18] The court of appeals also stated, in that if the attorney had represented both parties to the transaction, there was no improper conduct because the record showed that the sellers had knowledge of it and consented to it.[19]

San Antonio Bar Association v. Guardian Abstract & Title Co.[20] involved two lawyers who owned and represented a title company and a mortgage company. The lawyers regularly performed legal services for the title company, the mortgage company, and purchasers or borrowers in the same real estate transaction. In the typical transaction, their title company issued title policies. The bar association sought a

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12. *See id.* at 642.

13. *See id.* at 642-43.

14. *See id.* at 643 (citing The State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 228 (1959)).

15. *See id.* at 643.

16. 537 S.W.2d 764 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

17. *See id.* at 769.

18. *See id.* at 772. The court reasoned that an agent, serving two principals, owes the highest degree of loyalty to both and therefore must disclose any conflict arising from his or her service to both. *See id.* at 772.

19. *See id.* at 773.

20. 291 S.W.2d 697 (Tex. 1956).

permanent injunction against the attorneys.[21] Suit was filed alleging that the manner in which the businesses were operated by the attorneys constituted conflicts of interest as well as the unauthorized practice of law by a corporation.[22] In the normal course of business, when a contract was brought to the title company by a real estate agent, all the mortgage instruments for the lender were prepared at the office of the title company. The sale was closed at the title company and a title policy was issued. Many times, these transactions occurred with no participation whatsoever from the attorneys. Documents were prepared by scriveners, and closings were handled by non-lawyer closers. Neither the scriveners nor the closers were closely supervised by the attorneys. The trial court granted the injunction enjoining the attorneys from preparing *any* legal documents in connection with real estate transactions in which the title company was to issue a title policy.[23]

The court of civil appeals modified the injunction to permit the attorneys to prepare documents when all the parties to a transaction requested them to prepare the legal documents necessary to close the transaction.[24] The appellate court reasoned that if all the parties consented to the multiple representation then representation was proper and the lawyers should not be enjoined.[25] The Supreme Court of Texas reversed the judgment of the court of civil appeals and affirmed the trial court's judgment, stating that the public interest was better safeguarded by prohibiting the attorneys from further involvement through their mortgage company.[26] The court stated that to allow this form of multiple representation based merely on the "request" of the parties does not meet the full disclosure and informed consent

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21. *See id.* at 698.

22. *See id.* at 698-99 *see also* Rattikin Title Co. v. Grievance Comm. of the State Bar of Texas, 272 S.W.2d 948, 951 (Tex. Civ. App. — Fort Worth 1955, no writ) (acts of any person in drawing deeds, notes, mortgages, and releases relating to property rights of others, when performed for consideration, constitutes practice of law).

23. *See* San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 291 S.W.2d 697, 700 (Tex. 1956). A licensed real estate broker or licensed sales person may complete form earnest money agreements normally prepared by an attorney provided they comply with the standards of care demanded of an attorney. *See* Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 634-35 (Wash. 1985); *cf.* Sherman v. Broton, 497 S.W.2d 316, 322 (Tex. Civ. App. — Dallas 1973, no writ) (drafting leases by real estate broker constitutes unauthorized practice of law).

24. *See* San Antonio Bar Assn. v. Guardian Abstract & Title Co., 291 S.W.2d 697, 700 (Tex. 1956).

25. *See id.* at 700.

26. *See id.* at 703.

requirement necessary to validate such representation.[27]

In *Attorney Grievance Commission v. Collins,*[28] a Maryland case involving dual representation of a buyer and seller in connection with the purchase and sale of a lease and a liquor license, the attorney was suspended from practice for one year. A disciplinary action was brought against the attorney, who was also the seller's managing partner, for his failure to advise the buyer that the liquor license being sold had lapsed, and for his assertion to the buyer that a non-competition agreement with the seller was unnecessary.[29] The Maryland Court of Appeals determined that the attorney's conflicting loyalties had adversely affected his independent professional judgment, thereby making his representation unethical.[30]

A lawyer was reprimanded as a result of his representation of both the vendor and purchaser of real property in a New Jersey decision, *In re Lanza.*[31] The attorney failed to fully advise the parties of the areas of potential conflict of interest and, when a conflict subsequently arose, the attorney failed to withdraw from the representation.[32] The *Lanza* court found three instances of misconduct: (1) undertaking representation of the buyer without consulting with the seller to explain "in specific detail" all the potential conflicts that might foreseeably arise; (2) failing to obtain the prior consent of the parties; and (3) upon learning that the buyer would not be able to pay cash as provided in the contract, failing to require the execution and delivery of a mortgage or other security for $1,000 to adequately protect the seller.[33] The New Jersey Supreme Court, in deeming the reprimand

27. *See id.* at 703.

28. 457 A.2d 1134 (Md. 1983).

29. *See id.* at 1143-44.

30. *See id.* at 1145. The court, holding that DR 5-105 (A) and (B) were violated, found as significant the fact that the attorney was the seller's partner. *See id.* at 1144-45. Because of this partnership, the court held that the attorney had a personal "stake" in the sale of the license. *See id.* at 1145.

31. 322 A.2d 445, 447 (N.J. 1974).

32. *See id.* at 447. The attorney had prepared an earnest money contract providing for a cash sale. The parties later agreed to move up the closing date, but the buyer told the seller that he would lack $1,000 of the total purchase price at the earlier date. The buyer suggested that the seller accept his check for $1,000 postdated for 30 days. The seller was personally agreeable to this proposal but consulted the attorney who saw no reason not to follow such course. The sale closed and the seller took the buyer's $1,000 check. The buyer then discovered water damage in the basement of the home and stopped payment on the check. The seller called the lawyer; the lawyer did nothing on her behalf. *See id.* at 447.

33. *See id.* at 447.

to be proper, stated: "[i]t is ulterly insufficient to simply advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation . . . this is no more than an empty form of words."[34]

In a Kansas case involving the sale of approximately 320 acres of land, an attorney who represented both the buyer and seller was indefinitely suspended from practice.[35] The Kansas Supreme Court, in *State v. Callahan,* found that the attorney did not exercise independent professional judgment on behalf of the seller when he failed to disclose his business ties with the buyer and by his failure to disclose to the seller that she had no foreclosable interest in the land if the buyer later defaulted.[36]

In a Wisconsin case, *In re Nelson,*[37] an attorney represented both the buyer and seller in negotiations for the sale of condominium units. Title opinions regarding the property were also rendered to both clients by the attorney. The attorney was suspended for 60 days for: (1) failure to disclose his financial interest in the seller corporation, (2) failure to disclose financial difficulties being experienced by the seller of which the attorney had knowledge, and (3) deficiencies in the condominium document.[38]

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34. *Id.* at 448. The court noted that this case emphasized the problems awaiting attorneys representing both the buyer and seller in a real estate transaction. *See id.* at 448. The court pointed out that the New Jersey Advisory Committee on Professional Ethics has ruled that it is unethical in all circumstances for the same attorney to represent both the buyer and seller when negotiating the terms of a contract for sale. *See id.* at 448 (citing New Jersey Advisory Committee on Professional Ethics, Op. 243, *reprinted in* 95 N.J.L.J. 1145 (1972)).

35. *See* State v. Callahan, 652 P.2d 708 (Kan. 1982).

36. *See id.* at 713. The attorney had prepared a "Real Estate Purchase Contract" which provided for the purchase price to be paid partly in cash and partly by a note to the seller. A second contract was signed, entitled "Pledge, Escrow and Agreement," which recited the payment schedule and further provided that upon default and nonpayment of any judgment the seller would have a "specific lien" subject only to a prior Federal Land Bank mortgage. The seller believed she was receiving a second mortgage lien when in fact she received only an unsecured note. When the buyer defaulted, the seller contacted the attorney regarding foreclosure, but was told that foreclosure was not necessary. The seller persisted in requesting that the lawyer begin foreclosure proceedings. The lawyer ultimately declined citing conflicts of interest. The seller retained other counsel, who informed her that she had no foreclosable interest because she had received only an unsecured note. *See id.* at 710. *See generally,* Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 93-103 (1983); Roussel, Pera, & Rosenberg, *Bar-Related Title Insurance Companies: An Antitrust Analysis,* 24 VILL. L. REV. 639 (1979).

37. 332 N.W.2d 811 (Wisc. 1983).

38. *See id.* at 811-12. The court held that the attorney's actions were a violation of SCR 20.24 (refusing employment when the interests of the lawyer may impair his or her independ-

These cases illustrate the types of problems which can arise when an attorney is subject to conflicting loyalties because of representation of multiple parties with differing interests. Disciplinary actions ranged from reprimands to indefinite suspensions and permanent injunctions. In each case, these sanctions may have been avoided had the lawyer fully disclosed the specific nature of the conflict of interest and obtained the clients' informed consent. The following sections illustrate the rules applicable to multiple representation conflicts in more specific situations.

1. Lawyer Representing Lender and Borrower

In several jurisdictions, bar associations have opined that an attorney may represent both a mortgage lender and its borrower if the interests of each client can be adequately represented.[39] Each client, however, must consent to the dual representation after full disclosure

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ent professional judgment; similar to DR 5-101 (A)); 20.28 (refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer; similar to DR 5-105 (A)); 20.04 (4) (misconduct — engage in conduct involving dishonesty, fraud, deceipt or misrepresentation; similar to DR 5-105 (B)). *See id.* at 812; *see also* WISCONSIN COURT RULES AND PROCEDURE ch. 20 at 563 (West 1984) (Code of Professional Responsibility).

39. *See* Association of the Bar of the City of New York, Comm. on Professional Ethics, Op. 81-4 (1981) (interpreting DR 5-105 (C) which allows representation of multiple clients if attorney can adequately represent client's interest and all clients consent after full disclosure), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6319 (1985); *accord* Birmingham Bar Ass'n, Comm. on Professional Ethics, Op. 3 (1981) (interpreting DR 5-105 (A) which precludes lawyer from representing clients who have differing interests unless client consents after full disclosure; and EC 4-4 which discusses attorney-client privilege), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:1101 (1985); Connecticut Bar Ass'n, Comm. on Professional Ethics, Informal Op. 83-25 (1983) (interpreting DR 5-105 concerning representation of clients when independent professional judgment of lawyer is impaired; and EC 5-1 which states a lawyer should exercise professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:2061 (1985); *cf.* Illinois State Bar Ass'n, Comm. on Professional Ethics, Op. 644 (1980) (exception to general prohibition against representation of lender and borrower only after consent upon full disclosure per DR 5-101 and EC 5-15), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:3001 (1985). *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) (lawyer should exercise independent professional judgment when representing a client), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985); Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 84-86 (1983) (general discussion on borrower-lender conflicts).

has been made of the possible adverse effect such representation may have on the exercise of the attorney's independent professional judgment.[40] If dual representation is undertaken, the lawyer should constantly monitor the situation to ensure that the interests of each client are adequately protected and that each client is adequately advised.[41]

The New York City Bar Association has adopted a more restrictive rule with respect to multiple representation of a lender and a borrower. Under the New York City rule, an attorney may represent a lender and borrower only if: (1) the parties have agreed to the terms of the loan without involvement of the attorney; (2) the attorney's total involvement is ministerial; and (3) there is little flexibility in the loan documentation and terms.[42] The New York City Bar Association would prohibit a lawyer from representing both parties, even

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40. *See* Association of the Bar of the City of New York, Comm. on Professional Ethics, Op. 81-4 (1981) (interpreting DR 5-105 (C) which allows representation of multiple clients if attorney can adequately represent client's interest and all clients consent after full disclosure), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6319 (1985); *accord* Birmingham Bar Ass'n, Comm. on Professional Ethics, Op. 3 (1981) (interpreting DR 5-105 (A) which precludes lawyer from representing clients who have differing interests unless client consents after full disclosure; and EC 4-4 which discusses attorney-client privilege), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:1101 (1985); Connecticut Bar Ass'n, Comm. on Professional Ethics, Informal Op. 83-25 (1983) (interpreting DR 5-105 concerning representation of clients when independent professional judgment of lawyer is impaired; and EC 5-1 which states a lawyer should exercise professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:2061 (1985); *cf.* Illinois State Bar Ass'n, Comm. on Professional Ethics, Op. 644 (1980) (exception to general prohibition against representation of lender and borrower only after consent upon full disclosure per DR 5-101 and EC 5-15), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:3001 (1985). *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) (lawyer should exercise independent professional judgment when representing a client), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985); Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 84-86 (1983) (general discussion on borrower-lender conflicts).

41. *See* Illinois State Bar Ass'n, Comm. on Professional Ethics, Op. 644 (1980), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:3001 (1985); *see also* Crest Inv. Trust Co. v. Comstrock, 327 A.2d 891, 904-05 (Md. Ct. Spec. App. 1974) (lawyer must continually weigh possibility that his independent professional judgment is not impaired when dual representation is undertaken).

42. *See* Association of the Bar of the City of New York, Comm. on Professional Ethics, Op. 81-4 (1981) (relying on DR 5-105 (C) which allows an attorney to represent multiple clients as long as clients are adequately represented and each consents after full disclosure),

with consent, if the transaction involves actual negotiation of, or bargaining over, the terms and conditions of the loan.[43]

2. Lawyer Representing Buyer and Seller

The rules applicable to dual representation of a lender and a borrower are similarly applied to buyer and seller conflicts of interest. A lawyer may represent both the buyer and seller in a real estate transaction so long as consent has been obtained from both parties after full disclosure has been given, and no subsequent dispute arises between the parties.[44] If there exists a likelihood of subsequent disagreement between the buyer and seller, the attorney should not undertake the dual representation.[45]

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summarized in THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6319 (1985).

43. *See id.* at ¶ 801:6319. In New Jersey, if the attorney for the lender and borrower owns a beneficial interest in the title company involved in the transaction, there is an absolute conflict of interest that cannot be remedied even after full disclosure and consent. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 495 (1982) (relying on DR 5-101, 5-105, 5-107), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5807 (1985).

44. *See* Virginia State Bar, Virginia State Bar Council, Op. 414 (1983) (relying on DR 5-105 which allows representation of multiple clients so long as independent professional judgment is not impaired and consent of all clients has been obtained following full disclosure), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:8805 (1985); *see also In re* Samuels, 674 P.2d 1166, 1172-73 (Or. 1983) (representation is allowed when consent is obtained after full disclosure is given and no differing interest subsequently arise); *In re* Boivin, 533 P.2d 171, 175 (Or. 1975) (consent must be obtained after full disclosure is given and no future conflict arises). In an Indiana case, a conflict arose when the attorney representing both the buyer and seller relayed inaccurate facts about the land to the buyer based upon the seller's representations. *See In re* Banta, 412 N.E.2d 221, 222 (Ind. 1980). The court found that the representation of both parties constituted multiple employment and determined that the independent professional judgment of the lawyer had been impaired. *See id.* at 222. Such conduct was held to be an adverse reflection on the attorney's fitness to practice law and resulted in a public reprimand. *See id.* at 222; *cf.* Phillips v. Campbell, 480 S.W.2d 250, 253 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.) (real estate broker may act as agent for both buyer and seller with full knowledge and consent of both principals). *See generally In re* Dolan, 384 A.2d 1076, 1079-82 (N.J. 1978) (discussion of adequate disclosure and consent when there is dual representation in a real estate transaction).

45. *See* Connecticut Bar Ass'n, Comm. on Professional Ethics, Informal Op. 82-12 (1983) (relying on DR 4-101, 5-102, 5-105), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:2056 (1985). While in many situations an attorney's representation of both the buyer and seller in a real estate transaction may create a conflict of interest, if the parties have already agreed on the basic terms of the agreement and the attorney acts primarily as a scrivener, he may normally represent both parties after obtaining their consent. *See* Beal v. Mars Larsen Ranch Corp.,

3. Lawyer Representing Title Insurer and Another Party

Authorities are divergent on the role an attorney may assume in representing multiple parties if one of those parties is a title insurer. Formal Opinion 331 of the American Bar Association states that a lawyer who performs legal services for both a title company and a party in a real estate transaction may represent both parties only if two conditions are satisfied: (1) it must be obvious that the lawyer can adequately represent the interest of each; and (2) both the title company and the other party must consent to the dual representation after full disclosure of the possible effects the dual representation may have on the exercise of the lawyer's independent professional judgment.[46]

Texas allows an attorney representing another party to a transaction to accept a portion of the title insurance premium;[47] however, the attorney may not receive any portion of the title premium that ex-

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Inc., 586 P.2d 1378, 1384 (Idaho 1978). In *Beal,* the court found that when there was no showing that the land sales contract drafted by the attorney varied from the terms previously negotiated between the buyer and seller, there was no conflict. *See id.* at 1384; *see also* Blevin v. Mayfield, 189 Cal.App.2d 649, 651, 11 Cal. Rptr. 882, 884 (Cal. Ct. App. 1961) (no conflict since agreement had already been reached, therefore, attorney was merely a scrivener); Aronson, *Conflict of Interests,* 52 WASH. L. REV. 807, 826 (1977) (if parties already agreed to basic terms and attorney acts as "scrivener" no conflict occurs). When an attorney is represented by both parties to draft the appropriate documents, the attorney must explain with the utmost care, to each party, the effects of any provision adverse to the interest of that party. *See* Peaslee v. Pedco, Inc., 388 A.2d 103, 107 (Me. 1978).

46. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972), *reprinted in* 59 A.B.A.J. 311 (1973). *But see* New Jersey Comm. on Professional Ethics, Op. 495 (1982) (absolute conflict to represent title insurer, lender, and borrower), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5807 (1985). The ABA would apply the same rule when the lawyer, while not performing legal services for the title insurer, owns a beneficial interest in the company that will supply title insurance to the client. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972), *reprinted in* 59 A.B.A.J. 311-12; *see also* Collins v. Pioneer Title Ins. Co., 629 F.2d 429, 434 (1980) (attorney must make full disclosures concerning title policy to client). *See generally* Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 93-103 (1983) (discussion of various relationships between attorneys and title companies that result in conflict of interest); Comment, *Washington Title Insurer's Duty to Search and Disclose,* 4 U. PUGET SOUND L. REV. 212, 215 (1980) (attorney has duty to disclose interest in title company that supplies title insurance to client); ABA Spec. Comm. on Residential Real Estate Transactions, THE LAWYERS PROPER ROLE — SERVICES — COMPENSATION (1978) (interest in title company must be disclosed by attorney to client).

47. *See* State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 408 (undated), *reprinted in* 48 TEX. B.J. 44 (1984) (relying on DR 5-105 discussing impairment of independent professional judgment of attorney and full disclosure and consent

ceeds the attorney's usual fees for services actually rendered to the title company.[48] By accepting a portion of the premium, the attorney becomes the lawyer for the title company.[49] This requires disclosure of the lawyer's relationship with the title company to all the clients in accordance with the "usual and customary" rules of dual representation.[50] A more stringent policy has been adopted in Maine. Although dual representation of a title company and a party is permitted, any compensation received by a lawyer, acting as agent for a title company, must be credited to the bill of the client to the extent the compensation from the title company represents a fee for title work for which the client has already been billed.[51]

New Hampshire permits an attorney, who owns an interest in the subject property or the title company, to act as both title examiner and agent for a title company while representing a party to a transaction, so long as the consent of the client is obtained after full disclosure to the client.[52] On the other hand, Maryland limits the role of the title company's attorney to the drafting, execution and filing of closing documents.[53] Maryland also requires that each client be provided with a full explanation of the lawyer's limited role, the amount and source of his fee, and the potential effect the multiple representation may have on the exercise of the lawyer's independent professional judgment.[54] North Carolina and New Jersey have taken the strictest approach in this area. In North Carolina, a lawyer who owns a beneficial interest in property is prohibited from certifying the title or per-

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of each client); *see also* Wilson, *Ethical Responsibilities of Real Estate Attorneys,* State Bar of Texas Advanced Real Estate Law Course E-8 to E-13 (1981).

48. *See* State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 408 (undated), *reprinted in* 48 TEX. B.J. 44, 44 (1984).

49. *See id.* at 44.

50. *See id.* at 44.

51. *See* Maine State Bar Ass'n, The Grievance Comm. of the Board of Overseers of the Bar, Op. 40 (1983), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4206-07 (1985).

52. *See* New Hampshire Bar Ass'n, Ethics Comm., Op. 3 (1981) (relying on DR 5-101, 5-105, and 5-107 discussing impairment of lawyer's independent professional judgment and full disclosure and consent of each client), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5701 (1985).

53. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 83-7 (1982) (relying on DR 5-105, EC 5-14, 5-15, 5-16, 5-17 discussing interests of multiple clients), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4323 (1985).

54. *See id.* at ¶ 801:4323.

forming other legal services on behalf of a purchaser of such property.[55] In New Jersey, an attorney who owns a beneficial interest in a title company insuring title is absolutely barred from representing a lender and borrower in the same transaction.[56]

4. Lawyer Also Acting As Broker

In certain states, a lawyer may not act as both the broker and the attorney for either the purchaser or seller in a real estate transaction, regardless of whether the lawyer or another salesperson in the same office lists or sells the property.[57] The basis for this rule is the inherent conflict of interest that arises when the lawyer/broker has a financial stake in the outcome of the sale.[58] Similarly, some jurisdictions prohibit a lawyer from representing either party when the lawyer's spouse is the listing or selling agent.[59] In Texas, attorneys may serve

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55. *See* North Carolina State Bar Ass'n, Ethics Comm., Op. 302 (1981) (relying on EC 5-2 in discussing conflicts between attorney's personal interest and client's interests), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6606 (1985).

56. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 495 (1982) (relying on DR 5-101, 5-105, 5-107 discussing impairment of lawyer's independent judgment; need for full disclosure and consent of each client), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5807 (1985).

57. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 514 (1983) (relying on DR 5-101 discussing impairment of lawyer's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5810 (1985); North Carolina State Bar Ass'n, Ethics Comm., Op. 307 (1981) (relying on DR 5-101 discussing impairment of lawyer's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6607 (1985).

58. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 514 (1983) (relying on DR 5-101 discussing impairment of lawyer's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5810 (1985); North Carolina State Bar Ass'n, Ethics Comm., Op. 307 (1981) (relying on DR 5-101 discussing impairment of lawyer's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6607 (1985); *see also* Atlantic Richfield Co. v. Sybert, 456 A.2d 20, 28 (N.D. 1983) (in limited circumstances, an attorney may perform certain acts associated with sale of real estate without being licensed as a broker).

59. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 518 (1983) (lawyer may not represent party in real estate transaction when lawyer's spouse is listing or selling agent), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5811 (1985); Oregon State Bar, Legal Ethics Comm., Op. 472 (1982) (a lawyer who is married to real estate broker may not represent a seller or purchaser if selling agreement is listed with spouse), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:7109 (1985).

as brokers pursuant to the Real Estate Licensing Act,[60] when brokerage services are merely incident to the legal services performed by the attorney.[61] While attorneys are specifically exempt from the provisions of the Act, the attorney is nonetheless bound by the Canons, Ethical Considerations, and Disciplinary Rules of the Texas Code of Professional Responsibility when secondarily serving as the broker.

5. Lawyer Representing Governmental and Private Interests

Different jurisdictions have adopted varying rules regarding conflicts of interest arising from an attorney's representation of a governmental entity and a private client in the same matter. In Connecticut, an attorney who represents an independent town agency before the planning and zoning authorities of the town may also represent private clients before the planning and zoning authorities, so long as those clients do not have interests differing from those of the agency.[62] By contrast, in Indiana, a law firm, whose member is a county attorney, may not represent clients before the Area Planning Commission or the County Board of Zoning Appeals.[63] Maryland permits an attorney to represent multiple governmental bodies, such as a town, historic area, commission, and board of appeals so long as each entity authorizes and consents to the representation.[64] Should the lawyer

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60. *See* TEX. REV. CIV. STAT. ANN. art. 6573a, § 3(a) (Vernon Supp. 1985). For a general discussion and analysis of the Real Estate License Act, see Amdur, *Real Estate License Act,* 12 S. TEX. L.J. 269 (1971).

61. *See* Sherman v. Bruton, 497 S.W.2d 316, 321-22 (Tex. Civ. App.—Dallas 1973, no writ). The *Sherman* case also states that an attorney/broker/engineer who acts in the capacity of a broker could not recover fees for legal or engineering services since there was not written contract to support recovery of a commission as required by section 28 of the Real Estate Licensing Act. *See id.* at 323.

62. *See* Connecticut Bar Ass'n, Comm. on Professional Ethics, Informal Op. 80-17 (1980) (relying on Canon 5 and DR 5-105 discussing necessity of lawyer's exercise of independent professional judgment when representing clients), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:2051 (1985).

63. *See* Indiana State Bar Ass'n, Legal Ethics Comm., Op. 1 (1980) (relying on DR 4-101, other members of law firm prohibited from representing private entity at zoning hearing), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:3301 (1985). In a New Jersey case, the court found that an attorney who was a member of a city planning board should not represent clients in matters that must come before the body of which he is a member. *See In re* Shear, 371 A.2d 282, 283 (N.J. 1977). The court stated that a conflict is still present even if another attorney is retained to represent the client before the board. *See id.* at 284-85.

64. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 82-55 (1982) (relying on DR 5-105 and 7-110 discussing impairment of independent professional judgment and contact with

find that he represents both a public body and a private entity in the same matter, he may proceed until the representation requires the lawyer to take inconsistent positions.[65] When this occurs, withdrawal is the appropriate remedy.[66]

6. Lawyer as Investor or Principal

When a lawyer acts both as attorney and principal in a business venture, conflicts may arise. The San Diego Bar Association permits a lawyer to act as promoter of, and legal advisor to, an investment plan, as well as an investor in that plan, provided he discloses his various capacities and interests to the other investors.[67] In order to ensure that all investors are aware of the potential for conflict, the San Diego Bar Association has taken the position that the attorney must not only encourage the prospective investors to obtain advice from independent counsel but must also obtain written consent from such investors to continue as the entity's legal counsel.[68]

An opinion of the Maryland State Bar provides that a potential conflict of interest arises when a lawyer receives an undisclosed commission from a client's investment in a business transaction.[69] The Maryland Bar would allow the lawyer to continue to represent the

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officials), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4320 (1985). In a New Jersey case, the court held that one attorney may represent more than one township entity provided: (1) each entity consents; (2) full disclosure is made; and (3) there are no conflicts. *See* DeLuca v. Kahr Bros., Inc., 407 A.2d 1285, 1289 (N.J. Super. Ct. 1979). The court concluded that should a future conflict arise, the attorney must completely withdraw and not represent any of the entities. *See id.* at 1289.

65. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 82-55 (1982) (relying on DR 5-105 and 7-110 discussing impairment of independent professional judgment and contact with public officials), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4320 (1985).

66. *See id.* at ¶ 801:4320.

67. San Diego County Bar Ass'n, Legal Ethics and Unlawful Practices Comm., Op. 1984-1 (1984) (relying on Rule 3-102, 3-103 and 5-101 discussing financial arrangements with non-lawyers, forming a partnership with non-lawyers and avoiding adverse interest), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:1804 (1985).

68. *See id.* at ¶ 801:1804.

69. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 82-42 (1982) (relying on DR 5-105, EC 5-1, 5-14, 5-15, 5-16 and Canon 9 discussing impairment of independent professional judgment when representing multiple clients and necessity for attorney to avoid appearance of professional impropriety), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4318 (1985).

client, but acceptance of a commission from one other than the client is allowed only after the client consents.[70] Full disclosure of the potential adverse effect upon the lawyer's independent professional judgment must precede the client's consent to the representation.[71]

Similarly, in a State Bar of Michigan opinion, an attorney who represented a client in an unsuccessful attempt to publicly sell a mortgage, may not thereafter purchase the mortgage, absent the client's informed consent.[72] A subsequent Michigan opinion permits a lawyer to purchase real property from a client provided: (1) the client consents after full disclosure has been made; (2) the transaction does not otherwise give the appearance of impropriety; and (3) the lawyer is not prevented from exercising independent professional judgment by virtue of an interest in acquiring the property.[73] In such a situation, the Michigan Bar admonishes the lawyer to encourage the client to seek independent counsel.[74]

7. Lawyer as Bank Director

A lawyer who serves as both a director of a bank and counsel for the institution creates the potential for conflict.[75] An attorney who serves as a director should not participate in board of directors deci-

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70. *See id.* at ¶ 801:4318.

71. *See id.* at ¶ 801:4318; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (C) (1980) (discussing requirement for full disclosure), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985).

72. *See* State Bar of Michigan, Comm. on Professional and Judicial Ethics, Op. CI-615 (1981) (relying on DR 5-104 and Canon 5 discussing business relations with a client and the necessity for the attorney to exercise independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4819 (1985).

73. *See* State Bar of Michigan, Comm. on Professional and Judicial Ethics, Op. CI-627 (1981) (relying on DR 5-104 and Canons 5 and 9 discussing business relations with a client and the necessity for attorney to exercise independent professional judgment along with avoiding even the appearance of professional impropriety), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4821 (1985).

74. *See id.* at ¶ 801:4821.

75. *See* 12 C.F.R. § 571.8 (1985) (Statement of Policy); FHLBB Reg. 83-548, 48 FED. REG. 45-382 (1983) (explanation of conflicts of interest regulations). Additional responsibilities of and restrictions upon bank directors may be found in the regulations of the Federal Reserve Board, Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. *See* IV CCH BANKING LAW REPORTER Interlocking Directorates ¶¶ 47,168; 47,205 (1982) (contains Federal Reserve and other agencies' provisions prohibiting interlocking directorates).

sions, or participate in loan committee action on applications for bank loans, involving other clients of the attorney.[76]

8. Referrals Between Broker and Lawyer

There is no express prohibition against a lawyer referring clients to a real estate broker if the lawyer is not compensated for the referral.[77] The Dallas Bar Association has opined that a lawyer may accept compensation from a broker for a referral relating to a transaction for which the attorney has performed legal services but only after full disclosure of the commission arrangement and then only with consent of the client.[78] On the other hand, New Jersey totally prohibits an attorney from representing a fee-paying buyer in transactions where the attorney originated mortgage financing on a referral fee basis with the mortgage broker.[79]

9. Solicitation by Lender's Lawyer

A lawyer should not not send letters to potential clients seeking

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76. *See* State Bar of Michigan, Comm. on Professional and Judicial Ethics, Op. CI-867 (1983) (relying on DR 4-101 and 5-105 discussing preservation of the client's secrets and confidences and the attorney's impairment of independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4856 (1985).

77. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 82-63 (1982) (relying on DR 2-103 and 5-101 discussing recommendation of professional employment and the lawyer's impairment of independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4321 (1985).

78. *See* Dallas Bar Ass'n, Legal Ethics Comm., Op. 1981-1 (1981) (relying on DR 5-104 and 5-107; EC 5-2, 5-21, and 5-22; and Canon 5 discussing limiting business relations with clients and avoiding influence by third parties), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:8402-03 (1985); *accord* Philadelphia Bar Ass'n, Professional Guidance Comm., Op. 81-84 (1981) (attorney may retain referral fee provided client was aware of fee), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:7520 (1985); *see also In re* Dolan, 384 A.2d 1076, 1078 (N.J. 1978) (purchaser uses seller's attorney and pays legal fees). *See generally* Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation — Lawyers Stretching the Rules,* 6 W. NEW ENG. L. REV. 73, 87-88 (1983) (discussing attorney conflicts with real estate brokers).

79. *See* New Jersey Advisory Comm. on Professional Ethics, Op. 463 (1980) (relying on DR 5-107 discussing the attorney's need to avoid the influence of third parties when representing a client), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:5802 (1985); *see also In re* Dolan, 384 A.2d 1076, 1078 (N.J. 1978) (discussing conflicts of interest arising out of multiple representations at real estate closings).

employment for closing real estate loans and handling foreclosures in which the lawyer implies that he or she will be able to influence financial institutions represented by the lawyer.[80] Such representations create the impression that the lawyer would be putting his own financial and personal interests above those of the client thus giving rise to an appearance of impropriety.[81]

B. *Adverse Representation*

When a lawyer undertakes to represent interests which are adverse to an existing or former client conflicts of interest may arise. In real estate transactions, such conflicts of interest are most likely to arise in foreclosure litigation. There is a potential conflict when the attorney who represented one of the parties to the initial closing represents the holder of the mortgage foreclosing on property.[82] The conflict results from the obligation of a lawyer to preserve the confidences and secrets of the client during and after termination of the attorney-client relationship.[83] To avoid such a conflict, a lawyer who serves as trustee under a deed of trust should not subsequently represent either the borrower or the lender in foreclosure proceedings.[84] An effective so-

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80. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 81-10 (1980) (relying on DR 2-101, 2-103, 5-101, 5-105, and 5-107 and Canon 5 discussing publicity and recommendation of professional employment and the impairment of the attorney's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4306 (1985).

81. *See id.* at ¶ 801:4306. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 9 (Code of Professional Responsibility) Canon 9 (1982) [hereinafter cited as TEXAS CODE OF PROFESSIONAL RESPONSIBILITY]; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:346 (1985).

82. *See* North Carolina State Bar Ass'n, Ethics Comm., Op. 325 (1983) (utilizing DR 4-101 to prohibit an attorney, employed by lender, from representing trustee at foreclosure), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6607 (1985).

83. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4; 4-5; 4-6 (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:305 (1985).

84. *See* North Carolina State Bar Ass'n, Ethics Comm., Op. 325 (1983) (lawyer employed by lender may not also represent trustee in foreclosure), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6609 (1985); North Carolina State Bar Ass'n, Ethics Comm., Op. 309 (1981) (relying on DR 4-101 discussing preservation of a client's confidences and secrets), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6607 (1985); Illinois State Bar Ass'n, Comm. on Professional Ethics, Op. 644 (1980) (relying on Rules 4-101 and 5-101 discussing the necessity to preserve the client's

lution to this type of conflict is to appoint a substitute trustee.

Generally, a lawyer may not represent any party with interests adverse to those of an existing client even when the matters are separate and distinct, unless both clients give their informed consent after full disclosure, and it is obvious that the lawyer's representation of the new client will not impair the representation of the existing client.[85] The test to be applied to determine the effect of adverse representation varies among authorities.[86] In *International Business Machines Corp. v. Levin,*[87] the Third Circuit presumed an adverse affect on the professional judgment of the lawyer when the lawyer represents a position adverse to an existing client.[88] The ABA Standing Committee on

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secrets and confidences), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:3001 (1985).

85. *See* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 51:101 (1985); *see also* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1344-46 (9th Cir. 1981) (presumption of adverse affect rebutted upon disclosure and informed consent by all clients and showing that clients adequately represented); City Consumer Serv., Inc. v. Horne, 571 F. Supp. 965, 971-72 (C.D. Utah 1983) (client must be adequately represented and must consent after full disclosure has been made); Bankers Trust of South Carolina v. Bruce, 323 S.E.2d 523, 530 (S.C. 1984) (a client must be adequately represented and client must consent after full disclosure has been made). After a lawyer's representation of a client ceases, the lawyer may with consent of the former client, represent another client in the same or a substantially related matter in which the new client's interests are materially adverse to those of the former client. *See* LaSalle Nat'l Bank v. Triumvera Homeowners, 440 N.E.2d 1073, 1080 (Ill. App. Ct. 1982).

86. *See* Int'l Business Machines Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:340 (1985); *see also* Sapienza v. New York News, 481 F. Supp. 676, 680 (S.D.N.Y. 1979) (consent cannot justify representing party against present client's interests); E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 398 (S.D. Tex. 1969) (DR 5-105 requires explicit disclosure of facts to meet informed consent requirement).

87. 579 F.2d 271 (3d Cir. 1978).

88. *See id.* at 280. *Levin* was an anti-trust action against IBM based upon alleged monopolistic credit practices. The firm representing the plaintiff, Levin, also performed legal services for IBM in an unrelated area, labor union negotiations. During the course of the anti-trust action, the law firm actively represented IBM in labor negotiations. Several attorneys in the firm knew of this dual and possibly adverse representation. *See id.* at 277-80. While the Second Circuit concluded that this form of representation raised a presumption of adverse effect, it also found that the law firm and its attorneys had failed to adequately disclose the nature of the conflict to the clients so as to allow such representation. *See id.* at 281-82. The court held that the attorneys shouldered the responsibility to disclose all relevant facts to their clients so that the clients could make an informed decision. *See id.* at 282. In *Levin* the attorneys failed to explicitly disclose the conflict and argued that the clients had constructive knowledge of the conflict; the court rejected this attempt to validate the adverse multiple representation. *See id.* at 282; *see also* E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 398 (S.D. Tex. 1969) (DR 5-

Ethics and Professional Responsibility espoused a *per se* prohibition against accepting employment for a new client, if the representation is adverse to an existing client.[89] In *Cinema 5 Ltd. v. Cinerama, Inc.*,[90] the Second Circuit adopted the following standard: "[w]here the relationship is a continuing one, adverse representation is prima facie improper . . . and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation."[91] One New York federal district court has held consent to the successive representation to be ineffective when the clients' interests are directly adverse to each other.[92] Furthermore, the Model Code requires a lawyer to decline proferred employment if the representation would be adverse to the interests of an existing client.[93]

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105 requires explicit disclosure of facts to client so as to allow informed consent; constructive knowledge insufficient).

89. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982) (relying on Rule 1.7 discussing the prohibition of a lawyer from accepting representation directly adverse to an existing client even in unrelated matters), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:340 (1985).

90. 528 F.2d 1384 (2d Cir. 1976).

91. *See id.* at 1387. The conflict in question arose from the relationship between the firm representing the plaintiff and the firm representing the defendant in this corporate take-over dispute. An attorney, Manly Fleischmann, was a partner in both of the law firms involved in the suit. The Second Circuit affirmed the motion disqualifying plaintiff's attorneys because the professional standards of keeping client's secrets and confidences and avoiding an appearance of impropriety had been breached. *See id.* at 1385. The court reasoned that an attorney or a law firm could not fulfill its duty to act as the client's fiduciary and simultaneously represent interests adverse to the client. *See id.* at 1387; *see also* American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971) (if attorney breaches fiduciary duties through multiple representation, law firm also disqualified). Most writers in this area agree that representation adverse to existing clients should be avoided because of its inappropriate appearance. *See* DRINKER, LEGAL ETHICS 112, 116 (3d ed. 1976); WISE, LEGAL ETHICS 256 (2d ed. 1971).

92. *See* Sapienza v. New York News, 481 F. Supp. 676, 680 (S.D.N.Y. 1979) (motion to disqualify granted on grounds that consent to representation insufficient because clients' interests directly adverse). In *Sapienza* an attorney attempted to represent both the plaintiff and a principal defendant in an anti-trust action. The court granted the defendant's motion to disqualify filed by the defendant's office counsel, reasoning that an attorney can never represent both parties to an adversarial action. *See id.* at 678-79 (construing the requirements of DR 5-105); *see also* Jedwabny v. Philadelphia Transp. Co., 135 A.2d 252, 254 (Pa. 1957) ("[n]o one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action").

93. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980) (discussing impairment of attorney's independent professional judgment), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:301 (1985).

Once the attorney-client relationship terminates, a lawyer may not represent a new client in a substantially related matter in which the new client's interests are materially adverse to those of a former client without consent of the former client.[94] The limitations on representation adverse to the interests of a former client are based on the duty to preserve confidences and secrets of a client even after termination of the employment.[95] The test applied by most jurisdictions in assessing former representation conflicts is whether the subject matter is "substantially related."[96] The facts, circumstances, and legal issues involved in the former representation must be scrutinized to determine whether they are substantially related to the present matter.[97]

Under certain circumstances, a law firm may represent a bank in foreclosure actions against a former client for whom the firm had done a number of real estate closings.[98] The current legal matter

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94. *See* Kevlik v. Goldstein, 724 F.2d 844, 850-51 (1st Cir. 1984) (lawyer may not represent an adversary to former client unless consent is given); Whiting Corp. v. White Machinery Corp., 567 F.2d 713, 716 (7th Cir. 1977) (attorney must obtain former client's consent if conflict arises); Oyster v. Bell Asbestos Mines, 568 F. Supp. 80, 82 (E.D. Pa. 1983) (when defending third party with interest adverse to former client consent must be obtained from former client); LaSalle Nat'l Bank v. Triumvera Homeowners, 440 N.E.2d 1073, 1080 (Ill. App. Ct. 1982) (consent of former client required).

95. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6; DR 4-101 (1980) (duty to preserve secrets and confidences of clients), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1:298 (1985).

96. *See, e.g.*, Freeman v. Chicago Musical Instr. Co., 689 F.2d 715, 721-22 (7th Cir. 1982) (question of substantial relationship is question of fact); Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) (attorney's previous activities must be examined before ruling on disqualification); Hydril Co. v. Multiflex, Inc., 553 F. Supp. 552, 554 (S.D. Tex. 1982) (mere advice to party cannot be basis for disqualifying firm when later opposing party on another issue). *See generally* Greene, *Everybody's Doing It—But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney's Representation of a Client with Interests Adverse to Those of a Former Client*, 6 U. PUGET SOUND L. REV. 205, 210-29 (1983).

97. *See, e.g., In re* Fine Paper Antitrust Litigation, 617 F.2d 22, 28 (3d Cir. 1980) (evidence of actual consultation with party necessary to justify disqualification on adverse representation grounds); Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978) (test requires examination of question of evidence to support disqualification); Realco Services v. Holt, 479 Supp. 867, 872 (E.D. Pa. 1979) (court must consider all facts in regard to prior representation when ruling on motion to disqualify lawyer and his firm). *See generally* Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEXAS L. REV. 726, 728-34 (1979) (discussing disclosure, consent, and rebutting a presumption of disqualification).

98. *See* Maryland State Bar Ass'n, Comm. on Ethics, Op. 82-51 (1982) (relying on DR 4-101 and 5-105 discussing preservation of client's secrets and confidences and impairment of attorney's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL

must be separate from any matter previously handled for the former client, and no privileges, confidences, or information, which may have been obtained, can be used to improperly aid the firm in the matter against the former client.[99] For example, if the prior representation included the mortgage sought to be foreclosed, the current matter would not be "separate," and representation would be barred.[100] In accord with this rule, North Carolina would permit a lawyer to represent a client in an ejectment action against his partner's former client where the former representation is unrelated to the present action, and no relevant confidences or secrets were received by the lawyer's partner.[101]

Movement by attorneys from one job to another is also a source for conflicts of interest. It is increasingly common for an attorney, especially early in practice, to change jobs one or more times. Attorneys move from government practice to private practice, and vice versa, and also move within the private sector. A potential conflict arises when a lawyer acquires confidences and secrets of a client, then changes employment.[102] When a potential conflict is identified as having arisen because of an attorney's former representation of a client while with a previous employer, the effect will vary depending on the nature of the work performed by the attorney at the former firm. Factors to be considered when assessing conflicts arising because of attorney movement include: identification of the matters previously handled by the attorney at the former firm, the nature and extent to which confidences or secrets of the client divulged to the attorney while handling matters for the client at the former firm, the relation-

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AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:4319-20 (1985).

99. *See id.* at ¶ 801:4319-20.

100. *See id.* at ¶ 801:4319-20.

101. *See* North Carolina State Bar Ass'n, Ethics Comm., Op. 309 (1981) (relying on DR 4-101 discussing preservation of client's secrets and confidences), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:6607 (1985).

102. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) (duty to preserve client's secrets and confidences), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1:298 (1985); *see also* TEXAS CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1982) (requiring preservation of client's secrets and confidences). The Fifth Circuit has considered this requirement only in the criminal context, but the court did disqualify an attorney and his law firm on the grounds of ensuring a prior client's confidences. *See* United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), *cert. denied*, 444 U.S. 843 (1979).

ship of matters handled by the two firms, and the measures taken by the present firm to avoid ethical conflicts of interest.[103]

If an attorney was privy to confidences and secrets of a former client at his or her former employer, the risk is that such knowledge may be imputed to the entire new firm.[104] Courts in various jurisdictions have addressed this issue and have reached varying results. In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[105] the defendant moved to disqualify the plaintiff's attorney and his law firm on the ground that the plaintiff's attorney had been previously associated with the law firm representing the defendant.[106] The Second Circuit determined that the nature and extent of the attorney's work at his old firm was not substantially related to the matters being handled by

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103. *See* Miller and Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 643-49 (1983).

104. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 12 (1985 ed.); *see also* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1:125 (1985). Rule 1.10 is derived from DR 5-105 (D) which generally provides that if an attorney in a law firm is disqualified because of ethical conflicts, the firm is also disqualified. Rule 1.10 reads:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
>
> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.
>
> (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
>
> (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

105. 518 F.2d 751 (2d Cir. 1975).

106. *See id.* at 752. An automobile dealer brought an action against the manufacturer. The manufacturer brought a motion to disqualify the automobile dealer's attorney on the ground that the attorney was once a summer associate with an eighty-man firm that represented the manufacturer. *See id.* at 752-53. The court held that where the attorney's involvement with cases relating to the manufacturer was limited to briefs, informal discussions on procedural matters, and research on specific points of law. This evidence was sufficient to rebut the presumption that confidential information was acquired. *See id.* at 757.

his new firm, therefore, the court denied the defendant's motion to disqualify.[107] The Seventh Circuit in *LaSalle Nat'l Bank v. County of Lake,*[108] conducted a three-level inquiry in determining the effect of a conflict alleged to have resulted from movement by an attorney.[109] First, the scope of the prior legal representation must be determined; second, it must be determined whether it would be reasonable to infer that the confidential client information allegedly possessed by the new lawyer would have been given to that lawyer in the course of his or her prior representation of that client; and third, it must be determined whether that information is relevant to the issues raised in the present matter against the former client.[110] Both the Second and Seventh Circuits have applied a "rebuttable presumption" standard in attorney-movement cases thereby requiring the attorney to affirmatively disprove any alleged conflict of interest.[111]

In the event a conflict of interest arises because of attorney movement, the conflict may be resolved by consent of the former client or, in some jurisdictions, by "screening" the attorney within the new firm.[112] "Screening" an attorney has been referred to as erecting "Chinese Walls" around an attorney within a firm to avoid a conflict of interest.[113] Screening attempts to prevent the new attorney from handling client matters which could raise a conflict.

Model Rule 1.10 deals directly with the problem of imputed disqualification resulting from movement of attorneys.[114] Rule 1.10

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107. *See id.* at 756-57.

108. 703 F.2d 252 (7th Cir. 1983).

109. *See id.* at 255-56. In this case, the county sewer system moved to disqualify the plaintiff's law firm because an associate formerly represented the county. The court disqualified the lawyer because he did work on similar sewage agreements and had knowledge of the county's attitude or policy toward sewer service in general. *See id.* at 257-58.

110. *See id.* at 255-56.

111. *See* LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983) (rebuttal presumption overcome by attorney); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) (presumption was rebutted by attorney and law firm).

112. *Compare* Chung v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980) (unilateral screening of new attorney rejected), *vacated on other grounds,* 450 U.S. 903 (1981) *with* Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983) (unilateral screening sufficient to prevent disqualification of new firm).

113. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 230 (2d Cir. 1977) (screening created a "Chinese Wall"); Weglarz v. Bruck, 470 N.E.2d 21, 24 (Ill. App. 1984) (screening merely erecting a "Chinese Wall").

114. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) (general rule of imputed disqualification), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 12 (1985 ed.).

adopts the rule of imputed disqualification with respect to lawyers currently associated with a firm in order to insure that the firm itself meets its obligation of loyalty to its clients, but rejects any per se rule of disqualification.[115] Thus, the Model Rules adopt an approach which combines the rules of *Silver Chrysler* and *LaSalle* by stating that the inference of knowledge, obtained by an attorney in his former employment, is rebuttable. Rule 1.10, however, does not contain a provision for screening an attorney who fails to rebut the presumption.[116]

III. AVOIDANCE AND RESOLUTION OF ETHICAL CONFLICTS OF INTEREST

Before representing a new client or beginning representation for an existing client on a new matter, a simple conflicts of interest check should be made to identify potential or existing conflicts of interest. The attorney, or the firm, should maintain a compilation or list containing certain basic information such as the names of all existing clients and the matters being handled for each client. For organizational clients, this list should include the names of all principals in the organization. In addition, there should be a record of all other parties involved in each matter for each client. Prior to opening a new client file, or a new matter file for an existing client, a review of this data should be made. If this information is listed on the new file memorandum for each client and matter, and a copy of each memo-

115. *See id.* at 12; *see also* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1:125-27 (1985); Miller and Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel,* 40 BUS. LAW 631, 643-49 (1983) (discussion on the problem of imputed disqualification due to movement of attorneys).

116. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) (general rule of imputed disqualification), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 12 (1985 ed.). Screening procedures, while a possible method to prevent conflicts from arising, have been unsuccessful in preventing disqualification of small firms once the conflict of interest has been raised. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 229 (2d Cir. 1977) ("Chinese Wall" cannot be built within single, small law firm); Weglarz v. Bruck, 470 N.E.2d 21, 24 (Ill. App. 1982) (screening procedure could not defeat motion to disqualify law firm which contained only twenty-five attorneys). The "Chinese Wall" defense, while a practical solution to attorney-movement ethical problems, is a demanding standard. It requires the attorney to prove by clear and convincing evidence that he or she had no knowledge of the challenging client's secrets or confidences. *See* Freeman v. Chicago Musical Instr. Co., 689 F.2d 715, 723 (7th Cir. 1982). As a general rule a court will resolve any doubt in favor of disqualification. *See* Weglarz v. Bruck, 470 N.E.2d 21, 25 (Ill. App. 1984).

randum is kept in a single binder, all necessary information to monitor for conflicts will be readily accessible.

For large firms, the system for checking conflicts will need to be more refined, especially when the firm has multiple offices in different cities, states or countries. With the increased prevalence of computers and data communication equipment in law offices, the firm's database containing the basic client information previously discussed can be used for conflicts checks. Because most computer systems allow searching by key words, potential conflicts should be readily ascertainable. If the multi-office firm's database is linked by communication lines so that any office has immediate access to all of the firm's file lists, conflicts verification should be relatively simple. If this capability does not exist, one lawyer in each of the firm's offices should be designated as the "conflicts" liaison. All conflicts checks may then be routed to the designated attorney, who in turn, contacts his counterparts at the firm's other offices in order to complete the conflicts check.

When the conflicts check reveals an actual or potential conflict of interest, the attorney has two options. If the representation will not adversely affect his or her independent professional judgment, the attorney may accept the representation only after full disclosure of the nature of the conflict and consent by the client to the representation. The other option is to decline representation at the outset. If an actual conflict of interest arises after the representation has been accepted such that the attorney is unable to exercise independent professional judgment because of divided loyalties, the attorney should withdraw from further representation of either client in the transaction.[117]

The prohibitions contained in Canon 5 and DR 5-105(C) against simultaneous representation of multiple clients may be avoided if each client consents after full disclosure of the conflict or potential conflict.[118] For consent to be effective, however, the attorney must fully

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117. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 (9th Cir. 1982) (attorney should not continue employment if conflict impaires independent professional judgment); Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 279-83 (3d Cir. 1978) (relying on DR-101, attorney should withdraw from further representation when independent professional judgment is impaired); *In re* Lanza, 322 A.2d 445, 448 (N.J. 1974) (where conflict arises in dual representation, attorney should withdraw pursuant to DR 5-105).

118. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345-46 (9th Cir. 1982) (discussing meaning of consent under Canon 5 and DR 5-105); E. F. Hutton & Co. v.

disclose all of the facts and implications of the representation to all affected clients.[119] The attorney has the burden to affirmatively disclose all relevant facts.[120] Consent must be express and based upon actual knowledge; it will not be implied nor can it rest on constructive knowledge.[121] Preferably, the client's consent should be in writing.[122] If the client is fully apprised of the risks and limitations of multiple representation before an attorney-client relationship is formed, the lawyer or law firm should be protected against subsequent challenges to the representation based upon allegations of conflicts of interest.[123]

The nature of the disclosures by the attorney to the client will determine the effectiveness of a client's consent to representation after disclosure of a conflict of interest. In *Interstate Properties, Inc. v. Pyramid Co.*,[124] both the plaintiff and defendant were developers who owned adjacent parcels of land on which each intended to build a shopping center. In an administrative proceeding involving an application for an environmental permit, Interstate's attorneys were suc-

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Brown, 305 F. Supp. 371, 398 (S.D. Tex. 1969) (Dr. 5-105 requires affirmative disclosure and consent); *In re* Boivin, 533 P.2d 171, 173-75 (Or. 1975) (consent essential for multiple representation under DR 5-105). *See generally* Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation—Lawyers' Stretching the Rules*, 6 W. NEW ENG. L. REV. 73, 81-86 (1983) (discussing multiple representation in real estate transactions).

119. *See, e.g.*, Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 280-83 (3d Cir. 1978) (attorney must disclose all necessary facts); E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 398 (S.D. Tex. 1969) (affirmative disclosure required); *In re* Boivin, 533 P.2d 171, 173-75 (Or. 1975) (full disclosure is required under DR 5-105).

120. *See* Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); *see also* State Bar of Texas, Professional Ethics Comm., Op. 408 (undated) (relying on DR 2-106 and 5-105 for support that attorney must disclose adverse facts to client), *reprinted in* 48 TEX. B.J. 44 (1984).

121. *See* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345-46 (9th Cir. 1982) (discussing disclosure, consent and adequate representation in multiple representation cases); Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 280-83 (3rd Cir. 1978) (discussion on adequate representation of multiple clients and necessity for full disclosure and consent).

122. *See* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345-46 (9th Cir. 1982); Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 280-83 (3rd Cir. 1978).

123. *See* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345-46 (9th Cir. 1982) (consent must be informed to be effective); Int'l Business Machines Corp. v. Levin, 579 F.2d 271, 280-83 (3rd Cir. 1978) (consent must be based on full disclosure by attorney). Where dual representation of both the seller and purchaser in a real estate transaction is sought, the parties consent must be knowing, intelligent, voluntary and obtained in such a way as to insure that each party has adequate time to reflect upon the choice. *See In re* Dolan, 384 A.2d 1076, 1082-83 (N.J. 1978). The consent must not be forced upon the client by the exigencies of closing. *See id.* at 1083. This also applies to the dual representation of a mortgagor and mortgagee. *See id.* at 1083.

124. 547 F. Supp. 178, 182 (S.D.N.Y. 1982).

cessful in blocking Pyramid's application. Subsequently, the two developers formed a joint venture to develop a single mall on their combined properties. By the terms of the joint venture, Pyramid was to obtain the necessary environmental permits. The attorneys who earlier opposed Pyramid's application were retained by Pyramid to pursue the new application. The permits were issued and, thereafter, the attorneys continued to represent Pyramid with respect to other permit applications and eventually the relationship flourished to the point that the attorneys became Pyramid's general counsel.

A dispute arose between Interstate and Pyramid over the shopping center joint venture, and a lawsuit was filed by Interstate against Pyramid. The suit was filed by Interstate's attorneys who were by then also Pyramid's general counsel.[125] The attorneys informed Pyramid they could not continue to represent Pyramid in connection with the joint shopping center project. The attorneys, however, continued to represent a subsidiary of Pyramid in environmental matters. Pyramid filed a motion to disqualify the attorneys from representing Interstate due to conflicts of interests.[126] The attorneys argued that (1) Pyramid had waived the right to object to the conflict, and (2) the nature of the continuing representation of a Pyramid subsidiary eliminated the possibility that confidences regarding the litigation had been communicated to the attorneys.[127] In denying the motion to disqualify, the district court relied upon a consent letter signed by Pyramid prior to the filing of the lawsuit.[128]

The consent letter contained the following elements: (1) a grant of express permission for the attorneys to continue to act as general counsel for Interstate in any and all pending and future matters including any adversary proceedings that might arise between Interstate and Pyramid; (2) a clear reminder to Pyramid that it was aware of the attorneys' representation of Interstate; (3) a reminder that Pyramid was represented by counsel of its own choosing in connection with the negotiation, revision, execution, and delivery of the joint venture agreement; (4) a statement that differences had arisen between Interstate and Pyramid regarding the joint venture and that the attorneys were representing Interstate in attempting to resolve those differences;

125. *See id.* at 182.
126. *See id.* at 178.
127. *See id.* at 179-80.
128. *See id.* at 179-80.

(5) an acknowledgment by Pyramid that the attorneys had no confidential or privileged communications that would inhibit the attorneys' representation of Interstate regarding the joint venture agreement; (6) a caution to Pyramid to have the letter reviewed by independent counsel prior to signing; and (7) a statement that Pyramid was not relying on any advice from the attorneys but instead was relying upon advice of independent counsel.[129] The district court scrutinized the contents of the consent letter and determined that the disclosures, particularly those regarding client confidences and secrets, were sufficient.[130] The court also held that the express consent was effective to defeat the motion to disqualify.[131]

In summary, when an attorney undertakes representation of multiple clients, should a disagreement subsequently arise between the parties, such that the lawyer cannot continue to adequately represent each of the parties, the lawyer's duty is to withdraw from the representation. Although, as previously discussed, Canon 5 and DR 5-105 permit simultaneous representation after full disclosure and consent, it nonetheless must be "obvious that [the lawyer] can adequately represent the interest of each [client]."[132] The Model Rules attempt to clarify the applicable standards. The comments to Rule 1.7 state that "loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent . . . thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."[133] The Model Rules impose a "directly adverse" standard by which to evaluate multiple representation conflicts.[134] Thus, under the most current standards, the lawyer, even after consent, should withdraw from the representation altogether when the clients' interests are directly adverse, and the lawyer cannot adequately represent either party.

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129. *See id.* at 179-80.

130. *See id.* at 180.

131. *See id.* at 180.

132. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1:301 (1985).

133. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 Comment [1] (1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 8 (1985 ed.).

134. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983), *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VII at 8 (1985 ed.).

IV. STATUTORY AND REGULATORY CONFLICTS OF INTEREST

The real estate attorney must not only be familiar with the standards of professional conduct governing ethical conflicts of interest, but he or she must also be cognizant of specific conflicts of interest that arise by statute or administrative rule when representing lending institutions and title insurers.

A. *Lender Regulations*

The statutes and regulations governing financial institutions prohibit certain activities determined to constitute conflicts of interest. Regulations governing savings and loan associations provide a comprehensive example of the types of statutory and regulatory conflicts that may arise when representing a mortgage lender.[135] If a savings and loan association's deposits are insured by the Federal Savings & Loan Insurance Corporation (FSLIC), the association's activities are subject to the state as well as Federal Home Loan Bank Board (FHLBB) Insurance of Accounts Regulations (Insurance Regulations).[136] The Insurance Regulations contain attorney conflicts of interest rules in several areas: (1) composition of the board of directors

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135. *See* 12 C.F.R. § 571.8 (1985) (Statement of Policy); FHLBB Reg. 83-548, 48 FED. REG. 45-382 (1983) (explanation of conflicts of interest regulations). Neither the Texas Savings and Loan Act nor the Rules of the Texas Savings and Loan Department contain conflicts of interest provisions. *See* TEX. REV. CIV. STAT. ANN. art. 852a, § 5.05 (Vernon Supp. 1985) (governing loans to directors and officers of associations); 10 TEX. REG. 2510, 2512 (Aug. 6, 1985) (proposed rules governing limitations and requirements on loans to directors, officers, and employees). In addition to the savings and loan regulations, various statutes and regulations governing banks include similar conflicts of interest provisions. *See* 12 U.S.C. §§ 375, 375a, 375b, 376 (1982 and Supp. 1985) (Garn-St. Germain Depository Institutions Act limits purchases from and sales to directors, loans to executive officers; prohibits loans and extensions of credit to executive officers and directors; and sets rate of interest paid by directors and officers); 12 C.F.R. §§ 31-32 (1985) (regulations governing extensions of credit to executive officers, directors and principal shareholders of national banks); 12 C.F.R. §§ 215.1-.23 (1985) (Regulation O, Officer of Comptroller of Currency, regulations regarding loans to insiders and required disclosures); *see also* 12 U.S.C. § 1828 (j) (1982) (FDIC Act limits loans to officers, directors, and shareholders). Federal law also prohibits certain types of financial arrangements between national banks and their officers and directors. *See* 15 U.S.C. § 9 (1982) (Clayton Act prohibits interlocking directorates among national banks); 12 U.S.C. § 3210 (1982) (Depository Institution Management Interlocks Act prohibits one board of directors controlling more than one national bank). The following national bank regulations govern or prohibit multiple-directorate activities: 12 C.F.R. § 26 (1985); 12 C.F.R. § 348 (1965); 17 C.F.R. § 250.70 (1985). The above banking regulations should be consulted by the reader when confronted by a potential conflict of interest in banking activities.

136. *See* 12 C.F.R. § 571.5 (1984) (Statement of Policy); FHLBB Reg. 83-548, 48 FED. REG. 45-382 (1983) (explanation of conflicts of interest regulations).

of an association, (2) legal fees incurred by a lender's attorneys with respect to residential mortgage loans, and (3) general provisions regarding conflicts of interest.[137]

Section 563.33 of the Insurance Regulations limits the number of attorneys from a single firm eligible to serve as a director of an association. Not more than one director of an FSLIC-insured institution may be an attorney with a particular firm.[138] All directors are admonished by the FHLBB to avoid conflicts of interest of any sort so as not to detract from the trustworthiness of the institution.[139]

With respect to compensation of an association's outside attorneys, the board of directors of an insured institution has a responsibility to determine the reasonableness of the fees paid to its outside counsel.[140] Discharge of this responsibility will not be satisfied merely by a determination that the fees paid to counsel are comparable to fees charged by other attorneys for services rendered to other insured institutions.[141] Section 563.45 of the Insurance Regulations requires each insured institution to submit an annual report to the FHLBB disclosing information prescribed in FHLBB Form AR (Annual Report).[142] In the Annual Report, an association must list the amount of direct renumeration paid by the institution or its subsidiaries for all services rendered by the association's attorney.[143] A director who is also the institution's outside counsel must disclose all fees received for legal services rendered for or on behalf of the institution.[144]

The Insurance Regulations prohibit certain tying arrangements. An insured institution, or service corporation of the institution, is

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137. *See* 12 C.F.R. § 563.33 (1985).

138. *See id.* § 563.33(a)(1)(iii)(1985). "Firm" is defined in this section to include any office-sharing arrangements thereby encompassing partnerships and professional corporations. *See id.* § 563.33(a)(1). The purpose of this definition is to prevent any form of collusion and to promote independent boards of directors. *See* 12 C.F.R. § 571.5 (1984) (Statement of Policy).

139. *See* FHLBB Memorandum R 62, *reprinted in* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, UNITED STATES LEAGUE FEDERAL GUIDE ¶ 9869, at 2784.3 (1984 ed.) (memorandum outlining director's obligations and responsibilities).

140. *See* 12 C.F.R. § 563.33 (a)(1)(iii)(1985).

141. *See* FHLBB Op. Gen. Counsel (1976), *reprinted in* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, UNITED STATES LEAGUE FEDERAL GUIDE ¶ U9-96.14, at 6934-35 (1978 ed.).

142. *See id.* at ¶ U9-96.14 at 6935-36.

143. *See* FHLBB Memorandum R 42 (1977), *reprinted in* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, UNITED STATES LEAGUE FEDERAL GUIDE ¶ 9843, at 2801.4 (1984 ed.).

144. *See id.* at ¶ 9843, at 2801.4.

prohibited from granting any loan on the prior condition that the borrower contract with any specific person or organization for legal services rendered to the borrower.[145] In connection with a residential mortgage, however, an insured institution may require a borrower to reimburse the institution for legal services rendered by its attorney, or to pay directly for such services if, but only if, certain disclosures are made. First, the attorney's fee must be limited to fees incurred for processing and closing the loan; second, the fee, if it exceeds $100, must be accompanied by a statement that (i) describes the legal services rendered, (ii) sets forth the time spent and hourly rate of the attorney, (iii) states that such legal services were performed for the lender, and (iv) states that the fee is being paid by the borrower. Third, the attorney's fee must be reasonable and necessary; and finally the fee must be itemized on the closing statement as a fee paid by the borrower to lender's attorney.[146] These disclosures may be made in the form of a Notice Regarding Representation by Lender's Attorney with a copy of the attorney's statement for services attached as an exhibit. A form of such notice is included as Appendix A. The amount of the fee should also be listed on the borrower's closing statement as legal fees paid at closing by borrower to lender's counsel.

All FSLIC-insured savings and loan associations are subject to the FHLBB's regulations regarding "affiliated party" conflicts of interest.[147] All affiliated party transactions must be disclosed by the institution in its Annual Report to the FHLBB.[148] These regulations are complex and should be studied by counsel each time an affiliated party transaction is contemplated by an association. In some situations, especially those in which various business entities are involved, it is very helpful to diagram the relationships with the regulation close at hand to determine whether an affiliated party transaction will result.[149] No insured institution, or subsidiary, may directly or indi-

145. *See* 12 C.F.R. § 563.45 (1985) (Form AR Item 6 (a)).

146. *See id.* at § 563.45 (1985) (Form AR Item 6 (e)).

147. *See* FHLBB, Office of General Counsel, Interpretive Letter (Nov. 17, 1976), *reprinted in* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, UNITED STATES LEAGUE FEDERAL GUIDE ¶ U9-96.11, at 6929 (1977 ed.); FHLBB Ops. Gen. Counsel (Dec. 16, 1976), (Feb. 4, 1977), *reprinted in* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS, UNITED STATES LEAGUE FEDERAL GUIDE ¶ U9-96.14, at 6937-5 (1978 ed.).

148. *See* 12 C.F.R. § 563.35 (a)(3)(1985).

149. *See id.* § 563.35 (d). The term "affiliated person" of an insured institution means: (a) a director, officer or controlling person (meaning a 10% or greater shareholder) of such institution; (b) a spouse of a director, officer or controlling person; (c) a member of the imme-

rectly purchase, lease from, jointly own with, sell, or lease to an affiliated person of the institution any interest in real or personal property, unless the transaction is determined by the principal supervisory agent of the FHLBB to be fair and in the best interest of the insured institution or its subsidiary.[150] Affiliated party transactions must comply with the requirements of Section 563.41 of the Insurance Regulations. First, the institution must obtain prior written approval for the Section 563.41 transaction from the FHLBB.[151] Second, the institution must obtain an independent appraisal establishing the value of the property which is the subject of the transaction.[152] Third, the transaction must be approved by majority vote of the institution's board of directors after full disclosure of (i) the affiliated person's source of financing for the transaction and (ii) the relationship, if any, between the insured institution and the entity providing the financing.[153]

With certain exceptions, an insured institution, which includes any of its subsidiaries, may not make a loan to, or purchase a loan from, an affiliated person.[154] An exception to this rule is made for loans in the ordinary course of business of an institution or subsidiary which: (1) do not involve more than the normal risk of collectibility or which present other unfavorable features, and (2) do not exceed the loan amount which would have been available to members of the general public for a similar loan.[155] The following loans are examples of permissible extensions of credit to affiliated persons: (1) loans secured by the principal residence of the borrower; (2) loans secured by savings accounts of the borrower at the institution; (3) home improvement loans; (4) overdraft protection; (5) student loans; (6) consumer loans; and (7) credit cards.[156] Mortgage loans or home improvement

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diate family of a director, officer or controlling person, who has the same home as such person or who is a director or officer of any subsidiary or holding company of the institution; (d) any corporation or organization of which a director, officer or controlling person is chief executive or chief financial officer, general partner, limited partner with greater than 10% interest in the limited partnership; and (e) any trust in which a director, officer or controlling person has a substantial beneficial interest (meaning an interest greater than 10%). *See id.* § 563.35 (d).

150. *See id.* §§ 563.41, 563.43.

151. *See id.* § 563.45.

152. *See id.* § 561.29.

153. *See id.* § 563.41 (b).

154. *See id.* § 563.41.

155. *See id.* § 563.41.

156. *See id.* § 563.41 (c).

loans to an affiliated person, however, must be approved by the institution's board of directors after full disclosure of the interest rate, collateral, and terms of the proposed loan.[157] While such loans may be made at a favorable rate of interest, generally an association may not make such a loan at an interest rate less than the institution's cost of funds.[158] Such a loan is justified by the affiliated person's status as a salaried officer or employee of the institution.[159] Extensions of credit to affiliated persons for commercial purposes may not exceed $100,000 and require notice to the FHLBB.[160] Investments by an insured institution or subsidiary in stocks, bonds, notes or securities of an affiliated person, or the purchase of securities under a repurchase agreement with an affiliated person are prohibited.[161]

In addition to the restrictions on loans and investments involving affiliated persons, certain transactions with third parties are also prohibited. Prohibited third party transactions include: (i) loans on the security of real estate purchased from an affiliated person (unless the property was the affiliated person's principal residence); (ii) loans secured by property in which an affiliated person has a security interest;

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157. *See id.* § 563.43 (b). Texas also has limitations on loans made to persons closely related to the association. The Texas Savings and Loan Act provides in Section 5.05:

> In no event shall an association make a loan, purchase or sell a note or lien or enter into any participation transaction authorized in Sections 5.01, 5.02, and 5.03 in violation of any rule or regulation promulgated under Section 5.04 and no association shall:
>
> (1) Make a real estate loan to an officer or director of the association unless such loan be first approved unanimously by its board of directors and such approval recorded in the minutes of the meeting of the board at which such loan was approved.

TEX. REV. CIV. STAT. ANN. art. 852a, § 5.05 (1) (Vernon Supp. 1985). The Texas Savings and Loan Department in August, 1985 proposed the following regulations:

> (a) An association may make loans authorized by this chapter to any officer, director, or employee of the association on the following terms:
>
> (1) prior to funding, the loan must be approved by all disinterested members of the board of directors, with the vote of each director reflected in the minutes, at a duly constituted meeting; and
>
> (2) the loan shall be at an interest rate not less than the association's cost of funds and shall be on other terms no more favorable to the borrower than if the borrower were not an officer, director, or employee of the association.
>
> (b) Prior to funding a loan under this section, an association shall have in its loan file the documents and records required by § 65.12 of this title (relating to Loan Documentation), as applicable to the type of loan in question.
>
> (c) All such loans shall fully comply with the applicable provisions of this chapter.

10 TEX. REG. 2510, 2512 (Aug. 6, 1985). These proposals have not yet been adopted.

158. *See* 12 C.F.R. § 563.43 (b) (1985).

159. *See id.* § 563.43 (b).

160. *See id.* § 563.43 (b)(2).

161. *See id.* § 563.43 (b)(3).

(iii) accepting stocks, bonds or notes of an affiliated person as collateral on a loan to a third party; and (iv) maintaining a compensating balance or entering into any guarantee or takeout commitment with respect to a loan by a third party to an affiliated person.[162]

In most instances, it should be readily apparent to the institution whether an affiliated person is involved in a loan or investment transaction. As previously discussed, however, in situations involving loans to corporations, partnerships or limited partnerships, it is always advisable to review the regulation, and when necessary, to diagram the relationships to determine whether an affiliated person is involved, directly or indirectly, through an entity involved in the transaction. As a matter of practice on all loans, a lending institution should always require its borrowers and guarantors to execute at closing a Conflicts of Interest Certificate in which each borrower and guarantor certifies that the entity or individual is not an affiliated party. A form of Conflicts of Interest Certificate is included as Appendix B.

B. *Title Insurance*

Article 9.30 of the Texas Title Insurance Act prohibits payment of commissions, rebates, or discounts in connection with issuance of title insurance policies.[163] Article 9.30(C), however, provides that the general prohibition against payment of referral fees out of premiums paid for title policies does not prohibit payment of a fee to an attorney for legal services actually rendered in connection with issuance of the policy.[164] The State Bar of Texas has opined that this section of the Title Insurance Act does not result in an ethical conflict of interest.[165]

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162. *See id.* § 563.43 (b).

163. *See* TEX. REV. CIV. STAT. ANN. art. 9.30 (Vernon 1981).

164. *See id.* art. 9.30 (C); *see also* State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 408 (undated) (relying on DR 2-106 and 5-105 discussing fees for legal services and impairment of attorney's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:8303 (1985).

165. *See* TEX. REV. CIV. STAT. ANN. art. 9.30 (Vernon 1981); *see also* State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 408 (undated) (relying on DR 2-106 and 5-105 discussing fees for legal services and impairment of attorney's independent professional judgment), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 801:8303 (1985).

V. CONCLUSION

Ethical conflicts of interest arise with regularity in a real estate practice. The ideal solution to a conflict of interest situation is to decline the representation. However, this is not always a practical solution. For example, in a small town in which there is only one real estate lawyer, it may not be practical to refer a client to another lawyer to avoid a conflict. In such a situation, the attorney should fully disclose the nature of the conflict and obtain the clients' written consents to the representation. In large metropolitan areas on the other hand, it may be more practical to refer the matter to another lawyer. The point to be made, in any case, is that the real estate lawyer should be aware of the rules regarding conflicts of interest and should make every reasonable effort to avoid conflicts in a manner consistent with the Canons, Ethical Considerations, Disciplinary Rules, statutes, and administrative rules discussed in this article. All attorneys who practice in the real estate area should recognize these requirements and strive to avoid unexpected and unnecessary conflicts of interest.

APPENDIX A

NOTICE AND STATEMENT REGARDING LENDER'S ATTORNEYS

The purpose of the following is to fully disclose the relationship between the law firm of _____, hereinafter referred to as "Attorneys", that has, or will prepare the legal documents for this loan transaction for _____, hereinafter referred to as "Lender".

The undersigned acknowledge that the Attorneys have acted only as counsel to Lender, and have not, in any manner, undertaken to assist or render legal advice to the undersigned, with respect to this transaction. The attorneys preparing the loan documents represent only Lender, and not any of the other parties involved in this transaction.

The undersigned understand that they have the right to be represented by their own attorney and to have such other attorney present at any of the loan transaction meetings.

The undersigned have been provided with an opportunity to examine the title commitment issued by the title company in this transaction, and are satisfied with the contents of said commitment. Further, the undersigned agree and understand that this transaction is not "closed" until the Lender issues its funds and until all disbursements are made on behalf of all parties. In the event there are any additional charges by anyone furnishing services, requiring payoff, or by any taxing authority, the undersigned will pay same upon written request.

The undersigned acknowledge Borrower's obligation as a part of Borrower's agreement with Lender, to pay the legal fees of Attorneys. If this transaction involves a sale of property, the undersigned understand that the parties may allocate payment of the legal fees between themselves as they may agree.

The undersigned acknowledge that they have been notified and understand their right to independent legal counsel and that the Attorneys represent only the interest of Lender, and not those of any of the other parties.

Dated to be effective the _____ day of _____, 1985.

BORROWER

_____

GUARANTOR

_____

THE STATE OF _____ §
COUNTY OF _____ §
This instrument was acknowledged before me on the ____ day of _____, 1985, by _____.

_____

Notary Public, State of _____
My commission expires: _____

APPENDIX B
CONFLICT OF INTEREST CERTIFICATE

_____

_____

_____

RE: $_____ Loan (the "Loan") from
_____ ("Lender") to
_____ ("Borrower")

The undersigned is the applicant for and will become the obligor on the Loan and hereby certifies to Lender that:

Borrower is not acting as trustee for any officer, director or stockholder of Lender or any affiliate of Lender and no officer, director, or stockholder of Lender or any affiliate of Lender is an officer, director, stockholder or partner of Borrower.

Borrower acknowledges Lender's intended reliance upon this certificate in making the Loan to Borrower.

Executed this ____ day of _____, 1985.

BORROWER

_____