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Gretchen L. Jankowski
University of Baltimore School of Law

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COMMENTS

THE ETHICS INVOLVED IN REPRESENTING MULTIPLE PARTIES IN A BUSINESS TRANSACTION: HOW TO AVOID BEING CAUGHT BETWEEN SCYLLA AND CHARYBDIS¹ WITHIN THE CONFINES OF THE MARYLAND DISCIPLINARY RULES

I. INTRODUCTION

ACT I. Scene 1. [*Multiple Representation of Joint Ventures/ Formation of Business Entities*]. Enter three potential clients into Attorney Jane's office. Attorney Jane leads the individuals into her office and asks how she can assist them.

Emily Entrepreneur: Arnold, Betty, and I are entrepreneurs who are interested in setting up a joint venture to sell industrial equipment. Essentially, we have worked out the details and will only require your "legal drafting" assistance in creating a partnership. Will you represent us? [Fade Out].

ACT I. Scene 2. [*Multiple Representation of Existing Clients*]. Attorney John is seated at his desk when the telephone rings. It is one of his existing clients, Peter Purchaser. The conversation proceeds as follows:

Peter Purchaser: I have decided to purchase a seafood restaurant in the downtown area. I want you to draft the sales contract. I am purchasing the business from Sheila Seller, who tells me that you are also her attorney. We both want you to draft the sales agreement. Neither one of us wants any other attorney involved. Besides, you are the only attorney either one of us trusts. Will you represent both of us? [Fade Out].

ACT I. Scene 3. [*Multiple Representation in Real Estate Transactions*]. Attorney Kate enters Lender Bank's conference room. Seated at the conference table are Bob Borrower, Sam Seller, and Leon

1. Scylla refers to "a nymph changed into a monster in Greek mythology who terrorizes mariners in the strait of Messina." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1057 (1984). Charybdis refers to "a whirlpool off the coast of Sicily personified in Greek myth as a female monster." *Id.* at 228. The phrase caught "between Scylla and Charybdis" means having to choose "between two equally hazardous alternatives." *Id.* at 1057.

Loan Officer. Attorney Kate is not presently retained by any of the parties. However, Attorney Kate has represented Lender Bank in the past.

Leon Loan Officer: We have called this meeting because all three of us are interested in hiring you as the attorney for this real estate transaction. Bob Borrower, our customer, wants to purchase a tract of residential land from Sam Seller. Lender Bank, of course, will be responsible for the financing. Your role will be to draft the sales contract and conduct any necessary title work. Lender Bank already has the mortgage agreement drafted. In the interest of saving money, we have decided to each contribute one-third of your fee. Will you undertake the representation? [Fade Out].

Although each of the preceding hypotheticals is fictitious, similar dilemmas face attorneys daily. Often, an attorney's knee-jerk reaction is to avoid a situation involving multiple representation. Attorneys have been indoctrinated since law school with the notion that "the world is divided into clients and non-clients, and that there is no place for anything other than uncompromising advocacy in favor of the one, and aggressive opposition as to the other."² Additionally, common sense dictates that the Rule of Matthew be followed: "No man can serve two masters"³

Adopting a rigid Rule of Matthew approach in a multiple representation situation leads an attorney to overlook several legitimate reasons for undertaking multiple representation. In the case of the entrepreneurs seeking to form a business entity, multiple representation would be advantageous because the parties are "united in purpose," and hiring three separate attorneys might create conflicts that did not already exist.⁴ When an attorney is confronted by existing clients seeking multiple representation, the involvement of additional attorneys not only may make a simple business transaction "unduly complicate[d]," but also can "provoke unnecessary and expensive disputes."⁵ Furthermore, requiring clients to hire separate attorneys "pad[s] the pockets" of the profession.⁶ Particularly, in the real estate setting, using one attorney will cost less money,⁷ a benefit to both buyers and sellers who have already incurred costs. A final

2. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 2.2:102 (2d ed. Supp. 1993).

3. Kenneth Kipnis, *Conflict of Interest and Conflict of Obligation* (1986), reprinted in *ETHICS AND THE LEGAL PROFESSION* 283, 285 (Michael Davis & Frederick A. Elliston eds., 1986).

4. Barry S. Martin, *Counsel for the Situation*, *CAL. LAW.*, May 1987, at 18, 18.

5. *Id.*

6. See Louis M. Brown, *One Lawyer for Two*, *BEVERLY HILLS B.A.J.*, Winter 1986-87, at 50, 50.

7. See *id.* at 51.

consideration common to all three scenarios is the overriding public interest in permitting an individual the right to retain counsel of his or her own choice.⁸

Although each of the preceding arguments contains an element of truth, the hard reality is that if an attorney declines to represent multiple parties, he could lose the future business of any one of these clients. Declining to represent multiple parties becomes particularly acute when both parties are existing clients; an attorney in this situation risks losing existing and future business. Yet if the attorney blindly undertakes the multiple representation, he may create a situation likely to run afoul of the requirements mandated by the disciplinary rules.⁹

This Comment demonstrates how a Maryland practitioner who chooses to undertake multiple representation in a business transaction can do so within the ethical norms of the disciplinary rules. However, the disciplinary rules address only one facet of the ethical obligations of an attorney. Therefore, inherent in any discussion of the require-

8. Nathan B. Feinstein, *Lawyers' Conflicts Under the Model Rules: A Primer*, in *CONFLICTS/ADVERTISING/HANDLING OF CLIENT'S MONEY* 84, 88 (The Maryland Institute for Continuing Professional Education for Lawyers, Inc. ed., 1990); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1303-04 (1981) [hereinafter *Conflicts of Interest*].

9. As used in this Comment, the term "disciplinary rules" generally refers to each state's statutory enactment governing an attorney's conduct in the practice of law. More specifically, "disciplinary rules" refers to each state's codification of the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) or the ABA's Model Code of Professional Responsibility (Model Code). Although the Model Rules are the ABA's most recent enactment, see *infra* notes 20-21 and accompanying text, not all states have enacted these rules. See generally 1 to 4 NAT'L REP. ON LEGAL ETHICS AND PROF. RESP. (U. Publications of Am. 1994) (cataloguing all 50 states' disciplinary rules).

Although lawyers must conduct themselves in accordance with the disciplinary rules, "[t]he [r]ules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983) (emphasis added). Although a violation of a disciplinary rule may subject an attorney to sanctioning by a disciplinary authority, it does not, nor should it, serve as a basis for civil liability or serve to create any presumption that a legal duty has been breached. *Id.* "Accordingly, nothing in the [r]ules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." *Id.*

The disciplinary rules are typically applied in judicial decisions within the context of a disqualification proceeding or a fee dispute. Feinstein, *supra* note 8, at 86. In either case, the court may force the attorney to remit previously collected attorney's fees if the attorney has violated one or more of the disciplinary rules. Martin, *supra* note 4, at 70.

ments of multiple representation is a complementary discussion of the legal obligations of attorneys.¹⁰ Because multiple representation in business transactions involves the application of various bodies of law, and depends, in large measure, on individual factual patterns, this Comment focuses upon the situations outlined previously in Act I, Scenes 1 through 3. In addition, this Comment explores the pitfalls inherent in multiple representation, in an effort to develop a framework for the Maryland practitioner.

II. HISTORICAL DEVELOPMENT OF THE MODEL RULES OF PROFESSIONAL CONDUCT

Traditionally, the legal community has frowned upon multiple representation.¹¹ The Model Code of Professional Responsibility

10. Multiple representation appears to present an ethical dilemma because of an attorney's fiduciary relationship to each client, and the duties of loyalty and confidentiality that accompany such a relationship. *See, e.g.*, *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 346-47, 612 A.2d 322, 326-27 (1992), *cert. granted*, 329 Md. 168, 617 A.2d 1085 (1993); *see also* HENRY S. DRINKER, *LEGAL ETHICS* 89-96 (1953) (discussing the lawyer's obligations as a fiduciary). "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged" *Id.* at 89 (quoting *Stockton v. Ford*, 52 U.S. 232, 247 (1850)).

11. *See* GLEASON L. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* 64 (1910); 1 HAZARD & HODES, *supra* note 2, § 2.2:103; RAYMOND L. WISE, *LEGAL ETHICS* 272-73 (2d ed. 1970); Brown, *supra* note 6, at 50; John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *STAN. L. REV.* 683, 708-09 (1964); *Conflicts of Interest*, *supra* note 8, at 1292. The traditional view that an attorney should avoid representing multiple parties is best summarized by Wise: "No man can serve two masters." If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients . . . the employment should be refused." WISE, *supra*, at 273.

The Maryland appellate courts have also championed the view that "no man can serve two masters." In *Crest Inv. Trust, Inc. v. Comstock*, 23 Md. App. 280, 327 A.2d 891 (1974), the court of special appeals warned that multiple representation "should generally be avoided" in business transactions. *Id.* at 300, 327 A.2d at 904. More recently, the court of special appeals reiterated its position in *Blum v. Blum*, 59 Md. App. 584, 477 A.2d 289 (1984) (holding that where one attorney represents both the husband and wife in a domestic dispute, the separation agreement will not be set aside unless the terms are unfair and inequitable):

This is not the first time the Court has seen parties apparently relying on the same attorney. This situation has arisen frequently enough to suggest to the members of the Bar that no matter how careful they may be to explain their relationship to each of the parties, they are advancing at their own peril. Where there is a potential conflict in interest between the parties, as is true in every domestic dispute, it is inappropriate to attempt to represent them both. This is true even where the parties appear to be in full accord at the time.

Id. at 598, 477 A.2d at 296.

(Model Code), as the predecessor to the Model Rules of Professional Conduct (Model Rules), addresses the issue of multiple representation in only two subsections of Disciplinary Rule 5-105.¹² Disciplinary Rule 5-105(B) states that “[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in [sic] behalf of a client will be or is likely to be adversely affected by his representation of another client.”¹³ Therefore, Disciplinary Rule 5-105(B) prohibits an attorney from representing multiple parties when an actual conflict develops between those parties. However, Disciplinary Rule 5-105(B)’s prohibition against the representation of multiple parties is not without limits. Even where a conflict exists between the parties, an attorney may continue the representation if he follows the mandates of Disciplinary Rule 5-105(C). In the face of an actual conflict, Disciplinary Rule 5-105(C) requires an attorney representing multiple parties to (1) assess the situation and determine if he “can adequately represent the interest of each”; (2) fully disclose “the possible effect of such representation on the exercise of his independent professional judgment on behalf of each”; and (3) obtain each client’s consent to the multiple representation.¹⁴

Although Disciplinary Rule 5-105 generally permits multiple representation, a review of Ethical Considerations 5-14 through 5-17 demonstrates the Model Code’s underlying philosophy that multiple representation should be avoided.¹⁵ For example, Ethical Consideration 5-14 discusses the importance of an attorney maintaining his independent professional judgment, and concludes that an attorney’s judgment becomes compromised “whenever [he] is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.”¹⁶ Similarly, Ethical Consideration 5-15 urges attorneys to decline to undertake multiple representation:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all

12. As stated in the preamble to the Model Code, the Disciplinary Rules are mandatory in character and state the “minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980). In contrast, the Canons are statements of axiomatic norms, and the Ethical Considerations are “aspirational,” representing objectives for which attorneys should strive. *Id.*

13. *Id.* DR 5-105(B).

14. *Id.* DR 5-105(C).

15. *See id.* EC 5-14 to 5-17.

16. *Id.* EC 5-14.

doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests¹⁷

A review of these Ethical Considerations supports the view that the Model Code provisions were drafted with the assumption "that the litigation rules of conduct apply to any lawyering process in which two or more parties may have separate points of view."¹⁸

Despite the Model Code's warnings about the dangers of multiple representation, attorneys, nevertheless, engaged in multiple representation. Once the rulemakers acknowledged the reality that attorneys were representing multiple parties and serving in roles much more expansive than that of an advocate,¹⁹ they made changes to the existing model. In August 1983, the House of Delegates of the American Bar Association (ABA) approved the Model Rules,²⁰ replacing the Model Code. Maryland adopted the Model Rules on January 1, 1987.²¹ In contrast to the Model Code, the Model Rules recognize that an attorney can, and often does, serve in the dual roles of advisor and intermediary.²²

Specifically, Rule 1.7²³ serves as the analogue to former Disci-

17. *Id.* EC 5-15.

18. Brown, *supra* note 6, at 50.

19. The preamble to the MODEL RULES OF PROFESSIONAL CONDUCT (1983) states:

As a representative of clients, a lawyer performs various functions. 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 advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, acts as a spokesperson for each client. A lawyer acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others.

20. THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 2 (ABA ed. 1987). According to Stephen Gillers, the Model Code was in effect for 13 1/2 years. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 243 (1985).

21. MD. RULES 1230 (1994). Once Maryland adopted the Model Rules, these Rules were referred to as the Maryland Rules of Professional Conduct. *See id.* Appendix. Because Rules 1.7 and 2.2 of the Maryland Rules of Professional Conduct substantively mirror Model Rules 1.7 and 2.2, this Comment only discusses and refers to Model Rules 1.7 and 2.2. *Compare* MARYLAND RULES OF PROFESSIONAL CONDUCT Rules 1.7 & 2.2 (1994) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7 & 2.2 (1983).

22. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.1 & 2.2 (1983).

23. The text of Rule 1.7 reads as follows:

Rule 1.7. Conflict of Interest: General Rule

plinary Rules 5-101 and 5-105.²⁴ "Rule 1.7 clarifies [Disciplinary

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

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

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

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. Rule 1.7.

24. *Id.* Rule 1.7 Model Code Comparison.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1980).

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in [sic] behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in [sic] behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, affiliated with him or his firm may accept or continue such employment.

Id. DR 5-105 (1980).

Rule] 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation," but in addition to consent, the lawyer must be reasonably convinced that the representation will "not be adversely affected by the lawyer's other interests."²⁵ In contrast, Rule 2.2²⁶ has no "direct counterpart" in the Disciplinary Rules of the Model Code,²⁷ although it has been compared to Disciplinary Rules 5-105(B) and 5-105(C).²⁸ Additionally, reference to the concept of an intermediary can be found in Model Code EC 5-20.²⁹

The ABA's adoption of Rule 1.7 and Rule 2.2 supports the position that multiple representation can be ethical, when undertaken

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 Model Code Comparison (1983).

26. The text of Rule 2.2 reads as follows:

Rule 2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect of the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Id. Rule 2.2.

27. *Id.* Rule 2.2 Model Code Comparison.

28. *See id.* For the text of DR 5-105(B)-(C), see *supra* note 24.

29. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 Model Code Comparison (1983). EC 5-20 states that "[a] lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980). However, as the Comment to Rule 2.2 makes clear, Rule 2.2 was not intended to govern attorneys who act as impartial mediators or as arbitrators between parties who are not clients. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1983); see 1 HAZARD & HODES, *supra* note 2, § 2.2:101.

within certain limits. Not only do these rules provide a more concrete set of guidelines, but they focus on protecting clients, in apparent recognition that the "principal danger of [multiple] representation is that one of the parties will take unfair advantage of the other, knowingly or not."³⁰

III. MULTIPLE REPRESENTATION IN MARYLAND

A. *The Relationship Between Model Rule 1.7 and Model Rule 2.2*

Before choosing to represent multiple parties in a business transaction, a Maryland attorney must first consider the requirements imposed by Model Rules 1.7 and 2.2. While Rule 1.7 addresses conflicts of interest generally,³¹ and Rule 2.2 governs the limited situation where an attorney acts as an intermediary between clients,³² neither rule explicitly outlines the situations where it should be applied. As a result, determining each rule's limitations and applicability is difficult, particularly because both share several common elements.³³ Therefore, by explaining each rule's requirements, this Comment attempts to provide guidance to the practitioner, faced with a multiple representation situation, as to which rule should be applied.

Rule 1.7 applies in two types of conflict of interest situations: (1) Where representation of one client "will be directly adverse" to another client,³⁴ and (2) where representation of a client "may be materially limited" by an attorney's obligations to another client, "a third person, or by the lawyer's own interests."³⁵ Although Rule 1.7 generally forbids representation where either type of conflict of interest is present,³⁶ an attorney may undertake the representation if two conditions are satisfied. First, the attorney must "reasonably

30. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 39 (1982). *Contra* Gillers, *supra* note 20, at 245 ("[The rulemakers] have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice.").

31. *See supra* note 23.

32. *See supra* note 26.

33. Both Rules 1.7 and 2.2 require that before multiple representation is undertaken, an attorney must (1) determine that the representation will not adversely affect either party; (2) fully explain the risks and advantages involved in the common representation; and (3) obtain client consent. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7 & 2.2 (1983).

34. *Id.* Rule 1.7(a).

35. *Id.* Rule 1.7(b). The comment to Rule 1.7 indicates that paragraph (b) applies to multiple representation. *Id.* Rule 1.7 cmt.

36. *Id.* Rule 1.7(a) & (b).

believe[] the representation [itself] will not be adversely affected."³⁷ Second, the attorney must obtain each client's consent.³⁸ Before obtaining a client's consent, the attorney must disclose the "implications of the common representation and the advantages and risks involved."³⁹

The comment to Rule 1.7 illuminates the type of situations covered by this Rule. Rule 1.7 is particularly applicable in the context of estate planning and administration, and "where the clients are generally aligned in interest even though there is some difference of interest among them."⁴⁰ Rule 1.7 may also come into play when an attorney is representing multiple buyers or multiple sellers. Because Rule 1.7 imposes less strict consultation, evaluation, and withdrawal requirements upon an attorney than its complement, Rule 2.2,⁴¹ Rule 1.7 is best followed when a potential conflict exists among the multiple clients.⁴²

In a similar fashion, Rule 2.2 requires an attorney, before undertaking intermediation, to first "consult[] with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtain[] each client's consent."⁴³ Second, the attorney must "reasonably believe[] that the matter can be resolved on terms compatible with the clients' best interests," that each client is capable of making informed decisions, and "that there is little risk of material prejudice to the interests of any of the clients" if the multiple representation fails.⁴⁴ Third, the attorney must "reasonably believe[] that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients."⁴⁵

Unlike Rule 1.7, once the intermediation has commenced, Rule 2.2 explicitly requires that the attorney "consult with each client" about decisions to be made and disclose to each client any relevant considerations that would aid each client in making an informed decision.⁴⁶ Rule 2.2 also requires an attorney, during the intermediation process, to continually evaluate whether the conditions imposed

37. *Id.* Rule 1.7(b)(1).

38. *Id.* Rule 1.7(b)(2).

39. *Id.*

40. *Id.* Rule 1.7 cmt.

41. *See id.* Rule 2.2. The text of Rule 2.2 is set forth in *supra* note 26.

42. *See id.* Rule 1.7 cmt. Rule 1.7 applies to "common representation of persons having similar interests" when the risk of causing an adverse effect on the parties is minimal and the requirements of paragraph (b) are satisfied. *Id.*

43. *Id.* Rule 2.2(a)(1).

44. *Id.* Rule 2.2(a)(2).

45. *Id.* Rule 2.2(a)(3).

46. *Id.* Rule 2.2(b).

by Rule 2.2(a) still exist.⁴⁷ If any one of the conditions ceases to exist, the attorney is obligated to withdraw.⁴⁸ Withdrawal is also mandated "if any of the clients so requests."⁴⁹ Rule 2.2 further imposes an additional restriction upon a withdrawing attorney; he "shall not continue to represent any of the clients *in the matter that was the subject of the intermediation.*"⁵⁰

In contrast to Rule 1.7, Rule 2.2 presumes that an acute or apparent conflict already exists.⁵¹ Situations where Rule 2.2 demands adherence include the representation of two or more existing clients in the same transaction⁵² and where three individuals are seeking to form a partnership.⁵³ Choosing to follow either Rule 1.7 or Rule 2.2 in a nonlitigation setting depends on the "proximity and degree" of potential conflicts.⁵⁴ "Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer," the foreseeability of potential conflicts exacerbating into real ones, and the likelihood of prejudice to a client if an irreconcilable conflict does arise.⁵⁵

B. Maryland Appellate Decisions

While an attorney must consult Model Rules 1.7 and 2.2 before undertaking multiple representation in Maryland, the inquiry should not stop with the Model Rules. Another important source governing multiple representation in Maryland comes from Maryland's appellate decisions. Although these appellate decisions consider the relationship between multiple representation and Disciplinary Rules 5-101 and 5-105 of the Maryland Code of Professional Responsibility (Maryland Code), they are instructive for several reasons. First, these appellate

47. *See id.* Rule 2.2(c).

48. *Id.*

49. *Id.*

50. *Id.* (emphasis added).

51. "The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests." *Id.* Rule 2.2 cmt.

52. *See id.* The comment to Rule 2.2 states that a lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients.

Id.

53. 1 HAZARD & HODES, *supra* note 2, § 2.2:402.

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

55. *Id.*

decisions highlight the pitfalls inherent in multiple representation. Second, they identify the particular multiple representation situations where an attorney has run afoul of the disciplinary rules, and suggest how the situation might have been rectified by the attorney. Finally, because these decisions interpret Disciplinary Rules 5-101 and 5-105, the predecessors to Model Rules 1.7 and 2.2,⁵⁶ they provide a framework within which to interpret the mandates of Rules 1.7 and 2.2.

1. Multiple Representation of Joint Ventures/Formation of Business Entities

Both the Maryland court of appeals and the court of special appeals have discussed the obligations of attorneys representing multiple parties in a joint venture. In *Crest Investment Trust, Inc. v. Comstock*,⁵⁷ the Court of Special Appeals of Maryland considered the propriety of Kaplan's multiple representation of both Crest Investment and Mr. and Mrs. Comstock in an investment transaction involving the development of an animal breeding business.⁵⁸ Kaplan drafted a lending agreement conveying the Comstocks' farmland to a new corporation, Comstock, Inc., with Crest Investment assuming the Comstocks' outstanding mortgage debt.⁵⁹ At this juncture, Kaplan acknowledged that he represented the Comstocks and convinced Mr. Comstock that hiring a separate attorney to review the agreement was unnecessary.⁶⁰ In the years following this initial agreement, the joint venture continued to fail, prompting Kaplan to draft two subsequent agreements, each diminishing the Comstocks' interest in their property and primary residence.⁶¹ When foreclosure proceedings were initiated against the Comstocks, they sought independent counsel and sued Kaplan for malpractice.⁶²

56. See *supra* text accompanying notes 23-29.

57. 23 Md. App. 280, 327 A.2d 891 (1974).

58. *Id.* at 282-83, 327 A.2d at 894-95.

59. *Id.* at 286, 327 A.2d at 896.

60. *Id.* at 283-84, 327 A.2d at 895.

61. *Id.* at 287-90, 327 A.2d at 896-98. At issue was the November 30, 1967 agreement that was the first of the two subsequent agreements drafted by Kaplan. *Id.* at 287, 327 A.2d at 896. The November 30, 1967 agreement stated that the farmland previously conveyed to Comstock, Inc. would "remain [its] absolute and sole property," with the single exception that upon repayment of the mortgage debt and repayment to Crest of all monies advanced to Comstock, Inc., the dwelling and one acre would be reconveyed to the Comstocks for the price of \$1.00. *Id.* at 288, 327 A.2d at 897. The November 30, 1967 agreement was significantly different from the initial agreement drafted by Kaplan because it extinguished Comstock, Inc.'s obligation, upon the satisfaction of all corporate and mortgage debt, to convey the balance of 97 acres to the Comstocks for \$1.00 or purchase it from the Comstocks for \$5.00. *Id.*

62. *Id.* at 291, 327 A.2d at 899.

The trial court found that (1) an attorney-client relationship had existed between Kaplan and the Comstocks, and (2) Kaplan had acted unfairly and had failed to make adequate disclosures.⁶³ In considering whether the trial court had erred, the court of special appeals initially noted that "[t]he instant case . . . presents a situation substantially different from a single transaction for the sale of realty."⁶⁴ Rather, "the conveyance of the land and improvements was a *part* of a business promotion and all parties were ultimately interested in the success of the enterprise."⁶⁵ According to the court, although a conflict is not necessarily inherent in a joint venture situation, if the "'clients' involved can foreseeably have adverse economic interests and if duality of representation is undertaken, it should be 'within very narrow limits.'"⁶⁶

After distinguishing the Comstocks' case from the typical real estate transaction, the court outlined the legal principles governing multiple representation in Maryland. The court stated that if multiple representation occurs, adherence to the Maryland Code⁶⁷ and "prudent concern for legitimate self-interest against possible liability dictate that full disclosure be made of the possible dangers involved and that the legal representation be fundamentally fair to both sides."⁶⁸ In describing what is encompassed by full disclosure, the *Comstock* court adopted the requirements of the Supreme Court of New Jersey verbatim from its decision in *In re Kamp*.⁶⁹

63. *Id.* at 293, 327 A.2d at 900. The trial court's decree stated the following: It is patently clear that the defendant Kaplan, acting as attorney for the [Comstocks] in this transaction, failed to make an adequate disclosure to them of all relevant factors involved in their entering into the agreement of November 30, 1967, with defendant Crest . . . and said agreement was obviously preferential to his clients, defendants Crest and Comstock, Inc., and manifestly unfair to his clients, the [Comstocks] *Any lawyer should have known that this was not a fair transaction and the failure to protect the plaintiffs and so advise them while acting as their attorney is a complete breach of the fiduciary relationship.*

Id. at 298, 327 A.2d at 903 (emphasis added).

64. *Id.* at 302, 327 A.2d at 905.

65. *Id.*

66. *Id.* at 303, 327 A.2d at 905.

67. The specific Disciplinary Rule under consideration was DR 5-105. *Id.* at 301, 327 A.2d at 904. See *supra* note 24 for the text of DR 5-105 of the Model Code. Because Disciplinary Rules 5-101 and 5-105 of the Maryland Code of Professional Responsibility substantively mirror Disciplinary Rules 5-101 and 5-105 of the Model Code, this Comment only references the text of the Model Code. Compare MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 & DR 5-105 (1981) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 & DR 5-105 (1980).

68. *Crest*, 23 Md. App. at 303, 327 A.2d at 905.

69. 194 A.2d 236 (N.J. 1963). The following is a recitation of facts from *In re*

Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, *but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full significance of the representation of conflicting interests should be disclosed to the client so that he may make an intelligent decision before giving his consent.* If the attorney cannot properly represent the buyer in all aspects of the transaction because of his relationship to the seller, full disclosure requires that he inform the buyer of the limited scope of his intended representation of the buyer's interests and point out the advantages of the buyer's retaining independent counsel.⁷⁰

Ultimately, the court affirmed the trial court's decision to void the various transactions between the Comstocks and Crest Investment.⁷¹ Although the court of special appeals refused to hold that

Kamp: In 1962 Mrs. Cronk and Staben Custom Built Homes, Inc. (Staben), entered into a contract, whereby Mrs. Cronk agreed to purchase a home that was to be built by Staben. *Id.* at 238. The contract required Mrs. Cronk to make a \$2,000 down payment at the execution of the contract, and then make periodic payments that coincided with the construction progress of the house. *Id.* In addition, the contract stated that all parties agreed that attorney Daniel Kamp would handle the closing of title. *Id.* Kamp first received notice of the sale to Mrs. Cronk when Staben sent him a copy of the executed contract. *Id.* After paying Staben approximately \$10,500, Mrs. Cronk hired her own attorney, Richard Huckin. *Id.* Huckin tried to conduct a title search of the property but was unable to locate the property with sufficient accuracy. *Id.* Huckin then contacted Kamp about his unsuccessful title search. *Id.* Kamp responded to Huckin's inquiry by telling him that Mrs. Cronk had signed the contract agreeing to Kamp's representation, and that Kamp had every intention of making Mrs. Cronk pay his fee. *Id.* Huckin then informed Kamp that "he considered such arrangement improper and would report his actions to the ethics committee if he continued to maintain his present position." *Id.* A complaint against Kamp was filed with the Bergen County Ethics and Grievance Committee. *Id.*

- At trial, Kamp testified that he believed that the contract between Mrs. Cronk and Staben created an attorney-client relationship between himself and Mrs. Cronk. *Id.* Kamp admitted, however, that he never met with Mrs. Cronk, nor did he do anything to protect her interests. *Id.* The Supreme Court of New Jersey concluded that the facts "clearly show[ed] a violation" of the disciplinary rules. *Id.* at 239. According to the supreme court, because "[a] conflict of interest is inherent in the relationship of buyer and seller," representation is improper unless the attorney makes a full disclosure and receives client consent. *Id.* at 240. The supreme court unanimously reprimanded Kamp. *Id.* at 242-43.
70. *Crest*, 23 Md. App. at 303, 327 A.2d at 905 (quoting *In re Kamp*, 194 A.2d 236, 240 (N.J. 1963)).
71. *Id.* at 307, 327 A.2d at 907. The court stated that

multiple representation in a business transaction is a per se violation of the Maryland Code, it did conclude the following: "This is rather a situation where an attorney has chosen to act for both sides (with the knowledge of both sides) in a business transaction—an undertaking which is indeed fraught with serious problems and potentially dire consequences and should generally be avoided."⁷²

Similarly, in *Atlantic Richfield Co. v. Sybert*,⁷³ the court of appeals subscribed to the court of special appeals' reasoning in *Crest* regarding multiple representation under the Maryland Code.⁷⁴ Specifically, the court of appeals agreed with the court of special appeals that when multiple representation does occur, full disclosure, as defined in *Crest*, must be made regarding the possible dangers involved, and the representation itself must "be fundamentally fair to both sides."⁷⁵ Recent decisions in Maryland affirm the *Crest* and *Atlantic Richfield* requirement of full disclosure by attorneys undertaking multiple representation.⁷⁶

In making a full disclosure to his clients, the attorney should explain the advantages and disadvantages of the common representation. When explaining the advantages, the attorney should inform all parties that they have both time and money to save; in addition, multiple representation may also have the effect of neutralizing conflicts that might be exacerbated if two more attorneys were added

Mr. and Mrs. Comstock were entitled to more, at the hands of Mr. Kaplan, than the advice that foreclosure was inevitable and, in effect, that their capitulation to the terms of the November 30, 1967 agreement was their only alternative to financial ruin. Indeed, it is clear beyond any reasonable doubt that Mr. Kaplan at that point should have urged that the Comstocks engage independent counsel. His failure to do so and his failure to make adequate disclosure compel a declaration that the November, 1967 agreement was void.

Id.

72. *Id.* at 300, 327 A.2d at 904.

73. 295 Md. 347, 456 A.2d 20 (1983).

74. *Id.* at 355-56, 456 A.2d at 24-25. Disciplinary Rules 5-101(A) and 5-105(A)-(C) were under consideration in *Atlantic Richfield*. *Id.* at 356, 456 A.2d at 25; see *supra* note 24 for the text of these disciplinary rules.

75. *Id.* at 356, 456 A.2d at 24. The court of appeals, quoting the court of special appeals, also adopted the language from *In re Kamp* verbatim. *Id.* at 356, 456 A.2d at 24-25.

76. See *Walton v. Davy*, 86 Md. App. 275, 286-88, 586 A.2d 760, 765-67, *cert. denied*, 323 Md. 309, 593 A.2d 669 (1991) (discussing, in the estate context, that a transaction will not be set aside if after full disclosure a client has voluntarily and knowingly consented to the multiple representation); *Blum v. Blum*, 59 Md. App. 584, 599-601, 477 A.2d 289, 296-97 (1984) (stating that although multiple representation is inappropriate in the domestic relations context, if undertaken, an attorney must nevertheless "disclose to the parties the possible ramifications of his [multiple] representation and their respective rights").

to the equation. On the other hand, the attorney should also explain that if the multiple representation fails, each person will need to hire a separate attorney, resulting in increased costs and loss of valuable time.

In addition, the attorney should explain to all parties that client confidences normally protected under Rule 1.6 must be shared among all clients.⁷⁷ Therefore, all clients are forbidden from "keeping secrets." The attorney should stress that when one of the clients fails to disclose all pertinent information, it directly affects everyone else's ability to make informed decisions.⁷⁸ The attorney should emphasize that when decisions are made, all parties should be present. In the event that the former is not possible, the persons not present at a meeting will be kept up to date by the attorney. The attorney should explain that if any one of the parties attempt an *ex parte* conversation, he must be aware that this information will be disclosed to the remaining parties. In the event that any one of them refuses to share all information, then they must be aware that the attorney will terminate the representation and discontinue any involvement in the transaction.

2. Multiple Representation in Real Estate Transactions

Although no Maryland case appears to have considered the propriety of multiple representation where the attorney has represented both clients in the past, several Maryland cases have addressed various aspects of multiple representation in real estate transactions. The Court of Appeals of Maryland addressed the conflict of interest inherent in the lender/mortgagee-borrower/mortgagor relationship in *Flaherty v. Weinberg*.⁷⁹ The court of appeals offered the following

77. See 1 HAZARD & HODES, *supra* note 2, § 2.2:202. After discussing confidentiality, Hazard and Hodes make the following comment: "Perhaps more important, the evidentiary attorney-client privilege does not apply to parties who have shared a lawyer, so that if the parties were later to litigate against each other over the subject of the failed mediation, the lawyer would be called and forced to testify as a witness." *Id.*

78. Martin, *supra* note 4, at 20.

79. 303 Md. 116, 492 A.2d 618 (1985). In 1977, Mr. and Mrs. Flaherty entered into a contract of sale to purchase a home in Frederick. *Id.* at 132, 492 A.2d at 626. The Flahertys financed their purchase by securing a mortgage loan through First Federal Savings and Loan Association (First Federal). *Id.* During the settlement, First Federal was represented by the law firm Weinberg, Michel and Sterns (Weinberg); the Flahertys, on the other hand, did not retain a separate attorney. *Id.* However, Weinberg assured the Flahertys that they were purchasing the property described in the contract of sale, and that this property contained a house and a well. *Id.* The Flahertys did not pay Weinberg any fees, in fact, Weinberg paid for the 1976 survey of the property. *Id.* at 132, 492 A.2d at 626.

observations. One area where potential conflicts exist involves the respective title requirements of the mortgagor and the mortgagee.⁸⁰ The mortgagee desires that the title not be impaired to the extent that indebtedness exceeds the value of the security in the property.⁸¹ In contrast, "the mortgagor wants assurances of maximum enjoyment of the property and freedom from post-settlement claims by third parties."⁸² Despite this apparent conflict, the court failed to address whether an attorney, giving the appropriate disclosures in accordance with the Maryland Code, could overcome this type of conflict, because it found that the facts did not give rise to an inference that a conflict existed between the Flahertys and First Federal's multiple use of the same attorney.⁸³

The court of appeals also has considered multiple representation of sellers, purchasers, and mortgagees in the context of a disciplinary proceeding against an attorney. In *Attorney Grievance Commission v. Lockhart*,⁸⁴ Lockhart, the attorney, was charged with violating several Disciplinary Rules under the Maryland Code, including Disciplinary Rules 5-105(B) and 5-105(C).⁸⁵ Lockhart had represented the sellers, Crystal Beach Manor, Inc., and its parent corporation, Extens Associates, various purchasers, and the mortgagees.⁸⁶ As settlements on the various properties occurred, Lockhart failed to procure releases of existing liens on the properties; therefore, the subsequent title insurance purchased by the buyers and the mortgagees did not reflect that the land conveyed was subject to these existing deeds of trust.⁸⁷

The court of appeals accepted the trial court's conclusion that DR 5-105(B) and DR 5-105(C) were violated because Lockhart's loyalty was to Extens, and such loyalty "adversely affected the exercise of his independent professional judgment in [sic] behalf of

In 1982, after obtaining another survey of their property, the Flahertys discovered that their swimming pool, well, and driveway were situated upon their neighbor's property. *Id.* at 132-33, 492 A.2d at 626. As a result, the Flahertys sued Weinberg and the 1976 surveyor for negligence and breach of warranty. *Id.* at 133, 492 A.2d at 626. With respect to the negligence claim asserted against Weinberg, the court of appeals held that the trial court had erred in sustaining Weinberg's demurrer because the facts alleged that the Flahertys were the intended beneficiaries of Weinberg's representation of First Federal. *Id.* at 138-39, 492 A.2d at 629-30.

80. *Id.* at 138, 492 A.2d at 629.

81. *Id.*

82. *Id.*

83. *Id.*

84. 285 Md. 586, 403 A.2d 1241 (1979).

85. *Id.* at 587, 403 A.2d at 1241. For the text of DR 5-105(B)-(C), see *supra* note 24.

86. *Id.* at 590, 403 A.2d at 1243.

87. *Id.*

the purchasers."⁸⁸ The court set forth the portion of the trial judge's opinion discussing the conflict of interest inherent in multiple representation in real estate transactions.⁸⁹ Specifically, quoting the trial judge's opinion, the court expressed the following opinion: " 'Clearly it would be improper . . . for an attorney to represent both the purchaser and the seller, or the purchaser and the lender, without full disclosure of the facts and consent by all parties.' "⁹⁰

Although in this case the court suspended Lockhart for one year,⁹¹ it did express a tolerance for multiple representation in real estate contexts.⁹² The court stated:

88. *Id.* at 591-92, 403 A.2d at 1244.

89. *Id.* at 595 n.6, 403 A.2d at 1245 n.6. In his opinion, Judge Rasin took " 'judicial notice of the practice in the Second Judicial Circuit [of Maryland] that it is not unusual for the same attorney to represent the seller, purchaser, and mortgagee in a real estate transaction context.' " *Id.* The *Lockhart* court then quoted liberally from Annotation, *Attorney and Client: Conflict of Interest in Real-Estate Closing Situations*, 68 A.L.R.3d 967, 970 (1976):

A problem for the attorney, and for representatives of the bar attempting to provide standards for guidance of the legal profession in this area, is that to require independent representation of all potentially conflicting interests would be impractical, requiring duplication of effort and greater expense on the part of individual clients, and a consequent increased cost to the public for legal services in real-estate transactions. On the other hand, to permit the representation of conflicting interests in the name of efficiency or economic necessity would interfere with the attorney-client relationship and with a client's right to expect an attorney to represent his interests to the fullest extent permitted by law.

Lockhart, 285 Md. at 595 n.6, 403 A.2d at 1245 n.6.

90. *Id.* (quoting ABA Comm'n on Ethics and Professional Responsibility, Informal Op. C-472 (1961)).

91. *Id.* at 597, 403 A.2d at 1247.

92. Other cases from the Court of Appeals of Maryland have expressed a similar view that multiple representation, with the appropriate disclosures and fairness to all parties involved, can be ethical in real estate transactions. See *Attorney Grievance Comm'n v. Collins*, 295 Md. 532, 553-56, 457 A.2d 1134, 1145-46 (1983) (suspending Collins for one year for failing, while representing both the buyer and seller, to advise the former of his options and to include in the contract a noncompetition clause); *Busey v. Perkins*, 168 Md. 19, 176 A. 474 (1935) (refusing to set aside the mortgage because the attorney had disclosed each party's respective rights and obligations).

In a recent decision, the Court of Special Appeals of Maryland held that Homa, the attorney who represented the seller, Friendly, Inc., and the buyer, P/T Ltd., Inc. in connection with the sale of mobile parks, was liable to the seller in fraud. *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 344, 350, 612 A.2d 322, 325, 328 (1992), *cert. granted*, 329 Md. 168, 617 A.2d 1085 (1993). According to the court of special appeals, when an attorney represents multiple parties in a real estate transaction, "if an attorney's relationship with the buyer interferes with his ability to represent the seller, the attorney must inform the seller." *Id.* at 347-48, 612 A.2d at 327. In this

Settlement lawyers in effect representing all interests, as did Lockhart, must recognize that they have a special duty to all parties to the settlement. This duty includes prompt obtention of appropriate releases of liens. It also includes prompt and proper disbursement of all funds passing through their hands.⁹³

A review of Maryland's relevant case law regarding multiple representation in business transactions indicates that the courts will permit multiple representation, provided that (1) the attorney makes a full disclosure to all clients, and (2) the representation is fundamentally fair. The type of full disclosure required by the Maryland courts mirrors the disclosure requirements codified in Model Rules 1.7 and 2.2,⁹⁴ and provides a noteworthy example of what full disclosure mandates.

In contrast to the explicit provisions of Model Rules 1.7 and 2.2, the Maryland courts will also judge whether the attorney's conduct in the transaction, and any resulting agreements, were fundamentally fair to all parties involved. By stressing that the attorney is obligated to act fairly in relation to all parties, the Maryland courts seem to dispel any notion that multiple representation, in accordance with the disciplinary rules, can be equated with the attorney acting as a scrivener for the parties.⁹⁵ On the contrary, by analyzing the agreement or transaction in terms of whether it was fair, the Maryland courts refuse to condone one-sided representation by the attorney. This refusal to recognize a one-sided agreement or transaction would likely translate into a rejection by the Maryland courts of the defense that the attorney was merely "making legal" the parties' independent agreement. To permit an attorney to

case, Homa's representation of the sellers was materially affected by his representation of the buyers because (1) he had a financial interest in P/T Ltd., and (2) he knew that the owner of P/T Ltd. would not assume Friendly's outstanding mortgage upon the consummation of the transaction. *Id.* at 350, 612 A.2d at 328. Therefore, because Homa did not disclose either his financial ties with the buyer or his knowledge with respect to the assumption of the mortgages prior to undertaking the representation, he breached his fiduciary duty to the sellers. *Id.* As a result, the court of special appeals upheld the trial court's finding that Homa's failure to make the appropriate disclosures made him liable to the sellers in fraud. *Id.*

93. Attorney Grievance Comm'n v. Lockhart, 285 Md. 586, 597, 403 A.2d 1241, 1247 (1979).

94. Compare *supra* notes 23-26 with notes 68-71 and accompanying text.

95. See, e.g., Blum v. Blum, 59 Md. App. 584, 601, 477 A.2d 289, 297 (1984) ("Although counsel may have believed that he was merely acting as a 'scribe' with regard to the Blum's separation agreement, . . . the very least counsel should have done was disclose to the parties the possible ramifications of his dual representation and their respective rights.'").

successfully raise this defense would result in an abrogation of the attorney's fiduciary obligation, which the Maryland courts have consistently recognized.⁹⁶

IV. OTHER STATE APPROACHES TO MULTIPLE REPRESENTATION

A. *Multiple Representation in Joint Ventures/Formation of Business Entities*

Several states have addressed the propriety of multiple representation in the context of joint ventures and the formation of business entities. Oregon and Washington, for example, have considered whether multiple representation is appropriate in the context of joint ventures. In an attorney disciplinary proceeding, the Supreme Court of Oregon confronted the situation where one attorney represented multiple investors interested in purchasing corporate stock.⁹⁷ Attempting to exonerate himself from disciplinary action, Moore argued that "he was representing the group purchasing Pinnacle Packing and not the individuals."⁹⁸

The court rejected Moore's defense because his testimony conflicted with his conduct in the situation.⁹⁹ The court held that Moore had violated Disciplinary Rule 5-105 of the Model Code, by failing "to make full disclosure" and to receive the consent of all the parties involved in the transaction.¹⁰⁰ However, the court did not rule out the possible validity of this defense should it be raised in a future case.¹⁰¹

96. See *Atlantic Richfield Co. v. Sybert*, 295 Md. 347, 353-55, 456 A.2d 20, 23-24 (1983); *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 346-47, 612 A.2d 322, 328-29 (1992), *cert. granted*, 329 Md. 168, 617 A.2d 1085 (1993).

97. *In re Moore*, 703 P.2d 961, 962 (Or. 1985).

98. *Id.* at 965. Apparently, Moore's defense was an application of the principle of "lawyer for the situation." See *generally infra* part V.A. (defining the "Lawyering for the Situation" model).

99. *Moore*, 703 P.2d at 965. The Disciplinary Review Board stated "that what [Moore] apparently did in this case was 'follow the money.'" *Id.*

100. *Id.*

101. *Id.* In addressing Moore's defense that he was representing the group and not the individuals, the court stated the following:

Moore's letter of January 11, 1980, claiming to represent only the group purchasing Pinnacle Packing came too late. The damage was already done. Which group was Moore representing—Vanya Corporation or JJ & L Properties?

[Disciplinary Rule] 5-105(C) does not apply to this situation because Moore did not make a "full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each client." There was no consent by [the clients] to Moore's multiple representation.

Id.

The Supreme Court of Washington confronted an analogous situation in *Eriks v. Denver*.¹⁰² The court dealt with the propriety of Denver's multiple representation of promoters and investors in a tax shelter arrangement.¹⁰³ The court held that Denver violated Disciplinary Rule 5-105 of the Model Code, by failing (1) to discuss any potential conflicts of interest with his investor clients and (2) "to explain any circumstances that might [have] cause[d] a client to doubt [his] loyalty."¹⁰⁴ By failing to disclose the potential conflict that existed with his investor clients and to discuss the "dangers inherent in multiple representation," the court stated that Denver also violated his duty of loyalty to his investor clients.¹⁰⁵

Had Denver only represented the investors, he could have advised them that the IRS would audit each client's return and would probably disallow the tax credits and deductions associated with the tax scheme.¹⁰⁶ In addition, he could have informed his investor clients that if the IRS disallowed the tax credits, they could potentially assert claims against the promoters.¹⁰⁷ Instead, when the conflict actually developed, Denver advised his investor clients to seek independent counsel.¹⁰⁸ According to the court, "the evil [that Disciplinary Rule 5-105 was] designed to prevent actually came about in this case."¹⁰⁹

The Supreme Court of Arizona considered the propriety of one attorney representing a group of individuals seeking to form a

102. 824 P.2d 1207 (Wash. 1992).

103. *Id.* at 1208-09. In 1977, the promoters started selling investments in master sound recordings as tax shelters. *Id.* at 1209. Because the promoters knew that the IRS would challenge the tax credits and deductions taken by the investors, they formed a trust fund to provide monies for a joint legal defense for the investors and promoters in future cases brought by the IRS against them. *Id.* The promoters then hired Denver to represent the investors and promoters who had contributed to the trust fund. *Id.*

Before undertaking the multiple representation, Denver knew that the IRS was categorically denying tax credits and deductions based upon investments in master sound recordings. *Id.* Denver also was confident that the IRS would disallow the investors' credits and deductions. *Id.* In addition, Denver knew that the investors might have potential civil claims against the promoters. *Id.* Denver undertook the multiple representation after discussing his knowledge about the IRS's tax policies with his promoters, but not with the investors. *Id.*

104. *Id.* at 1212.

105. *Id.* at 1211-12.

106. *Id.* at 1212.

107. *Id.*

108. *Id.* at 1211.

109. *Id.*

business entity in *In re Ireland*.¹¹⁰ In *Ireland*, while representing a group of incorporators, Ireland also represented one of them in a pending domestic lawsuit, the outcome of which would affect the assets of the newly formed corporation.¹¹¹ Not only did Ireland fail to disclose this domestic representation to the remaining incorporators, but he also failed to disclose this client's subsequent misuse of corporate funds.¹¹² Not surprisingly, the court held that the attorney had violated the Model Code by ignoring the full disclosure requirements.¹¹³ By negative implication, the court would appear to permit multiple representation in this type of situation, provided that full disclosure had occurred.

The common theme emerging from these three examples is that the representation of multiple parties in a joint venture or in the formation of a business entity can be ethically undertaken. In each of the preceding cases, the attorneys' conduct warranted sanctioning because of a failure to fully disclose possible conflicts. Had each attorney, in accordance with the Model Rules or the Model Code, explained to his respective clients the potential conflicts inherent in multiple representation and obtained their consent, he probably would not have been sanctioned.

B. Multiple Representation of Existing Clients

A few jurisdictions have addressed the multiple representation of existing clients. In considering whether an undisclosed law firm may represent multiple claimants to a fund being distributed by a copyright tribunal, the Legal Ethics Committee of the District of Columbia Bar (D.C. Committee) permitted multiple representation within the strict confines of Rule 2.2.¹¹⁴ Although the law firm had formerly represented two parties before a copyright tribunal, the D.C. Committee advised that the law firm could represent these same two parties and a third party on the following conditions:

- 1) [T]he firm fully discloses the risks and benefits of joint representation to all the clients, including a frank discussion of the implications of the rules on conflicts with former clients and confidentiality; 2) the firm obtains consent of each client to the representation; and 3) the firm does not

110. 706 P.2d 352 (Ariz. 1985) (en banc).

111. *Id.* at 356.

112. *Id.* at 356-57.

113. *Id.* at 358; see also *In re Kali*, 569 P.2d 227 (Ariz. 1977) (en banc) (suspending attorney for the failure to reveal his multiple representation to two clients for whom he had arranged a loan transaction).

114. Legal Ethics Comm. of D.C. Bar, Formal Op. 217 (1991), summarized in THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PRO-

advocate for any one of the clients in negotiations with the other clients as to the allocation of any award.¹¹⁵

Similarly, relying upon the mandates of Rule 2.2, the Connecticut Bar Association Committee on Professional Ethics (Connecticut Committee) advised an undisclosed law firm that it could draft a sales contract between two existing clients.¹¹⁶ The Connecticut Committee concluded that Rule 2.2¹¹⁷ governed the transaction because

(1) . . . both the small business and the non-profit corporation had been represented over a period of time by the firm; (2) . . . both the small business and the non-profit corporation appear to want the law firm to perform certain services for their common interest; (3) . . . the parties will establish the price and other terms of the sale without the

PROFESSIONAL CONDUCT ¶ 1001:2301 (1991) [hereinafter D.C. Bar, Formal Op. 217]. Ethics opinions are issued by the ABA and committees from each state's bar association at the request of an attorney faced with a particular ethical dilemma. *See generally* 1 to 4 NAT'L RPTR. ON LEGAL ETHICS (U. Publications of Am. 1993) (compiling various ethics opinions from each state). These ethics opinions are therefore only advisory in nature. Although the value of a particular ethics opinion will vary from state to state, ethics opinions generally serve to provide guidance to state courts when considering the propriety of an individual attorney's conduct, *see, e.g.*, Feinstein, *supra* note 8, at 86, and are often cited as persuasive authority, *see, e.g.*, Attorney Grievance Comm'n v. Lockhart, 285 Md. 586, 595 n.6, 403 A.2d 1241, 1245 n.6 (1979).

115. D.C. Bar, Formal Op. 217, *supra* note 114, ¶ 1001:2301.

116. Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 91-14 (1991), *summarized in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 7 Current Rep., No. 23, at 385 (Dec. 18, 1991). The Committee was presented with the following facts:

A law firm had for many years represented a small business and a non-profit corporation. One of the partners of the firm has recently been elected president of the non-profit corporation. The non-profit corporation has begun negotiations to acquire the small business. No one in the firm will participate in the negotiations to establish the terms and purchase price of any sale between the parties. The partner who is president of the corporation will abstain from participation in any discussion involving the transaction and from any vote taken.

Id.

117. The Committee initially inquired whether Model Rule 1.7 or Model Rule 2.2 applied to the situation. *Id.* The Committee concluded that Rule 1.7 did not apply and stated the following:

It does not appear that the representation of the small business by the law firm will be "directly adverse" to the representation of the non-profit corporation as required for the applicability of Rule 1.7. The deal will have been made and the firm will act only to prepare an agreement to incorporate the terms and to close the transaction. Therefore, the firm is not engaged by either party to take a position adverse to the other.

Id.

participation of anyone in the law firm; and (4) . . . the participation of the firm may be for the mutual benefit of both parties by expediting the transaction and saving legal expenses.¹¹⁸

According to the Connecticut Committee, it would permit the multiple representation on this limited basis if the law firm could satisfy each requirement of Rule 2.2.¹¹⁹

The California District Court of Appeals also addressed the representation of existing clients in *Blevin v. Mayfield*.¹²⁰ In *Blevin, Weis*, the attorney, drafted a deed for two clients who had already agreed upon the essential terms of the conveyance.¹²¹ Although the attorney had a prior attorney-client relationship with both clients, the court succinctly concluded that because the terms of the agreement had already been reached, "the only service performed by Mr. Weis was that of a scrivener."¹²² Therefore, the court affirmed the trial court's holding that the evidence did not justify the cancellation of the deed.¹²³

These three preceding examples generally demonstrate that the multiple representation of existing clients can occur without the attorney violating the disciplinary rules. Several common features distinguish, however, the multiple representation of existing clients from the multiple representation of parties participating in a joint venture or forming a business entity. First, unlike the previously discussed cases on multiple representation of parties participating in a joint venture or forming a business entity, these three examples stress that multiple representation is appropriate where the parties have agreed in advance upon all the essential terms. Therefore, these

118. *Id.*

119. *Id.* For the requirements of Rule 2.2, see *supra* note 26.

120. 11 Cal. Rptr. 882 (Cal. Dist. Ct. App. 1961).

121. *Id.* at 883. The case was brought as an action by the executor, Blevin, and executrix, Smith, to cancel a deed that the decedent, Howlett, executed in favor of Mayfield nine days before his death. *Id.* at 882-83. The plaintiffs sought to cancel the deed on the grounds of incapacity, fraud, and undue influence. *Id.* at 883. The decedent summoned Mayfield to his home, proposing that he sell her 80 acres of property for \$5,000. *Id.* The decedent realized that the property had a greater value than his asking price. *Id.* Attorney Weis drafted the deed only after satisfying himself that the decedent was competent. *Id.* On appeal, the plaintiffs argued that the trial court erred by refusing to set aside the deed drafted by Weis, because his prior relationship with both the decedent and Mayfield constituted an impermissible conflict of interest. *Id.* at 884.

122. *Id.*; see also *Beal v. Mars Larsen Ranch Corp.*, 586 P.2d 1378, 1384 (Idaho 1978) (adopting the view that "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").

123. *Blevin*, 11 Cal. Rptr. at 882, 884.

examples seem to indicate that the attorney may not serve as an “advocate” for the parties, but rather may only serve as a “scrivener” for the parties.

Second, two of the three examples advocated a strict compliance with Rule 2.2 that, at a minimum, requires full disclosure, client consent, and attorney evaluation prior to and during the representation. In contrast to the varying application of Rules 1.7 and 2.2 to the multiple representation of parties participating in a joint venture or forming a business entity, two of these three examples uniformly apply Rule 2.2. Therefore, according to these two examples, Rule 2.2, which governs intermediaries, should be followed when an attorney confronts the multiple representation of existing clients. Based upon these three examples, one can conclude that when undertaking the multiple representation of existing clients, an attorney (1) must be more careful to follow Rule 2.2 mandates and (2) should assume a less active role in the negotiations between the parties.

C. Multiple Representation in Real Estate Transactions

1. Unique Approaches to Multiple Representation in Real Estate Transactions

Many states permit the multiple representation of buyers and sellers, or buyers and lenders, or a combination of all three, provided that full disclosure and consent have been obtained pursuant to either the Model Code or Model Rules.¹²⁴ Of those states permitting multiple

124. See *Holley v. Jackson*, 158 A.2d 803, 808 (Del. Ch. 1959) (holding that when an attorney acts for both parties in a real estate closing, he has a particular duty to disclose any potential conflicts and to ensure the protection of all parties); *Florida Bar v. Teitelman*, 261 So. 2d 140, 143 (Fla. 1972) (stating that where a seller is unrepresented at closing, an attorney for the buyer or lender may not charge the seller absent (1) the creation of an attorney-client relationship, (2) full disclosure, and (3) client consent to the representation and the amount of the fee); *State v. Callahan*, 652 P.2d 708, 709, 713 (Kan. 1982) (suspending attorney who represented a buyer and seller because he failed to disclose his business ties to the buyer according to DR 5-105); *In re Dolan*, 384 A.2d 1076, 1080 (N.J. 1978) (requiring full disclosure before an attorney undertakes representation of both the buyer and the seller, or the financing party and the buyer); *In re Kamp*, 194 A.2d 236, 240-41 (N.J. 1963) (same); *In re Conduct of Samuels & Weiner*, 674 P.2d 1166, 1172 (Or. 1983) (stating that “[s]ince at least 1975, it has been clear that it is not proper for a lawyer to represent both the buyer and the seller in a real property transaction in the absence of express consent after full disclosure”); *Dillard v. Broyles*, 633 S.W.2d 636, 642-43 (Tx. Ct. App. 1982) (holding that an attorney may represent both the buyer and the seller after he has disclosed potential conflicts and obtained the parties’ consent), *cert. denied*, 463 U.S. 1208 (1983); *In re Nelson*, 332 N.W.2d 811, 812 (Wis. 1983) (suspending an attorney who represented the

representation in real estate transactions, some have imposed additional requirements beyond those listed in the Model Code or Model Rules, or have offered different rationales for the acceptance of multiple representation. Because these states have chosen a unique approach to multiple representation in real estate transactions, each approach is discussed separately.

The West Virginia State Bar Committee on Legal Ethics (West Virginia Committee) addressed multiple representation in a host of residential real estate transactions because of a perceived "need among members of the state bar for a formal opinion."¹²⁵ In addressing the representation of buyers and lenders, the West Virginia Committee stated that "because of the nature of the real estate market in this state it is appropriate for a lawyer to represent both buyer and lender if certain conditions are met."¹²⁶ Before undertaking the representation, the attorney must first conclude that (1) "no actual conflict of interest" exists and (2) the parties can be competently served.¹²⁷ Second, the attorney must make a full disclosure in writing and receive written consent from the parties.¹²⁸ Third, in the event a dispute develops, the attorney is barred from representing either party in litigation.¹²⁹

The West Virginia Committee next discussed the representation of buyers and sellers, acknowledging that this situation is "less likely"

buyer and the seller in negotiations for the sale of a condominium, for his failure to disclose his financial ties to seller and seller's precarious financial position); see generally Jeb C. Sanford, *Ethical, Statutory and Regulatory Conflicts of Interest in Real Estate Transactions*, 17 ST. MARY'S L.J. 79, 88-90 (1985) (discussing multiple representation of lender and borrower or buyer and seller in a single real estate transaction).

125. West Virginia State Bar Comm. on Legal Ethics, Formal Op. 89-1 (1989), summarized in THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 6 Current Rep., No. 6, at 117 (Apr. 25, 1990).

126. *Id.* In describing the West Virginia real estate market, the Committee stated the following:

Because this is a small, somewhat rural state, real estate transactions between private individuals tend to be handled by one attorney. Frequently there is no clarification as to whom this attorney represents. Conflict questions cannot be resolved, however, without determining on whose behalf the lawyer is acting.

Id.

127. *Id.*

128. *Id.* The Committee stated that "a lawyer may not be a party to a real estate transaction with a client without the written informed consent of the client."

Id.

129. *Id.* However, the Committee commented that an attorney may represent the buyer or lender, or both, in subsequent negotiations according to the requirements of Rule 2.2. *Id.*

to occur.¹³⁰ The West Virginia Committee remarked: "While there is no absolute ban on a lawyer's representation of both [the] buyer and seller, the lawyer must be very cautious in undertaking such a representation."¹³¹ The attorney must provide the client with a written disclosure sheet explaining that the attorney-client privilege cannot exist.¹³² Similar to the representation of buyers and lenders, the attorney must withdraw if a conflict develops, and he cannot represent either the buyer or seller in subsequent litigation.¹³³

Finally, the West Virginia Committee addressed "the unusual case" where the attorney is asked to represent the buyer, lender, and seller.¹³⁴ In addition to written disclosure, written consent of the clients, and compliance with Rule 2.2, the attorney must clarify "at the outset of the transaction whose interests he is representing."¹³⁵ By requiring written disclosure and consent in all multiple representation situations, the West Virginia Committee adds an additional requirement to Model Rules 1.7 and 2.2. In addition, the West Virginia Committee appears to accept multiple representation more readily because of the realities of the real estate market in West Virginia—a justification not previously offered as to why multiple representation should be sanctioned.

Relying on Rule 1.7 instead of Rule 2.2, the Committee on Professional Ethics of the Illinois State Bar Association (Illinois Committee) advised that multiple representation is permissible in real estate transactions.¹³⁶ Under the Illinois Committee's interpretation of Rule 1.7, an attorney may draft documents for the lender and also represent the buyer, provided that the attorney "continuously monitor[s]" the representation.¹³⁷ "[I]f the lawyer believes that one representation is adversely affecting the other, he must withdraw from each representation."¹³⁸

Significantly, the Illinois Committee recognized an additional limitation: If the attorney or his law firm serves as general counsel to the lending institution in a real estate transaction, neither the

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Illinois State Bar Ass'n, Formal Op. 90-31 (1990), summarized in THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 1001:3004 (1991).

137. *Id.*

138. *Id.* The Committee stated that "[i]nitial disclosure must include the possible necessity of subsequent withdrawal." *Id.* In addition, the attorney may not represent either the buyer or the lender in a subsequent foreclosure or bankruptcy proceeding in cases where the lender has a security interest. *Id.*

attorney nor the law firm may represent the buyer for several reasons.¹³⁹ First, representation of the buyer "may be materially limited by the lawyer's responsibilities to the lender."¹⁴⁰ Second, "even after full disclosure and client consent the lawyer cannot 'reasonably believe' that the representation of the buyer will not be adversely affected."¹⁴¹ Finally, the attorney "has a fiduciary duty to that institution and may have a possible personal interest therein."¹⁴²

In a similar vein, the Massachusetts Bar Association Ethics Committee (Massachusetts Committee) recommended that the multiple representation of a borrower/buyer and mortgage lender in the same real estate purchase can be ethical.¹⁴³ Although the Massachusetts Committee noted that the interests of the parties are "likely to be diverse regarding the substantive contents of the mortgage documents," prior to undertaking joint representation, the lawyer should review all documents for any existing or possible conflicts.¹⁴⁴ Additionally, the lawyer should receive, preferably in writing, the informed consent of the borrower and mortgage lender.¹⁴⁵ Finally, if a conflict or a dispute should occur, the attorney is bound to withdraw from representing either party.¹⁴⁶

The Massachusetts Committee next advised attorneys about the relationship between confidentiality and multiple representation:

Unless otherwise agreed, multiple representation waives the confidentiality obligation between the borrower and the lender, and both clients should be so advised. A lawyer who

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Massachusetts Bar Ass'n Ethics Comm., Op. 1990-3 (1990), summarized in THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 6 Current Rep., No. 13, at 259 (Aug. 1, 1990) [hereinafter Massachusetts Bar Ass'n Ethics Comm., Op. 1990-3]. The Committee analyzed this transaction according to DR 5-105(C). See *supra* note 24 for the full text of DR 5-105(C).

144. Massachusetts Bar Ass'n Ethics Comm., Op. 1990-3, *supra* note 143, at 259. According to the Committee, when reviewing loan documents an attorney should be alerted to actual or potential conflicts if the documents contain "oppressive, ambiguous, or unusual provisions." *Id.*

145. *Id.* The Committee stated that [t]he lawyer should advise the borrower on the important terms of the mortgage and note, as well as on the contract that defines the lender's obligations to fund the mortgage loan, especially with respect to conditions imposed by the lender. A clearly written, unambiguous mortgage commitment that delineates the rights of the lender and borrower greatly reduces any risk of actual conflict.

Id.

146. *Id.*

acquires knowledge about either client relevant to the transaction, such as uncertain financial condition or source of funds, or misstatements, omissions, or errors in the mortgage application or the documents to be signed at closing, is required to disclose it to the other client.¹⁴⁷

In addition, the Massachusetts Committee suggested that potential conflicts could be prevented from occurring at the closing if the attorney included a provision in the purchase and sales agreement to the effect that the "seller will provide title acceptable to the buyer's mortgage lender or that any questions of title will be settled by reference to ascertainable standards."¹⁴⁸

Like Massachusetts, the South Carolina Bar Association (Bar Association) advised that the multiple representation of lenders and borrowers in real estate transactions can occur without violating the disciplinary rules. The Bar Association offered a different rationale for its position, however. In its advisory opinion, the Bar Association was presented with the following factual scenario, which is similar to that presented in Act I, Scene 3:

Law Firm frequently represents Lender in a wide range of matters. Law Firm also represents various Borrowers from time to time in real estate loan closings in which Lender is the lending party. In these transactions, Law Firm considers itself to be representing both Lender and Borrower; however, Law Firm considers its primary obligation to the Lender.¹⁴⁹

Based upon these facts, the Bar Association concluded that "[a] conflict does not necessarily exist where one attorney represents the interests of more than one party in a loan closing."¹⁵⁰ Rather than relying on Model Rules 1.7 and 2.2 for justification, the Bar Association turned instead to Model Rules 1.2(c) and 1.9(a).¹⁵¹ Rule 1.2(c) provides that an attorney "may limit the objectives of the representation if the client consents after consultation."¹⁵² In light of Rule 1.2, the Bar Association stated that

[i]n order to preserve a continuing relationship with and loyalty to Lender, Law Firm prior to representing Borrower in a loan transaction may request that Borrower sign a

147. *Id.*

148. *Id.*

149. South Carolina Advisory Op. 93-23 in 4 NAT'L RPTR. ON LEGAL ETHICS SC: Opinions, at 105 (U. Publications of Am., 1993).

150. *Id.* at 105.

151. *Id.* at 105-06.

152. *Id.* at 105.

document whereby Law Firm limits the objectives of its representation and Borrower consents to Law Firm representing the Lender in disputes which may arise between Borrower and Lender in the future involving the mortgage loan Upon completion of the closing such representation is deemed to be concluded.¹⁵³

The Bar Association then reviewed Rule 1.9(a), which provides that an attorney "who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter . . . unless the former client consents after consultation."¹⁵⁴ In light of Rule 1.9, the Bar Association commented that despite the waiver of the Borrower, situations involving the continued representation of the Lender could arise which might be adverse to the interests of the Borrower.¹⁵⁵ In this event, an attorney would be required to obtain additional consent from the former client, the Borrower, or forego the continued representation of the Lender.¹⁵⁶

The New York State Bar Association Ethics Committee (New York Committee) also considered the propriety of multiple representation of sellers and lenders in real estate transactions. The New York Committee concluded that an attorney should not represent both parties, except under unusual circumstances, and then only if the conditions of Disciplinary Rule 5-105(C) are satisfied.¹⁵⁷ The New York Committee first recognized that multiple representation of a buyer and seller may ethically occur where "there is an agreement on price, time and manner of payment and other basic business terms."¹⁵⁸ In the case of seller and lender, the attorney should be careful to determine "after weighing the specific facts and circumstances . . . that it is not likely that the interest of these parties will differ," and should procure each client's consent after full disclosure of the implications.¹⁵⁹ The New York Committee explained the potentially differing interests that can occur between sellers and lenders:

If, for example, issues arise concerning the acceptability of title, or environmental conditions, or some other condition of closing, the seller may desire to close while the lender may decide it has no obligation to make the loan. In that event, the lawyer may be obligated to withdraw from rep-

153. *Id.* at 105-06.

154. *Id.* at 106.

155. *Id.*

156. *Id.*

157. New York State Bar Ass'n Op. 611 (1990) in 1990 WL 304218, at *1.

158. *Id.*

159. *Id.* at *2.

resenting either party, with possible delay and disruption to the pending transaction.¹⁶⁰

In direct conflict with the consensus existing among the various state courts and state bar associations that multiple representation may be ethically undertaken, one commentator urges attorneys to decline to undertake multiple representation in residential real estate settings.¹⁶¹ According to this argument, "[t]he purchase of a home is one of the major rites of passage for a great majority of the American public."¹⁶² Under this approach, the significance of purchasing a home to the average buyer coupled with the inherent conflict of interest involved in either the buyer-seller or buyer-lender relationship mitigates against multiple representation.¹⁶³ Therefore, "a lawyer should avoid any attempt to represent more than one party in a residential real estate transaction. [E]ven the cautious lawyer may run into unexpected professional responsibility problems when attempting" multiple representation.¹⁶⁴

2. Critique of Multiple Representation in Real Estate Transactions

Advocating a blanket denial to undertake multiple representation in the residential real estate setting is problematic because such a denial understates the client's role by abrogating it completely.¹⁶⁵ Urging attorneys to decline to undertake multiple representation indicates a lack of appreciation for the ability of clients to make informed choices once they are apprised of all material facts, and also fails to take into account practical realities. Particularly in the residential real estate context, the closing costs associated with securing a first mortgage are substantial enough¹⁶⁶ to make hiring a

160. *Id.*

161. Philip W. Bolus, Comment, *One for All is Worth Two in the Bush: Mixing Metaphors Creates Lawyer Conflict of Interest Problems in Residential Real Estate Transactions*, 56 U. CIN. L. REV. 639, 662 (1987).

162. *Id.* at 639. According to the United States Government statistics, "the purchase of a residence is 'the single most significant financial step of a lifetime.'" *Id.* at 642 (quoting [Current] Fed. Banking L. Rep. (CCH) 69, 530, reprinted in UNITED STATES DEP'T OF HOUSING AND URBAN DEV., SETTLEMENT COSTS AND YOU, A HUD GUIDE FOR HOME BUYERS (1977)).

163. *Id.* at 642-45.

164. *Id.* at 662.

165. See *supra* text accompanying note 8.

166. See 12 U.S.C. § 2601 (1988), where Congress outlined the following reasons for its 1988 amendments to the Real Estate Settlement Procedures Act of 1974: The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unneces-

separate attorney financially impossible for the average home buyer.

An approach urging attorneys to decline multiple representation, while easily followed, forecloses a realistic option for many middle income to low income clients—the choice to benefit from an attorney's legal assistance.¹⁶⁷ Unfortunately, this approach runs the risk of leaving the clients without the assistance of counsel. If an attorney fully discloses any potential conflicts and reasonably believes the representation can be undertaken without adverse effect on the parties' interests, then the clients ought to make the final decision about whether to hire the attorney. As the Supreme Court of New Jersey has stated regarding the nature of full disclosure, "[i]t is utterly 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."¹⁶⁸ Full disclosure enables a client to make an informed choice as to whether to hire an attorney.

However, to suggest that the realities of the market dictate that multiple representation be tolerated, as West Virginia seems to do,¹⁶⁹ does not necessarily compel a finding that multiple representation is per se ethical. Multiple representation, regardless of the nature of the real estate market in a particular state, is only ethical if the attorney follows the mandates of the Model Rules by making the appropriate disclosures and receiving informed client consent. Before undertaking multiple representation in a real estate setting, the attorney ought to consider whether, under a given situation, he is capable of addressing the issues, answering the concerns, and protecting each client. However, an attorney should not undertake multiple representation because he considers that the practical realities of the real estate market where he practices law justify such conduct.

West Virginia advises that attorneys make a full disclosure in writing and also receive client consent in writing.¹⁷⁰ Similarly, Massachusetts suggests that client consent be made in writing.¹⁷¹ Requiring an attorney to make written disclosures and to receive written client

sarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.

Id.; see also Michael S. Glassman, Note, *Real Estate Settlement and Procedures Act of 1974 and Amendments of 1975: The Congressional Response to High Settlement Costs*, 45 U. CIN. L. REV. 448, 448 (1976) ("These [settlement] costs can be especially burdensome because they fall due at closing, cannot be prorated over the life of the mortgage, and in some instances are unreasonable.").

167. See Brown, *supra* note 6, at 51.

168. *In re Lanza*, 322 A.2d 445, 448 (N.J. 1974).

169. See *supra* note 126 and accompanying text.

170. See *supra* text accompanying note 128.

171. See *supra* text accompanying note 145.

consent is important and ought to be mandatory under the Model Rules. When an attorney accompanies his oral disclosure with a written disclosure sheet, the attorney enables the client to evaluate, at his own leisure, the risks and the advantages of the multiple representation. An attorney should also be obligated to obtain client consent in writing. First, requiring a client to consent in writing will not only put the client on notice of the dangers inherent in multiple representation, but will also make the client more likely to take his decision more seriously. Second, having the client sign a consent form also can protect the attorney from later claims by the client that he did not understand the ramifications of multiple representation, such as the waiver of confidentiality between the multiple parties. Therefore, written client consent and written disclosure serve as a safeguard for both the attorney and the client.

South Carolina's approach in the real estate closing situation is particularly troublesome.¹⁷² In essence, South Carolina allows a type of multiple representation that is inherently one-sided. According to the South Carolina Bar Association, with client consent, an attorney can represent the borrower and lender in a closing, and then represent the lender against the borrower should future litigation arise. Although the South Carolina Bar has justified its position with reference to Model Rules 1.2 and 1.9, its reliance upon these two Rules is misplaced. For example, the comment to Rule 1.9 states that "when a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests is clearly prohibited."¹⁷³ Similarly, Rule 2.2 contemplates that after the representation in the matter is completed, the attorney shall not represent any of those parties "in the matter that was the subject of the intermediation."¹⁷⁴

Even in light of the mandates of Rules 1.2 and 1.9, it is problematic to suggest that an attorney's loyalties in multiple representation will not be divided when he is financially tied to only one of the clients. For example, what motivation does the attorney have to represent the best interests of the borrower, when the lender is paying his fee?¹⁷⁵ South Carolina's approach seems to encourage multiple representation where the attorney's judgment is skewed at the outset.

172. See *supra* text accompanying notes 149-56.

173. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. (1983).

174. *Id.* Rule 2.2(c).

175. See discussion *infra* part VI.F. For a discussion of the problems inherent in multiple representation where the attorney has had prior dealings with only one of the parties, see *infra* part VI.B.

V. LAWYER FOR THE SITUATION:¹⁷⁶ AN ALTERNATIVE MULTIPLE REPRESENTATION MODEL

A. Defining the "Lawyering for the Situation" Model

Although being a "lawyer for the situation" contemplates operation similar to that imposed by Rule 2.2,¹⁷⁷ it also adds some variations. Examples of matters requiring "situation treatment" include the following: (1) where two or more people, who have not been clients, bring a problem to a lawyer; (2) where a client becomes involved with a third party who does not have an attorney; and (3) where two or more existing clients bring a "situation" to the attorney.¹⁷⁸ Yet, "[l]awyering for the situation" is marginally illicit professional conduct because it violates the principle of unqualified loyalty to [one] client.¹⁷⁹

Lawyering for the situation has been compared to the representation of an organization under Model Rule 1.13.¹⁸⁰ "Just as formal entities cannot make their wishes known directly, neither can 'situations.'"¹⁸¹ The significance of characterizing the representation as a "situation" is that the attorney represents "no one," but acts in an effort to devise a common resolution of the problem.

Although defining what constitutes lawyering for the situation is difficult because the concept is both flexible¹⁸² and fact specific, a common thread pervades this theory: As the only attorney involved, he acts as a confidante, an analyst, an interpreter, and an instructor.¹⁸³ The attorney must listen to each party's concerns, discover their needs, articulate incoherent or weak positions, outline the law,

176. The term "lawyer for the situation" has been attributed to Justice Louis D. Brandeis. Frank, *supra* note 11, at 683-86. In the midst of Senate confirmation hearings questioning his ethics, Justice Brandeis characterized his past representation of several clients as counsel for the situation. *Id.*

177. 1 HAZARD & HODES, *supra* note 2, § 2.2:102-03.

178. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 63-64 (1978) [hereinafter HAZARD, ETHICS].

179. *Id.* at 64.

180. See 1 HAZARD & HODES, *supra* note 2, at 312. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1983).

181. 1 HAZARD & HODES, *supra* note 2, at 312.

182. "[U]nlike advocacy or legal counselling involving a single client, lawyering for a situation is not provided with a structure of goals and constraints from outside. The lawyer and the clients must create the structure for themselves, with the lawyer being an active participant." HAZARD, ETHICS, *supra* note 178, at 66.

183. *Id.* at 64.

and devise a plan or agreement that reflects the common agreement.¹⁸⁴ The attorney "could be said to be playing God."¹⁸⁵

The "lawyer for the situation," on the other hand, has choices to make that obviously can go against the interest of one client or another, as the latter perceives it. A lawyer who assumes to act as intercessor has to evoke complete confidence that he will act justly in the circumstances. This is to perform the role of the administered justice itself, but without the constraints inherent in the process A person may be entrusted with it only if he knows that in the event of miscarriage he will have no protection from the law. In this respect, acting as lawyer for the situation can be thought of as similar to a doctor's "authority" to terminate the life of a hopeless patient: It can be properly undertaken only if it will not be questioned afterwards.¹⁸⁶

Although this approach could properly be "fit" into the framework of the Model Rules, it allows the attorney to be more than just an intermediary or a passive advisor. This approach appears to encourage the attorney to serve as a third party participant. Lawyering for the situation represents the "ideal forms of intercession suggested by the models of wise parent or village elder."¹⁸⁷

B. Critique of the "Lawyering for the Situation" Model

Although lawyering for the situation has its appeal as a departure from the traditional roles assumed by attorneys, this approach presents some potential problems. As Geoffrey Hazard, the promulgator of this approach, concedes, "[p]laying God is a tricky business."¹⁸⁸ Not only must the clients place an incredible amount of trust in the attorney, but they also must defer to the attorney's "judgment." In addition to these concerns, a conscientious attorney will likely decline to assume such an omniscient role because of doubts regarding his or her own wisdom and sense of judgment.

Some basic assumptions underlying this approach also are troublesome. First, Hazard assumes that an attorney does indeed "know what is best" for a group of clients.¹⁸⁹ A lawyering model based upon such an assumption seems prone to a paternalistic form of representation. Often clients with a prevailing common interest need

184. *Id.* at 64-65.

185. *Id.* at 65.

186. *Id.* at 67.

187. *Id.* at 65.

188. *Id.*

189. *Id.* at 64-65.

a referee rather than a "village elder." Unlike the clients, the attorney is often in a superior position, having the resources available to ensure a particular outcome. Although in an ideal world an attorney would not overreach, but would rather serve as consensus builder, in reality the opposite may be true. The more active the role that the attorney assumes, the more likely that an attorney will impose his or her judgment upon the decision of the group. As a master of both the law and the subtle art of persuasion, an attorney can influence the desired outcome. As a trained advocate, the attorney's active participatory role, as Hazard contemplates it, may forge a solution or an agreement never intended by the parties.

Second, as Hazard admits, this flexible lawyering model has not been championed by members of the bar, and "[t]he fact that it has not been may itself be worth exploring."¹⁹⁰ Lawyering for the situation has not been endorsed by bar associations, probably because it is a model that involves proceeding on an ad hoc basis.¹⁹¹ To assume that attorneys want to engage in a multiple representation situation with few guidelines is problematic. First, attorneys are accustomed to applying rules. A large portion of law school and the practice of law consists of the application of "black-letter" law. Second, a sparsity of guidelines increases the likelihood that an attorney may run afoul of the ethical norms of the disciplinary rules—a proposition that promulgators of the disciplinary rules have probably recognized.¹⁹²

Despite these legitimate concerns, lawyering for the situation embraces the spirit of what multiple representation ought to accomplish. In this model, "[w]hat the lawyer actually does is let the parties to the situation share his knowledge, skill and judgment."¹⁹³ Using one attorney "discourage[s] [the] escalation of conflict and recruit-

190. *Id.* at 65.

191. *See supra* note 182.

192. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). The Preamble to the Model Rules states in pertinent part:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic underlying principles of the Rules.

Id.

193. ETHICS AND THE LEGAL PROFESSION 279, 281 (Michael Davis & Frederick A. Elliston eds., 1986).

ment of . . . allies"¹⁹⁴ among the parties. Therefore, the parties benefit by saving time and money and by resolving the situation on an amicable basis.

In addition to the benefit that can accrue to the individual clients, multiple representation also can produce positive side-effects in society. As one commentator describes, the attorney that categorically declines multiple representation and encourages each client to retain separate attorneys disserves the public:¹⁹⁵

In the litigation process, a lawyer might be disciplined for representing conflicting interests. There is no comparable disciplinary proceeding that enables the profession to assert that a lawyer is overbearing or too demanding for requiring two lawyers where one might do. The public's remedy is to avoid lawyers entirely. That result should be regarded as a disservice to the public.¹⁹⁶

Another positive side-effect that may accrue to society is the decrease in litigation. According to another commentator, "[t]he presence of multiple attorneys may also promote more litigiousness than there needs to be."¹⁹⁷ For instance, where three clients might be able to reach an agreement "in an informal setting, it may be that such agreement will be difficult where both sides are represented by attorneys *before* an actual conflict has arisen."¹⁹⁸ Multiple representation, therefore, appears to benefit both individual clients and society.

VI. ETHICAL CONSIDERATIONS IN UNDERTAKING MULTIPLE REPRESENTATION

When undertaking multiple representation, an attorney should conduct himself in accordance with either Rule 1.7 or Rule 2.2 because, unlike the lawyering for the situation model, each Rule provides a concrete set of guidelines. At a minimum, each Rule obligates an attorney to consult with his clients about the implications of the multiple representation and the advantages and risks involved, and to obtain client consent.¹⁹⁹ In addition, both Rules ensure that the clients are apprised of material facts before they agree to a multiple representation arrangement.

194. HAZARD, *ETHICS*, *supra* note 178, at 64.

195. *See* BROWN, *supra* note 6, at 51.

196. *Id.*

197. *See* KIPNIS, *supra* note 3, at 286.

198. *Id.*

199. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b) & 2.2(a) (1983).

Whether the attorney should operate under Rule 1.7 or Rule 2.2 depends upon the facts of each case. In determining whether Rule 1.7 or Rule 2.2 should be applied, the attorney should consider the following factors: (1) The relationship between the parties,²⁰⁰ (2) the prior dealings between the parties,²⁰¹ (3) whether the parties are existing clients,²⁰² (4) the degree to which the parties need to be apprised of the applicable law,²⁰³ (5) what role the attorney will serve in drafting agreements,²⁰⁴ and (6) the fee arrangement between the clients and the attorney.²⁰⁵ By analyzing each factor, an attorney is better able to judge the scope of his potential representation and the degree to which conflicts, actual or potential, may affect the multiple representation.

If the representation is more complicated at the outset, this would weigh in favor of the application of Rule 2.2, because this Rule requires fuller disclosure by the attorney than Rule 1.7.²⁰⁶ Likewise, if the situation between the parties is more susceptible to conflicts, the application of Rule 2.2 is favored because it requires a more in depth evaluation by the attorney than Rule 1.7.²⁰⁷ Although an attorney may initially opt to follow Rule 1.7, the attorney's subsequent evaluation regarding the scope of his representation, or the nature of actual or potential conflicts between the parties, or both, might convince the attorney to follow Rule 2.2 instead.

A. *Relationship Between the Parties*

In deciding to undertake multiple representation, the attorney should first consider the relationship between the parties. By their very nature, some relationships are ridden with conflicts. For example, conflicts are less likely to exist between two buyers as opposed to a buyer and a seller. To the extent the relationship is not prone to conflicts, the likelihood that a conflict will develop is naturally minimized. If the relationship appears amicable at the outset, the attorney probably only needs to follow Rule 1.7. If, however, the relationship becomes adverse, an attorney should engage in the more extensive evaluation process that is mandated by Rule 2.2.²⁰⁸ To the extent that any conflicts cannot be reconciled, the attorney may be

200. See *infra* part VI.A.

201. See *infra* part VI.B.

202. See *infra* part VI.C.

203. See *infra* part VI.D.

204. See *infra* part VI.E.

205. See *infra* part VI.F.

206. See *supra* notes 26, 43-46 and accompanying text.

207. See *supra* notes 26, 47-48 and accompanying text.

208. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)-(b) (1983).

obligated by Rule 2.2 to withdraw from the representation.²⁰⁹

Even where it may appear that the parties have an overriding common interest, the relationship may possess subtle conflicts. For example, "power dynamics" underlying the relationship²¹⁰ may prevent the "matter [from being] resolved on terms compatible with the clients' best interests" or prevent each client from making informed decisions.²¹¹ For example, "[a] contemplated 50-50 partnership may have deeply unsurfaced aspects because of age, wealth, know-how, and motivational differences between the two parties."²¹² Rather than a neutral attorney, the dominated party needs an advocate.²¹³

Prior to undertaking representation of the parties seeking to set up a joint venture to sell industrial equipment, Attorney Jane from Act I, Scene 1 ought to be aware of warning signs that might indicate the existence of potential conflicts between Arnold, Betty, and Emily. Whether proceeding under Rule 1.7 or Rule 2.2, Attorney Jane should consider the following questions: Is one of her clients more sophisticated in business matters such that he or she may dominate the others?²¹⁴ Are Arnold, Betty, and Emily already disagreeing about the amount of each partner's initial capital contribution, or that partnership voting rights should not be equal?²¹⁵ Have Arnold, Betty, and Emily failed to discuss some significant issues, such as the amount of financing required by the joint venture, or how to handle a withdrawing partner?²¹⁶ Are Arnold, Betty, and Emily disturbed by the idea that they may keep no secrets and that all negotiations must occur jointly?²¹⁷ To the extent that any one of these questions is answered affirmatively, Attorney Jane should consider that multiple representation may be inappropriate.

Assessing whether multiple representation should be undertaken also depends upon whether Attorney Jane "reasonably believes" that none of the parties will be adversely affected.²¹⁸ To the degree that

209. See *id.* Rule 2.2(c).

210. The term "power dynamics" loosely refers to those factors underlying the parties' relationship that enables one party to dominate or control the judgment or decision making ability of the other party, such as age, wealth, social skills, emotional well-being, motivational differences, and/or business sophistication. See Brown, *supra* note 6, at 51; Robert G. Spector, *The Do's and Dont's When One Lawyer Represents Both Parties*, FAM. ADVOC., Spring 1991, at 16, 17.

211. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)(2) (1983).

212. Brown, *supra* note 6, at 51.

213. Spector, *supra* note 210, at 17.

214. See *id.* at 17.

215. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1983).

216. See Spector, *supra* note 210, at 17.

217. See 1 HAZARD & HODES, *supra* note 2, § 2.2:202.

218. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 & Rule 2.2 (1983).

the relationship between Arnold, Betty, and Emily is antagonistic or bound to lead to "contentious litigation or negotiations," Attorney Jane should decline representation.²¹⁹ If, however, Attorney Jane believes in good faith that she can neutralize the effects of any power dynamics that may exist, multiple representation would be ethical, and has often been successful where parties are seeking the formation of a business entity or the establishment of a joint venture to sell industrial equipment. Unlike the situation where parties are seeking to dissolve a partnership, if Attorney Jane's multiple representation fails, the end result is that the joint venture does not succeed. Attorney Jane will not confront the situation where Arnold, Betty, and Emily bring lawsuits against each other if the multiple representation fails.

B. Prior Dealings with the Parties

Another consideration in an attorney's decision to undertake multiple representation is whether he has had prior dealings with one of the parties. Commentators disagree over the course the attorney should take when confronted with this situation. To the extent that the attorney has represented one of the parties in the past, serving as an intermediary may be improper "when impartiality cannot be maintained."²²⁰ A salient example of when intermediation may be inappropriate exists when the attorney has represented one of the clients "for a long period and in a variety of matters," and has just been introduced to the new client.²²¹ Other commentators believe that if the attorney has had either a close professional or personal relationship with any of the parties, multiple representation should not be undertaken:²²² "[A] lawyer can hardly be thought of as neutral when he or she has benefitted from one of the parties as a client or may do so in the future."²²³ As a practical matter, an attorney should probably recommend that the "new client or clients" seek independent counsel.²²⁴

An example of when multiple representation might be appropriate is when the attorney is asked to establish an equal partnership.²²⁵ If the parties are "friendly and cooperative," have "similar business abilities and objectives," and are in a financial position to hire separate attorneys should the representation fail, multiple represen-

219. *See id.* Rule 2.2 cmt.

220. *Id.*

221. *Id.*

222. Spector, *supra* note 210, at 18.

223. *Id.*

224. 1 HAZARD & HODES, *supra* note 2, § 2.2:204.

225. Martin, *supra* note 4, at 20.

tation can be ethical.²²⁶ The attorney should ask the parties with whom he has no prior dealings the following questions: What advantage do they see in using one attorney? Why are the clients unwilling to hire separate attorneys? Are each of the clients in a financial position to hire separate attorneys? In addition, the attorney should ask his current client the following questions: Who is responsible for my fee? Are you aware that I may have to disclose to the remaining parties information that I have acquired through my representation of you in the past if it materially affects this transaction? Who suggested that I represent all of these parties? The answers to both sets of these questions will aid the attorney in determining if all parties are aware of the meaning of multiple representation, and their intentions in only using one attorney. To the extent that the attorney thinks that his client has improperly influenced the other parties' consent to multiple representation, the attorney should decline multiple representation.

Discretion also weighs in favor of the attorney declining multiple representation when he serves as general counsel for one party.²²⁷ Unlike the situation where an attorney owes allegiance to all clients equally, a situation where an attorney is financially tied to one client is fraught with difficulty. An attorney may find it difficult, if not impossible, to distance himself from his "employer." In addition, after the attorney discloses his financial relationship with his employer to the other party, the informed party is unlikely to allow that attorney to also represent him. Even if a party consents to multiple representation after full disclosure, an attorney should, nevertheless, seriously question whether his financial ties to the client will impair his independent judgment.

Attorney Kate of Act I, Scene 3 faces a potential dilemma if she chooses to represent the lender, seller, and buyer in the residential real estate transaction described therein. Although Attorney Kate does not serve as general counsel to Lender Bank, she has been retained by Lender Bank in the past. Therefore, her financial ties to Lender Bank appear to be more complex than if she had only been hired for one transaction. Before considering whether to undertake the representation of Lender Bank, Sam Seller, and Bob Borrower, Attorney Kate must disclose her prior dealings with Lender Bank. By making the disclosure, Attorney Kate may be relieved of making a decision because neither Sam Seller nor Bob Borrower may be comfortable with her representation. In all likelihood, Sam Seller

226. *Id.*

227. *See supra* text accompanying notes 139-42 (The state of Illinois prohibits an attorney who serves as general counsel for a lending institution from representing the buyer in the same real estate transaction).

and Bob Borrower may only have a Hobbesian choice: either they jointly accept Attorney Kate's multiple representation or they forego representation altogether because of the expense. Therefore, when making her decision to undertake representation, Attorney Kate should weigh not only the strength of her loyalty to Lender Bank, but also how her refusal to undertake multiple representation will affect the transaction. If her refusal means that Sam Seller and Bob Borrower are unrepresented, then perhaps Attorney Kate ought to reevaluate her decision.

If Attorney Kate ultimately decides to undertake the representation, despite her prior dealings with Lender Bank, she should satisfy the following conditions: (1) Attorney Kate must disclose the prior relationship; (2) she must be convinced that Sam Seller and Bob Borrower are comfortable with her divided loyalties; and (3) she must be confident that Sam Seller and Bob Borrower will not be apprehensive about "confiding in someone else's lawyer."²²⁸

C. *Existing Clients*

Connecticut seems to have adopted the most sound approach to multiple representation of existing clients.²²⁹ By requiring the existing clients to agree upon all essential terms without the participation of an attorney, Connecticut helps ensure that the attorney remains neutral.²³⁰ Without proscribing these additional limits, as Connecticut seems to have done, allowing multiple representation in accordance with either Rule 1.7 or Rule 2.2 may cause the attorney unforeseen problems because all clients are not necessarily similarly situated.

Attorney John of Act I, Scene 2 may experience loyalty problems if he chooses to represent his existing clients, Peter Purchaser and Sheila Seller, in connection with the purchase and sale of the seafood restaurant. Perhaps one of the two has generated a disproportionate share of Attorney John's fees over the years. Thus, Attorney John may unknowingly be predisposed toward one of the clients and thus sacrifice his impartiality. Unless Attorney John is assured that Peter Purchaser and Sheila Seller have in fact agreed upon the material terms of their transaction, he should not undertake the representation. In the event that Peter Purchaser and Sheila Seller have not ironed out the details to Attorney John's satisfaction, the best tactic may be to recommend that each client either seek separate counsel or seek another attorney as an intermediary.

D. *Apprising the Parties of the Applicable Law*

Assuming that Attorney John decides that the multiple representation of Peter Purchaser and Sheila Seller is appropriate because

228. See *supra* text accompanying notes 139-42.

229. See *supra* text accompanying notes 116-19.

230. See *supra* text accompanying notes 116-19.

neither party has generated a significant amount of his legal fees so as to impinge his loyalty to either client, Attorney John must obtain each client's consent to the multiple representation. Before Peter Purchaser and Sheila Seller can consent and make informed decisions during the negotiation process, Attorney John must apprise both clients of the law governing the transaction. Although Peter Purchaser and Sheila Seller are experienced business persons, they probably do not understand their rights and responsibilities under state or federal law.²³¹ For example, Attorney John must advise Peter Purchaser about some of the warranties he may want to secure from Sheila Seller. Additionally, Peter Purchaser may not have asked Sheila Seller about inspections, parking permits, or the sale of a liquor license before he decided to purchase her seafood restaurant. Likewise, Sheila Seller may not expect the sale to be subject to Peter Purchaser's contingency requirements.

In addition to advising each client about his or her respective rights and obligations, Attorney John should also explain what role the intermediary serves. Attorney John should inform Sheila Seller and Peter Purchaser that he will provide each client with the benefit of his skill and knowledge, but that he cannot advocate either client's position. Therefore, Peter Purchaser and Sheila Seller need to understand that Attorney John cannot "present the best position for either party."²³²

E. Drafting Agreements

Before undertaking multiple representation, the attorney must consider that he cannot draft agreements that unnecessarily favor one party. For example, "[i]f the tentative figures do favor one party (because of mutual error, for example), [the lawyer] must feel entirely free to suggest amendments, without fear that the favored party will feel betrayed."²³³ In addition to suggesting alternatives, the attorney also "must be careful to explain to each client alternative provisions that are to his advantage and disadvantage."²³⁴ If the lawyer either reasonably believes that one party "would feel betrayed by having his or her advantage taken away," or later discovers this to be true, the attorney should decline or terminate the representation.²³⁵ To adopt the view that the attorney serves only as the scrivener abrogates the attorney's fiduciary duty to act fairly and equitably toward each client; each client deserves to be informed about how each provision will impact his interest and the alternative provisions that might be included.²³⁶ To suggest that the attorney is only a scrivener is to

231. See Spector, *supra* note 210, at 17.

232. *Id.* at 18.

233. 1 HAZARD & HODES, *supra* note 2, § 2.2:204.

234. Martin, *supra* note 4, at 70.

235. 1 HAZARD & HODES, *supra* note 2, § 2.2:204.

236. See Florida Bar v. Belleville, 591 So. 2d 170, 172 (Fla. 1991). In *Belleville*, the

suggest that the attorney bears no responsibility for the final agreement should it unnecessarily discriminate against one of the parties—a proposition the Maryland courts have rejected.²³⁷ An attorney should not serve as the rubber stamp for a transaction where only one client is making the decisions.

Attorney Jane of Act I, Scene 1 should initially be concerned if Arnold, Betty, and Emily are asking her to be a scrivener in connection with the formation of their partnership. If the parties do not want Attorney Jane's advice or suggestions about their agreement, then Attorney Jane should seriously consider declining multiple representation. If, however, the parties are willing to listen to Attorney Jane's proposals and suggestions, then multiple representation is probably appropriate. Because the parties do not have a formal agreement in writing, Attorney Jane has considerable leeway in directing the negotiation process. Attorney Jane can supervise the discussions between Arnold, Betty, and Emily and ensure that all issues are addressed by the formal agreement. By directing the scope of the discussion, Attorney Jane can ensure that Arnold, Betty, and Emily understand their accompanying rights and responsibilities with respect to each provision in their partnership agreement.

F. Fee Arrangements

Multiple representation may be unwarranted depending upon how the fee arrangements are structured. If an attorney learns at the

Supreme Court of Florida confronted the situation where an attorney, Belleville, drafted the documents in a real estate transaction between the buyer and seller. *Id.* at 171. Although the buyer, Bloch, and the seller, Cowan, only negotiated for the sale of an apartment building, the documents stated that Cowan was selling both the apartment building and his residence. *Id.* In exchange, Cowan only received an unsecured note providing for 10% interest to be amortized over a 25 year period. *Id.*

In considering whether attorney Belleville committed ethical violations, the supreme court first noted that Belleville should have realized from the documents alone that the transaction was "one-sided." *Id.* at 172. According to the supreme court, Belleville should have explained (1) that he was representing an adverse interest, and (2) that the material terms in the documents that he drafted "so that the opposing party fully understands their actual effect." *Id.* The court stated: "When the transaction is as one-sided as that in the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone." *Id.* The court then suspended Belleville from the practice of law for 30 days. *Id.* Based upon *Belleville*, if an attorney can be suspended for drafting documents that unnecessarily favor a party who is not his client, then an attorney should have a duty to draft documents that do not unnecessarily favor one group of clients.

237. See *supra* notes 95-96 and accompanying text.

outset that only one of the clients is responsible for the fee, the attorney ought to consider two potential problems. First, the financial resources of one party may be used against the other parties to coax arrangements that favor the "money-man." Second, the attorney's impartiality in the situation may be compromised. A natural response by an attorney is to extend more loyalty toward the individual "paying the bill." To the extent that the attorney follows the fee, he or she may face disciplinary action.²³⁸ Even the most impartial attorney may find that his equal allegiance toward all clients might wane over time.

The fee arrangement proposed by Leon Loan Officer in Act I, Scene 3 does not appear to present a problem for Attorney Kate if she decides to undertake representation of the parties in their real estate transaction. In this scene, all three clients have agreed to be responsible for one-third of the fees. Attorney Kate might want to inquire where Bob Borrower is receiving the money for his one-third of the fee. For example, if Bob Borrower is receiving his "fee funds" from Lender Bank, he may be inclined to follow Lender Bank on all issues out of a desire to have his property financed. Although having Bob Borrower's fee financed may not necessarily affect Attorney Kate's loyalty to Bob Borrower, she may find herself in a position where Lender Bank is dictating the terms of the agreement at the expense of Bob Borrower. Provided that Lender Bank does not dominate the discussions and coerce decisions, the equal division of the fee does not appear to present loyalty concerns for Attorney Kate.

VII. CONCLUSION

When an attorney is confronted with the opportunity for multiple representation in Maryland, the impulse to categorically decline the representation is no longer an appropriate response. While it remains true that the avoidance of multiple representation will spare the attorney from confronting ethical dilemmas, this stance indicates a lack of appreciation for the multi-faceted roles that attorneys now serve. Particularly when an attorney operates on a transactional level, multiple representation may become necessary to serve all of the client's needs. When multiple representation succeeds, the attorney not only saves money for a group of clients, but can also often "sustain[] good relations between the parties that will pay dividends in the future."²³⁹ If an attorney is honestly interested in assisting and advising clients, particularly those of modest means, and nurturing

238. See, e.g., *In re Moore*, 703 P.2d 961, 965 (Or. 1985).

239. 1 HAZARD & HODES, *supra* note 2, § 2.2:202.

attorney-client relationships, multiple representation seemingly offers the attorney a viable alternative.

The attorney's role in multiple representation is best understood as explaining the applicable law to the parties, sharpening the issues, and describing both the advantages and disadvantages of the potential alternatives. To characterize the attorney as a "scrivener" is to miss the point of multiple representation. The attorney has a fiduciary obligation to ensure that the negotiations and any subsequent agreements are the product of clients who are making decisions on an informed basis and on an equal footing.

The more often Maryland attorneys champion the role of intermediary and serve both as counselors and advisors to multiple clients, the more likely it seems that lawyering will not necessarily be equated with the courtroom. A positive side-effect also will accrue to clients. Although the role that the litigation process serves should not be minimized where the courts are often the only proper or realistic arena for legal redress, the current state of litigation might be drastically different if clients were more inclined to seek one attorney to help maximize their common goals and iron out their insignificant differences of opinion. Perhaps clients would be less quick to respond, "I'll see you in court," when the first impasse arises.

Gretchen L. Jankowski