Representing Vendor and Vendee in a Single Transaction: A Strict View of Conflicting Interests

Attorney Guy J. Lanza, representing vendor of certain residential property in New Jersey, agreed to act as counsel for vendee in the same transaction. At the closing, vendee found himself one thousand dollars short of the full purchase price, but vendor agreed to accept a postdated check in the amount of the deficit and to allow vendee to move into the house. The check was subsequently returned for insufficient funds. When asked by vendor to honor the check, vendee refused, claiming that a serious water condition had been discovered and that the repair would cost the one thousand dollars demanded by vendor. After Lanza failed to act on her behalf, vendor retained other counsel, initiated legal proceedings against vendee, and apparently disclosed the above facts to the ethics committee in Lanza's home county, which then filed a presentment against him in the New Jersey Supreme Court. In *In re Lanza,*[1] the court found that adequate representation of the seller should have compelled the attorney to insist upon the full purchase price in cash at the date of closing, or, in lieu of cash, a mortgage for the amount due. Even more, said the court, once the purchasers persisted in withholding the balance of the purchase price, the attorney "should have immediately withdrawn from the matter, advising both parties to secure independent counsel of their respective choosing."[2]

The relationship between an attorney and client is often a jealous one, tempered, as *In re Lanza* suggests, as much by the lawyer's willingness to render impartial service for his client as by the client's expectation that his attorney will provide the legal protection he seeks. Fundamental to this relationship is the premise that the attorney will represent his client with "undivided fidelity"[3] and will avoid interests which may conflict with those of his client.[4] At the same time, as Justice Story wrote in 1824,

> When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements,

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1. 65 N.J. 347, 322 A.2d 445 (1974).

2. *Id.*, 322 A.2d at 448; *accord,* Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298, 300 (1968).

3. ABA, CANONS OF PROFESSONAL ETHICS No. 6; ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Ethical Consideration [hereinafter cited as EC] 5-14.

4. ABA CODE, Disciplinary Rule [hereinafter cited as DR] 5-105(A) and (B).

> which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.[5]

Thus, an attorney-client relationship represents far more than a mere commercial transaction; its fiduciary character is as significant as the objective which first compels the client to seek legal advice.[6]

Although the premise that the attorney must avoid conflicting interests with respect to this client necessarily forms a part of every attorney-client relationship, the premise will be considered here within the context of a real property purchase and sale negotiation.[7] Specifically, cases indicate that a single attorney often represents both vendor and vendee in one transaction, and generally they hold such representation to be permissible.[8] Because an attorney who represents both parties faces the risk of breaching his duty of loyalty to either client, or to both, this comment will consider the ramifications of dual representation. It will first discuss various reasons why this type of practice should generally be avoided, then focus upon the conditions under which such representation is deemed acceptable, and, finally, placing special emphasis upon *Lanza*, consider whether, as a matter of policy, an attorney should ever represent both vendor and vendee.

The Inadequacy of Multiple Representation

The pitfalls awaiting an attorney who seeks to represent both vendor and vendee in real estate sales transactions are numer-

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5. Williams v. Reed, 3 Mason 405, 418 (C.C.D. Me. 1824).

6. An attorney-client relationship need not be created by formal contract nor by the payment of a fee, but may be implied by the conduct of the parties. Arden v. State Bar of Cal., 52 Cal. 2d 310, 341 P.2d 6, 9 (1959); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891, 902 (Ct. Sp. App. Md. 1974). In *In re* Chase, 68 N.J. 392, 346 A.2d 89 (1975), the court stated that "representation" as used in ABA Code, DR 5-105(C) "contemplates all the ways in which an attorney can or does act for others, whether in matters of law, business, or otherwise."

7. This comment assumes that no litigation is involved and that the nature of the transaction is civil, not criminal, because disclosure and consent become irrelevant "when the subject matter is crime and when the public interest in the disclosure of criminal activities might thereby be limited." *In re* Abrams, 56 N.J. 271, 266 A.2d 275, 278 (1970).

8. *E.g.*, Strong v. Int'l B., L. & I. Union, 82 Ill. App. 426 (1899); *In re* Lanza, 65 N.J. 347, 322 A.2d 445 (1974); *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963); Eiseman v. Hazard, 218 N.Y. 155, 112 N.E. 722 (1916).

ous—they are likely to appear in any such transaction and they inevitably raise the question of whether the attorney can provide adequate representation for his clients. One of the most common difficulties in this area, for example, is that the lawyer may be inadvertently influenced or biased in behalf of one client despite good faith efforts to represent both faithfully.[9] Cases demonstrate that attorneys all too often enter transactions believing that neither their judgment of the legal ramifications of a particular transaction nor their perception of clients' interests will be impaired by the fact that they are representing interests which can only be characterized as conflicting.[10] As a result, they may favor one client over the other[11] or else fail to recognize that a conflict exists.[12]

Similarly, even in the most elementary real estate transactions, a number of questions arise which require the exercise of legal judgment but which, according to the New York State Bar Association, may generate conflicting loyalties for the attorney.[13] Such questions are:

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9. Kelley v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937 (Sup. Ct. 1968); Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298, 300 (1968). In *Grelle* attorney represented *H* in a personal injury suit. *H* and his wife, *W*, signed a separation agreement in attorney's office, and later *W* requested attorney to obtain a divorce for her. According to the separation agreement, *W* was to receive one-third of the proceeds of *H*'s personal injury action. After the divorce had been obtained, *H* settled his case for $19,000, but attorney refused to disclose that amount to *W*. When *W* filed a motion to reduce to a money judgment her part of the separation agreement, attorney successfully resisted the motion. According to the court, attorney should have withdrawn from the matter once the motion had been filed:

> Too many experienced lawyers have accepted such employment in separation or divorce matters under such circumstances, only to ultimately abandon the interest of one or the other of their clients. In such instances of dual representation, a party disappointed in the financial results, as was [W], may validly argue after the fact that the dual representation brought about the omission from the agreement of specific language protecting her upon distribution of the anticipated settlement fund.

237 N.E.2d at 300. *See also In re* Chase, 68 N.J. 392, 346 A.2d 89, 92 (1975).

10. *E.g.*, Kelley v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); *In re* Boivin, 75 Ore. Sup. Ct. & Ct. App. Adv. Sheet 829, 533 P.2d 171 (Sup. Ct. 1975).

11. *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963); Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

12. Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (Ct. Sp. App. 1974); *In re* Trench, 76 Misc. 2d 180, 349 N.Y.S.2d 265 (Sup. Ct. 1973).

13. New York State Bar Association Committee on Professional Ethics,

> (i) whether a deed should be full covenant and warranty, bargain and sale, with or without covenants, or quitclaim; (ii) what customs are to be followed in making adjustments; (iii) which points disclosed in the title report are important and which may be disregarded; (iv) what title company to use, considering that a title company reinsuring may perpetuate past errors which another title company would discover.[14]

Another factor which affects the adequacy of representation, albeit one whose effect is more public than peculiar to the client's personal needs, is the appearance of misconduct which dual representation may foster.[15] In his treatise on legal ethics, Drinker observes that the appearance of misconduct alone may be significant enough to compel the lawyer to reject dual representation.[16] "[E]ven where all parties agree," he says, "the appearance of a lawyer on both sides of the controversy, particularly in cases of some notoriety, will often give an impression to the public which is most unfortunate for the reputation of the bar, and which of itself should be decisive."[17] If a necessary element of the attorney-client relationship is a degree of trust which the client assumes toward the lawyer, it is no less true that such trust must be fostered publicly by the legal profession. Avoiding the appearance of misconduct in a dual client situation should not be discounted as a fundamental element to be weighed by any attorney facing potentially conflicting interests.

Standing beside all of the above factors is Justice Story's maxim that the client has a right to presume that the attorney will not betray his judgment.[18] Even if a client has been fully informed of the pitfalls of dual representation, he may still fail to comprehend fully the dangers of such a practice.[19] Likewise, a vendee who has requested an attorney's advice may believe that the attorney will fully protect his interests simply because the attorney is *his* lawyer,

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FORMAL OPINIONS, [hereinafter cited as N.Y. STATE OPINIONS] No. 38 (1966).

14. *Id.*

15. *In re* Hurd, 69 N.J. 316, 354 A.2d 78 (1976); *In re* Cipriano, 68 N.J. 398, 346 A.2d 393, 395 (1975); *In re* Greenberg, 21 N.J. 213, 121 A.2d 520, 525 (1956); Kelley v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937 (1968).

16. H. S. DRINKER, LEGAL ETHICS 105 (1953).

17. *Id.*

18. *See supra* note 3.

19. Kelley v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937 (1968).

even though that attorney may also represent the vendor.[20] In such situations, in which the client assumes the attorney will grant him the legal protection he needs, dual representation should be avoided.[21]

Other difficulties with dual representation can perhaps be visualized. But the lawyer's failure to consider the possibility of conflict before entering such transactions, along with the practical problems posed by the legal question itself, the appearance of misconduct and the client's likely belief that the attorney will not fail to provide impartial service, emerge as some of the most difficult problems presented by dual client representation.

The Prerequisites of Disclosure, Consent and Adequate Representation

Despite those problems which limit the lawyer's ability to represent his client, the American Bar Association's *Code of Professional Responsibility* permits an attorney to undertake dual representation, although it provides certain prerequisites which should be satisfied before this type of practice is followed. The *Code*, for example, provides that before an attorney may represent two clients with differing interests, he must explain to them the implications of the common representation.[22] The purpose of this disclosure is to give each client an opportunity "to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires."[23]

Although an attorney who represents conflicting interests should disclose to each client the implications of the common representation, the extent of the appropriate disclosure may vary with

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20. *In re* Young, 188 App. Div. 538, 177 N.Y.S. 259 (Sup. Ct. 1919).

21. Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298, 300 (1968). In *In re* Greenberg, 21 N.J. 213, 121 A.2d 520 (1956), the court found clients' lack of both education and knowledge of business matters significant in deciding that the attorney's attempt to represent clients with conflicting interests violated Canon 6. And in *In re* Hurd, 69 N.J. 316, 354 A.2d 78 (1976), the court stated that attorney should have refused to represent both vendee, attorney's sister, and vendor, a family friend. Vendor was unsophisticated in business matters, and because of her friendship with attorney's family, she trusted attorney's judgment. According to the court, attorney should have refused to follow through with the transaction until vendor obtained independent counsel.

22. ABA Code, EC 5-16.

23. *Id.*

each case. One court has held that it is insufficient "simply to advise a client that he, the attorney, foresees no conflict of interest."[24] Rather, the attorney should be familiar with the variety of potential areas of conflict that might arise and lay these before the client with "considerable specificity."[25] An attorney attempting to represent a vendee when he already represents the vendor must disclose all "material facts"[26] and "explain in detail the pitfalls"[27] that may arise during the transaction. And this must be done with each client.[28]

Essential to such disclosure is the notion that the client needs as much information about the transaction as possible in order not only to make an informed consent to the attorney's representation of his interests, but also to decide for himself whether he should seek independent counsel.[29] Part of the disclosure which the attorney must make actually incorporates his pointing out the advantages of at least one of his clients retaining independent counsel.[30]

Disclosing to each client the nature of the attorney's dual repre-

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24. *In re* Lanza, 65 N.J. 347, 322 A.2d 445, 448 (1974).

25. *Id.* In a case in which an attorney represented both the insured and the insurance company, the court found that it was the attorney's duty to disclose all facts necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation. Lysick v. Walcom, 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406, 414 (1968).

26. *In re* Boivin, 75 Ore. Sup. Ct. & Ct. App. Adv. Sheet 829, 533 P.2d 171, 174 (Sup. Ct. 1975).

27. *In re* Kamp, 40 N.J. 588, 194 A.2d 236, 240 (1963).

28. ABA CODE, EC 5-16.

29. *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963); *In re* Boivin, 75 Ore. Sup. Ct. & Ct. App. Adv. Sheet 829, 533 P.2d 171 (Sup. Ct. 1975); ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS [hereinafter cited as ABA OPINIONS] No. 224 (1967).

30. *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963). In *In re* Hurd, 69 N.J. 316, 354 A.2d 78 (1976), the New Jersey Supreme Court distinguished certain cases such as *In re Lanza* and *In re Kamp,* both of which involved "arm's length" transactions, by saying that the attorney should not have represented both his sister, vendee, and a long-time family friend, vendor, who was unsophisticated in business affairs. Because of the unique relationship between attorney and vendor and vendee, vendor required independent counsel.

Also, although it does not form a part of this discussion, an attorney who undertakes dual representation without making the full disclosure required of him incurs the risk of civil liability to the client who suffers loss caused by such lack of disclosure. Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891, 904 (Ct. Sp. App. 1974).

sentation is an essential prerequisite to such representation, but it is not the only one. Once the attorney has made a full disclosure to both of his clients, he must then obtain their consent to his representation of each.[31] Just as it is insufficient for the lawyer to advise his clients that he foresees no conflict of interest, it is not enough for him merely to make a disclosure of the potential conflict and then to request their consent, for the clients must be aware of the full significance of their assent.[32] In other words, in addition to being apprised of the dual representation and of the potential for conflict, the clients must understand that the attorney's representation may be limited and that if a conflict should arise for which an acceptable solution is not forthcoming, the attorney would have to cease acting for both parties.[33] As the New York State Bar Association has observed, "The attorney has the affirmative duty to be certain that the clients have the capability and actually do fully understand the conflicts that may arise and the peculiar position dual representation may cause them to be placed in."[34]

Although Canon 5 of the ABA *Code of Professional Responsibility* and its predecessor, Canon 6 of the ABA *Canons of Professional Ethics,* have allowed dual representation after disclosure and consent, they should not be read to imply that even disclosure and consent alone suffice. Raymond L. Wise has pointed out, for example, that consent does not offer exoneration,[35] and the court in *In re Trench*[36] has emphasized that the new *Code,* as opposed to the old *Canons of Ethics,* "sharply stiffened" the requirements for dual representation so that "consent is exculpatory in a multiple client case only if 'it is obvious that [the lawyer] can adequately represent the interest of each.'"[37] As a result, even when an attorney discloses all material facts to both of his clients and obtains their consent to his representing each, the lawyer has the added responsi-

31. *In re* Lanza, 65 N.J. 347, 322 A.2d 445, 447-48 (1974); *In re* Boivin, 75 Ore. Sup. Ct. & Ct. App. Adv. Sheet 829, 533 P.2d 171 (Sup. Ct. 1975). *See also* State *ex. rel.* Neb. State Bar Ass'n v. Nelson, 147 Neb. 131, 22 N.W.2d 425 (1946) (attorney represented both the city and defendants in a foreclosure suit. Held: disclosure and consent were necessary before conflicting interests could be represented).

32. *In re* Kamp, 40 N.J. 588, 194 A.2d 236, 240 (1963).

33. *In re* Lanza, 65 N.J. 347, 322 A.2d 445, 447 (1974).

34. N.Y. STATE OPINIONS, No. 38 (1966).

35. R. L. WISE, LEGAL ETHICS 142 (1966).

36. 76 Misc. 2d 180, 349 N.Y.S.2d 265 (Sup. Ct. 1973).

37. *Id.* at 184, 349 N.Y.S.2d at 271.

bility of deciding whether he can "adequately" serve their interests.

Perhaps the responsibility of undertaking dual representation only if adequate service can be provided makes the lawyer's decision concerning such matters easier, for dual representation must then be undertaken only when it is readily apparent that such service will not be marred by conflict. Many courts agree that despite the limited flexibility which the *Code* affords an attorney who wishes to represent dual interests, such representation should be given only in the clearest[38] or most exceptional[39] cases. Nevertheless, the possibility that conflict may arise even in these clear cases cannot be eliminated, and often it is after a conflict has already appeared that attorneys find themselves in positions in which clients' interests are likely to be damaged.[40] This is actually the difficulty with the way in which the *Code* treats the dual representation problem. By requiring the attorney first to determine whether he can adequately represent his client before representing dual interests, the *Code* begs the question of whether dual representation is advisable. The problems which attorneys are likely to encounter in these situations have already been discussed,[41] and their probable presence in any dual client situation suggests that dual representation can seldom be adequate for either client. As a consequence, requiring representation to be "adequate" offers no help in determining whether the representation should be attempted.

Just as the *Code* permits dual representation under certain conditions, some courts, too, have held that sometimes an attorney ought to represent two potentially conflicting sides.[42] The *Code* itself specifies that "there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests

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38. Columbus Bar Ass'n. v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298, 300 (1968).

39. Kelley v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 460, 296 N.Y.S.2d 937 (1968). One case used reasonableness as the criterion for determining whether an attorney ought to have undertaken dual representation. "Respondent was in violation of paragraph (C) [of ABA CODE, DR 5-105] in that he could not reasonably believe that he could 'adequately represent the interests of each . . . .'" *In re* Chase, 68 N.J. 392, 346 A.2d 89, 91 (1975).

40. *E.g.*, *In re* Lanza, 65 N.J. 347, 322 A.2d 445 (1974); *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963); Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

41. *See* text *supra* under *The Inadequacy of Multiple Representation.*

42. *See infra* notes 43 & 45, and H. S. DRINKER, LEGAL ETHICS 120, n. 19 (1953).

in matters not involving litigation."[43] But the *Code* does not offer any examples or guidelines for this ruling other than to suggest that if interests vary only slightly "it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client."[44] One case, *Eiseman v. Hazard,*[45] held it proper for an attorney to represent two adverse clients because the attorney was able to satisfy each client's wishes. Such an after-the-fact judgment affords little guidance for future transactions, however, and the court itself stressed that this type of case is "exceptional" and "never entirely free from danger of conflicting duties."[46] An earlier case stated that an attorney could represent adverse litigants when he acts "in the character of an umpire,"[47] and one can imagine situations in which an attorney might be able to act in such capacity—perhaps when he handles a matter between members of his own family. Yet, even these situations pose hazards similar to those noted above,[48] especially when legal matters are complicated by intra-familial tensions. Thus, instances in which an attorney may represent both vendor and vendee are exceptional.

Actual v. Potential Conflict: A False Distinction

Despite the fact that the ABA *Code of Professional Responsibility*, as well as a number of cases,[49] allows dual representation of clients,[50] one can argue that the representation of potentially conflicting interests should never be countenanced.

In re Lanza,[51] for example, displays a clear-cut juxtaposition between what is here referred to as the "traditional" and the "strict" views of dual representation. In its majority opinion, the Supreme Court of New Jersey provided a traditional reading of the *Code,* stating that representation of vendor and vendee is permissible when the attorney discloses all material facts to both clients and

43. ABA Code, EC 5-15.
44. *Id.*
45. 218 N.J. 155, 112 N.E. 722 (1916).
46. *Id.* at 159, 112 N.E. at 723.
47. Strong v. Int'l B., L. & I. Union, 82 Ill. App. 426, 431 (1899).
48. *See supra* note 40.
49. *See supra* note 8.
50. ABA Code, EC 5-15.
51. 65 N.J. 347, 322 A.2d 445 (1974).

obtains their consent to his representation.[52] The court concluded that buyer-seller representation always presents a case of "potential" conflict, but that this "potential" alone does not warrant an attorney's failure to serve both clients, provided the disclosure and consent requirements are met. It is only when this potential conflict ripens into actual confrontation that the attorney must withdraw his counsel.[53]

Unimpressed with this analysis, the concurring judge[54] disagreed with the majority's interpretation of the *Code.* He rejected the dichotomy between potential and actual conflict and insisted that in every buyer-seller situation there exists "an inherent conflict of interests which, even though inadvertent, may affect or give the appearance of affecting an attorney's impartiality and professional relationship. Therefore, it becomes irrelevant whether full disclosure is made and informed consent is given."[55] It is this "inherent conflict," this potential for damage which always exists, that demands that no dual representation be allowed in a vendor-vendee situation.

The policy underlying this strict view gathers strength from various sources. First, as discussed above,[56] inadvertent bias by the attorney, the appearance of misconduct, or the unsophisticated client may all require the attorney to refrain from representing a buyer and a seller in a single transaction. These factors played an influential role in the concurring opinion in *Lanza:* "Because of the admittedly inherent nature of a buyer-seller situation, and the dangers involved, true impartiality is only an ideal and not an actual-

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52. *Id.*, 322 A.2d at 447.

53. *Id.* The majority does not actually speak in terms of "potential" and "actual" conflict, but it seems to have these concepts in mind. It talks, for example, of "latent" conflicts of interests which become "acute." 322 A.2d at 447. One can represent latent conflicts but not those which are acute. The concurring opinion apparently takes this dichotomy to mean potential versus actual conflict. *Id.* at 451. The "potential-actual" conflict terminology is preferred in this comment.

54. *Id.*, 322 A.2d at 449.

55. *Id.*, 322 A.2d at 450. The concurring judge relied on two New Jersey cases which dealt with matters other than vendor-vendee transactions but which held that representation of conflicting interests could not be given even with disclosure and consent. *I.e., In re* Cohn, 46 N.J. 202, 216 A.2d 1 (1966); *In re* A & B, 44 N.J. 331, 209 A.2d 101 (1964); *cf. In re* Hurd, 69 N.J. 316, 354 A.2d 78 (1976) (court held that the attorney should not have represented vendor and vendee in a non-arm's length transaction).

56. *See supra* note 40.

ity."[57] However impartial the attorney may attempt to be, furthermore, the strength of impartiality may be diminished by the inherent nature of conflict which may appear to affect such impartiality, and full disclosure and consent are illusory because "neither buyer nor seller can ever possibly fully appreciate all the complexities involved."[58] As the concurring judge stated:

> What most people typically do is rely upon the representation of their attorney when he reassures them that everything will be properly handled. However, the attorney is, unfortunately, not a clairvoyant who can foresee problem areas. . . .[59]

The client's own trust in his attorney's ability is, thus, further complicated by the limitations of the attorney himself.

Secondly, there are practical reasons for shunning dual representation, and the concurring opinion in *Lanza* directs attention toward what is one of the most persuasive arguments against this type of practice. Even under the majority's analysis, for instance, an attorney must cease representing both clients once a potential conflict develops into actual disagreement.[60] Such withdrawal of counsel leaves the situation no better than when it first occurred, and, according to the strict view, "probably a bit worse."[61] As a result, because conflict is always potential and, arguably, likely to develop in many cases, a safer and far more practical rule would be to avoid dual representation in all cases. "The inconvenience in retaining separate attorneys is minimal when weighed against the dangers involved, and the cost differential in the final analysis would be inconsequential."[62] Because the object of the purchase, *e.g.*, a home, is often of considerable value, the damage which can be created by dual representation surpasses any inconvenience or cost in avoiding even potential conflict.[63] Where the majority and concurring opinions place their greatest emphasis emerges most visibly at this point. While the former foresees real danger in actual,

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57. *In re* Lanza, 65 N.J. 347, 322 A.2d 445, 449 (1974).
58. *Id.*, 322 A.2d at 451.
59. *Id.*
60. *Id.*, 322 A.2d at 447.
61. *Id.*, 322 A.2d at 451.
62. *Id.*
63. This is an additional pitfall which could be added to the list given above under *The Inadequacy of Multiple Representation* and to this writer seems to be equally troublesome.

not potential, conflict, the latter maintains that potential conflict is itself dangerous, that potential conflict implies that actual conflict can never be far away, and that the mere chance of actual conflict must be eliminated. Accordingly, one espousing the concurring side in *Lanza* would probably accept the position taken in one case before the Pennsylvania Supreme Court that "the test of a conflicting interest is not the actuality of conflict, but the possibility that conflict may arise."[64]

Lastly, the concurring opinion of *Lanza* rests upon a strict interpretation of the *Code of Professional Responsibility*. In accordance with the second paragraph of the old Canon 6, a lawyer could only represent conflicting interests after giving a "full disclosure of the facts" and obtaining the "express consent of all concerned."[65] The new *Code* retains these requirements in DR 5-105(C) but prescribes that the attorney must also be able to give adequate representation.[66] At the same time, DR 5-105(B) provides that a lawyer shall not accept multiple employment if his independent judgment "is likely to be adversely affected by his representation of another client," and DR 9-101 recalls the effect which public appearance has upon "adequate representation" by requiring that the attorney must avoid any "appearance of impropriety."[67] DR 5-105(C), which allows multiple representation with disclosure, consent, and adequate representation, can be properly construed only in conjunction with the two rules just mentioned. Thus, the concurring opinion suggests that the spirit of the new *Code*, when considered alongside the inherently conflicting interests of a buyer-seller situation, compels the attorney to avoid representing both vendor and vendee in the same transaction.[68]

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64. *In re* Trench, 76 Misc. 2d 180, 349 N.Y.S.2d 265 (Sup. Ct. 1973); Middleberg v. Middleberg, 427 Pa. 114, 233 A.2d 889 (1967); NEW YORK COUNTY LAWYERS ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS No. 236 (1956).

65. ABA CANONS OF PROFESSIONAL ETHICS No. 6.

66. DR 5-105(C) provides, in part:

> . . . 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.

67. ABA CODE, Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety," and EC 9-6 provides that a lawyer should strive "to avoid not only professional impropriety but also the appearance of impropriety."

68. *In re* Lanza, 65 N.J. 347, 322 A.2d 445, 449 (1974).

Conclusion

Judge Pashman's concurring opinion in *Lanza* is not the only one which finds an inherent conflict in every buyer-seller situation,[69] although it is perhaps the most articulate expression of that view found in case law. That it does represent such an isolated analysis of the pitfalls of dual representation suggests the careless attitude which many lawyers assume toward this type of practice. The *Code* does not forbid dual representation, but it should not be read to imply that disclosure and consent provide a license for simultaneous representation of vendor and vendee. A careful reading of the *Code* suggests that dual representation should generally be avoided even in what appear simple cases. As a profession, it is essential that the bar avoid the commercialism which dual representation often presents, and the factors analyzed above are sufficient to discourage a form of practice that is ultimately unnecessary. Justice Story's assertion that "no man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests,"[70] applies with equal force to an attorney and to his client. Avoiding a situation that is inherently filled with conflict may at least encourage a proper direction of the attorney's efforts in behalf of one client alone.

Michael D. Waters

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69. *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963). In a concurring opinion in *In re* Rockoff, 66 N.J. 394, 331 A.2d 609 (1975), Judge Pashman reiterated the position he took in *Lanza* that "dual representation should be totally forbidden." *See also* the Oregon Supreme Court's statement that, "The representation by a lawyer of both the buyer and the seller in a business transaction is one of the clearest cases of the improper representation of conflicting interests." *In re* Boivin, 75 Ore. Sup. Ct. & Ct. App. Adv. Sheet 829, 533 P.2d 171, 174 (Sup. Ct. 1975).

70. *See supra* note 5.