

Conflicts of Interest When an Attorney Acts to Represent Both Mortgagor and Mortgagee

This comment will reflect on the conflicts which can arise when a lawyer represents both the mortgagor and the mortgagee in a mortgage transaction.

Rule 1.7 of the Model Rules of Professional Conduct¹ states that a lawyer is not to represent one client if that representation will harm another client.² The Rule specifies two exceptions to this: when "(1) the lawyer believes the relationship will not adversely affect the relationship with the other client; and when (2) each client consents after consultation."³ The comment to this Rule bases its reasoning in loyalty.⁴ "Loyalty is an essential element in the lawyer's relationship to a client. . . . As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent."⁵ The comment, however, distinguishes the degree of adversity of the representation.⁶ "[S]imultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be *directly* adverse to the other."⁷

Because there are many possibilities for conflicts to occur in the mortgagor-mortgagee transaction, it is important for each party to have someone protecting its interest.⁸ When

1. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter "MRPC"] Rule 1.7 (Discussion Draft 1980).

2. *Id.*

3. *Id.*

4. MRPC Rule 1.7 comment (Loyalty to a Client).

5. *Id.*

6. *Id.*

7. *Id.* (emphasis added).

8. *In re Dolan*, 76 N.J. 1, —, 384 A.2d 1076, 1084 (1978) (Pashman, J., concurring & dissenting). In a footnote, Justice Pashman points out that,

only one attorney is to represent both parties, the parties must be made aware of how risky that can be.⁹

Some of these conflict possibilities include: safeguarding each client's economic interests,¹⁰ limitation or inadequacy of the attorney's representation,¹¹ "exploitation of unsophisticated purchasers,¹² and division of the attorney's loyalty."¹³

(t)he most frequent topics of controversy at closing are:

- A) Difficulties with the quality of title deliverable by the seller.
- C) Warranties.
- K) Mortgage and tax escrows - amount and interest.
- L) Escrows of a part of seller's money to assure compliance with above problems, including schedule for release of funds.
- M) Appropriate remedies for compliance with any agreements concerning the above.

Id. at 1083 n.3.

9. *Id.*

10. *Id.*

11. *Id.* Justice Pashman in his concurrence/dissent states,

I am similarly distressed by this Court's continuing condonation of the concept of "limited" dual representation, first sanctioned in *In re Kamp*, 40 N.J. 588, 595-596, 194 A.2d 236 (1963). By securing the derivative client's consent to such a limitation on his duty, the attorney, in addition to his plenary representation of the primary client, "represents" the derivative client also as to some matters involved in the closing of title but not as to others. In practical terms what this arrangement means is that at the settlement table, moments after having purportedly acted on behalf of the derivative client's interest, the attorney will turn on his "former" client and act solely as the advocate for the primary client as to the matters reserved from dual representation. One can readily imagine the bewilderment of the derivative client as he sees the attorney transformed from ally to enemy in a matter of seconds. He didn't bargain for that result when he gave his "consent" to the limits of the dual representation he would receive. Agreeing to allow an attorney not to press certain matters on your behalf is not equatable with agreeing to have him press those very matters against you. This incongruous situation would be ludicrous were it not so tragic. Yet the Court sees fit to perpetuate such an arrangement, which in reality is nothing less than a travesty of the attorney-client relationship and mocks the very concept of the professionalism of lawyers. The impropriety of permitting an attorney to act as both the advocate and adversary of a client in a single transaction is too obvious even for statement.

Id. at ____, 384 A.2d at 1085.

12. *Id.*

13. *Id.* at ____, 384 A.2d at 1083-84. Justice Pashman, discussing loyalty

The existence of these conflicts necessarily leads to the issue of dual representation.

Opinions have been mixed on how dual representation may arise in this area and whether it should be condoned under any circumstances. In a discussion of *Page v. Frazier* and other decisions, one commentator¹⁴ was not persuaded by courts finding against the creation of an attorney-client relationship through justifiable reliance in mortgage transactions.¹⁵

They ignore the practical realities of mortgagor reliance on the title examination conducted by the attorney selected by the bank. The mortgage application is not a document that is the result of bargaining between mortgagor and mortgagee. The mortgagor generally must use the bank's attorney. For a routine transaction involving, as in this case, a one acre parcel of unimproved land, it would make no sense for the mortgagor to retain independent counsel and have two separate title examinations. . . . [I]t would seem obvious that the mortgagor would reasonably rely on the bank's attorney to perform the title examination properly.¹⁶

Others have felt that there should be no dual representation because each party should have its own attorney. Judge Pashman

problems, states:

Undertaking a dual representation, the attorney will find himself in an impossibly equivocal position. As representing the seller, he must use all reasonable and proper means to see that the proposed sale of his client's property is consummated; as representing the buyer, he has an obligation to reveal any information which would be of genuine interest or help to the buyer in determining whether to make the purchase and in protecting his rights after the contract has been signed. It is apparent that this twofold obligation cannot be met in circumstances where the attorney's knowledge embraces any fact, known to him as the result of his relationship with the seller, which, if known to the buyer, might influence him to reject the purchase or to insist upon terms or conditions less favorable to the seller.

Id. (quoting N.J. Dup. Ct. Advisory Comm. on Professional Ethics, Op. 51, 87 N.J.L.J. 705 (1964).

14. 383 Mass. 55, 445 N.E.2d 148 (1983).

15. Case & Statute Comment, *Tort Law—Legal Malpractice—Attorney Liability for Lay Employees—Mortgagee's Conveyancer Duty Toward Mortgagor*, 68 MASS. L. REV. 150 (1983).

16. *Id.* at 151.

in his concurrence/dissent in *In re Dolan*¹⁷ argued for independent counsel via a *per se* rule against dual representation in real estate transactions.¹⁸ He claimed that such rule would alert persons of modest means to the gravity of the transaction and "impel" them to get their own attorney. (The majority of the court thought a modest income person would end up unrepresented in such situations.)¹⁹ Pashman further argued that relatively uncomplicated real estate matters could be handled at moderate fees.²⁰ He added that the cost would be one most purchasers would not mind bearing if they were aware of the "potentially significant benefit."²¹ He felt "many purchasers will leap at the opportunity to avoid a purportedly unnecessary extra expense when they are misled into believing that the other's attorney can and will give them equally effective representation for free or at a lesser cost than if they obtained their own representation."²²

Perhaps the most practical occasion for use of dual representation occurs when the mortgage is guaranteed by federal financing.²³ With these mortgages, the terms are less flexible. "Federal auspices in this context brings with it a certain rigidity which leaves little room for negotiation of prices and such other commonly negotiable features as limits and rates on borrowed money."²⁴ Variance from the fixed terms in the government mortgage forms are rarely permitted.²⁵ Even in this situation, the Supreme Court of New Jersey warned that "the severely strictured nature of the relationship between mortgagor and mortgagee in no wise serves to diminish the essential obligation of full and timely disclosure."²⁶

Some of the situations that might face an attorney in a mortgagor-mortgagee transaction are discussed below.

1. *When the attorney is representing only one party*

Sometimes the attorney who is present at the closing transac-

17. *Id.*

18. *Dolan*, 76 N.J. at _____, 384 A.2d at 1084.

19. *Id.* at _____, 384 A.2d at 1085.

20. *Id.*

21. *Id.*

22. *Id.*, citing *Bates v. Arizona State Bar Assoc.*, 433 U.S. 350 (1977).

23. *Dolan*, 76 N.J. at _____, 384 A.2d at 1080.

24. *Id.*

25. *Id.*

26. *Id.*

tion is there to represent *only* his own client.

a. Attorney is unaware of Mortgagor's reliance

There does not have to be a formal situation to establish an attorney-client relationship.²⁷ There can be an implied attorney-client relationship due to the conduct of the parties.²⁸ If the attorney is the only lawyer present, he "should realize" that the other party may "lean" on him, especially when the mortgagor is relatively unsophisticated.²⁹

In such situations, it may be hard for an attorney to "prove" that he had no idea of the possibility of the mortgagor's reliance. The more prudent course in such a situation would be to assume that there may be reliance and to act accordingly.

In *Biakanja v. Irving*, a 1958 case, the California Supreme Court used a balancing test to determine liability which replaced the previous requirement privity.³⁰

[T]he court weighed: (1) the degree of the intended effect of the transaction on the plaintiff; (2) the foreseeability of injury to the plaintiff; (3) the certainty of actual injury to the plaintiff; (4) the degree of proximity between the defendant's behavior and the plaintiff's injury; (5) the immorality of the defendant's conduct; and (6) the policy of avoiding a repetition of the harm.³¹

Another standard which measures the establishment of an attorney-client relationship in terms of foreseeable reliance was brought out in *Craig v. Everett M. Brooks Co.*³² where a contractor and an engineer each had a contract with a developer, though not

27. See *Crest Inv. Trust, Inc. v. Comstock*, 23 Md. App. 280, —, 327 A.2d 891, 901 (1974).

28. *Id.* at —, 327 A.2d at 902.

29. See *id.*

30. *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 19. Cited in *Recent Cases, Liability—Negligence—Malpractice—Attorneys—An Attorney Retained by a Mortgagee Lender is not Liable to Mortgagors of Unimproved Real Estate for Negligent Misrepresentation with Respect to a Title Examination When the Mortgagors Have Been Warned Expressly that the Mortgagee's Attorney Represents the Mortgagee's Interests and that the Mortgagors May Engage their Own Attorney to Represent Their Interest—Faye v. Frazier*, 388 Mass. 55, 445 N.E.2d 148 (1983), 52 CIN. L. REV. 1069, 1072 (1983).

31. 52 CIN. L. REV. at 1072-73.

32. 319 Mass. 92, 64 N.E.2d 693 (1946). See 52 CIN. L. REV. at 1074.

with each other, and the contractor's contract contemplated reliance on the engineer's performance. The court noted these elements: (1) knowledge by the attorney of the identity of the relying party, (2) knowledge of the degree of reliance, and (3) negligence proximately causing the damage.³³ In these circumstances (knowledge of party and reliance) there was no risk of indeterminate liability.³⁴ The implication by later courts relying on this test³⁵ is that a nonclient would probably prevail "if his claim against a negligent attorney could withstand the *Craig* test of foreseeable reliance."³⁶ "In essence, the foreseeable reliance test poses the question: under the circumstances, would the plaintiff reasonably have been expected to rely on the attorney's services?"³⁷

b. Attorney realizes mortgagor might rely on him

"The catalyst . . . is the (lawyer's) knowledge of the plaintiff's reliance upon him."³⁸

The case of *Page v. Frazier*³⁹ devotes a good deal of discussion to the mortgagor-mortgagee-one-attorney situation. The Pages signed a mortgage application which contained the bank's conspicuous cautionary advice that "its attorney would represent its interests, and that the plaintiffs might retain their own attorney to represent their interests."⁴⁰ There the plaintiffs claimed that the proper test for the court to use in determining if there was an attorney-client relationship was whether the plaintiffs "had a contract with the bank which 'contemplated reliance' on (the attorney's) services."⁴¹ The Supreme Judicial Court of Massachusetts disagreed and looked at "whether the attorney's contract with the bank was exclusively and expressly for the benefit and protection of the bank."⁴² The appellate court pointed out that it was conceivable for the bank's interest to differ materially from the plain-

33. 52 CIN. L. REV. at 1075-75.

34. *Id.* at 1075 n.51.

35. *Id.* at 1076.

36. *Id.*

37. *Id.* at 1079.

38. *Page*, 383 Mass. at _____, 445 N.E.2d at 154, quoting *Bromfield v. Kosong*, 349 Mass. 749, 755, 212 N.E.2d 556 (1965).

39. 383 Mass. at _____, 445 N.E.2d at 148.

40. *Id.* at _____, 449 N.E.2d at 154.

41. *Id.*

42. *Id.*

tiff's.⁴³ How could the plaintiffs know that what the attorney did for the bank was going to be what they needed and could rely on?⁴⁴

The other reason the court found no attorney-client relationship was more express. "Because of . . . (the mortgage application's) 'strong exculpatory language,' the judge concluded that the plaintiffs were not 'entitled . . . to rely upon the defendant's services.'" ⁴⁵ The "disclaimers" stated in the mortgage application put the mortgagor on notice. As the *Page* court stated, if a nonclient gambles that his interests are the same as the client's, and "does so in the face of an express warning that the interests may differ, his claim of foreseeable reliance cannot be rescued simply because, in retrospect, the interests are shown to have differed." A mortgagor who knowingly takes such a risk after disclosure, therefore, is not protected.⁴⁶

In a footnote to *In re Dolan*,⁴⁷ the Supreme Court of New Jersey commented:

[T]he not uncommon practice by some lending institutions of requiring real estate mortgagors to be represented by the lender's attorney has not gone unnoticed by the Legislature. N.J.S.A. 46:10A-6 prohibits such a practice where the mortgagee is a consumer. Senate Bill 35, an amendment to this statute which has passed the Senate and is now before the Assembly Banking and Insurance Committee, expands the scope of the statute to prohibit such a practice in all mortgage loan transactions, regardless of whether the mortgagee is a consumer or a commercial party.⁴⁸

2. *When the attorney is representing both parties—the duty to disclose*

"[I]f dual representation does occur, fidelity to the Code of Professional Responsibility 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 represen-

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at _____, 445 N.E.2d at 154-55.

47. *Dolan*, 76 N.J. 1, 384 A.2d 1076.

48. *Id.* at _____, 384 A.2d at 1079 n.4.

tation be fundamentally fair to both sides.⁴⁹

The Comment to Rule 1.7 of MRPC regarding conflict of interest states,

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. 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 likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.⁵⁰

"The lawyer may represent both clients only if it is obvious that he can adequately represent the interest of each and if each consents to the representation on the exercise of his independent professional judgment on behalf of each."⁵¹ In *Crest Investment*

49. *Crest*, 23 Md. App. at ____, 327 A.2d at 905.

50. MRPC Rule 1.7 comment (Other Conflict Situations).

51. *Crest*, 23 Md. App. at ____, 327 A.2d at 904. The court in footnote 11 cites "Maryland Rules" Vol. 98, as follows:

The Ethical Considerations which accompany Canon 5 under the caption "Interests of Multiple Clients," EC 5-14 to 5-20 inclusive, contain the following relevant guidelines:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. (EC 5-14).

Again:

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 doubts against the propriety of the representation." (EC 5-15)

And also:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that

Trust, Inc. v. Comstock,⁵² the Chancellor of the Maryland Circuit Court spoke to this point:

The law of Maryland required that the defendant Kaplan having undertaken representation of more than one party to this transaction owed a continuing duty to each party to act fairly and to adequately disclose to each all relevant facts of each transaction and to act in his clients' best interest as an attorney.⁵³

Further, in *Dolan*, the New Jersey Supreme Court pointed out that an attorney owes complete and undivided loyalty to his client.⁵⁴ The attorney should be able to advise the client by using his professional training, ability and judgment to protect the client's interests. "Consequently, if any conflicting interest could arise which would stand in the way of that kind of unstinting zeal, then the client must be so informed and the attorney may continue his limited representation only with the client's informed consent."⁵⁵

Justice Proctor in *In re Kamp*,⁵⁶ discussed disclosure requirements which apply when an attorney represents both mortgagor and mortgagee. First, the attorney must disclose his representation of the other party.⁵⁷ Second, he must "explain in detail the pitfalls that may arise" in the transaction that should make the mortgagor seek independent counsel.⁵⁸ If the attorney will represent the [mortgagor] in only part of the transaction, full disclosure requires that he inform the client of his intent to limit the scope of his representation and "point out the advantages of . . . retaining independent counsel."⁵⁹

each client be given the opportunity to evaluate his needs or representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. (EC 5-16)

MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY appendix F (1957-Repl. Vol. 1971).

52. 23 Md. App. —, 327 A.2d 891.

53. Quoted *id.* at —, 327 A.2d at 899.

54. *Dolan*, 76 N.J. at —, 384 A.2d at 1080.

55. *Id.*

56. 40 N.J. 588, 194 A.2d 236 (1963).

57. *Id.* at 595, 194 A.2d at 240.

58. *Id.*

59. *Id.* at 596, 194 A.2d at 240.

In 1984, the Government of Great Britain released a consultation paper on how to avoid conflicts of interest when one solicitor acts for both parties.⁶⁰ Still, the Government "admit[s]" that there are some circumstances in which there would always be conflicts of interest between the mortgagor and mortgagee such as when advice is needed on the form of mortgage, or when changes occur in terms.⁶¹

The opportunity for conflict to arise—for instance, in terms of a condition of title acceptable to one party but not the other—while perhaps remote is by no means non-existent. . . . Without presuming to suggest an exhaustive list of potential areas of conflict, we draw attention to these as the kinds of matters of which consenting purchasers-mortgagors should be made aware before they consent to the attorney representing another party to the transaction.⁶²

a. Disclosure ahead of time

The best chance for an informed consent is when disclosure is made enough ahead of time so that the parties can properly reflect about the potential problems of sharing an attorney and make a deliberate, well-thought-out decision in the matter. "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."⁶³ As the court in *Dolan* suggested, "[T]he time should have been taken and the opportunity created to explain to the purchasers the potential conflicts—the 'pit-falls'—so as to allow for execution of the consent forms after due deliberation."⁶⁴

b. Disclosure at the closing

More likely than not, if the attorney does not disclose the problems of dual representation until the closing of the mortgage transaction, a strong argument could be made that any consent for the dual representation made at that time is not informed con-

60. Conveyancing Conflicts, 134 NEW L.J. 303 (1984).

61. *Id.*

62. *Dolan*, 76 N.J. at _____, 384 A.2d at 1080-81.

63. *In re Kamp*, 40 N.J. at 588, 194 A.2d at 240.

64. *Dolan*, 76 N.J. at _____, 384 A.2d at 1081.

sent.⁶⁵ "Decisions to represent more than one client are typically not made with any degree of soul-searching. Either the attorney regularly represents more than one client or he does not. Often he will not even meet the other client until the day of the closing."⁶⁶

The *Dolan* court commented,

The problems that can arise from the failure to heed that instinctive warning are graphically demonstrated in the matter before us. The record reveals that a purchaser objected to signing one of the consent forms after the conflict of interest situation had been explained to him (because he believed it might place him in the position of approving a conflict which was "illegal"), but ultimately he executed the form as the result of persuasion from his wife and a desire to avoid the serious disruptions of his moving plans resulting from any adjourned or cancelled closing. Although we agree with the Committee's conclusion that the consent was signed voluntarily in the literal sense that neither respondent nor the seller exerted any overt pressure on the client, nevertheless we are left with the impression, as was the Committee, that execution of the form was due more to the exigencies of the situation than to an unfettered will. And this need not and should not have been. The circumstances surrounding the execution of the consent form in this instance and in every other instance where the forms were executed in like fashion should not have been permitted to arise.⁶⁷

It is important that the client have enough time to think through what he is consenting to.⁶⁸ Disclosure "sprung" on the client can not fairly be said to be other than "consents which are less than knowing, intelligent and voluntary. (These) must not be forced upon the client by the exigencies of the closing. This applies with equal force to the dual representation of mortgagor and mortgagee."⁶⁹

c. No disclosure at all

There could be situations where the attorney has not made full disclosure at all, literally or effectively. The lawyer might find

65. *Id.*

66. Comment, *Conflicts of Interest in Real Estate Transactions: Dual Representation—Lawyers Stretching the Rules*, 6 W.N. ENG. L. REV. 73, 79 n.28.

67. *Dolan*, 76 N.J. at _____, 384 A.2d at 1081.

68. *Id.* at _____, 384 A.2d at 1082.

69. *Id.*

it easier to perceive a failure to disclose if he had said nothing at all. But in some instances he might be acting for the various parties in a non-adversarial transaction and fail, not only to realize the problems, but to disclose these to the clients.⁷⁰ Even where all parties were ultimately interested in the success of the enterprise, the parties can foreseeably have adverse economic interests.⁷¹

In *Crest Investment Trust*, the defendant-attorney forestalled the plaintiff from having separate counsel examine a reworked mortgage agreement by advising the plaintiff, "Save your money, I am your attorney."⁷² On other occasions, the plaintiff "was dissuaded from seeking independent legal advice and was always assured that the defendant Kaplan was acting as his attorney and on his behalf."⁷³ Kaplan was also primarily acting as attorney on behalf of the lender/mortgagee. The mortgagor client ended up in a situation where he would have surely "lost the farm" without the court's intervention on his behalf.⁷⁴ Against the attorney the court held that it "was rarely appropriate for the defense of laches to be interposed by an attorney and his clients in a suit by another client predicated upon a reach of the attorney-client relationship."⁷⁵

Conclusion

An attorney is not prohibited from representing the mortgagor and the mortgagee,⁷⁶ but he must tread a narrow path to avoid ethical problems⁷⁷ and civil liability.⁷⁸ If he is the only attorney involved and he does not want to be "deemed" attorney for "the other party," he must take steps to disclaim their reliance *before* it

70. *Crest*, 23 Md. App. at ____, 327 A.2d at 905.

71. *Id.*

72. *Id.* at ____, 327 A.2d at 895.

73. *Id.* at ____, 327 A.2d at 901.

74. *Id.* at ____, 327 A.2d at 910.

75. *Id.* at ____, 327 A.2d at 909-10.

76. MRPC Rule 1.7 comment:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

77. *See Dolan*, 76 N.J. 1, 384 A.2d 1076.

78. *See Crest*, 23 Md. App. 280, 327 A.2d 891.

takes place.⁷⁹ If he is going to represent both, he must take *full* disclosure of his dual representation to both clients.⁸⁰ The parties should actively agree to the dual representation once they are in possession of all the facts.⁸¹ The attorney must place each party in a position to know of all the ramifications of the total transaction.⁸² If the situation becomes one where a conflict of the parties' interest arises, this, too, must be explained and the attorney should recommend that the parties obtain separate counsel.⁸³

What seems to be the key element is the *full disclosure*⁸⁴—the notice requirement necessary for the client to be able to make an informed decision about matters affecting his life and his finances for long years to come.⁸⁵

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79. See *Page*, 383 Mass. 55, 445 N.E.2d 148.

80. See *Crest*, 23 Md. App. 280, 327 A.2d 891.

81. See MRPC Rule 1.7.

82. *Id.* But see MRPC Rule 1.7 comment (Consultation and Consent):

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

83. See MRPC Rule 1.7 comment: "If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation."

84. MRPC Rule 1.7.

85. *Dolan*, 76 N.J. at _____, 384 A.2d at 1084.