

Dual Agency and the Legal Profession



By Brian Madigan LL.B.

Lawyers act for their own clients. They don't act for opposing parties in the same deal or adversaries in Court. The basic element of the agency appointment for lawyers is "advocacy".

The lawyer is selected as an advocate to act for, and champion the cause of the client. Avoid conflicts of interest! If there is a potential conflict, even if it's not real, avoid that too.

It would indeed be rather absurd to find that the plaintiff's lawyer was also representing the defendant in the same case. How would that work? Of course, it doesn't work at all.

If the defendant asks the plaintiff's lawyer for assistance, then the lawyer will refer the defendant to other counsel. From time to time, the defendant will be commonly represented by a particular law firm. If it turns out that the law firm commenced legal proceedings against one of its own clients by mistake (sometimes unknowingly) then both parties will be referred to other counsel.

This reminds me of a small law firm which developed substantial expertise in the field of environmental law. There were three partners, but soon they found that they had to turn down just about every case due to conflicts of interest. The work soon went to other less experienced counsel. All their own (former) clients were annoyed. So, what did they do? They split up the partnership and went three separate ways. In the end, as between all three new law firms, they represented all their former clients. All the conflicts of interest were avoided.

On referral, there is no percentage payment or reimbursement. There is no referral fee. It is a quid pro quo situation. If Bob refers a case to Bill this week, hopefully Bill will refer a client to Bob next week. Any payment is considered inappropriate and unethical. Perhaps, if Bill does not have a client to refer, then the next time they are out to lunch, he will pick up the tab. But, that's it. Otherwise, any referral compensation would go against the laws related to champerty, that is encouraging lawsuits. It was long considered unethical to encourage or have a vested interest in the outcome of a lawsuit. Good lawsuits were simply to proceed unencumbered and based on their merits.

While the lawsuit situation is clear, a solicitors' practice is not. Here we are dealing with the advice and counsel provided to clients by lawyers in respect to their business dealings, contracts, and personal matters.

It is somewhat more difficult to establish boundaries when the two clients are not in Court, but both are sitting across from each other in the lawyer's boardroom attempting to negotiate a deal.

Nevertheless, law societies have established and maintained strict guidelines: in essence, don't act for both. That's all there is to it.

From time to time, there are limited geographic exceptions in non-controversial matters. Perhaps a law firm may be permitted to act for two parties (provided they have somewhat similar interests) in a remote rural area, otherwise one party is going without counsel. So, limited dual agency is acceptable out of necessity. This however is a rare set of circumstances.

There are some **duties and obligations** owed to clients that arise out of the common law of **agency**:

- Loyalty
- Confidentiality
- Obedience
- Accounting
- Disclosure
- Best interests

In fact, these same rules apply to real estate agents. But, lawyers have clients. They don't have customers. There are no second-tier or second-rate clients that have a different name. You are either a client or you are not. If you are a client, you are entitled to receive those duties and obligations.

There simply is no dual agency. Someone gets moved to another law firm. Both parties are entitled to representation and that means "client status".

Generally, law firms will make far less money in a real estate deal than the realtors, so perhaps it is somewhat easier to refer one of the parties. But, temptation should not be a sufficient justification for dual agency in the real estate business.

By and large, law firms do their utmost to maintain high ethical standards and avoid conflicts of interest between their clients. The real estate industry would do well to follow suit. Unfortunately, dual agency has been around too long, so the practice is likely to continue in the foreseeable future.

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