A photograph of a building facade with graffiti and scaffolding. The building has a grey brick wall with several horizontal bands of yellow and white paint. There is a large amount of graffiti in various colors (blue, white, yellow, purple) on the wall. A bare tree is visible on the left side. Scaffolding is visible in the foreground, and a few people can be seen through the glass windows of the building. The overall scene is urban and somewhat gritty.

ETHICAL ISSUES IN THE PRACTICE OF REAL ESTATE LAW



**NATIONAL
LAW INSTITUTE**
Continuing Legal Education

Marc Israel, Esq.

Marc@Marcisrael.com



Representing Both Buyer and Seller: Permitted if Test is Satisfied

Rule 1.7(b)

Representation of buyer and seller permitted if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) each affected client gives informed consent, confirmed in writing.

The Reality of Dual Representation

- Hard to Imagine a Situation Where (1) No Terms are Negotiated or (2) No Conflicting Interests
- Very Difficult to Objectively Represent Both Parties
- “Dual representation should be practiced sparingly....”
- “It is difficult to justify, except in unusual and very limited circumstances....”



If Conflict Arises During Representation

- Rule 1.7(b) Applied
- Three-Part Test is Reapplied
- If the Test is Not Satisfied Dual Representation Must Cease
- If the Test Fails Who Can the Attorney Represent?



Representing Both Buyer and the Lender

- The Dual Representation “creates the potential for a clear conflict”
- Lender and Borrower/Buyer Have Different Interests
- Potential for the Attorney to be on Both Sides of a Negotiation
- Out of State Lenders



Representing Both Buyer and the Lender: Exception to the Rule

Ethics Opinion 753 Creates an Exception to its Own Rule:

“In some circumstances there is not negotiation or assertion of rights between the lender and buyer in which a lawyer has any role. As long as full disclosure of the risks of dual representation has been made and knowing consent obtained” dual representation may be permissible.

Acting As Attorney and Real Estate Broker: Inherent Conflict

- Broker Only Gets Paid if the Deal Closes
- Attorney Cannot Have a Personal Stake in the Advice Rendered
- These Two Interests Directly Conflict with Each Other when Attorney is the Broker
- Prohibition Extends to the Spouse
- Ethics Opinion 493 Dated October 5, 1978



Attorney Cannot Be Mortgage Broker and Attorney on Same Transaction

- Same Reasoning as With Real Estate Broker
- Attorney Cannot Have Personal Stake in the Advice Rendered
- Prohibition Extends to the Spouse
- Cannot Be Both Lender's Counsel and Mortgage Broker



Attorney Cannot Be Mortgage or Real Estate Broker and Attorney on Same Transaction

Ethics Opinion 753 Dated February 26, 2002

“By acting as an associate of the mortgage [or real estate] broker for a commission, the attorney would then have a divided loyalty between the obligations to his client and the desire to see the transaction close.”



Representing the Buyer and Owning the Title Company

- Ethics Opinion 731 Dated July 27, 2000
- Attorney Has Built In Conflict in Negotiating with Himself
- What Will be Omitted or Excepted from the Title Policy?
- Client's Interests "inherently conflict with those of the title company regarding what risks will be insured".



Being the Attorney When Title Company is Owned by the Spouse

- Ethics Opinion 738 Dated April 16, 2001
- Attorney and Spouse Have Joint Financial Pecuniary Interests
- Attorney is Treated as Owning the Title Company with Spouse
- Same Rule as in Ethics Opinion 731 Applies

Acting as Counsel to Coop and Individual Seller

Can Represent Both Coop Board and Seller if Role for Board is “purely ministerial”

“The lawyer must be sensitive to situations where the selling tenant is in fact aligned with the buyer in seeking concessions from the cooperative to the buyer in order to facilitate the sale. In such cases,...we do not believe it will ever be “obvious” that the lawyer can “adequately represent the interests of each.” City Bar Association.



Commingling of Funds Prohibited

- Escrow Monies Must be Deposited into a Segregated Account
- Account Must Only Hold Funds Entrusted to the Attorney by Clients or Third Parties
- Attorney's Operating Monies Cannot be Deposited into the Account
- Similarly Escrow Monies Cannot be Deposited into Attorney's Operating Account



Utilizing Escrow Account in a Manner That Reflects Negatively on Attorney's Honesty and Trustworthiness

Rule 8.4

A lawyer or law firm shall not: . . . (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer, (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.....[and] (d) engage in conduct that is prejudicial to the administration of justice.



Paying Legal Fees Out of Escrow

- It is Permissible for the Attorney to Pay Herself Her Fee Out of Escrow
- Must Have Client's Express Permission to Do So
- Any Disputed Part of the Fee Must Remain in Escrow
- Failure to Immediately Take out Fee is Commingling



Writing Checks to “Cash” and Other Rules

- It is Prohibited to Write a Check to “Cash”
- Rule 1.15(e)
- All Checks Must be Made Payable to a Named Payee
- Rule 1.15(e) Permits Only Lawyers Admitted in New York to Sign Checks



Permissible Account Titles

- (1) “Attorney Special Account”, (2)“Attorney Escrow Account”, (3) “Attorney Trust Account”, (4) “Attorney IOLA Account”
- All Printed Materials Related to Account Must Have Full Name of Account
- Additional Language is Permitted



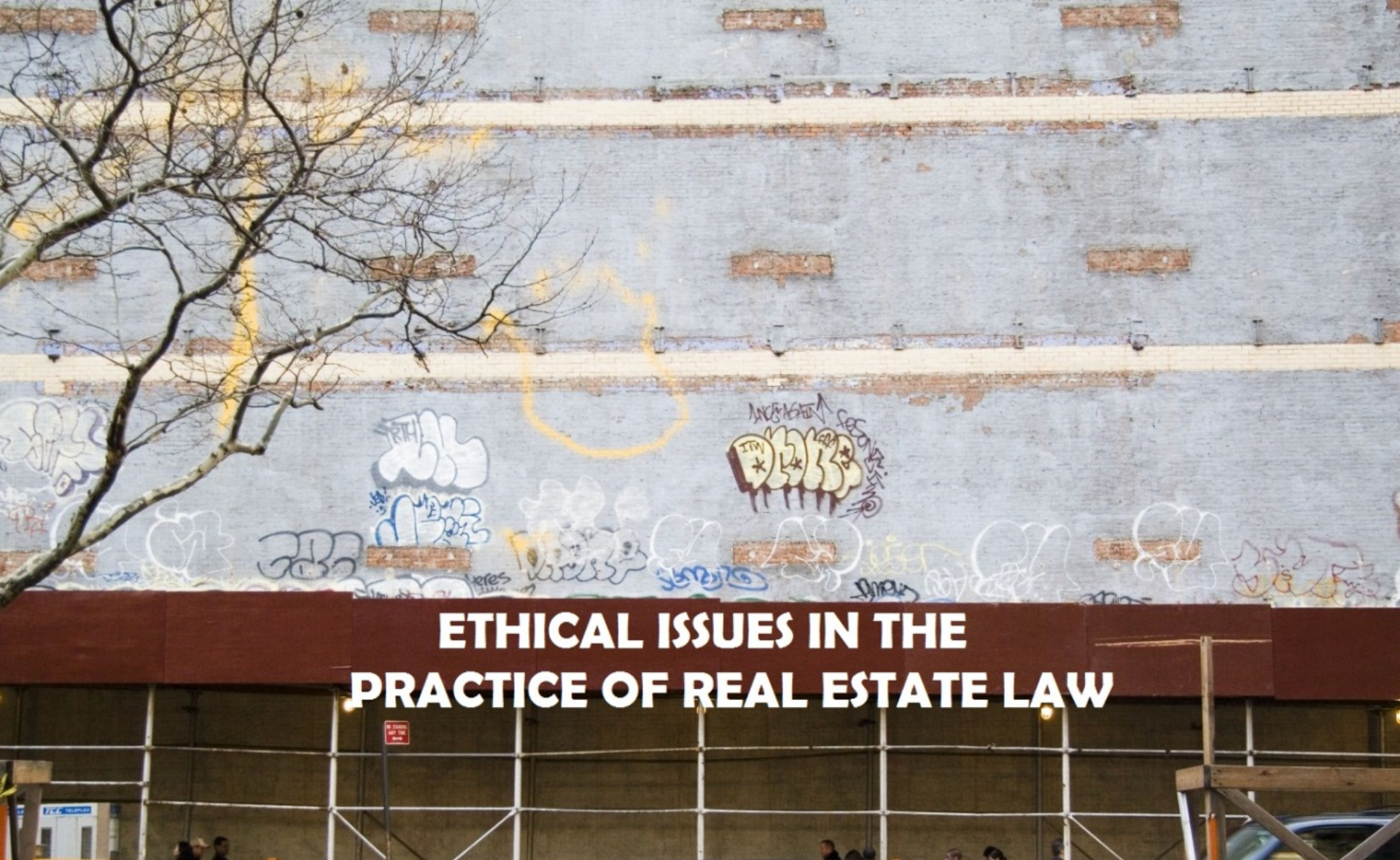
Bookkeeping Rules

- Attorney Must Maintain Records for Seven Years
- Deposits, Withdrawals, Dates, Amounts, Payees
- Checkbook or Record Book
- Check Stubs, Bank Statements, and Duplicate Deposit Slips

Producing Records

- Failure or Refusal to Produce Records is Sanctionable
- Rule 1.15(i)
- No Excuse for Violating Rules
- Excuse that Attorney was “Bad” at Bookkeeping is Unacceptable



A photograph of a building facade with graffiti and scaffolding. The building has a grey brick wall with several horizontal bands of lighter-colored bricks. The wall is covered in various graffiti tags and pieces, including a large yellow circle and a piece with the word 'INCREASE' and 'LAW'. A tree with bare branches is visible on the left side. Scaffolding is visible in the foreground, and a few people can be seen walking on the sidewalk below.

ETHICAL ISSUES IN THE PRACTICE OF REAL ESTATE LAW



**NATIONAL
LAW INSTITUTE**
Continuing Legal Education