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Three Lessons for Lawyers

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Roger Bernhardt

Christine Tour-Sarkissian

Introduction

The decision in *Wood v Jamison* (2008) 167 CA4th 156, 83 CR3d 877, is based on mistakes that attorneys might easily make. So we'll use that case as an object lesson for these cautions.

From the court's sketchy summary of the facts, it appears that McComb, a smooth talker, persuaded Peterson, a little old lady, into financing and joint venturing a nightclub operation with him. After she depleted her own bank accounts for him, he took her to the office of attorney EBJ for her to get \$250,000 by putting a mortgage on her house. EBJ, who appears to have already been representing McComb on some aspects of the nightclub project, discussed the mortgage loan with both McComb and Peterson and then subsequently did all the paperwork on that loan. (More facts will be mentioned as they become relevant.) EBJ ultimately ended up being held liable to Peterson for malpractice, breach of fiduciary duty, and elder abuse.

I. The Attorney-Client Relationship

EBJ's first mistake started when an existing client came into his office bringing a stranger along with him. EBJ should have immediately seen red flags waving. Any time two people come to an attorney, he or she has to be concerned about the potential of conflict of interest—whether the two visitors be brother and sister worrying about an ailing parent or one person just coming along to give the other moral support. Once both McComb and Peterson were in the same room with EBJ, he had to be concerned about whether he was creating a relationship with each of them—and, if so, what kind. If McComb was already his client (perhaps on this same matter), he was on dangerous ground in talking to Peterson.

That does not mean that EBJ had to ask Peterson to leave at once. Two laypersons make a joint visit generally to economize on attorney fees; a complete refusal to speak to the second one is a good reason for people to dislike lawyers. But before letting them go too far in telling their story—and certainly before rendering any opinions—EBJ should have given them a preliminary lecture about what it would mean to be the lawyer for them both, including the impossible predicament he would be in if they were both his clients and later had a falling out. For his own safety, EBJ should also have invited questions from them, which would not only have given him further opportunities to explain the situation, but also enabled him to perceive how well they understood the situation and made him better able to judge how likely it was that a real conflict could arise (if that was not already inherent from the start). Agreeing, instead, to help Peterson get a loan was not a wise way to begin.

If McComb and Peterson were both going to be clients, getting written conflict-of-interest waivers from both of them would have been the proper next step, although it bears remembering that such waivers will work only if the foundational and previous discussion of them was full and fair. EBJ did produce a waiver in court, and while it was easily rejected as coming in too late

(five months after the trial) and too suspicious (mail from an anonymous source), the appellate court also rejected it on the ground that it had not been preceded by legal advice to Peterson on the issue of conflict of interest before she (allegedly) signed it. (Nor had EBJ—as is generally prudent—documented that her execution of the waiver had not been rushed and had been with knowledge of her right to consult someone else about it.) Merely having a waiver in the file does not do too much to help an attorney accused of conflict of interest.

This particular waiver also failed, according to the court, because of the way it was worded. It referred only to Peterson’s joint venture with McComb, and not to EBJ’s services in getting the mortgage loan on her house, which were the activities that constituted EBJ’s malpractice. The court’s reasoning may tempt attorneys to draft broader waivers for clients to sign (since future requests for services are never completely foreseeable), but attempting to obtain a blanket waiver covering anything and everything may put the attorney no less at risk in the other direction. (It could well be that this court was not going to buy this waiver claim under any circumstances, and any statement about scope in the opinion was just a throwaway extra reason.)

If one of the parties refuses to sign the waiver, the attorney thereafter has to deal with her on a clearly adversarial basis and constantly make sure that he never lulls her into thinking that he is doing anything as her lawyer. Given the services EBJ subsequently performed for Peterson, that would probably have been impossible. So our analysis of the case continues, on the assumption that a valid conflict waiver might have been, or was in fact, executed. But that only leads to the next ground of liability that was asserted against EBJ.

II. Malpractice

EBJ was guilty of malpractice, according to the court, not only because he failed to advise Peterson about his conflict of interest—covered above—but also because:

- He put her into a bad loan.
- He made a secret profit on that loan.

a. The Loan Terms

EBJ was held guilty of malpractice for obtaining an unsuitable loan, *i.e.*, one that was certain to lead to foreclosure. His liability arose because he agreed to find a lender but then also took care of all of the paperwork involved in getting the loan. For the court, that loan work alone was “sufficient to support a finding that an attorney-client relationship existed.” That assistance also became the basis for imposing extra duties on EBJ to inquire into Peterson’s financial situation, the propriety of the loan terms, and, apparently, the wisdom of the investment being made with the loan funds. According to the court, EBJ should have sent Peterson to an independent investment advisor if he himself was not going to advise her about it. Sending a client to any other professional—loan broker, CPA, or financial advisor—would not only have reduced EBJ’s documentary tasks, but should have shifted the advisory responsibilities off his and onto other shoulders; that potential consequence should admonish attorneys not to lightly volunteer to be extra helpful. However, how much EBJ’s legal and ethical responsibilities (he was guilty of both malpractice and breach of fiduciary duty) would have been reduced had he limited his services to less than the everything that he did is unclear; it is always difficult to predict safe stopping places along the slippery slope of doing more and more for the client.

EBJ was also guilty of not advising Peterson that a nightclub venture was an inappropriate investment for her (although this sounds almost like an afterthought in the opinion). On that feature, attorneys are in notorious disagreement over the wisdom of making themselves into the financial advisors of their clients; it is not self-evident that assisting a client in obtaining a loan imposes on counsel a companion obligation to see that the loan proceeds are well spent. But if this part of the opinion is taken seriously, it represents a new risk for attorneys to consider.

b. The Secret Profits

EBJ was also held liable because he received a \$4000 “referral fee” from Peterson’s lender and used her mortgage proceeds to get himself repaid for a \$10,000 loan that he had earlier made to McComb.

The court did not discuss whether EBJ could have legitimately taken this money had he not been acting as her attorney. There is no indication that EBJ charged Peterson any kind of attorney fee. Perhaps such fees were paid by McComb, or perhaps EBJ thought of the funds he got from the loan as a substitute for attorney fees. Perhaps he believed that he was only acting as a kind of loan broker or loan finder for a nonclient, but since he was being treated as her attorney, nondisclosure of these two items was held to be malpractice. Boyd Lemon, Peterson’s expert witness, opined that his conduct ran afoul of both Cal Rules of Prof Cond 3–310 (because he was rendering legal services to Peterson without disclosing the conflict) and 3–300 (because he was receiving a nonattorney’s fee out of a business transaction with a client that was disadvantageous to her).

Those opinions make it unlikely that EBJ would have avoided liability if he had simply disclosed his receipts to Peterson. The fact that he was also held guilty of breaching fiduciary duties makes the relevance of her knowledge and consent even more problematic. But surely an attorney who discloses all sources of income to anyone affected by a transaction—whether or not he is attorney or the hearer is client—is less endangered than one who conceals that information.

III. Elder Abuse

EBJ was also held liable under the Elder Abuse Act (Welf & I C §15600) because Peterson was 78 years old and EBJ “took the undisclosed finder’s fee,” “knowingly aided and abetted McComb’s abusive scheme to take the \$250,000,” and “knew what the loan proceeds would be used for,” under circumstances in which “[a]ny attorney would know it was an inappropriate use of Peterson’s funds.”

This highlights another hazard that attorneys must be alert to in handling real estate transactions for America’s growing elderly population. The Elder Abuse Act is so broad that EBJ could have been held liable under it even if he had properly avoided all of the attorney-client, malpractice, and fiduciary duty pitfalls discussed above. EBJ clearly came within the Act if he was representing the elderly Peterson, but also even if he was representing only the younger McComb in McComb’s deal with Peterson. EBJ had to do more; for his own protection, he needed either a videotape of his consultation with her, or a statement from a health care professional that she was of sound mind at all critical stages of the deal, even if it was embarrassing to tell her he had to take those steps.

Financial elder abuse does not require an attorney-client relationship. Nothing in §15610.30 limits the definition of elder abuse to attorney-client relationships or makes full disclosure a

defense against it. EBJ was held to have aided and abetted McComb in committing elder abuse by knowing that he was taking Peterson's property for a wrongful purpose.

Indeed, under the facts as described in the opinion, EBJ may have needed to affirmatively stop the deal once he knew Peterson was 78. That might have put him in trouble with his client McComb, but he should not have ignored the fact that Welf & IC §15657.5(a) provides for costs and attorney fees to a plaintiff who prevails in an elder abuse claim. Such fees are one-way, rather than bilateral, meaning that an attorney can end up owing them if he loses, but unable to recover them if he wins. See *Wood v Jamison* (2008) 167 CA4th 156, 83 CR3d 877.

Professor Bernhardt gratefully acknowledges the contributions of his colleague Christine Tour-Sarkissian to this portion of this issue's Midcourse Corrections column. Ms. Tour-Sarkissian practices law in San Francisco and is Adjunct Professor of Law at Golden Gate University, teaching Real Estate Transactions and Real Estate Litigation.

A Useful Book for Starting Lawyers

I received a new book from the Real Property Trust & Estate Law Section of the ABA, entitled *From Handshake to Closing: The Role of the Commercial Real Estate Lawyer*, by Sidney Saltz (a well-known Chicago attorney).

Now that I know of it, I will recommend this book to two kinds of people in the future. First, I will recommend it to students who tell me that they have just gotten a job doing real estate work for a law firm—I will tell them that this book is what they should read before they start work there, so that they will not have to risk embarrassing themselves asking too many questions that reveal how little they know. Second, I will recommend it to the lawyers I know at real estate firms when they complain that they spend too much time explaining the simple facts of law life to their new hires—I will advise them to just give those beginners a copy of this book and save themselves all that work.

This book is filled with many of the tips and anecdotes that an acolyte needs in order to fit in more smoothly with the rest of the firm—*e.g.*, when to draft a document herself or when to trust someone else to do it, or when to use a form instead. (Incidentally, there are some very useful form clauses with some excellent commentary accompanying them, although all of that is in the context of commercial leases.)

What I would not recommend the book for is as a deskbook for reference to particular problems. Saltz's informal style and organization make his text almost impossible to pick up and search for treatment of any individual item. It is really too bad that there is no index. (I had to use a lot of post-it notes so that I could get back to points I wanted to remember.) I will advise my students: "Read this *before* you show up for the first day of work; after that you won't have the time to go through it looking for an answer; and then store it in your bookshelf under commercial leases."