

**ETHICS: POSITIONAL CONFLICTS  
FOR REAL ESTATE LAWYERS**

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## ETHICS: POSITIONAL CONFLICTS FOR REAL ESTATE LAWYERS

### I. STATE BAR AND ABA DISCIPLINARY RULES ON PROFESSIONAL CONDUCT

ABA Professional Conduct Model Rule 1.7 forbids legal representation that “involves a concurrent conflict of interest” without obtaining proper consent from the client. Such a conflict can go beyond a “directly adverse” representation, since the rule states that “[a] concurrent conflict of interest exists if...there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” Only where “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and after obtaining proper consent, may the attorney continue to represent both clients.

A “positional conflict” is taking a position in a single pending matter that may later prove detrimental to an existing client who is not directly involved in that matter. For instance, if a law firm sues a bank alleging usury and, if they are successful, it may result in an adverse position for another lender client. In representing clients with potentially conflicting positions, the questions to ask are always: (1) Is it “directly adverse” (i.e. you are asked to represent the seller of real property to a buyer you represented in another, unrelated matter)? If so, the lawyer must obtain written, informed consent of each client. (2) “Is it always directly adverse” (i.e. you represent several individuals seeking to form a joint venture; because of your relationship to the individual partners involved this could foreclose alternatives and suggestions that potentially create conflicts with the other partner). (3) Has the position of the law firm or the lawyer been “obviously compromised,” such that the law firm must reasonably consider the need for aggressive representation of the existing client (i.e. does it materially interfere with the lawyer’s independent professional judgment and in considering alternatives)?

**Informed consent** requires that each affected client be aware of:

- (1) the relevant circumstances and of the material, and
- (2) reasonably foreseeable ways that the conflict could have adverse effects on the interest of the client.

The information required depends on:

- (1) nature of the conflict, and

- (2) the nature of the risks involved. In representing multiple clients in a single matter, it must also include the implications of common representation, including possible effects on loyalty, confidentiality, and privilege (ABA Model Rule 1.7, Comment 18).

The American Bar Association and several district court opinions have established the following three points:

A law firm may not take opposite positions at the same time for the same tribunal.

1. If different times or different tribunals are involved, the law firm may take opposite positions, provided the representations of one client will not be adversely affected by the representation of the other.
2. In some of these “informed” situations, the potential conflict requires the firm to obtain written consents from the clients involved. Note ABA, Formal Opinion 93-377, *Fiandaca vs. Cunningham*, 827 F. 2nd 825 (1st Circuit - 1987).

[Note Comment 24 to Model Rule 1.7, which states:

...“The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter, does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case....”

And from Comment 8:

“The critical questions are the likelihood that a difference in interests 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.”]

### A. Multiple Representation

These rules were crafted to prevent conflicts in litigation issues. Additionally, comments 26-35 to Model Rule 1.7 discusses multiple representations in non-litigation matters, which usually occurs in two contexts. The first is where a lawyer individually represents multiple clients having a common objective (forming a corporation or partnership, or the buyer and the seller in a routine property transfer). The second context is where the lawyer did not intend to represent multiple parties, but is alleged to have been a “lawyer for the deal”.

### B. Drafting Papers

When drafting papers for title companies similar issues concerning client representation arise. To prevent conflicts, many attorneys ask that the parties sign off on a “non-representation” agreement, wherein the attorney merely explains that he was hired by the title company or lender to draft papers “for the transaction,” and that he represented none of the parties in the transaction. At the same time, the attorney might suggest that the parties specifically read the documents in great detail. The lawyer who drafted the documents often has not reviewed the legal description, the earnest money contract, and all amendments thereto. In many instances, the lawyer may not know to prepare documents that were anticipated by the earnest money contract (i.e. reservation of mineral interest, or an “as is” provision). See attached Exhibits “A”, “B” and “C”. The attorney simply follows the “order form” prepared by the title company. Practical considerations: Are these letters merely unilateral waivers? Does the signatory have informed consent?

It is important for parties to realize whether or not their interests are being represented by an attorney involved in a conveyance, and if the attorney is not acting as counsel, it is important to fully disclose this, so that the parties consider obtaining their own counsel. Two recent Texas cases demonstrate the need for competent representation in a conveyance, so that the parties ensure their actual intent is expressed in the transfer by deed. Note *Johnson vs. Conner*, 260 S.W.3d 575 (Tex. App.–Tyler, 2008), wherein the contract for sale attempted to limit the conveyance of the mineral estate, but the Grantor signed the deed conveying the entire estate, including the minerals. The court held that there was no mutual mistake and title and mineral estate passed, holding the grantor to a duty of care of having read and understood the conveyance. The opposite holding was reached in *Givens vs. Ward*, 272 S.W.3d 63 (Tex. App.–Waco, 2008). The court held that where there is a unilateral mistake by one party, acknowledgment of that mistake by the other party is equivalent to a mutual mistake, creating an ambiguous question of fact as to the intent

of the parties for the jury. In this case, the court allowed reformation of the deed to reserve the mineral rights. In *Givens* the court noted that there was a document executed at the closing wherein the parties agreed to correct errors and mistakes in the closing documents. See attached Exhibit “D”. This issue wasn’t mentioned in *Johnson*.

### C. Fee Attorneys

Fee attorneys are also restricted by the various disciplinary rules of professional conduct prescribed by the State Bar of Texas and the American Bar Association. Lawyers may be disbarred or sanctioned if they violate professional rules that prohibit referral fees, fee splitting, and the unauthorized practice of law. While not regulated by the State Bar, title insurance companies are also affected by certain statutes dealing with the unauthorized practice of law. Therefore, the fee attorney and the title insurance company should be aware of the disciplinary rules and statutes that affect their services and division of premiums. A recent case has held that as an escrow holder, an attorney is subject to the duties of an escrow agent under Texas law to all parties. *Newington Limited v. Forrester*, 2008 WL 4908200 (N.D. Tex.), discussed later.

Ethics Opinion 408 issued by the State Bar of Texas Committee on Professional Ethics responded to the following question: “Under what circumstances may an attorney representing a party to real estate transaction accept a fee consisting of a percentage of the title insurance premium from the title insurer?” The Committee made several pertinent points. Any fee arrangement with a title company would give rise to an attorney-client relationship between the lawyer and the title company. The relationship would therefore be embraced by all relevant disciplinary rules. In this regard, the fee received by the attorney must be reasonable under Disciplinary Rule (DR) 2-106, whether based on a percentage or some other mode of calculation. The opinion went on to note that if the arrangement causes the title company to become a client of the attorney, a situation of multiple client representation is presented. The opinion further notes that if it is obvious that the lawyer can represent each interest, and each client consents after full disclosure of the possible effects on the client’s representation of the client interest, then such multiple representation is permissible, presumably with informed consent by all parties.

In *Newington Limited v. Forrester*, 2008 WL 4908200 (N.D. Tex.), the plaintiff appointed an agent to negotiate and purchase restricted shares in a corporation, and made a \$1,000,000 “good-faith” deposit in a trust account for the purchase. The trust account was controlled by defendant, an attorney who had provided legal services for the corporation for nearly ten years.

Plaintiff claimed that its agent sent explicit written instructions for the defendant to hold the deposit until the negotiations were finalized, and that the plaintiff only transferred the money based on the express understanding with defendant that the deposit would be held until a deal was reached. However, defendant transferred \$200,000 of the deposit to a third party creditor of the corporation’s CEO.

The negotiations for purchase of the shares were ultimately unsuccessful, and defendant was only able to refund \$800,000 of the deposit. Plaintiff made three further demands for payment of the balance owed, and ultimately sought recovery through various liability theories: conversion, unjust enrichment, breach of fiduciary duties, breach of trust, and money had and received.

Defendant moved to dismiss based on the premise that: (1) that the tort claims fail because plaintiff is limited to a breach of contract claim, (2) defendant and plaintiff do not have a fiduciary relationship, (3) breach of trust claim fails as a matter of law, (4) unjust enrichment is not a cause of action recognized by Texas law, and (5) money had and received claim fails because defendant didn’t benefit from the \$200,000.

The court found that there are circumstances where a plaintiff can sue in tort despite the existence of a contract. Defendant owed plaintiff the duties of an escrow agent under Texas law, where such duties are imposed on a holder of funds acting in an escrow type arrangement, despite the lack of a formal escrow agreement. An escrow agent owes fiduciary duties to the parties in a transaction, consisting of the duties of loyalty, full disclosure, and to exercise a high degree of care in conserving and distributing the funds only to those entitled to receive it. Acting outside of the instructions of the depositor is a breach of the escrow duties, regardless of whether a contract existed or not.

**D. Fee Issues**

Rules 1.04 and 7.03 of the Texas Disciplinary Rules of Professional Conduct provide restrictions on things of value received and things of value provided by attorneys. The specific subsections of Rule 1.04 applicable to this presentation are as follows:

1. Rule 1.04. Fees

**Illegal or Unconscionable Fees**

- (a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.
- (b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; . . .

**Query:**

- 1. Attorney Jim closes a \$10,000,000 deal, acting as the escrow officer. He spends 5 hours getting payoff and tax information, reviewing documents and handling the closing.
- 2. Does his E & O cover his negligence? Does the client know enough to ask?
- 3. Is \$16,523.60 (\$3,304.72/hour) unconscionable?
- 4. If the business is client generated, has the attorney compromised the position of my client (the title company) while representing another party to the transaction?
- 5. Attorney Jim prepares the papers for a flat fee from the parties. Must he have written consent from the title company (his client) to do so?

2. Division of Fees

Rule 1.04 (cont.)

- (f) A division or agreement for division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is:
  - (i) in proportion to the professional services performed by each lawyer;...

- (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed...; and
- (3) the aggregate fee does not violate paragraph (a).

Rule 1.04 raises the same questions raised by Section 2502.051 of the Texas Insurance Code: are fees unconscionable and are they in proportion to the service performed by the lawyer?

Rule 7.03, on the other hand, pertains to value provided by the attorney. Rule 7.03 is substantially as follows:

3. Rule 7.03. Prohibited Solicitation and Payments

- (b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting

prospective clients for, or referring clients or prospective clients to, any lawyer or firm...

The Committee on Professional Ethics has interpreted Rule 7.03(b) to prohibit corporations from receiving a discount in their legal fees for referring the work of other corporations to the law firm.

**Query:**

Does this prohibit a discount for legal fees on to my client if I get a title insurance premium?

4. Barratry

Also of concern because of its severe penalty and broad language, is Section 38.12 of the Texas Penal Code, which provides, in part, as follows:

**§ 38.12. Barratry and Solicitation of Professional Employment**

- (a) A person commits an offense if, with intent to obtain an economic benefit, the person:
  - ...
  - (2) solicits employment, either in person or by telephone, for himself or for another;
  - (3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client;
  - (4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;
  - (5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or
  - (6) accepts or agrees to accept money or anything of value to solicit employment.

**Query:**

Can I, as an attorney, receive a brokerage commission?

Note §1101.651(a) of the Occupations Code. A licensed broker may not pay a commission unless it is to another licensee. Additionally,

**§ 38.12. Barratry (cont.)**

- (b) A person commits an offense if the person:
  - (1) knowingly finances the commission of an offense under Subsection (a);
  - (2) invests funds the person knows or believes are intended to further the

commission of an offense under Subsection (a); or

- (3) is a professional who knowingly accepts employment within the scope of the person’s license, registration, or certification that results from the solicitation of employment in violation of Subsection (a).

- (c) It is an exception to prosecution under Subsection (a) or (b) that the person’s conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court.

**II. CONFLICTS OF INTEREST AND CONFIDENTIALITY**

Let’s consider two classic conflicts of interest:

- 1. Big Time law firm has represented a developer for years. The developer buys a controlling interest in a bank. Not surprisingly, the primary attorney is put on the Board of Directors of the bank. The bank then enters into a joint venture agreement to develop a piece of property with the developer. The bank is the lender, the lender and his partner, the developer, each share 50 percent of the profits. Big Time law firm prepares all of the joint venture documents, the lending documents, and handles all of the paper drafting for real estate at the bank. The development is under water, owes more than the property is now worth, because we are in a sagging economy, and the attorney is called to draft work-out documents. Who does he represent?
- 2. You have grown up in Small Town, Texas; you are an upstanding citizen on the board of directors of the bank; you own the local title company; and you have a prospering law office. A transaction comes to the title company for the sale of a large, single-family residence. You represent the bank making the loan, you drafted the papers, you are in Rotary with the owner of the home, your son is buying the home, your title company is insuring it, and your wife is the real estate agent.

How do you get “informed consent” (note page 2) from all of these parties?

There are also several disciplinary rules on conflicts of interest and confidentiality, as well as suggestions by the Title Insurance Subcommittee in its study of the relationship between lawyers and the title industry. Of primary interest are Sections 1.05 through

1.08 of the Texas Disciplinary Rules, which provide as follows:

**Rule 1.05. Confidentiality of Information**

- (a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
  - (1) Reveal confidential information of a client or a former client to:
    - i. a person that the client has instructed is not to receive the information; or
    - ii. anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.
  - (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

**Query:**

I am a closing attorney. I know of a potential claim by an heir of my client that has not yet materialized – do I tell my title company?

Rule 1.05 (cont.)

- (c) A lawyer may reveal confidential information:
  - (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
  - (2) When the client consents after consultation.

\* \* \*

- (d) A lawyer also may reveal unprivileged client information:
  - (1) When impliedly authorized to do so in order to carry out the representation.
  - (2) When the lawyer has reason to believe it is necessary to do so in order to:
    - (i) carry out the representation effectively;....

**A. General Rule**

**Rule 1.06. Conflict of Interest: General Rule**

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
  - (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or
  - (2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

**Query:**

While drafting the closing documents, I change the legal description in a deed at my client’s (the seller) direction...then insure the title (as changed). Did I compromise the title company’s position?

Rule 1.06 (cont.)

- (c) A lawyer may represent a client in the circumstances described in (b) if:
  - (1) the lawyer reasonably believes the representations of each client will not be materially affected; and
  - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

A lawyer may not be able to consider, recommend, or carry out any appropriate course of action for one client, because of (1) the lawyer's own personal conflicting interest (i.e. you have a business relationship which may conflict with the ultimate goal of the client representation), or (2) responsibility to another client (i.e. in another, prior transaction). The critical question is whether there is any likelihood that a conflict exists that will materially and adversely affect a lawyer's independent professional judgment.

### Query:

When you are "closing" the transaction and drafting the closing documents, your client asks a question. Do you answer as a lawyer or a title company representative? Does the client know the difference?

\* \* \*

### Rule 1.06 (cont.)

- (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

Common representation may be permissible where the clients are generally aligned in interest, even though some difference of interests can exist between or among them. In *Simpson vs. James*, 903 F.2d 372 (5th Cir., 1990) the court noted that dual representation can be proper, and in some circumstances an attorney can represent both sides in a real estate transaction.

But note a New Jersey case, *Baldassarre vs. Butler*, 604 A.2d 112 (N.J. Super. 1992), involved a case of a real estate lawyer who represented both parties, wherein the Court stated:

"...plaintiffs' execution of the 'conflict of interest' letter did not cure the conflict and that [the attorney's] dual representation was the genesis of the underlying dispute between the parties.

...the representation of a buyer and a seller in connection with the preparation and execution of a contract of sale of real property is so fraught with obvious situations where a conflict may arise that one attorney shall not undertake to represent both parties in such a situation... a conflict of interest will exist and consent to continue representation is immaterial."

Similar potential conflicts arise when a lawyer represents a corporation or other organization and also serves as a member of that organization's board of directors. If there is a material risk that the dual role will compromise the lawyer's independence or professional judgment, the lawyer should not serve as a director. In any event, a lawyer who represents multiple parties in a matter shall not thereafter represent any of the parties in a dispute among the parties arising from the same matter. N. Ray McCormick, 2002 W.L. 31076557 (Tex. App.—Tyler, 2002). If a conflict exists, no other lawyer with the same firm can engage in representation of that client either.

### B. Intermediaries

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Before representation is undertaken, the lawyer must obtain the informed consent of each client as set out in Paragraph (b) below. In many real estate transactions, there is no anticipation of having direct adverseness to the clients' interests. For example, a lawyer seeking to represent several individuals who plan to form a joint venture is limited in the lawyer's ability to recommend or advocate all possible positions that each individual party might take. Again, the critical questions are the likelihood that interests will conflict and whether or not it will materially interfere with the lawyer's independent professional judgment.

### Rule 1.07. Conflict of Interest: Intermediary

- (b) A lawyer shall not act as intermediary between clients unless:
- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;
  - (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
  - (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without

improper effect on other responsibilities the lawyer has to any of the clients.

- (c) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can made adequately informed decisions.
- (d) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

A recent case gives the “lawyer for the deal” some comfort, however. In *Span Enterprises vs. Wood*, 274 S.W.3d 854 (Tex.App.-Houston [1 Dist.] 2008), an investor in a start-up limited liability partnership (LLP) venture brought claims against an attorney for breach of fiduciary duty. The claim stated that the partnership agreement failed to include the terms of a preliminary agreement between the venture’s CEO and the investor regarding the investment.

The plaintiff investor claimed that there was an implied attorney-client relationship, which was breached by defendant. In signing the partnership agreement, plaintiff was unaware that the terms of a preliminary agreement had been changed when its investor’s attorney (defendant) drafted the contract. Upon realizing a loss of approximately 4 percent partnership interest, plaintiffs filed suit against the defendant.

Plaintiff claimed that although the attorney was working for the investor, alleging that the companies were joining made it safe to assume that the attorney was working on behalf of the plaintiff as well. In other words, Span assumed that Wood was impliedly their attorney. However, the court held that no attorney-client relationship existed. There was no evidence to show that Span ever manifested an intent to the attorney that the attorney was providing legal services to Span. “Texas courts have refused “to expand Texas law to allow a non-client to bring a cause of action for ‘aiding and abetting’ a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client.” (*Span v. Wood* citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 407 (Tex.App.-Houston [1st Dist.] 2005, pet. denied).

**C. Prohibited Transactions**

Some conflicts are prohibited. Under some circumstances, it may be impossible to make the disclosure necessary to obtain consent (i.e. in a multiple representation, a client refuses to consent to certain disclosures to the other client, necessarily

requiring that the clients be referred out to separate representation). A lawyer cannot properly ask for such an agreement, or provide representation on the basis of a client’s consent. A subsequent conflict may revoke the consent and may terminate the lawyer’s representation at any time.

**Rule 1.08. Conflict of Interest: Prohibited Transactions**

- (a) A lawyer shall not enter into a business transaction with a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
  - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  - (3) the client consents in writing thereto.

**Query:**

Am I making decisions based on legal issues or my wallet? When do you know the difference?

\* \* \*

Rule 1.08 (cont.)

- (a) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client consents;
  - (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.05.

**Query:**

Can Dad hire me to represent his daughter? Must I maintain her confidentiality when Dad asks?

\* \* \*

Rule 1.08 (cont.)

- (j) As used in this Rule, “business transactions” does not include standard commercial

transactions between the lawyer and the client for products or services that the client generally markets to others.

Exhibit "A"

ATTORNEY REPRESENTATION NOTICE
[Represent lender, borrower pays fee]

Re: \$\_\_\_\_\_ loan, or so much thereof as may be advanced ("Loan")

Dated Effective: \_\_\_\_\_

Lender: \_\_\_\_\_

Borrower: \_\_\_\_\_

Property: Exhibit "A " attached hereto

A. The legal instruments involved in the Loan have been prepared for \_\_\_\_\_. Borrower acknowledges that the Firm has acted as counsel to Lender, and has not, in any manner, undertaken to assist or render legal advice to the Borrower with respect to the Loan or the Property securing it or the documents or instruments being executed in connection therewith. Borrower further acknowledges that Borrower has retained its own counsel to advise it regarding the transaction and/or to review and render advice concerning any of the documents or instruments being executed in connection therewith.

B. RESPONSIBILITY OF BORROWER FOR PAYMENT OF FEES. As a part of the obligation of the Borrower to pay the expenses of Lender in connection with the preparation of the legal documentation, Borrower agrees to pay, directly to \_\_\_\_\_ at the Loan closing, for the account of Lender, the amount indicated on the attorney invoice.

C. DESCRIPTION OF LEGAL SERVICES PERFORMED. The Firm may have prepared all or part of the following legal instruments affecting title to the Property: Residential Development Loan Agreement; Promissory Note; Deed of Trust and Security Agreement; Additional Deed of Trust and Security Agreement, Assignment of Licenses, Permits and Contracts; Financing Statements; Borrower's Affidavit and Release; Regulation Z Affidavit; FIRPTA Certificate; Attorney Representation Notice; §26.02 Tex. Bus. & Comm. Code Notice; Assignment of Construction Contracts; and Declaration of Residential Restrictions. It is clearly understood by Borrower that the Firm has not conducted a title search with regard to the Property and does not warrant the condition of title or access to the Property or the marketability of the Property.

D. BASIS FOR FEE. The document preparation fee charged by the Firm is intended to provide fair compensation for the above-described services taking into consideration the time and labor required, the complexities of the questions involved, and the skill required to perform said services, which is incorporated into an hourly basis charge for actual time spent by its attorneys and other personnel. Other factors included in the hourly basis charge for preparation of documents include the expertise of the Firm in the complexities of the real estate practice, the necessary overhead associated with the rendering of the said services and the assumption of risk by the Firm in the rendering of said services.

Borrower hereby acknowledges receiving, reading, and understanding a copy of this Notice.

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Exhibit “B”

**ATTORNEY REPRESENTATION AND NOTICE  
[Prepared at title company request]**

Legal instruments and other loan documents in connection with this loan and real property transaction (the “Loan”) have been prepared at the request of the title company by the law firm of [name of firm]. As a part of the contractual obligation to pay the reasonable expenses in connection with the consummation of the sale and conveyance of the real property securing the Loan (the “Property”), the Borrower agrees to pay the legal fees charged for the preparation of legal instruments and loan documents at closing. The Borrower acknowledges that the fees charged by [name of firm] as set out in the law firm’s invoice, are based on the standard fees charged for the preparation of closing documents for similar real estate transactions. The Borrower further acknowledges that [name of firm] has not, in any manner, undertaken to assist or render legal advice with respect to the Loan and/or the purchase of the Property, or with respect to any of the documents or instruments being executed in connection with those transactions. By signing below, the Borrower acknowledges that they are aware that they may consult independent counsel or hire an attorney to represent them and advise them regarding this transaction and its consequences to them. The Borrower has not been charged any fee for preparation of any federal disclosures such as the Truth in Lending Statement.

If [name of firm] has prepared a warranty deed with respect to the Property, at the expense of the Seller, it is for the purpose of assuring the Lender that a proper vendor’s lien has been retained and transferred therein to the Lender; and/or if [name of firm] has prepared other instruments at the expense of the Seller in connection with hit transaction, the Seller acknowledges that all instruments have been prepared by [name of firm] based on information provided to [name of firm] by the closing agent either directly or through the Lender, that [name of firm] has not undertaken, an any manner, to assist or render legal advice to the Seller with respect to this transaction, and that [name of firm] makes no representations to the Seller that it has undertaken any independent effort to verify the information provided to [name of firm] and utilized for the preparation of the warranty deed or other instruments. Seller is further advised to consult its own legal counsel before signing the warranty deed.

**BORROWER:**

**SELLER:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Exhibit "C"

**DISCLOSURE ABOUT \_\_\_\_\_  
ATTORNEY AT LAW**

Address: \_\_\_\_\_  
\_\_\_\_\_

I.

Identity of \_\_\_\_\_

\_\_\_\_\_ prepared the various legal instruments and loan documents in connection with this transaction. By signing below you are acknowledging that \_\_\_\_\_ has not represented you or given you any legal advice concerning the acquisition or sale of the business known as \_\_\_\_\_, the legal instruments and loan documents executed in connection with the transaction, or the closing of the transaction itself.

II.

Freedom to Hire a Lawyer

By signing below you acknowledge you are aware you are free to hire a lawyer or attorney to represent you and advise you regarding this transaction, to review all of the writings pertaining to this transaction and their consequences for you.

III.

Obligation to Pay Legal Fees

By signing below you acknowledge you are aware you must pay at the time of closing or on demand the legal fees of \_\_\_\_\_ as you may have agreed to pay in the earnest money contract or any other documents you may have signed. The charges for the services of \_\_\_\_\_ are set forth on the closing statement or settlement statement furnished by \_\_\_\_\_.

IV.

What Signing This Means

By signing below you acknowledge to \_\_\_\_\_ that you have received a copy of this disclosure, you have read all of the above statements, you understand them, and you acknowledge that what has been stated in this disclosure is accurate and truthful. Both parties to this transaction acknowledge that \_\_\_\_\_ does not represent either party in this transaction, whether or not \_\_\_\_\_ has represented or may be representing any of the undersigned in any other transaction.

SIGNED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, \_\_\_\_\_.

SELLER:

BUYER:

\_\_\_\_\_

Exhibit "D"

**LENDER:** \* \_\_\_\_\_  
**BORROWER:** \* \_\_\_\_\_  
**PROPERTY:\*** \_\_\_\_\_  
**DATE:** \* \_\_\_\_\_

**DOCUMENT CORRECTION AGREEMENT****AGREEMENT TO CORRECT MISSTATEMENT OR PROVIDE ADDITIONAL DOCUMENTATION**

**OR FEES:** In consideration of Lender disbursing funds for the closing of the **Loan** secured by the **Property** being encumbered, and regardless of the reason for any loss, misplacement, or inaccuracy in any loan documentation, **Borrower(s)** agrees as follows: if any document is lost, misplaced, misstated, or inaccurately reflects the true and correct terms and conditions of the **Loan**, upon request of the **Lender**, **Borrower(s)** will comply with **Lender's** request to execute, acknowledge, initial, and deliver to **Lender** any documentation **Lender** deems necessary to replace or correct the lost, misplaced, misstated, or inaccurate document(s). If the original promissory note is replaced, the **Lender** hereby indemnifies the **Borrower(s)** against any loss associated with a demand on the original note. All documents **Lender** requests of **Borrower(s)** shall be referred to as "Replacement Documents." **Borrower(s)** agrees to deliver the Replacement Documents within ten (10) days after receipt by **Borrower(s)** of a written request for such replacements. **Borrower(s)** also agrees that upon request **Borrower(s)** will supply additional amounts and/or pay to **Lender** any additional sum previously disclosed to **Borrower(s)** as a cost or fee associated with the **Loan**, which for whatever reason was not collected at closing.

**REQUEST BY LENDER:** Any request under this Agreement may be made by the **Lender**, (including assignees and persons acting on behalf of the **Lender**) or **Settlement Agent**, and shall be prima facie evidence of the necessity for same. A written statement addressed to **Borrower(s)** at the address indicated in the Loan documentation shall be considered conclusive evidence of the necessity for Replacement Documents.

**BORROWER LIABILITY:** If **Borrower(s)** fails or refuses to execute, acknowledge, initial, and deliver the Replacement Documents or provide the Additional Documents or fees to **Lender** more than ten (10) days after being requested to do so by **Lender**, and understanding that **Lender** is relying on these representations, **Borrower(s)** agree(s) to be liable for any and all loss or damage which **Lender** reasonably sustains thereby, including but not limited to all reasonable attorney's fees and costs incurred by **Lender**.

**FAILURE TO DELIVER REPLACEMENT DOCUMENTS CAN CONSTITUTE DEFAULT:** If the **Loan** is to be guaranteed by the Department of Veterans Affairs ("VA") or insured by the Federal Housing Administration ("FHA"), **Borrower's** failure or refusal to comply with the terms of the correction request may constitute a default under the note and/or deed of trust, and may give **Lender** the option of declaring all sums secured by the loan documents immediately due and payable.

This Agreement shall survive the closing of the **Loan**, and inure to the benefit of **Lender's** successors and assigns and be binding upon the heirs, devisees, personal representatives, successors, and assigns of **Borrower(s)**.

BORROWER:

\_\_\_\_\_