

# Ethical Landmines for Real Estate Lawyers

Presented To  
Law Seminars International:  
Advanced Commercial Real Estate Leases

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## Ethical Landmines for Real Estate Lawyers

### **CLIENT IDENTITY PROBLEMS**

- ▶ They don't know who the client is
- ▶ They fail to make clear who they do (and do not) represent
- ▶ Their records show the wrong client

### **THIRD-PARTY LIABILITY**

- ▶ They take on responsibilities that create liability to third parties who otherwise cannot sue them
- ▶ They deal directly with unrepresented parties without advising them they are not representing them
- ▶ They assume corporate management knows that they are representing the company, not management

### **CONFLICTS**

- ▶ They fail to do proper conflict checks up-front
- ▶ They do not spot conflicts
- ▶ They spot conflicts but choose to minimize or ignore them
- ▶ They spot and resolve conflicts, but do it all orally

### **DUTY OF LOYALTY**

- ▶ What is it? How broad is it?
- ▶ What is "adverse to?"
- ▶ When does duty start? Stop?

### **LIMITED REPRESENTATION PROBLEMS**

- ▶ They take on a limited scope of representation and do not document it
- ▶ They fail to document subsequent limitations that the client imposes on the representation
- ▶ They fail to document important circumstances or events that affect what the client has asked for or needs, e.g., that client has no leverage
- ▶ They fail to document that the client has limited funds and has asked for limited representation
- ▶ "Scrivener" or "lawyer for deal"

### **RECORDKEEPING PROBLEMS**

- ▶ They trust their clients (and their own memories) when they shouldn't
- ▶ They do not keep a good record of what they did, didn't do and why
- ▶ They by-pass options for perfectly good reasons, but create no record why
- ▶ They fail to document important decisions made by the clients
- ▶ They fail to document important strategical decisions concurred in by the client -- e.g., risk assessment/options
- ▶ They fail to document circumstances that heavily affect the transaction (e.g., that their client has no leverage or limited finances)
- ▶ They fail to document that the other side controls the documents
- ▶ They don't ensure that important documents get in the file
- ▶ They don't keep good billing records
- ▶ They give files back to clients without keeping copies
- ▶ They fail to store their working files with the official firm files

### **TERMINATION PROBLEMS**

- ▶ They fail to document when the representation is over, which creates the potential for ongoing liability and makes conflict decisions harder than they need be
- ▶ They withdraw without creating a good paper trail
- ▶ They withdraw and leave a bad paper trail

### **COST OF THESE MISTAKES**

- ▶ They make the plaintiff's case easy
- ▶ They make your defense very difficult
- ▶ They may cost the firm a lot of money
- ▶ They will cost you a lot of time [which is additional lost money]