Adventures in the Mortgage Trade

A Case Study in Legal Ethics

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Real estate lawyers can run into ethical issues in any transaction at any time. Some of those issues are easy to identify and handle; others are not as easy. The lawyer who doesn't "spot the issue" as soon as it arises may find himself or herself embarrassed or worse when the ethical issue they didn't spot eventually comes to light.

The following case study shows how a wide range of ethical issues can arise in the practice of real estate law—specifically in a hypothetical loan transaction that, when it started, might have seemed rather unlikely to pose ethical challenges.

This case study was originally prepared for a session on ethics and mistake prevention in the Practising Law Institute's seminar *Commercial Real Estate Financing: What Borrowers and Lenders Need to Know Now.* That seminar, scheduled for New York City on June 14 and 15, 1999, and for three other cities in May 1999, will be chaired by Joshua Stein.

After the "case study" is a series of endnotes where the authors discuss ethical issues and other problems that arise from the case study. Those endnotes are not, however, intended to provide "all the answers" or an exhaustive discussion of every possible ethical issue and all relevant authority. They are intended more to stimulate thought and discussion.

In real life, of course "the issues" are never as stark and "the answers" are never as easy as they may seem here. Among other things, the answers often depend on facts not in evidence and the issues often arise under adverse circumstances, such as extreme time pressure.

The content of this case study is generally fictitious; in a few areas, it is loosely inspired by stories the authors have heard; and, in even fewer areas, by the authors' experiences. All characters are named after the authors' friends, family members or a cosmetics line owned by one of the foregoing; any similarity to real people in real estate is unintended. This case study is not intended to reflect the actual state of legal ethics and sensitivity thereto in the real estate bar.

Many ethical discussions and analyses in the text of the case study are inconsistent with accepted standards (surprise!). Do not rely on them.

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Clay Johnson's secretary interrupted another call to tell him that Francine Rosetti was on the line. Rosetti wanted to talk to Johnson right away about a new deal. She couldn't wait. And Johnson didn't want to make her wait, so he took the call quickly.

"Clay, do you think you can handle about a half billion dollars worth of new originations for us during the next year?"

The request certainly caught Johnson's attention. Rosetti was a mortgage loan officer at Wildside Commercial Mortgage Investment Company, a leading institutional mortgage lender. Over the last few years, Johnson's firm, Sherman & Hannah, LLP ("S&H"), had received more than its share of Wildside's work.

Rosetti said that the new transaction would collectively involve over 50 properties in about 20 states, and that she had obtained special approval to have S&H handle the entire matter.[1]

Johnson thought about his calendar and the calendar of his group.

It was jammed. And it would stay jammed for the next two months. But regardless of how much work he had, Johnson never turned away work. One way or another, Johnson and S&H had always managed. If need be, he thought, he could hire more part-time law students and paralegals—whatever it took.[2]

"Of course, Fran. We can start right away and we've got the team to do the job,"[3] he said, fervently hoping the transaction wouldn't start for another two months.

Rosetti described the new borrower and its business plan. Helaina Equities, a newly formed real estate company, was made up of a group of real estate lawyers who had invested quite successfully in real estate over the years, but had decided to go into the business full-time after lining up a dozen major investors to back them.

One of Helaina's great selling points, according to Rosetti, was the fact that every principal in its organization was a lawyer—an active member of the bar of at least one

state. Rosetti felt this would, among other things, help keep their investment strategy conservative and assure that they wouldn't play any games.

Rosetti thought one or two of Helaina's principals had once worked at S&H, a fact that seemed to give her a particularly high level of comfort about the whole group.

Rosetti told Johnson that Helaina had hooked up with United Widget ("UW"), a company with light manufacturing and distribution operations around the United States. UW wanted to stop owning real estate, which was a significant drag on earnings, a misallocation of its limited capital resources and a distraction to senior management. So Helaina would, through a staged series of four multiproperty closings, acquire all of UW's real estate, with mortgage financing from Wildside. UW would simply pay rent to Helaina.

Rosetti asked Johnson to prepare a term sheet for the proposed Helaina financing, which he was happy to do.[4] He achieved an unbelievably quick turnaround because the transaction was just like one he had closed the preceding week for another client, National Mortgage Origination Corporation ("National Mortgage"). All he had to do was slightly edit the National Mortgage term sheet.[5] And he could do it right on his computer screen.

Ten minutes later, Johnson printed out the UW term sheet, slapped on a fax cover sheet, and gave the package to his secretary, Richard Marks, to take to the fax room.

After taking two calls from other clients, Johnson started leafing through his copy of the fax to Rosetti. He noticed that the Wildside term sheet contained some information about the National Mortgage transaction, such as the number of sites and total dollars involved and, in the header area of every page except page one, the name of National Mortgage—one of Wildside's main competitors.[6]

Johnson had not noticed this second item, the problem in the header, because he had never actually printed out the term sheet to review it on paper. He had just edited it on the computer screen. But the header had never actually appeared anywhere on his computer screen. It showed up only on the printout, which he hadn't taken the time to read. After all, he had reviewed every word of the text on his computer screen already.[7]

Johnson asked Marks to stop the fax so Johnson could fix it. Marks quickly picked up the phone, called the fax room, left an urgent message on the fax supervisor's voicemail and promptly went back to work on the movie script he was editing for a friend.

On one level, Johnson wasn't all that concerned about the fax, but then he thought better of it. If there was something more he could still do to stop the fax, he should probably try.[8] Even if the National Mortgage information wasn't really confidential (the transaction had now been widely reported in the industry press), it wouldn't look good for Rosetti to see all the references to National Mortgage.[9]

As Johnson starting walking to the fax room, he was paged. Another client had to talk with him—now—about an urgent problem that had arisen on another transaction. Johnson took the call.[10]

Twenty minutes later, Rosetti called. She had received the fax and thought Johnson's term sheet was great.

Rosetti didn't notice the references to the National Mortgage transaction until Johnson mentioned them.[11] She was impressed that Johnson represented National Mortgage,[12] and was quite interested to find out that the National Mortgage transaction had involved 72 sites. "We'll have to do at least 73," she joked. And she was delighted to see her transaction was several times the dollar size of National Mortgage's.

Rosetti had some questions and comments about the term sheet. The whole process helped both Rosetti and Johnson focus on the Helaina transaction and some business and legal issues it raised.[13]

On further thought, Johnson realized the Helaina term sheet should provide for a new "multilateral transmediation" structure. This was a structural feature that Johnson had never seen until his recent work with National Mortgage.

As part of that assignment, he had spent hours with National Mortgage's accountants, who had analyzed historical data about thousands of mortgage loans originated by National Mortgage over three decades. Based on that analysis, the accountants had identified an accounting problem that Johnson had never before heard of, which was neatly solved by the new multilateral transmediation structure.[14]

Rosetti was very impressed when Johnson explained multilateral transmediation and how it worked. "That's why we hire you," she said.

Johnson decided that he should also include in the term sheet some special provisions on ancillary jurisdiction and intercurrency cross-validation—two issues that had arisen in the National Mortgage transaction after the term sheet had been signed. He had identified these two issues himself; so, although he felt a little uncomfortable about sharing multilateral transmediation, he felt no concern at all about ancillary jurisdiction and intercurrency cross-validation.[15]

Multilateral transmediation, ancillary jurisdiction and intercurrency cross-validation—all would clearly help Wildside mitigate some risks in the Helaina transaction, just as they had for National Mortgage. And any mitigation of risk might support some reduction in rate, thereby making Wildside just a bit more competitive. But National Mortgage and Wildside weren't bidding for the same transaction, Johnson assumed; this transaction had already priced, anyway, so it really didn't matter. And new ideas like these travel around in the industry pretty freely, so Johnson's conscience was clear.[16]

After Rosetti and Johnson spoke about the term sheet for half the morning, Rosetti asked Johnson whether Johnson's firm ever did any work for Helaina Equities or UW.

"Well, I've already ordered the conflict check," Johnson said, reassuringly. "It should be routine."

It wasn't.

Julia Equities of Lake Ozark, a subsidiary of Helaina under separate management, was an active development and land sales client in another office of S&H, according to the conflict report. Johnson dismissed that engagement as a nonissue, because it was a different entity—not the same as Wildside's borrower, which would be one or more wholly-owned single-purpose subsidiaries of the Helaina parent.[17]

The conflict report also noted that one of the individual principals of Helaina, Jaclyn Matthews, had previously been an associate at S&H, though for no more than three months. Matthews had left S&H almost a decade before under circumstances that, Johnson recalled, involved expense accounts and airplane tickets.

The excitement about Matthews had arisen before she was even admitted to the bar, and had ended with a mutually satisfactory agreement. Both sides had agreed to keep the whole thing confidential.[18] Johnson thought nothing more of it.[19]

Another S&H partner had noted in the conflict system that he had recently submitted a proposal to represent Helaina's retail development subsidiary in its leasing work. This proposal was marked as "pending—open" in S&H's conflict system. Johnson called the S&H partner in question, who confirmed that S&H had not been engaged by Helaina Retail Corporation, though he was hoping to hear any day now.[20] Johnson asked for a copy of the presentation to Helaina Retail Corporation.[21]

The conflicts system also showed that another S&H partner had previously represented another Helaina affiliate in some litigation against a financial institution. The file had been "closed" the preceding month. A closed file is clearly not a problem, Johnson thought.[22]

Although Johnson did not normally run a conflict check against names of lessees when he represented lenders, he thought it might be a good idea to run one for UW, as UW's credit and rent payments were the basis for the entire deal.[23]

He found that UW had been an active client of another office of S&H for a dozen years, with over 100 open matters. S&H had handled a wide range of matters for UW, including: "M&A," "Publicly Traded UW Stock," "Environmental Concerns," "Superfund Defense Strategy," "Hazardous Substances—Miscellaneous," "Insolvency," "Insolvency Structuring," "Insolvency Planning," "Insolvency 1997," "Insolvency 1998" and "Upstreaming Analysis (Off-Shore)."

Johnson wasn't surprised. S&H often represented lessees that leased real estate from borrowers financed by S&H's lender clients. In these cases Johnson typically went out of his way to avoid any direct negotiations with the lessee, such as nondisturbance agreements. Except for that, he had never regarded these situations as conflicts[24] and had never obtained a conflict waiver, oral or written. He never even raised the subject and only rarely checked for possible conflicts of this type.

Although the titles of some of the UW open matters sounded less than appetizing, Johnson decided he had no business sharing this information with Wildside. Wildside knew how to conduct its own due diligence. If Wildside wanted to find out about S&H there were plenty of ways to do so without relying on the S&H conflict-checking system. Information in that system was confidential.[25]

So he called Rosetti back and confirmed that S&H had no conflict[26] and that he would be happy to proceed.

Rosetti started to give Johnson more details about the engagement: the name of the law firm and individual lawyer who would represent Helaina, the schedule for the first 12-property closings (aggressive, of course), the environmental consultant that Helaina was using (and Wildside would also use, although Helaina would handle all communications and coordinate the process[27]), the appraiser and other useful information.

Johnson thanked Rosetti for thinking of S&H and said good-bye. Then he cleared his desk by throwing away the conflict printout for the new matter[28] and turned his attention to the pile of phone messages that had already accumulated.

The first message was from Jaclyn Matthews, the former S&H associate who was now a principal with Helaina Equities. Johnson returned the call immediately, even

before calling Helaina's lawyer, to say hello and introduce himself.[29]

"Clay, it's great to be able to work with you again," Matthews said. "I learned so much at S&H ten years ago . . . some of it the hard way . . . you're not going to mention anything to Wildside about what happened, are you?"

"It was all very confidential, wasn't it?" Johnson replied, and they laughed.

In Johnson's mind, he had just boarded a train pulling out of the station, but perhaps, he thought for a moment, this train would have been a good one to miss. Although, in Johnson's opinion, S&H didn't technically have a conflict, everyone at the firm could have egg on their face if anything at all ever went wrong with the Helaina financing or United Widget.

Johnson was already on the train, though, he thought and probably too far down the track to turn back. Rosetti was counting on him to help with the transaction, and the first closing was scheduled to occur almost immediately. If he were going to turn down the work, it seemed to him he should have done so a long time ago. Now he had no choice.[30]

The involvement of Jaclyn Matthews, particularly the weight that Rosetti attached to Matthews's tenure at the firm, caused him some particular discomfort.

On the other hand, there almost always seemed to be some conflict or issue, or possible conflict or issue, in every possible engagement. Johnson had always been able to deal with these problems just by knowing they existed and making sure he didn't step in anything. He hadn't stepped in anything yet.

Could Johnson in good conscience decline to represent Wildside? He remembered that he had once seen somewhere that lawyers aren't supposed to turn down any clients. Lawyers have an ethical obligation to represent anyone who walks in the door. That certainly sounded like a good rule to follow here,[31] so he stopped thinking about declining the engagement.

Matthews began to describe to Johnson the structure of the UW transaction. It became clear that Matthews's version of the deal was quite different from Wildside's. Johnson told Matthews about a few of those differences, each of which raised a genuine substantive legal issue of a type that Johnson would typically discuss with borrower's counsel early in the negotiating process.

"Well, we'd never agree to that," Matthews responded to one of Johnson's points. A few more of Johnson's comments seemed okay to Matthews, and she said she would update their internal transaction summary and instruct counsel accordingly. Johnson was glad he wouldn't have to negotiate those issues with Helaina's outside counsel.[32]

Matthews asked Johnson to look into a dozen substantive issues about the loan, then get back to her with Wildside's position on them. Some of these were "business" issues as basic as the interest rate on the note. Others were of a more legal nature.

Johnson was glad to assist. It occurred to him that maybe he could eventually get some assignments from Helaina. Matthews was obviously in a position to refer work and clearly was motivated to maintain a great relationship with the firm.[33]

Johnson's next call was from Helaina's outside counsel, a lawyer Johnson had never met before, David Witty. Witty made it clear that he would be playing a very central role in the closing process, and that any negotiations or discussions with Helaina would take place through Witty.

Johnson told Witty about the call he had just received from Matthews, and the previous connection between S&H and Matthews. Witty made it clear that he would prefer that his client not call Johnson again. If she did call again, Witty said, it would probably be better if Johnson limited the conversation to matters unrelated to the transaction.[34]

The next morning Johnson received the first due diligence package for the Helaina transaction. It contained photocopies of all the environmental reports for the first dozen Helaina sites. Ten minutes later, Matthews called, "just to touch base and see if you got the package."

"Yes, Jacki, it's here," Johnson assured her.

"Well, we've been through all the reports. We chose great environmental consultants in every city. Please don't hesitate to call me if you have any questions at all. We are really under tremendous time pressure to get these first dozen deals closed, and if there's anything I can do to help move things along please let me know."[35]

Johnson mentioned the call from Witty, and Witty's apparent desire to channel all communications and deliveries through his office.

"Oh, don't worry about him," Matthews said. "You and I are old friends. There's nothing wrong with us working together as a team on this one!"

Matthews said she wanted to talk to Johnson about the loan documents, and she was particularly concerned about personal liability and the "nonrecourse" clause.

"I assume you'll use the nonrecourse clause from Marilyn's Mountainside Motel," Matthews said, displaying a remarkable memory of the one transaction where Matthews

and Johnson had worked together during her brief tenure at S&H.

Actually, Wildside's standard documents typically used a more borrower-friendly nonrecourse clause than the one from Marilyn's Mountainside Motel. If left to his own devices, Johnson would never have thought of using the nonrecourse clause from Marilyn's Mountainside Motel. But why not, if that's what Matthews wanted?

The Marilyn's Mountainside Motel loan had defaulted in 1991, Johnson remembered. The lender, a savings and loan, had used the nonrecourse clause and related provisions to obtain a personal judgment that forced Marilyn into personal bankruptcy. Marilyn was now working as a waitress at a diner on Highway 61. Matthews obviously hadn't heard about this subsequent history.

"Sure, we'll be happy to use that nonrecourse clause," Johnson said.[36]

Johnson finished the call and sent Matthews's environmental reports to a paralegal at S&H.[37] The reports were copies, as originals typically were sent to the lender for review by its internal environmental people. Johnson reminded himself to confirm that Wildside was following the same procedure here.

As the Helaina transaction unfolded, it became obvious that Helaina needed more financing than the 80 percent loan-to-value originally contemplated.[38] So Johnson was not at all surprised to get a call from Rosetti telling him that an offshore majority-owned affiliate of Wildside—Kalson Lending, LP—was going to lend another 10 percent of value to bring total financing up to 90 percent.

Rosetti asked Johnson to prepare the documents for the new "mezz piece" of the loan structure. She said the mezz loan would technically be funded by Kalson Lending; but it would be handled completely by Rosetti and her team.

Johnson asked Rosetti if Kalson Lending had its own personnel and its own loan underwriting procedures, and Rosetti said Johnson didn't need to worry about them. But Kalson Lending was a legally separate entity, and not entirely owned by Wildside. As a mezzanine lender, its interests were in many ways inconsistent with those of Wildside. But Johnson was happy to have the extra work and one less set of opposing lawyers to negotiate with.[39]

Johnson felt uneasy about the extra financing, however. In his experience, it was the "stretch" deals—above 80 percent loan-to-value—that were most likely to run into trouble, most likely to "test" the strength of the closing documents. There had been some kind of edict from somewhere about mezzanine financing. Was it the Federal Reserve? Was it some other regulatory agency? He couldn't remember.

Johnson sent an e-mail to the other lawyers in his group, asking if anyone had seen anything that would limit the ability of lenders to provide mezzanine financing.[40] Within three minutes, his computer beeped with a response from Gloria Malkin, one of his partners who also worked on the Wildside account. Here's what it said:

> Clay, I got your e-mail. We just got a notice from legal at Wildside. Their Board made an order saying Wildside will not do mezz loans any more under any circumstances. Outside counsel is supposed to watch out for any form of mezz financing and report it to legal immediately. Top management seems very concerned. They had a subsidiary just for mezz financing, which they are trying to shut down. Have you ever run into Wildside's mezzanine financing operations? Hope this helps. /s/ GM

No, Malkin's e-mail didn't help. In fact it further complicated a client relationship that was already a bit too complicated. Johnson walked to Malkin's office and got a copy of the Wildside legal announcement. It was unambiguous, and totally consistent with Malkin's e-mail.

"Clay, you look concerned," Malkin said. Then, with a smile and a laugh: "What's the problem? Did you just close a mezz loan for Wildside?"

"No. Not at all." Technically, Johnson's response was accurate. He wasn't sure how he wanted to handle the situation. The less he told Malkin, the more flexibility he would have.

Once he brought her into it, he would lose control over how things would turn out. Presumably she wouldn't be too pleased if he just went ahead and closed the mezz financing, but did he have any obligation to her?[41]

It was clear that legal wanted to clamp down hard on all mezzanine lending.

But Johnson's relationship was with Rosetti and her loan origination team. They were the people who chose counsel and made sure counsel were paid.[42] And Johnson was very aware that Rosetti's compensation depended on the dollar volume of loans closed. Rosetti was the top producer in the company. They called her "The Closer," because year after year her dollar volume was consistently twice the next higher loan officer's. And this deal would clinch her position for the current year.

The last thing Johnson needed was to have Rosetti feel that Johnson had not only derailed the

Helaina transaction, the biggest in Rosetti's career, but also gotten Rosetti into trouble within the Wildside organization.[43]

"Mezzanine financing" had been all the rage just a few weeks before. All the lenders were doing it. Now the world had changed again. Quickly, too. Clay remembered other "stretch" deal structures he had seen over the years. Sixth trust deeds in California. Triple wrap-around mortgages in New York. Sale-and-leasebacks in Kansas with back-to-back subleases and an implied valuation of 150 percent of the last real appraisal. He thought about some of the characters involved in these transactions, and how badly many of these transactions had turned out.

The legal department wasn't wrong to care about mezzanine financing. But who was Johnson's client anyway? Johnson didn't even know anyone in the Wildside legal department! He made a mental note to deal with the problem. Then his thoughts turned to the constitutional law of impeachment. He had been thinking more than usual about constitutional law lately. Maybe it would have been a better career option, at least this year.

The phone rang. It was Jaclyn Matthews, calling just to touch base and to tell Johnson that Wildside was having its environmental consultants review the environmental reports so Johnson didn't need to worry about them and he should just file them away or even trash them, but he really didn't need to look at them at all.

Matthews asked Johnson if he had heard about the new "mezz loan," which she said was going to be handled quietly through a special subsidiary of Wildside. "Fly low and avoid the radar, you know," she said with a laugh.

But the real reason she called, she said, was to see if S&H would have any interest in representing Helaina Retail Corporation in its retail development program. "Let's talk about it later. No need to start thinking about it just yet, but it's probably there if you want it, assuming this Widget thing goes well," she said.[44]

She mentioned that another lawyer from another office of S&H had been sent a copy of Helaina's request for proposals for the retail job, but Helaina wasn't impressed with that lawyer's credentials. Johnson would probably have a better shot.[45]

Johnson asked her to send him a copy of Helaina's RFP. She faxed it to him within minutes, with a handwritten cover note: "Looking forward to helping you get this job. Don't worry about the deadline. Call me whenever you want. Best regards. Jacki."[46]

The Helaina transaction inched forward. Johnson assembled a team of lawyers and paralegals, and distributed several sets of draft documents. Witty provided comments on round after round of documents. Matthews called at least once a day just to touch base and to tell Johnson which of Witty's comments were truly important to Helaina, and which were just Witty's "legal minutiae" that Helaina didn't care about.[47]

Two days before the first closing, Johnson convened an "all hands" checklist meeting to go over the status of the closing.

"You checked the environmental reports, didn't you?," Rosetti asked Johnson.

"Well, we were going to review them all tonight, Fran, absolutely."[48]

And Johnson did. He wasn't an environmental lawyer, but he had seen enough environmental reports to be able to tell when a property was clean and when it wasn't.[49]

The 12 reports were all issued by different environmental firms. They had originally been commissioned by UW. Each was addressed to UW, with a handwritten note saying it was also directed to Helaina and Wildside.

In each report, the environmental firm noted that at the client's request, they had prepared a separate Hexadecimal Assay Analysis ("HAA") of the property, and attached it as an exhibit to their report. Johnson knew the HAA was often important, so he looked first at the HAA in each report.

Johnson noticed that although each property report had been prepared by a different environmental firm, all reports had exactly the same HAA exhibit, in exactly the same format. The HAA exhibit simply said: "Hexadecimal Assay Analysis—No Problems Found (Clean)." And each HAA was in exactly the same typeface, which was different from the typeface used in the body of the reports.

The next day, after a long series of inquiries, including long telephone conversations with some of the environmental firms (each prompting an even longer fax transmission), it became apparent to Johnson that someone at Helaina had removed the original HAA from each environmental report, and had replaced it with a one-page exhibit indicating there were no problems.

Jaclyn Matthews was the only person at Helaina who had ever been involved in the environmental work for the sites. She was the one who had received all the environmental reports and had arranged to copy them for Johnson. In fact at one point she had gone out of her way to tell Johnson how reliable the environmental reports were because she maintained complete control of them herself. Her job title included "chief environmental officer." Her cover letter was on every

package; her cover letters all used the typeface that appeared in each of the HAA's.

But Jaclyn Matthews was a lawyer—a former associate at S&H. Would a lawyer deliberately falsify an environmental report submitted to a lender? It was unthinkable.

Didn't Helaina have obligations to its investors? Wasn't every principal in the Helaina organization a lawyer? Weren't they above "playing games"—particularly games as amateurish and transparent as this one?

Johnson's first concern was to let Francine Rosetti know about the problem, and he dashed off a quick memo to her noting how odd it was that the HAA for each environmental report looked exactly the same. He wondered whether maybe he should notify someone else at Wildside—legal, perhaps?—but decided that doing so might violate normal protocol. A memo to Rosetti would probably be enough.[50]

Johnson was relieved. His rear end was completely covered. There was nothing else that anyone could say he should have done. Rosetti could make her own decision about the borrower and the loans.[51]

Rosetti called back and told Johnson to close the first 12 loans immediately. He did.

Then S&H closed another batch of properties, with a totally streamlined closing process that required almost no effort by Johnson. Johnson had negotiated a fixed fee for each closing that was more than seven times what he would have charged at the firm's regular billing rates for the actual lawyer and paralegal time each closing required. This was largely attributable to the firm's multimillion-dollar investment in automation and special loan documentation software.[52]

One night at home Johnson got a panicked call from Witty.

"You won't believe this, Clay," Witty said, "but I just realized that the deals we've closed so far all have the wrong interest rate. Every single property!"

Witty reminded Johnson that the interest rate in the term sheet was tied to a complicated formula that took into account the diversification and size of the portfolio, as well as the average loan size. Johnson had prepared the documents for the first advance assuming zero diversification and minimum portfolio size and loan size.

Actually, even the first advance would have qualified for a lower rate than the rate in the documents, and each subsequent advance would have qualified for a slightly lower rate. But each set of loan documents was prepared under extreme time pressure—cloned from the last set of documents—and no one ever checked the interest rate.[53]

Instead, when Witty had negotiated the loan documents he focused closely on other provisions of special importance to him.

His top priority had been casualty and condemnation—what would happen if the building burned down, how the insurance proceeds would be held and disbursed. He had negotiated an elaborate procedure with several notices back and forth and eight different levels of materiality, carefully tailored to take into account whether the affected building was "single purpose," the type of construction involved, the mechanic's lien procedures of each particular state and a number of other considerations. Every element of Witty's procedure made sense under some circumstance or another if you thought about it long and hard enough.

As a result, Johnson's original two paragraphs on casualty and condemnation had blossomed to twelve pages, including 27 new definitions and four pages of state-by-state optional provisions.

Witty also cared a great deal about notice clauses. He was concerned about things like what would happen if Wildside gave a notice of default to Helaina, but Helaina's entire top management was off-site for a week or the notice was lost in the mail. And Witty created an elaborate procedure to verify notices given by fax.

In negotiating these and several dozen issues of similar magnitude, Witty had overlooked the interest rate.[54] He seemed to give it the same priority as the nonrecourse clause, which had also sailed through without a single comment.

"Of course we'll fix the interest rate,"[55] Johnson said, then quickly thought better of it and said: "I'll speak to my client about this and get back to you first thing in the morning. I'll see if there's anything we can do."[56]

Johnson arrived at work early the next day and pulled out the term sheet. Witty was absolutely correct. Every loan document had the wrong interest rate—a mistake that could cost Helaina (or Witty's malpractice insurance carrier) well over a million dollars a year for the next ten years. And the prepayment provisions gave Helaina no practical ability to prepay.

When Johnson called Rosetti to talk about correcting the error, her reaction surprised him. She had already noticed the higher rate in the documents. She had actually noticed it during loan negotiations. She reminded Johnson that during one of their earliest conversations on the deal they had talked about using "basis points" as a way to address possible concerns about United Widget's "credit quality." She had assumed the higher rate was part of what Johnson had negotiated with Witty. She was glad to see that Johnson had taken the initiative,

but had never thanked him for it. And now she did.

Credit Committee had been very tough on the Helaina loan, Rosetti said. The little "bump" in the rate was the only thing that got Helaina approved. And the loans had already been pledged to a warehouse bank syndicate, so any change at all would require a 95 percent vote by almost three dozen banks. So there was nothing Rosetti could do, or Johnson should do, about the interest rate now.

Johnson dreaded talking to Witty. Witty had called twice, but Johnson told his secretary to say Johnson was in a meeting. He was actually checking his e-mail.[57]

He received 50 or so e-mails a day, of which only a handful were worth reading. The rest were a combination of "get rich quick," bad jokes from his cousin, and firmwide e-mails about lost eyeglasses and missing library books. So today he skimmed through his e-mail "in box" until he found a few messages he wanted to read. Quickly he highlighted all the others for deletion. He pushed the delete button and watched absentmindedly as 47 worthless e-mails were deleted, one after another. As the last e-mail flashed past, Johnson glanced at the heading: "United Widget—Urgent and Confidential."[58]

Perhaps in the short run Johnson's life would have been simpler if he had missed the United Widget e-mail. Luckily or not, Johnson retrieved it from his computer's "trash can" and read it.

The e-mail came from another office of S&H. It said that UW had engaged S&H to help UW prepare its Chapter 11 petition, which would be filed in about 30 days. The lawyers handling the filing needed to know whether anyone in S&H had any investment in UW, or represented or was otherwise involved with UW in any way.

In the meantime, according to the e-mail, the fact that UW contemplated filing was highly sensitive and should not be repeated outside S&H. The e-mail said that UW wanted its creditors to think UW was conducting "business as usual," so it could close some major capital transactions before filing.[59]

Johnson thought it odd for a firmwide e-mail to say so much about UW, and wondered whether it was realistic to think that this information would stay confidential. Thousands of people were on S&H's e-mail system around the world. They would all need to keep their mouths shut for several weeks. Would they? But then he remembered that very bad things happen in bankruptcy to law firms that don't disclose conflicts, so perhaps S&H had no choice but to send the e-mail.[60]

Johnson wondered whether he should give Wildside a discreet "heads-up" that they might want to limit their exposure to UW.

Rumors would inevitably fly in the business world about UW's upcoming filing.

And Johnson certainly intended to tell his wife[61] so she could tell her cousin and her cousin could "sell short" a block of UW stock. That plus dozens of other short sellers[62] would communicate the news about UW more effectively than any words ever could.

Given how quickly bad news travels and how hard it is to trace, what harm could Johnson do by saying something to Wildside?[63] How else would he have any hope of preserving his relationship with Rosetti once the filing and S&H's role became public? Maybe he could just whisper in Rosetti's ear that she should watch the UW share price and draw her own conclusions—not exactly typical advice for him to give.[64]

When Witty called a third time, Johnson took the call. To Johnson's surprise, Witty didn't want to talk about interest rates. Instead, he said that Helaina had identified the next batch of UW properties, and the whole batch had to close within 27 days to meet a crucial reporting deadline for UW.

This batch of properties was clearly the heart of the portfolio. It would support financing of more than three times as much as Wildside had previously loaned to Helaina in total. But Helaina was committed to close this package in time to meet UW's reporting schedule. As an incentive, UW would pay an up-front leasing fee of 11 percent of the value of the new properties[65] if the deal closed on time—"so there's plenty to go around," Witty said.

Helaina had agreed to pay Wildside an "expediting fee" of 3 percent of the loan, which would go right into the bonus pool—90 percent for Rosetti and the rest for her staff. Witty reminded Johnson that no one ever required any of the lawyers to provide backup on any bill for Helaina. Witty said he and his client would understand if the bill for these closings were higher than usual.[66]

Johnson wondered whether UW's accelerated closing deadline had anything to do with its upcoming filing. Of course it did, he thought. But was there anything Johnson could do?

It was Rosetti's job—not Johnson's—to underwrite Wildside's credit risks, and she knew what questions to ask and how to get answers. Moreover, the risk of a lessee bankruptcy was one that mortgage lenders take all the time.[67]

The next day, Jaclyn Matthews called again to touch base, and another large Federal Express box full of environmental reports arrived. Johnson was not surprised to find

the same familiar HAA attached to each of the new environmental reports, even though each report was again prepared by a different environmental firm.[68]

The phone rang. It was someone whose name Johnson didn't recognize, someone from Wildside's legal department. Earlier that very day, Johnson had meant to call Wildside legal, but had gotten distracted again. He took the call. It was a conversation he would never forget for the rest of his career.

Endnotes

1. Does this mean Rosetti expected Johnson to handle the matter without using local counsel? Would doing so run afoul of "unauthorized practice of law" provisions? *See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1 (1998) (holding that New York law firm engaged in unauthorized practice of law in representing a California client in connection with a California arbitration, and noting that out-of-state lawyers cannot avoid this restriction even by associating local counsel in the case).

2. Does Johnson have an ethical obligation not to take on work that he knows his group does not have time to handle? What if he has always been able to solve the problem in the past through measures like hiring temporary lawyers? Are temporary lawyers permissible? *See* ABA Model Rules of Professional Conduct ("Model Rules"), Rule 1.2(a) (requiring a lawyer to consult with the client as to the means by which the client's objectives are to be pursued), *id.*, Rule 1.4 (relating to client communication), ABA 88-356 (1988):

> Where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. . . . [W]here the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client.

Would a reasonable client expect to be told if the lawyer were staffing the matter with temporary lawyers? What if Wildside would care less (or more) than a hypothetical "reasonable client"?

3. Is there anything wrong with a "white lie" like this one? *See* Model Rules, Rule 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

4. Should Johnson have completed his conflict check before getting this far into the substance of the transaction? See New York Lawyer's Code of Professional Responsibility, Disciplinary Rule (DR) 5-105(E), which requires that

> [a] law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy of implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with [the rule on conflicts of interest].

5. What restrains a lawyer's reuse of work product prepared for other clients? Does it depend on whether: (a) Johnson prepared the National Mortgage term sheet himself, from scratch; or (b) National Mortgage prepared the first draft and transitioned the term sheet to Johnson? Does Johnson have to reinvent the same term sheet independently for each client? If Johnson can re-use prior work prepared for a previous specific transaction, can Johnson charge Wildside a premium for efficiency (the time it would have taken to prepare the term sheet from scratch)? In that case, should he give National Mortgage a credit against its bill to reflect the benefit achieved for another client?

6. Did this amount to a prohibited disclosure of confidential information? *See* Model Rules, Rule 1.6 ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."). What if it wasn't intentional? *See* ABA Code of Professional Responsibility ("Code"), Ethical Consideration (EC) 4-5 ("Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another.").

7. Problem prevention technique for computer users: Read the whole thing on paper, from beginning to end, before sending it out the door.

8. Can Johnson safely delegate to Marks the responsibility for preservation of client confidences? Is it a "non-delegable duty"?

9. Do mere appearances drive ethical obligations?

10. Should Johnson have done whatever he had to do—first—to stop the potentially troublesome fax? Should he have said he would call the other client back?

11. Should he have said nothing and hoped Rosetti wouldn't notice? Perhaps he could have quickly revised the term sheet and sent her an improved version that didn't contain any National Mortgage confidential information.

12. By disclosing the mere fact that he represented National Mortgage, was he disclosing confidential information? *See* Annotated Model Rules of Professional Conduct 87 (3d ed. 1996) ("Annotated Model Rules") ("The scope of [Rule 1.6] is broad enough to support the contention that a client's identity under some circumstances must not be disclosed."). Was this a circumstance where Johnson should not have disclosed his representation of National Mortgage? Can transactional real estate lawyers freely say who their clients are?

13. Johnson still hadn't conducted a conflict check. Was it wrong for him to get this far into the substance of the matter?

14. Did this make "multilateral transmediation" confidential proprietary information owned by National Mortgage? Was it appropriate for Johnson to use the same method for Wildside? National Mortgage had never asked him to keep it confidential. If he had asked them, though, they might very well have said that of course they would expect him to keep this technique confidential. But he hadn't asked them. Should he have done so?

15. Both "ancillary jurisdiction" and "intercurrency cross-validation" were new concepts he had developed "on National Mortgage's nickel." Should he have used them only for National Mortgage?

16. Should his conscience be clear? Should a lawyer be playing the "cross-pollination" role?

17. As a matter of (a) legal ethics and (b) client relations, did Johnson make the right call? *See* ABA Formal Op. 95-390 (1995) (discussing conflicts of interest in the corporate family context).

18. Was S&H right to keep this information quiet? Did S&H have an obligation to report it to the appropriate ethics com-

mittee? *See* Model Rules, Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness in other respects, shall inform the appropriate professional authority."). What about the fact that it happened before Matthews was admitted to the bar? *See* Michigan OP. RI-29 (1989) (recognizing lawyer's duty to report law student's disciplinary violation to admissions authorities); Nassau County Bar Op. 94-23 (1994) (lawyer has no affirmative duty to report misconduct by applicant to the bar, but employer or former employer who is asked to provide information may not withhold information concerning misconduct by the applicant).

19. Regardless of what S&H's reporting obligations might be, does Johnson have any obligation to disclose to Rosetti what Johnson knows? *See* Model Rules, Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Should Johnson consider himself bound by S&H's agreement not to tell? Remember that Rosetti is drawing great comfort from the fact that (a) Matthews is a lawyer and (b) Matthews worked for S&H earlier in her career. Does this matter?

20. Can a lawyer ethically take on an engagement where he or she will be negotiating against an affiliate of a possible future client? Is any disclosure or consent required? *See* note 17, *supra*.

21. Was there any legitimate reason to ask for this presentation? Does it create an unreasonable risk that Johnson might obtain confidential information about Helaina? Is there any constraint on his asking for it? *See* Annotated Model Rules, at 74-75 ("When a prospective client consults a lawyer in good faith for the purpose of obtaining legal representation or advice, the duty of confidentiality may arise under Rule 1.6 even though the lawyer performs no legal services for the would-be client and declines the representation."); ABA Formal Op. 90-358 (1990) (same).

22. Is that true? As an ethical matter? As a "client relations" matter? What if Helaina's litigation involved horrible allegations of fraud and lender liability? *See* Model Rules, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation.").

23. A multiproperty retail deal may involve hundreds of lessees. Some random subset of those lessees may create trouble regarding estoppels and nondisturbance agreements to a point where lender's counsel needs to get involved in negotiations with them—either directly or through borrower's counsel as an intermediary. To check conflicts on all these lessees would be a major job, and it would probably show that in some random subset of cases, lender's counsel's firm presently represented some of the lessee(s). Should that be a problem? Whose decision should that be? Can the problem be avoided by obtaining prospective waivers of conflicts of interest? *See* ABA Formal Op. 93-372 (1993) (lawyer may obtain advance waiver of conflicts of interest arising out of the representation of future clients with potentially adverse interests, but the client must receive enough information to appreciate the consequences of the prospective waiver).

24. If he thought these situations were not conflicts, why did he go out of his way to avoid direct communications with the lessees? Was that practice an "admission" that the situation created a conflict? Or was it a reasonable and practical way to deal with a potentially sticky situation?

25. When a lawyer finds that he or she represents a party that is adverse to a new or potential client, how much can the lawyer say about the former engagement without breaching confidences to the first client? Should the lawyer say anything at all, or instead find some other reason to decline the engagement?

26. Do you agree with this conclusion?

27. Should Johnson insist on controlling the communications with outside third-party advisers? Can Johnson reasonably assume that the borrower will not use its control of the process to commit fraud? Does the answer depend on Johnson's view of the business reputation and ethics of the borrower? Or is it simply a risk he shouldn't take?

28. Shouldn't he keep the conflict printout as part of his "client intake" folder? Does he have an ethical obligation to do so? Any other obligation?

29. At this point, Johnson knew Helaina was represented by counsel. Was it proper for Johnson to communicate directly with Matthews? Does the fact that Matthews initiated the call change the result? What about the fact that she was a lawyer? *See* Model Rules, Rule 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

30. What flexibility did Johnson have to resign the engagement at this point? *See* Model Rules, Rule 1.16(b) ("a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of client"), *id.*; Rule 1.16(a)(1) (a lawyer must withdraw from the representation if the representation will result in a disciplinary violation).

31. Is that a correct statement of the principle? *See* Monroe H. Freedman, *Understanding Lawyers' Ethics* 49 (1990) ("In short, a lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate. . . . [T]he choice of client is an aspect of the lawyer's free will, to be exercised within the realm of the lawyer's moral autonomy."). In transactional real estate work, when does a lawyer lose the ability to "turn down" a prospective client? What if the engagement seems headed for trouble, but the lawyer can't point to any particular ethical proscription that it would violate? And what if a possible client is clearly "high maintenance"—likely to complain about any outcome (regardless of how good) and refuse to pay any bill (regardless of how low)? What if a possible client has already fired four previous firms that handled this matter, and is in litigation with two of them?

32. The Matthews conversation turned out to be highly substantive. Should Johnson have cut off the conversation at some point, and continued it through Helaina's counsel instead? *See* Model Rules, Rule 4.2.

33. In other words, Matthews needed S&H to help preserve the secrecy of her earlier transgressions. If Johnson uses this leverage to obtain Helaina as a client or even as part of the negotiation process for this deal, does that amount to implied blackmail? If so, how can Johnson solve the problem? If his goal is to pursue Helaina as a future client, does he have a conflict of interest? *See* Model Rules, Rule 1.7(b), regarding conflicts arising out of the lawyer's own interest.

34. Was this within Witty's rights? If so, how far does Johnson have to go to comply with the request the next time Matthews calls? *See* Model Rules, Rule 4.2.

35. Should Johnson have cut Matthews off before she started talking about the environmental reports? Matthews is the client and she obviously knows what

she's doing. Does she have the right to overrule Witty's preferences about controlling communications? Can Johnson proceed accordingly? *See* Model Rules, Rule 4.2. Should Johnson tell Witty?

36. Assume Johnson should have cut off all direct communications with Matthews. On that assumption, does the Marilyn's Mountain House nonrecourse clause now amount to "forbidden fruit" because it would never have been part of the transaction but for those direct communications? Should Johnson simply use Wildside's standard nonrecourse clause? Is it his decision? Wildside's decision?

37. Was that the right way to handle the environmental reports? Was the paralegal supposed to do anything with them?

38. Are there any particular concerns that arise when lender's counsel realizes the business structure originally contemplated by the parties is not going to work and they seem to be shifting toward a much riskier structure?

39. Should Kalson Lending have its own counsel? It was not a wholly-owned affiliate of Helaina. Was Johnson supposed to protect the minority investors in Kalson Lending against any possible imprudence or disregard of their interests by Wildside? Just who is Johnson's client?

40. To what extent should a lawyer closing commercial real estate loans know and understand applicable banking (and other) regulatory restrictions? Do clients typically expect their "deal counsel" to advise them on these issues? Should Johnson clarify his responsibility for these issues, one way or the other, with Wildside? Can he agree with Wildside that they will handle, internally, issues relating to legal lending restrictions? Can a lawyer disclaim responsibility for knowing about a whole area of law potentially relevant to the work he or she is doing? And if Wildside does think Johnson is looking out for these issues, what should Johnson do to make sure he handles them competently? Are e-mails enough?

41. Did he?

42. Who was Johnson's client? Rosetti's group? The legal department? Wildside generally?

43. Aside from the concern in the legal department about mezzanine lending, if Johnson was himself growing very concerned about the wisdom of the contemplated transaction, is there anything he should have done? Clearly Rosetti wanted to maximize her current bonus, but what if it was patently obvious to Johnson that the transaction would inevitably come back to haunt Wildside sometime soon after the closing? When that happens, Rosetti will probably be living on an island somewhere, spending her accumulated bonuses, but Johnson and S&H will probably still be representing Wildside and, potentially, blamed for the problem. What, if anything, can or should he do now?

44. Was it proper for Matthews to dangle future work in front of Johnson? Does the answer depend on whether Matthews is a lawyer? Is there anything Johnson should now say or do about this interaction? If Johnson wants to take Matthews's bait, does he now have a conflict of interest?

45. Should Johnson say anything to his partner who he already knows is trying to get this work? Should Johnson chase the same work independently? Remember that Johnson already requested a copy of the materials that his partner prepared for Helaina Retail. Does it matter whether he actually received the materials? Reviewed them? Is this an issue of legal ethics at all? If not, then what?

46. Johnson now knows that either (a) the RFP process is a sham or (b) Matthews is trying even harder to manipulate Johnson. Again, is there anything he should say or do?

47. Did Johnson have an obligation to stop receiving these extracurricular reports?

48. This statement was not true when made, but Johnson had the ability to make it true. Did Johnson do anything wrong? Does the answer depend on whether "were" means "are"?

49. When can a real estate finance lawyer review an environmental report without assistance from an environmental lawyer? ABA Model Rules, Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

50. Is that true? If not, would a memo to legal have discharged Johnson's obligations? *See* ABA Model Rules, Rule 1.13(a), (b) (lawyer retained by organization represents the organization acting through its duly authorized constituents; but if the lawyer knows that an officer or employee is acting in violation of a legal obligation to the organization, the lawyer "shall proceed as is reasonably necessary in the best interest of the organization."). Should Johnson have reported the matter to the applicable ethics committee for investigation? *See* Model Rules, Rule 8.3(a). The district attorney or other prosecutors? Does the answer depend on what type of institution Wildside is?

51. Assume that no reasonable lender would proceed in the face of abject fraud of this type. If Rosetti nevertheless proceeds (and if Johnson reports it to the legal department, and the legal department doesn't seem to care either), does Johnson have an obligation to tell anyone else at Wildside? Outside of Wildside? *See* Model Rules, Rule 1.13.

52. What makes a fee "excessive"? *See* Model Rules, Rule 1.5(a) (listing factors relevant to determining reasonableness of a lawyer's fee). If the lawyer doesn't purport to tie the fee to billable hours—but simply negotiates at arm's length in an open market (is it an open market?) a specified number of dollars for a specified result—does the "time value" of the job matter? What if the lawyer is incredibly efficient? What if the lawyer's efficiency is driven by large investments previously made by the law firm? How far can a bar association or other "ethics" body go in discussing how much a lawyer can or can't charge for a particular result? When does an "ethical issue" become a "restraint of trade"?

53. Problem prevention techniques: (a) Keep it simple. (b) Watch the money. (c) Don't assume this deal is the same as the last one, even if it's "a cookie cutter." (d) Haste makes waste.

54. Problem Prevention Tip: Focus on the important stuff, particularly when under extreme time pressure.

55. Did Johnson have an obligation to (try to) correct something that he believed was a clear mistake by opposing counsel?

56. Is it Johnson's decision or Rosetti's? What if Johnson wants to correct the mistake but Rosetti wants to take advantage of the mistake? Should Johnson resign the engagement? *See* N.Y. City Op. 477 (1939) (when opposing lawyer recognizes inadvertent mistake in settlement agreement, lawyer should urge client to reveal the mistake and, if the client refuses, the lawyer should do so); ABA Informal Op. 86-1518 (1986):

> Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.

57. Should Johnson's secretary have told the truth? Is a lawyer obligated to tell the truth about why he or she doesn't want to take a telephone call? *See* Model Rules, Rule 4.1 (in the course of representing a client, a lawyer shall not "make a false statement of material fact or law to a third person"). What's "material"?

58. Did Johnson have a professional obligation to be more careful about reading his e-mail? If the missed message was truly important, did the senders have an obligation to send it through a more "serious" medium than e-mail? Should e-mail administrators do what they can to filter out garbage e-mail to increase the likelihood that system users will actually see e-mails that matter?

59. Should the lawyers representing UW have gone into this level of detail, particularly before knowing the answers to their first questions?

60. But how much did the e-mail really need to say? "Less is more" may be a great rule in all kinds of contexts.

61. Can a lawyer share this kind of confidential information with his or her spouse (even if the spouse weren't going to pass the information on to anyone else)?

62. When Johnson sets in motion the short sales by his wife's cousin, Johnson is probably violating the securities laws. Is he also violating any obligations to any client(s)? *See* Model Rules, Rule 1.6.

63. Presumably the information about UW retained its confidential status even though it was e-mailed to thousands of people at S&H. If disclosure by someone else is inevitable, does that make it OK for a lawyer to make the same disclosure?

64. Would it be improper for Johnson to give Rosetti this advice?

65. If this fee is more than five times the highest "leasing fee" Johnson had ever before seen in his career, should this set off special alarm bells for Johnson? And if so, then what should he do? Or is it inappropriate for him to make judgments about the business terms of his clients' deals?

66. Is it appropriate for opposing counsel to discuss the potential amount of each other's bills?

67. Did Johnson have any obligation to Rosetti to disclose what he knew about the magnitude of the risk of UW bankruptcy? If so, how could Johnson harmonize that obligation with his firm's obligations to UW? Could Johnson deliberately "go slow" in closing the next transaction, in the hope that Rosetti would find out about UW's newest problems before Rosetti advanced Wildside's money? Would "going slow" violate any obligation of S&H to UW?

68. Does Johnson himself at some point become an accomplice to Matthews's fraud?

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