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Mixing Client, Business Ends Badly

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SAN FRANCISCO — If you are developing a particularly close relationship with your client — close enough to consider going into business together — here's a cautionary tale.

One San Francisco Bay Area lawyer who tried that recently came up empty handed.

San Mateo County businessman Karl Bakhtiari first went to sole practitioner R. Thomas Fair in 1989 to seek legal advice regarding his real estate investments. The two men went into business together about a year later and developed three real estate companies in Burlingame called Stonesfair Entities. Fair became a shareholder, director and employee of the companies.

Bakhtiari considered Fair to be his lawyer both for the companies they founded together and his other real estate work. Fair could not be reached for this story. He is listed as "inactive" on the State Bar Web site.

Their business was profitable, but Bakhtiari and Fair had personality conflicts and began to clash. After approximately 10 years of working together, Bakhtiari fired Fair and later tried to buy out his share.

Fair brought a lawsuit in 2001 against Bakhtiari and Stonesfair Entities in San Mateo County Superior Court. He alleged that Bakhtiari breached his contract and fiduciary duties that stemmed from their business agreement and claimed \$14 million in damages.

"He was ousted from the company," said Jonathan Bass, Fair's attorney. "He had economic rights and ownership rights in future deals and the proceeds in existing deals."

However, the suit didn't go in Fair's favor. San Mateo County Superior Court Judge Carol L. Mittlesteadt released her decision earlier this month denying the attorney rights to the corporation's cash. *R. Thomas Fair v. Karl E. Bakhtiari, et al*, CIV 417058.

A separate wrongful termination suit Fair filed against Bakhtiari is still pending.

She ruled that Fair had a conflict of interest and failed to comply with the strict guidelines required for an attorney to enter into a business relationship with his client, thus rendering his agreements with Bakhtiari void.

While Fair argued that he wasn't Bakhtiari's personal attorney during their business relationship, the judge disagreed. "Mr. Fair did not carefully separate out his client relationships," she wrote in her Jan. 6 ruling.

An attorney getting into a business relationship with a client — or even a former client — is very tricky and should generally be avoided, said Los Angeles lawyer Robert Kehr, a legal ethics expert who testified at the trial.

"How is someone supposed to know at a given moment when he is giving legal advice or business advice?" he said. "The lawyer is setting himself up for a fall."

Arthur Shartsis and Erick Howard, San Francisco-based attorneys with Shartsis Friese, who represented Bakhtiari, called the case a lesson in professional responsibility.

They successfully argued that Fair had violated ethical obligations under Rule 3-300 of the state's Rules of Professional Conduct and Probate Code section 16004.

"Everything has to be in writing and it has to be fair and reasonable," Howard said. The attorney must make clear to the client any conflicts that could arise from their business relationship and advise the client to seek outside counsel, Shartsis explained. The client must understand the difference between the attorney's role as his personal lawyer and as his business associate and must consent to the terms of their business agreements in writing.

Mittlesteadt said Fair didn't advise Bakhtiari or any of the Stonesfair Entities that he was not their lawyer, and that they each "reasonably believed that they were Mr. Fair's clients."

While Bakhtiari is a highly educated businessman, the judge explained, Fair, as a lawyer, knew much more about the legal ramifications and benefits of their arrangements. An attorney cannot abuse his client's trust to

profit from a business transaction, Mittlesteadt added, but Fair "knowingly acquired an ownership interest adverse to Mr. Bakhtiari and/or Stonesfair Entities."

Even if an attorney has all the proper documents in order, a client business relationship is fraught with dangers, Shartsis said. The lawyer should always protect himself by bringing in independent counsel.

"There is a point where the client is going to argue that they weren't informed and there will be a problem," he said. "It's a risk you don't have to take."

Getting yourself into this situation at all is generally recognized as a bad idea — but that doesn't stop lawyers from doing it, said Rory Little, a professor at Hastings College of the Law who lectures nationally about legal ethics.

"All the disclosures in the world can't protect against unexpected business events," Little said. "It's a risky world."

And suing your client is usually a bad idea, too, he added. "Even if you think you are right, the heavy assumption is the client is protected."

The case began as a squabble over money — not ethics or representation. The argument that Fair breached his responsibilities as a lawyer did not come up until much later, said Bass, Fair's attorney, who is a partner with San Francisco's Coblenz, Patch, Duffy & Bass.

In fact, Bakhtiari was prepared to settle for \$5.4 million, but Fair wanted more, Shartsis said. A dispute arose over whether or not they had actually made an official deal during confidential mediation proceedings. The question went all the way to the state Supreme Court, which ruled in December 2006 that the mediation didn't result in an actual settlement agreement. It's when the case returned to trial court that Shartsis and Howard argued Fair had breached his obligations to his client.

"It's hard for a lawyer to be in a business relationship without it being taken as legal advice," Kehr said. "If the situation is not perfectly clear, it's the lawyer who is going to bear the burden."