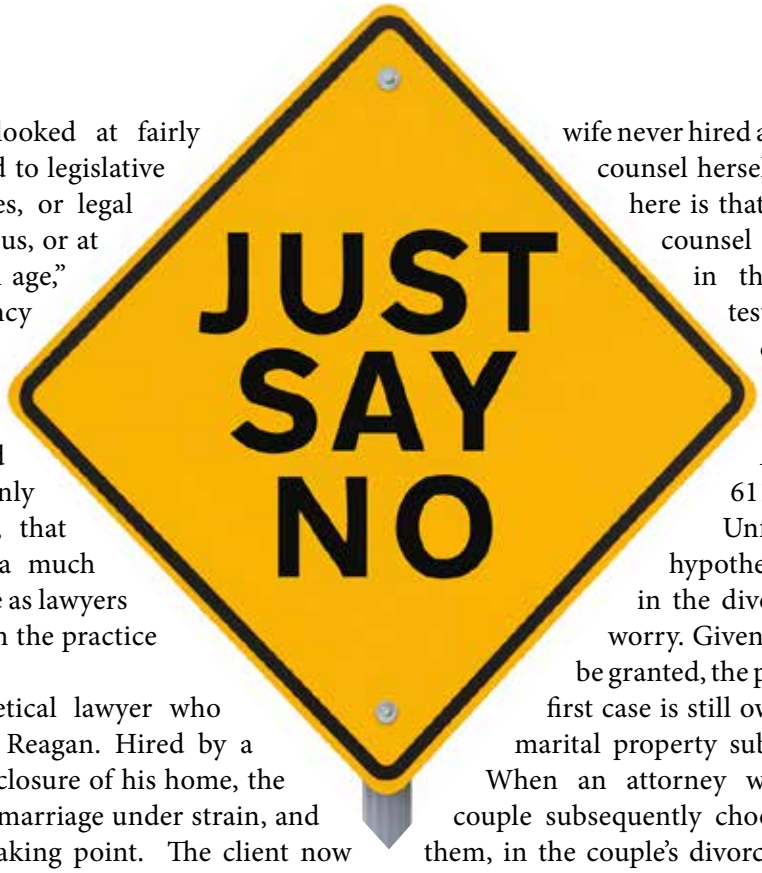
By Luis E. Insignares



In past columns, we've looked at fairly specific legal issues, often tied to legislative efforts, specific statutes, cases, or legal or equitable concepts. All of us, or at least those of us "of a certain age," can remember First Lady Nancy Reagan's admonition to "Just say no," and although in historical context that statement of course referred to the abuse of drugs, certainly a noble sentiment in itself, that simple idea can also have a much broader application, which we as lawyers would do well to remember in the practice of law.

Let's look at one hypothetical lawyer who should've listened to Nancy Reagan. Hired by a gentleman to defend the foreclosure of his home, the case puts the lawyer's client's marriage under strain, and it eventually reaches the breaking point. The client now wishes to obtain a divorce, and the client asks the lawyer to file for dissolution of marriage. After all, the lawyer has never even met the wife. His engagement contract for the mortgage case was signed by the husband only, and the Notice of Appearance the lawyer filed only stated that he represented the husband in the foreclosure case.

The problem is that in the above hypothetical, the mortgaged property is owned by the entireties. And the essential characteristic of an estate by the entirety is that each spouse is seized of the whole as opposed to a divisible part. *Ashwood v. Patterson*, 49 So.2d 848 (Fla.1951); *Andrews v. Andrews*, 155 Fla. 654, 21 So.2d 205 (1945). An estate by the entireties is but *one estate* and, in contemplation of law, held *by but one person*. *Ashwood, supra; Hunt v. Covington*, 145 Fla. 706, 200 So. 76 (1941); *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925). The *unity of person* as recognized in an estate by the entirety springs from the relationship of husband and wife. *Junk v. Junk*, 65 So.2d 728 (Fla.1953). A spouse's interest in property held as an estate by the entireties is *not severable* from that of the other spouse. *Markland v. Markland*, 155 Fla. 629, 21 So.2d 145 (Fla.1945); Strauss v. Strauss, 148 Fla. 23, 3 So.2d 727 (1941).

Given the above law applicable to the mortgaged property, query whether the helpful lawyer can now claim he was not in fact representing both parties in the foreclosure suit? Also, suppose the bank served papers meant for both defendant spouses on the helpful lawyer, and suppose further that the wife never hired any separate foreclosure defense counsel herself? Another concept applicable here is that, for purposes of disqualifying counsel (as would no doubt be sought in the hypothetical divorce), the test is whether the purported client's subjective belief that she was being represented was reasonable. *See, e.g., Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla. 2d DCA 1992). Unfortunately, for our helpful hypothetical counsel, disqualification in the divorce case may not be his only worry. Given that the foreclosure had yet to be granted, the property that is the subject of the first case is still owned by the couple, and is also marital property subject to equitable distribution.

When an attorney who previously represented a couple subsequently chooses to represent only one of them, in the couple's divorce, the ethical rules (which are also the basis for disqualification) are often violated. *See, e.g., The Florida Bar v. Dunagan*, 731 So.2d 1237 (Fla. 1999) (representation of husband in dissolution proceeding by attorney who previously had represented husband and wife jointly in matters relating to their business, was conflict of interest; evidence was sufficient to support finding that wife did not consent to attorney's representation of husband, and wife's failure to affirmatively object to representation could not be construed as "consent after consultation" as required by rules; held: evidence was sufficient to support finding that attorney had violated rules by using information relating to representation of wife to her disadvantage, and 91-day suspension from the practice of law was appropriate discipline); *The Florida Bar v. Wilson*, 714 So.2d 381 (1998) (attorney's representation of a wife in dissolution proceeding was a conflict of interest and in violation of disciplinary

rules, where attorney had previously represented both the husband and wife in a declaratory judgment action against Department of Lottery). In family law contexts, for purposes of determining whether the two proceedings are related, when the attorney has represented both parties in litigation regarding property which is subsequently contended to be a marital asset in a divorce, the attorney has a conflict of interest. *The Florida Bar v. Dunagan, supra* (business that was subject of prior litigation for couple jointly was later a marital asset in divorce).

In family law in particular "Just say no" can apply not only to our actions, but to those of our clients. In the next installment, we'll look at some of the recurring situations in which our clients should "Just say no." RG

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