AN INTERNATIONAL LEGAL SYMPOSIUM ON THE WORLD OF MUSIC, FILM, TELEVISION AND SPORTS

Ethics in Entertainment Law—A Practical Approach to Client Representation and Avoiding Malpractice Traps

MODERATOR

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Ethics in Entertainment Law—
A Practical Approach to Client Representation and Avoiding Malpractice Traps

Program Overview and Agenda

Prepared by
The University of Miami School of Law Entertainment and Sports Law Society

Moderated by
Jan L. Jacobowitz, Lecturer in Law; Associate Director, Center for Ethics & Public Service;
Director, Professional Responsibility & Ethics Program at the University of Miami School of Law

8:00-8:05am
Introduction of the panelists

8:05-8:15am
Brief presentation on the new standards for competence regarding technology and social media including proposed amendments to Florida’s Rule 4-1.1 based upon ABA 2012 amendments, other state amendments and ethics advisory opinions from New York, Pennsylvania, and Florida identifying social media as a component of competence. (Jan)

8:15-8:25am
Technology and social media impact legal practice in the entertainment and sports law.

A few examples to consider...

- 50 Cent Bankruptcy
- Courtney Love “Twibel,”
- Gulliver Academy Settlement Set Aside
  http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/
- Hackers’ access to law firm data.
  - http://abovethelaw.com/2015/03/is-your-law-firm-a-target-for-hackers-spoiler-yes/

8:25-8:35am
The difficulty of managing a case if a client has an active social media presence and managing a client’s reputation.


8:35-8:40am
The impact of today’s information security concerns for lawyers and their clients.
http://www.americanbar.org/groups/leadership/office_of_the_president/cybersecurity.html

8:40-8:50am
Traditional ethics issues that continue to arise in sports and entertainment law practice?
For example, conflicts of interest have traditionally been a large part of the practice. Conflicts may arise due to both corporate mergers and acquisitions and as a result of the fact that lawyers often wear multiple hats as agents, managers and legal advisors.
http://escholarship.org/uc/item/2tk5h9h1#page-1

8:50-9:00am
Questions from the audience and responses from the panelists.
American Bar Association Forum on the Entertainment and Sports Industries

Professional Responsibility, Conflicts, and Confidentiality

Materials Authored & Provided By:

The Professional Responsibility & Ethics Program

Jan Jacobowitz, Esq., Program Director
Bryan J. Harrison, Robert A. Ades Fellow
Gayland Hethcoat, Intern
Robert Zavistoski, Intern
**Hypothetical**

**Act One**

Larry Lee ("Lee") is an entertainment lawyer in South Florida. Lee receives a call from Caitlin Cook ("Caitlin"), who is a prominent television actress. Caitlin informs Lee that she has received an offer to star in a reality-televisionshow to be produced by the Star cable channel, which is owned by Universal Broadcasting Network (“UBN”), a major national network.

Caitlin has been referred to Lee by her Los Angeles counsel, who has been conflicted out of the arrangement. Caitlin asks Lee if he will represent her in generating a talent agreement for the reality-televisionshow. Caitlin also reveals that UBN is in the middle of an ongoing bidding war with Monument Television Network (“MTN”), another major national network. According to Caitlin, MTN has suggested through her agent that it would like to put her in the lead role of its own television series in development. A direct offer, however, has yet to materialize.

Given Caitlin’s prominence and Lee’s understanding of the situation, Lee knows that there is a significant amount of money to make for his firm, should he handle the matter. Lee ends the conversation by expressing a willingness to assist Caitlin, but adds that he must conduct a conflicts check in accordance with his law firm’s policy. The conflicts check uncovers that Lee and two junior associates represented Monument TV14-Miami six months ago in a case relating to music-broadcasting rights on local programming. MTN owns and operates Monument TV14-Miami, and all of its corporate decisions are subject to MTN’s oversight and approval.

**QUESTIONS:**

1. May Lee represent Caitlin?

2. Has Lee and his firm formally terminated the relationship with Monument TV14-Miami? What steps should the firm have taken in ending that relationship?

3. Must Lee notify MTN about the potential deal with Caitlin? What duties arise if MTN objects to Lee’s involvement, particularly if Caitlin accepts UPN’s offer and rejects MTN’s offer?
Act Two

Patrick Parker ("Parker"), a famous television producer, requests that South Florida lawyer Amanda Adler ("Adler") represent Parker, who is negotiating the terms of a project with Country Lifestyle Television ("CLT"), a cable channel. Mediacorp, a major media corporation, owns the channel. Parker indicates that Mediacorp approached him to develop programming for CLT. Five years ago, however, Adler represented Music Now!, another Mediacorp subsidiary, in a copyright-infringement suit. The plaintiff in that case was a famous record producer, whose branded music the cable channel allegedly used, without permission, in a short live segment. Adler settled the case for Music Now!.

Adler agrees to represent Parker on the terms of a contract for a project for CLT. A Mediacorp lawyer learns that Adler is representing Parker and calls Adler to question the propriety of her representation, in light of Adler’s representation of Music Now! in its settlement five years ago. Parker learns of the exchange and is not happy—Parker has already divulged confidential, private information to Adler and threatens a malpractice suit against Adler for not informing Parker of the prior settlement with Music Now!.

QUESTIONS:

1. What should Adler tell the Mediacorp lawyer?

2. Ethically and professionally, how should Adler proceed with Parker’s representation?
Act Three

Samantha Smith (“Smith”) is a first-year associate at a large entertainment law firm. Under pressure to bill more hours, Smith agrees to represent the prominent hip-hop artist Esquiregot (“Esquiregot”), without consulting a senior associate or partner. Smith believes that she can successfully defend Esquiregot, who has received a demand letter that threatens a defamation lawsuit. If she succeeds, it would be lucrative for the firm and would also impress the partners. Smith does not know: however, that Esquiregot has a lengthy history of drug abuse and recently has been the target of an undercover criminal investigation. Smith first learns of these issues after seeing the tabloids, which feature photos of a raid into Esquiregot’s home. After a series of embarrassing public-relations incidents, Smith realizes that she cannot resolve the defamation claim. The plaintiff files a lawsuit and Smith agrees to accept service even though she is not ably versed in defamation defense. The media learns about the case, and the firm is mentioned in a blog entry. The managing partner summons Smith to explain the incident. He wants to know why she is representing someone damaging to the firm’s reputation and whose representation is outside the scope of her practice areas.

QUESTIONS:
1. How should Smith have handled this situation from the outset?
2. What lessons surface for all entertainment lawyers from this situation?

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An Overview of Conflicts of Interest, Confidentiality, and Competency for the Entertainment Lawyer

Lawyers engaged in the practice of entertainment and sports law routinely confront ethical issues involving conflicts of interests with current and former clients and with subsidiary and parent companies. Additionally confidentiality and competency issues abound, as there are an ever present, rotating, and overlapping “cast of characters” involved in the entertainment and sports law communities. Discussion of these ethical considerations follows, with reference to the American Bar Association Model Rules of Professional Conduct as a framework.

Conflicts of Interest

One of the most complex and contentious areas of legal ethics is conflicts of interest. This is especially so in entertainment and sports law, where attorneys are often said to feel immune to the conflicts of interest that other bars confront in their practice.1 Regardless of the field of law, however; conflicts rules aspire toward the same goal: to require an attorney to employ unbiased judgment and to maintain loyalty to his or her client.2

Determining conflicts of interest often involves a several-step analysis. The first step generally entails an attorney assessing whether some interest jeopardizes the attorney’s independent professional judgment in representing a client. If the source of the potential conflict is another client, the attorney must define the other client as a current, former, or prospective client. This is an important determination because the application of the Model Rules differs

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1 See John A. Walton, Conflicts for Sports and Entertainment Attorneys: The Good News, the Bad News, and the Ugly Consequences, 5 Vill. Sports & Ent. L.J. 259, 259 (1998) (“Attorney are often unprepared for [conflicts of interest] because they assume that they are somehow immune from such conflicts, or that they are protected by a simple conflict of interest waiver letter.”); Richard E. Flamm & Joseph B. Anderson, Conflict of Interest in Entertainment Law Practice, Revisited, 14 Ent. & Sports Law. 3, 3 (1996) (“[W]hen it comes to the conflict of interest rules, entertainment attorneys often seem to feel that they are immune.”).

2 See Model Rules of Prof’l Conduct R. 1.7 cmt. 1.
depending upon whether there is a concurrent conflict or a successive conflict. For example, a conflict between a prospective client (with whom an attorney developed no ongoing client-lawyer relationship) and a current client generally arises only when the two clients’ interests are “materially adverse in the same or substantially related matter [and] if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. . . .” However, a conflict between current clients, or a current and former client, may arise where “the representation of one client will be directly adverse to another client or 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, a former client or a third person or by a personal interest of the lawyer.”

Thus, the conflicts analysis must consider all of the attorney’s relationships with his current, former, and prospective clients. The entertainment and sports industries present unique challenges in ascertaining the status of the attorney-client relationship because attorneys often juggle competing roles as lawyers, agents, and managers. There may be more uncertainty as to defining or indentifying prospective-client relationships, as myriad deals are pitched with a variety of industry “players” involved in the discussions. Nonetheless, prospective-client relationships are created if an individual merely “discuss[es] with a lawyer the possibility of

3 Compare R. 1.7 (concurrent conflicts) with R. 1.9 (former clients) and R. 18 (prospective clients).

4 R. 1.18(c). Even if such a conflict arises, it might be permissible. R. 1.18(d).

5 R. 1.7(a). Even if such a conflict arises, it might be permissible. R. 1.7(b).

forming client-lawyer relationship with respect to a matter,“ and these relationships give rise to
the duties to maintain confidentiality and to avoid conflicts of interest.

Therefore, a budding young actress who consults an attorney about negotiating a talent
agreement and provides confidential information regarding a new television series will generally
become an attorney’s prospective client, even if the attorney does not accept the representation.
On the other hand, an attorney may deem a corporate client to be a former client, but the
appropriate analysis may find that the entity is still a current client, who “assumes[s] that the
lawyer will continue to serve on a continuing basis unless the lawyer gives notice of
withdrawal.” Generally, the attorney-client relationship ceases only when the matter for which
an attorney undertook for a client has been resolved and the attorney clearly terminates his
representation.

Conflicts of interest in the entertainment and sports law practice often emerge in the
corporate or organizational setting. Attorneys need to have a conflicts process in place so that
they become aware of corporate-family or intra-organizational representations and potential
conflicts. Corporate or organizational conflicts particularly impact the entertainment industry,
given the corporate restructuring that continues to occur as a result of transformations in media.
The comment to the rule governing concurrent conflicts speaks to this point:

A lawyer who represents a corporation or other organization does not, by virtue of
that representation, necessarily represent any constituent or affiliated
organization, such as a parent or subsidiary. Thus, the lawyer for an organization
is not barred from accepting representation adverse to an affiliate in an unrelated

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7 R. 1.18(a).
8 R. 1.3 cmt. 4.
9 Id.
matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.  

In a widely discussed opinion, the ABA Standing Committee on Ethics and Professional Responsibility addressed conflicts in the corporate-family context under a previous, albeit similar, version of Model Rule 1.7. The committee opined that the Model Rules do not foreclose an attorney’s representation of a “party adverse to a particular corporation merely because the lawyer (or another lawyer in the same firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity.” The committee, however, cushioned its opinion with the same qualifiers that now appear in comment 34 to Model Rule 1.7, so that, under the totality of a given set of facts, a conflict of interest may develop vis-à-vis a corporate client and a corporate affiliate of that client.

Although highly instructive, the committee opinion does not appear to have completely settled this matter. The committee opinion itself is highly fractured, featuring several dissenting opinions, which argue that adverse representation as between a corporate client and its corporate affiliate always presents a conflict of interest for which consent is required. Moreover, several

10 R. 1.7 cmt. 34.


12 Id. at 2.

13 Id. at 3.

14 Id. at 14-21.
influential state and local bars have produced opinions on the topic, variously emphasizing different factors to measure a conflict.\textsuperscript{15} As with so many other areas of legal ethics, whether a corporate-family conflict exists thus depends ultimately on the unique factual circumstances in a given case. Nevertheless, the ABA committee recommended as best practice that “in the absence of a clear understanding otherwise . . . a lawyer [should] obtain the corporate client’s consent before the lawyer undertakes a representation adverse to its affiliate.”\textsuperscript{16} To avoid the emergence of a conflict of interest altogether, a firm may consider implementing internal controls, such a memorandum-circulation procedure regarding new clients that the firm takes on, to uncover potential conflicts sooner rather than later.\textsuperscript{17}


\textsuperscript{16} Id.

\textsuperscript{17} See Jack P. Sahl, A 2009 Update: What Every Entertainment Lawyer Needs to Know—How to Avoid Being the Target of a Legal Malpractice Claim or Disciplinary Action, 966 PLI/PAT 11, 40-41 (2009) (suggesting a name- and matter-matching system for firms with multiple offices and the circulation within a firm of a “new matter memo” when a firm accepts a new case).
Confidentiality

Confidentiality is another area in which attorneys may find subtle distinctions with significant ethical implications. An attorney’s main professional responsibilities to a client are fidelity and maintaining the client’s confidence.\(^\text{18}\)

An attorney obtains confidential information not only through direct communication with a client, but also in any other manner that the information is received during the representation. Specifically, Model Rule 1.6 protects the confidentiality of all “information related to the representation of the client.”\(^\text{19}\) Further clarification is found in comment three to the rule, which indicates that the term is interpreted broadly and includes “all information relating to the representation, whatever its source.”\(^\text{20}\)

However, a lawyer may disclose confidential information in accordance with the rules’ three main exempted categories: informed consent, implied authority, and the six exceptions to the confidential rule.\(^\text{21}\) Obtaining the client’s informed consent requires that the lawyer adequately explain the material risks and the reasonably available alternatives to the client.\(^\text{22}\) Client consent must be provided in writing.\(^\text{23}\) Implied authority pertains to a lawyer’s authority to reveal information about the client during the course of representation if that information


\(^{19}\)R. 1.6(a).

\(^{20}\)R. 1.6 cmt. 3.

\(^{21}\)R. 1.6.

\(^{22}\)R. 1.0(e).

\(^{23}\)R. 1.0 cmt. 1.
cannot properly be denied or facilitates a satisfactory conclusion to a matter. Finally, the six exceptions cover the prevention of death, substantial bodily harm, crimes or frauds; the lawyer’s securing of legal advice; the establishment of certain claims or defenses; and compliance with the law or a court order.

It is important to note that the confidentiality restrictions apply to information obtained while representing former clients and during discussions with prospective clients. Model Rule 1.18 provides that a lawyer need not enter into a formal representation of the client to be subjected to the confidentiality rule. Information exchanged in an initial consultation with a prospective client is deemed to be confidential. In fact, even divulgence of public information by a lawyer who learned the information in the course of representation may be deemed to be a violation of client confidentiality.

Legal representation in the entertainment community is particularly vulnerable to the nuances in the ethics rules regarding confidentiality. Agents, performers, producers, and

24 R. 1.6 cmt. 5.

25 R. 1.6(b). It is important to note that states vary as to whether these six exceptions are permissive or mandatory so the appropriate state rules must be considered as they should be in any specific legal ethics query.

26 R. 1.9(c)(2).

27 R. 1.18(b).

28 Id.

29 Douglas R. Richmond, Lawyers’ Professional Responsibilities and Liabilities in Negotiations, 22 GEO. J. LEGAL ETHICS 249, 254 (2009) (citing In re Anonymous, 654 N.E. 1128, 1129-30 (Ind. 1995) and Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861-62 (W.Va. 1995)). According to Richmond, “if this result seems unusual, it ought not. The fact that information relating to a client’s representation is available somewhere in the public domain does not mean that it is commonly known or readily available to those from whom the client might want it kept, or who might use it to the client’s disadvantage. And while it is certainly true that requiring a lawyer to maintain confidentiality serves little purpose when information relating to a client’s representation is generally known, it is also true that in many situations it is potentially unwise to assume that a lawyer’s duty of confidentiality is excused because ‘everyone already knows about [such] information.’ Information assumed to be generally known may in fact not be.” Id.
entertainment companies are a relatively small community that repeatedly engages in business deals and generally seeks to retain the relatively small number of lawyers who practice in this area. This repetitive interaction provides a fertile ground for confidentiality concerns for even the best-intentioned lawyer. Thus, lawyers must be diligent in assuring that fidelity and loyalty are maintained by strict adherence to the rules on client confidentiality.
**Competency**

There are significant competency issues at play for an attorney in the entertainment industry. These issues also permeate concerns about one’s professional image and the public-relations problems that might arise from such a representation. While a tarnished reputation may not give rise to a malpractice or disciplinary bar action, it can severely damage a promising career.

It is not just the young attorney who must identify and address attorney competency issues; however, the young attorney is likely to face these issues more frequently than a seasoned one. In fact, the average “law school graduate[,] ‘will be the subject of three or more claims of legal malpractice before finishing a career,’”30 and this caution is important when an attorney is involved with especially litigious entertainment clients. The Model Rules require that all attorneys “shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”31

A competent attorney understands the need to assess competency issues, along with conflicts and other due diligence, at the outset. The “competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . [and] adequate preparation.”32

30 Sahl, *supra* note 17, at 17 (citation omitted).
31 R. 1.1.
32 R. 1.1 cmt. 5.
Consequently, an entertainment lawyer needs to evaluate the scope of representation and whether any of the proposed representation falls outside that of the lawyer’s expertise or capability.33 When presented with a situation in which competency might be an issue, it is prudent to refer to a “lawyer with established competence in the field in question.”34 This is true for all lawyers, but especially so for those entertainment lawyers who work in a “highly competitive and rapidly changing business environment.”35 Thus, it is critical for an entertainment attorney to understand the resources of his firm and whether it is possible and reasonable to obtain the assistance of other firm lawyers to handle the case and thereby ensure competency throughout the representation.36

Another common concern is the “eleventh hour” client. An attorney who is given an extremely limited timeframe to investigate and fact-gather runs the serious risk of conducting improper due diligence, overlooking dispositive matters, and missing the statute of limitations.37 Where the deadline or tolling period is imminent, the risks to an entertainment lawyer are the greatest. These risks have repercussions in malpractice claims and disciplinary actions by the bar.

The easiest way to not become entangled in a competency dilemma is to properly vet prospective clients and to understand the client’s specific needs and expectations. Upon vetting the client, an attorney may make an informed decision as to whether that client’s reputation and

33 Sahl, supra note 18, at 17.
34 R. 1.1 cmt. 1.
35 Sahl, supra note 18, at 17.
36 R. 1.1 cmt. 6.
37 Id. at 45.
behavior may negatively impact the lawyer’s reputation. Upon determining the specific needs and expectations of a client, a lawyer has the opportunity to limit the scope of representation of a client so that the lawyer does not find himself operating outside his area of expertise. This should be done at the outset and is permitted as long as the limitation is reasonable and the client has provided informed consent.\textsuperscript{38} Finally, lawyers are “generally free to reject a client’s offer of employment.”\textsuperscript{39} Such a decision should not be made lightly; however, doing so is entirely appropriate where there are issues as to competency of the lawyer and/or issues pertaining to the long-range impact on the lawyer’s reputation.

**Conclusion**

Entertainment and sports law is a highly specialized area of practice that is replete with potential conflicts of interest issues. Additionally, competency issues abound for young lawyers as well as seasoned lawyers, who nonetheless are unfamiliar with novel and constantly changing practices. Lawyers practicing in these areas must be diligent in analyzing the unavoidable conflicts that arise while maintaining the confidentiality of their clients.

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\textsuperscript{38} R. 1.2(c).

ABA Model Rules Supplement

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) 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, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

**Rule 1.9 Duties to Former Clients**

(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 interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**Rule 1.18 Duties to Prospective Client**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

1. both the affected client and the prospective client have given informed consent, confirmed in writing, or:

2. the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

   (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

   (ii) written notice is promptly given to the prospective client.
ENTERTAINMENT LAW ETHICS

Kenneth J. Abdo, Esq.¹  Jack P. Sahl²

A. INTRODUCTION

Entertainment law is a highly competitive practice in which lawyers often assume non-traditional roles and responsibilities. Marketing, advertising, selling (shopping), packaging, networking and deal-making are common business activities for agents, managers and lawyers. As a result, lawyers sometime resemble agents and managers. However, lawyers are distinguished from others because lawyers are governed by codes of professional behavior.

Unlike agents and managers, lawyers must be highly educated and trained. They must pass a bar examination before being licensed to practice law. Their qualifications and character are scrutinized prior to entering law school and before taking the bar exam. After becoming licensed, most states require lawyers to continue legal education and training to maintain licensure.

Lawyers’ achievements are often overshadowed by criticism of self-interest, greed and incompetency. As a result, grievances and malpractice claims are filed against entertainment lawyers.³ A violation of the code threatens his or her reputation, license, and livelihood.

¹ Kenneth J. Abdo is a senior shareholder and Vice President of Lommen, Abdo, Cole King & Stageberg, P.A., Minneapolis, Minnesota where he practices entertainment law full time. He is a past Chair of the American Bar Association’s Forum on the Entertainment & Sports Industries. He was an Adjunct Professor of Entertainment Law at William Mitchell College of Law, St. Paul, Minnesota, for eleven years. Mr. Abdo is a voting member, Chicago Chapter Governor and past Chair of the Entertainment Law Initiative (ELI) of the National Academy of Recording Arts and Sciences (The Recording Academy®). He is a published author and national lecturer. He is a co-writer of the standard law school textbook “The Law and Business of the Entertainment Industries” (Don Biederman, et al./Praeger). The firm’s clients include Grammy®, Oscar®, Emmy®, Spirit® and Peabody® Award winners. Research assistance for this article was provided by Timothy C. Matson, Esq. and Melissa Biederman, Esq.

² Jack P. Sahl is a professor at the University of Akron School of Law, Akron, Ohio where he teaches Professional Responsibility and Entertainment Law. He also often consults on entertainment and professional responsibility matters. Before becoming a law professor, he worked full time in the music industry. Professor Sahl regularly lectures on professional responsibility in the United States and abroad. He is a member of the publications Board of the American Bar Association’s Center for Professional Responsibility and the Ohio State Bar Association’s Legal Ethics and Professional Conduct Committee. Professor Sahl is also the Deputy Director of the Miller Institute of Professional Responsibility, a research center studying lawyer and judicial conduct.

Lawyers’ reputations depend on their ability to build and maintain professional relationships. However, along with public and professional scrutiny, references to entertainment (and all) lawyers such as “counselor,” “advocate,” “champion” and even “mouthpiece” reflect the critical valued and powerful roles that lawyers perform. Despite the jokes and jabs, the standard of living that many lawyers enjoy reflects the significant value that society attaches to quality legal services.

Entertainment attorneys who aggressively represent clients often test the limits of permissible professional conduct. Given the highly competitive and entrepreneurial nature of the entertainment business, it is not surprising that entertainment lawyers are the subject of complaints before disciplinary authorities and the courts. This article addresses the realities and concomitant ethics issues often encountered by entertainment lawyers.

**B. PROFESSIONAL CONDUCT**

Given increased complexity of the law, advanced technology, sophisticated and litigious clients, practicing law today involves significant risks. One source predicts that recent law school graduates “will be the subject of three or more claims of legal malpractice before finishing a career.” Thus, lawyers should have professional liability insurance and understand how their insurance policies define the practice of law to insure that the policies cover their activities.

Professional responsibility is one of the most rapidly changing fields in law. There have been changes to the ABA Model Rules of Professional Conduct (1983) (MRPC), a code of ethical conduct that has been adopted in some version by more than 45 states. States that

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4. See Sahl, supra note 3, at 66 (noting that a decline in the high rate of grievances against lawyers is unlikely given these factors and an increase in public dissatisfaction with lawyers).


6. A lawyer’s professional liability policy “is not written for ‘negligence,’ but for certain ‘acts, omissions or errors’ in rendering professional services.” Id. at vol 4, 299. Courts have liberally defined the phrase, professional legal services, for purposes of covering lawyers’ activities. If the client’s principal purpose for retaining the lawyer is the rendition of legal services, “then the rendition of non-legal services that are incidental to the task are included” in the insurance policy. Id. at 302-03. A lawyer retained for non-legal purposes, such as, investing a client’s funds or selling limited partnership interests for commissions, is not entitled to coverage. Id. at 304-05. Thus, depending on the context, a lawyer’s advice to a client about selecting a home in the “Hamptons” or selling a client’s songs to publishers or advertising companies, may not constitute the rendition of legal services.

7. JAMES E. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS 26 (2000). A significant amount of entertainment business occurs in California and New York, the locations of many entertainment companies and creative talent. Although California does not follow the MRPC format, it has promulgated rules and statutes many of which are similar to the MRPC. New York follows the format of the older ABA ethical code, the MCPR. Since the MRPC are widely adopted, this article focuses on the MRPC with references to the California Business and Professions Code (“CBPC”) and Rules of Professional Conduct of the State Bar of California (“RPCC”).
follow a version of the older ABA Model Code of Professional Responsibility (1974) have revised portions of their codes that often track the MRPC. Courts adjudicating malpractice actions, and disciplinary authorities considering grievances, often use these codes to evaluate the propriety of lawyer conduct. Another change concerns the American Law Institute, which recently completed its new Restatement of the Law Governing Lawyers. The Restatement has identified important issues beyond the ABA’s ethical codes.8 In addition, in 1998 the ABA created the Ethics 2000 Commission to consider changes to the MRPC. The Commission held numerous hearings throughout the nation and released its report at the end of 2000. The report recommended numerous changes to the MRPC.9

In 2002, the American Bar Association adopted substantial revisions to the MRPC. The name and format of the amended Rules are the same as in 1983. Very few states follow the MRPC as amended in 2002, but many have established committees to review the changes. This article refers to the amended Model Rules, unless stated otherwise.

Lawyers should conduct “professional responsibility audits” of their practices to insure that they are complying with state ethical codes concerning the practice of law.10 For example, some states have particular rules concerning direct mail solicitation and advertising, which lawyers will want to review for compliance purposes.11 Records of a lawyer’s audit of his or her practice may become useful evidence of the lawyer’s efforts to comply with ethical standards if the lawyer becomes the subject of a grievance or a malpractice complaint.

A. Establishing an Attorney-Client Relationship

Courts and disciplinary authorities have found that the attorney-client relationship exists as soon as the client reasonably relies on the attorney’s advice. As a result, attorneys should be careful about casually offering advice on legal matters. An attorney should formally establish a professional relationship with a client and memorialize it in writing.12 At the initial meeting with the client, the attorney should

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8. MORGAN & ROTUNDA, PROBLEMS AND MATERIAL ON PROFESSIONAL RESPONSIBILITY 13 (7th ed. 2000)(hereinafter MORGAN)( identifying malpractice and liens to secure payment for legal services as some of the subjects not covered in MRPC); ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, 301:111 (1998) (reporting that some commentators believe the ALI’s Restatement (Third) of the Law of Lawyering might create yet another standard of care for judging lawyers’ conduct in malpractice actions).

9. See MORGAN, supra note 8, at 12 n.9.

10. There are legal consultants and companies, such as, the PLI, that will provide professional responsibility seminars to law firms and lawyers to promote compliance with states’ ethical rules for practicing law.

11. Some states require that solicitation letters be in envelopes with the phrase, “Advertisement Only,” in red ink and ten point type or more. See OCPR DR 2-101(F)(e). A few states require internet advertising to be pre-screened by bar committees. See Part 7 of the Texas Disciplinary Rules.

12. See MRPC, Rule 1.5 (b) (suggesting that with new clients that lawyers communicate in writing the basis of

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not give advice unless the attorney is prepared to accept responsibility for the consequences of the "client's" reliance thereon. Lawyers should be especially careful not to give advice at "beauty contest" interviews by parties seeking to hire lawyers, because they may be liable for incorrect advice and may also be precluded from representing the clients’ opponents for conflict of interest reasons. Ideally, the attorney should inform a prospective client at the initial meeting that he or she is not providing legal advice, and should reiterate this point in a follow-up letter thanking the person for his or her interest. This follow-up letter may also include the terms of a retention agreement that should have been discussed at the initial meeting. The retention agreement should clearly outline the scope and conditions of the lawyer’s representation as well as the basis for the fee if the client decides to employ the attorney. A comprehensive and precise retention agreement defines the expectations of the attorney and the client, facilitates good client relations, and protects the attorney against claims of wrongdoing based on the client’s unreasonable expectations. [See Retainer Agreements are attached as Forms I and II].

B. MRPC 1.1 - A Lawyer’s Duty of Competence

Once an attorney agrees to represent a client, MRPC 1.1 requires the lawyer to provide competent representation. Competence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The Comment to MRPC 1.1 states that in determining the competency of a lawyer to handle a matter, “relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, and the preparation and study . . .” the lawyer can give to the matter. The comment also recognizes that it may be necessary to associate or consult with a more experienced lawyer or even refer the matter to another lawyer. As a result, consultations even among more experienced entertainment lawyers are common and highly advisable. Lawyers should be careful


15. MRPC, Rule 1.2 “Scope of Representation.” For example, a lawyer may agree to negotiate the terms of a management contract for a client but not to handle his divorce. Id.; at 1.2(c) (permitting a lawyer to “limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).


17. See MRPC, Rule 1.1, Comment 1. Otherwise, no attorney would be competent to accept a first case. See CBPC §6092, RPCC, Rule 3-110.
in making referrals or associating counsel because they might be liable for incompetent referrals or associations.

Some states provide for the involuntary deactivation of a practitioner's license in the event of mental incompetency or habitual use of drugs. Many bar associations have substance abuse committees that confidentially assist lawyers with substance abuse and mental health issues.

C. **Conflicts of Interest - What's going on?**

1. Conflicts of interest in the entertainment industry have increasingly attracted significant attention. The public and the profession seem to have insatiable appetites for following lawsuits filed by famous artists against their famous lawyers.

   The unconventional culture of the entertainment business is conducive to conflicts of interest and other lawyer misconduct. The business is fast-paced, highly competitive, and intense. It is commonly described as “incestuous” with a premium attached to “who you know” as much as “what you know.” The entertainment business also tends to be dominated (at least at the corporate top) by a small number of resilient power-brokers. It is not unusual for these individuals to be fired or to resign from their positions only to resurface in a similarly powerful position at another company. Informed entertainment lawyers follow the trade journals and other media to track the frequent movement of business people within the industry as such changes often create conflicts of interest and other potential ethical problems.

   Some observers feel that conflicts of interest may be beneficial to parties. For example, a prominent entertainment attorney who represents a successful producer and a famous actor may unite them (as some agents do) in a “package” deal to secure box-office success. Although the package deal brings together clients with possibly differing interests, the combination ultimately makes the producer, actor, lawyer, and studio more successful. Everyone wins. For a less famous talent, the package is very valuable.

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18. See CBPC §6190.


20. One observer has stated the following about the recent interest in conflicts cases: “[s]ue the lawyers when not paying them does not work.” The increase in conflict of interest cases and related lawsuits have been, in part, on non-entertainment lawyers who do not understand the business culture. McPherson, *Conflicts in the Entertainment Industry? . . . Not!*, 10, No.4 ENT. & SPORTS L. J. 5. (Winter 1993) (hereinafter McPherson).

because it could launch their career. There is always the risk however, that attorneys may protect their special relationships with the studio and others in package deals by promoting more prominent clients at the expense of less famous clients.22

2. **MRPC 1.7 sets forth the general rule governing conflicts of interest:**

   a. *Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*

      (1) the representation of one client will be directly adverse to another client; or

      (2) 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, a former client or a third person or by a personal interest of the lawyer.

   b. *Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:*

      (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

      (2) the representation is not prohibited by law;

      (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

      (4) each affected client gives informed consent, confirmed in writing.

D. **Simultaneous Representation.** Under MRPC 1.7(a), an attorney’s simultaneous representation of a music manager who is a prior client and an artist in negotiating their artist-management contract raises serious conflicts of interest issues. Some commentators contend that attorneys should decline joint representation in this context because of the inherent conflict in the positions of the parties.23 The parties’ interests with

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22 McPherson, supra note 20.
respect to certain contract provisions, such as the duration of the contract, may be directly adverse. Even if the parties’ interests are not directly adverse, a concurrent conflict of interest may exist if there is a significant risk that the attorney’s responsibilities to the earlier client, the manager, may materially limit the attorney’s representation of the artist and violate 1.7(a). The manager’s attorney should ask the artist to retain independent counsel to facilitate the negotiation of the contract, to help ensure the enforcement of an eventual agreement, and to avoid personal liability for violating the conflict of interest rules. Another, perhaps less prudent, option is for the manager’s attorney to obtain written informed consent from both clients of any conflicts of interest. It is important to note that some conflicts are nonconsentable. Comment 14 to MRPC 1.7 describes a nonconsentable conflict as one in which, “the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”

that lawyers should generally avoid dual representation of managers and artists in negotiating the terms of a personal management contract).

24. Author John Grisham sued his attorney for breach of fiduciary duty and malpractice, in part, for not advising him of the conflicts of interest in the attorney’s simultaneous representation of both Grisham and his agent. Grisham claimed he retained the lawyer on the advice of his agent and that the attorney failed to inform Grisham that he did not have to renew his original agreement with the agent. See Richard E. Flamm & Joseph B. Anderson, Conflict of Interest in Entertainment Law Practice, Revisited, 14 ENT. & SPORTS L. J. 3 (1996) (discussing Grisham v. Garon-Brooke Assocs., Inc., Action No. 3:96 CV045-B (N.D. Miss. 1996) (hereinafter Flamm).

25. MRPC, Rule 1.7, Comment 14. Billy Joel sued his former New York lawyers claiming $90 million in damages. Joel charged attorney Grubman with conflict of interest, alleging that Mr. Grubman represented the singer while also representing his manager, top executives of his recording label, CBS Records (now Sony Music), and the merchandising company which holds the franchise for t-shirts and other items. Grubman's firm alleged that any conflicts were fully disclosed. Joel's conflict of interest claims also include an allegation that Grubman paid kick-backs to Billy Joel's manager in order to retain Joel as a client. Joel also claimed breach of contract, fraud, breach of fiduciary duty, and legal malpractice against his former attorney. Grubman was hired by Billy Joel's manager (and former brother-in-law) to represent Joel in negotiations with CBS Records. In a separate action, Joel also sued his former manager. The matters were settled for an undisclosed amount. Joel v. Grubman, 1992, Case No. 261-55-92 N.Y. Sup. Ct.

26. A television producer sued his former law firm alleging that the firm secretly represented other clients whose interests conflicted with his. Producer Phillip DeGuere, Jr. claimed that CBS contracted with him as writer and executive producer on "The Twilight Zone" series. CBS canceled the series after taping only nine of the 22 episodes it had ordered. DeGuere claimed that, under the contract, the network owed him $900,000 but that upon counseling with his law firm, he agreed to accept $250,000 in cash and a commitment for a different 13-week series in a subsequent season. DeGuere claimed he did not know that at the same time the law firm was representing him against CBS, the firm was also representing Columbia Pictures against CBS in a deal for the purchase of the daytime drama, "The Young and The Restless". DeGuere's suit claimed that, because CBS paid a premium price for the soap opera, it was forced to cut development of new shows, including a new television project produced by DeGuere, hence limiting CBS' ability to perform under the terms of his settlement agreement with him. DeGuere's attorney stated that the law firm should not be representing studios when they are also representing talent who must negotiate deals with those studios. Persistence of Vision, Inc. v. Ziffren, Brittenham & Branca, 1992, L.S. Sup. Ct. Case No. BC021603. Jimi Hendrix' father sued his long-time attorney and the foreign investment companies that purportedly granted rights to the late guitarist's favorable masters and copyrights. Hendrix alleged that Leo Branton, Jr. concealed the true nature of various agreements regarding Jimi Hendrix' recordings and copyrights and often acted in direct conflict of interest. Hendrix v. Branton, April 16, 1993, U.S. Dis. Ct. Wash.
1. The Comments to MRPC 1.7 - A Better Understanding of Conflicts of Interest:

The conflict of interest rules are designed to protect and advance two important values - confidentiality and undivided loyalty - in the attorney-client relationship. These two values overlap and are at the core of the lawyer’s fiduciary duty to clients. Both values are disregarded by a lawyer who harms a client by sharing the client’s confidences with the client’s adversary - reflecting obvious disloyalty. The Comments to MRPC 1.7 provide additional insight concerning the lawyer’s ethical duty of loyalty to the client.

The Comment to MRPC 1.7(a) indicates that an attorney is generally prohibited from representing a client when that representation involves a concurrent conflict of interest. “Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.”

Another less obvious example involves several parties forming a partnership. The safest practice is for each partner to secure separate counsel in negotiating or reviewing the partnership agreement. Alternatively, MRPC 1.7 expressly provides that after full disclosure of the potential conflicts of interest, the parties can waive such conflicts of interest by giving their informed consent, confirmed in writing, to multiple representation. Of course, if a direct conflict of interest does arise between the parties during the negotiation of the partnership agreement, or litigation erupts among the parties, the Comment to MRPC 1.7 suggests that unless the lawyer has obtained the informed consent of the client under the conditions of 1.7(b), the attorney ordinarily must withdraw in order to safeguard the confidentiality of the parties pursuant to MRPC 1.6.

27. See MRPC, Rule 1.6 (requiring lawyers to protect client confidences and listing exceptions to the general rule).

28. Id. At Rule 1.7, Comment [6]; see Cinema 5, Limited v. Cinerama, Inc., 528 F.2d 1384 (2d. Cir. 1976) (establishes the general standard in federal courts that a lawyer cannot sue an actively represented client of another firm in which the attorney is a partner). But see Universal City Studios v. Reimerdes, 98 F. Supp. 2d 449 (S.D.N.Y. 2000). In Reimerdes, Time Warner sought the disqualification of a lawyer who represented a defendant in a suit by the movie studios against the defendant who posted a computer program over the Internet that defeats the encryption system for DVD’s. Id. 450-51. The same lawyer represented Time Warner and other defendants in an unrelated suit involving the rights to the term, “Muggles,” from the Harry Potter books. Id. The federal judge in the Southern District of New York denied Time Warner Entertainment’s disqualification motion because Time Warner had improperly delayed the filing of its motion to unfairly prejudice the defendant. Id. at 455. In addition, there was no evidence that the defendant’s lawyer was privy to any of Time Warner’s secrets because of the lawyer’s work for Time Warner involving the “Muggles” case. Id. See also Stan Soocher, Bit Parts 16 Enter. Law & Fin. 8 (May 2000) (briefly discussing Reimerdes).
is important to note that the representation of multiple parties is not uncommon and not always impermissible in the entertainment business. For example, it may be permissible for a lawyer to negotiate a recording contract for a manager and the members of a group with a third party record label.

The Comment to MRPC 1.7(a) explains that loyalty to the client is also compromised “when there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . . .” 29 In such a case, the lawyer is unable to recommend or carry out an appropriate course of action for the client. For example, a lawyer representing a personal manager in an artist management contract cannot ethically acquiesce to a shorter duration of the contract because the artist’s father, a builder, has promised to give the lawyer a good rate on remodeling his home.

Subdivision (b) of MRPC 1.7 permits a lawyer to represent a client notwithstanding the existence of a concurrent conflict of interest if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. It is often very difficult to anticipate, and thus to inform the individuals in the group about, all of the possible future conflicts of interest that may arise among them. 30 When a lawyer is in doubt about undertaking or continuing representation because of a conflict of interest concern, he or she should consult with other lawyers, preferably experts in professional responsibility. If the lawyer is still concerned about the representation, he or she should decline representation until the new client responsible for the conflict of interest obtains independent counsel.

The Comments to MRPC 1.7 acknowledge that conflicts of interest in contexts other than litigation may be difficult to assess. “Relevant

29. MRPC, Rule 1.7(a)(2).

30. See Flamm supra note 24 at n.16 citing Adler v. Manatt, Phelps, Phillips & Kantor, L.A. Supr. Ct. BC O5307 (Apr. 1992) and noting that the former drummer of Guns’n Roses sued a law firm for malpractice and other causes for damages resulting from his signing an agreement with other members of the band.

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factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree.”

Thus, the evaluation of lawyer conduct in the entertainment industry will involve to some degree the custom and nuances involved in the business as well as the MRPC and its Comments. For example, if the lawyer represents a corporation which may "loan-out" the services of the artist or manager shareholder, the Comments warn of the potential for conflict if the lawyer also serves on the corporation's board of directors.

2. **Reviewing Other Noteworthy Conflicts of Interest Issues:**

   a. **Business transactions.** On its face, MRPC 1.8 appears to state clearly that a lawyer shall not enter a business transaction with a client unless (1) the transaction is fair and reasonable to the client, (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction, and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction. Does entering into a shopping agreement for a contingent fee from income derived from a record contract, the sale of a book, or some similar deal constitute entering a business transaction? The attorney should disclaim in the shopping agreement that the parties are entering into a joint business venture, to help ensure that the lawyer does not violate the ethical rules concerning a business transaction with a client.

31. MRPC, Rule 1.7, Comment [26].

32. The widow of the late popular songwriter and singer, Jim Croce, sued in New York Federal Court claiming unconscionability and breach of fiduciary duty against Croce's publishers, managers and an attorney on managerial and personal services contracts. At the initial meeting, an attorney was introduced to the Croces as "the lawyer" and reviewed the contract terms. The Croces were aware that the attorney had a business relationship with the publishers and managers on the transaction. Although the attorney was clearly not the Croces' lawyer and the Court upheld the contracts, the Court found the attorney liable for all of Croce's legal fees in challenging the contracts. The Court held that the attorney had breached a fiduciary duty to the Croces by failing to advise them to seek independent counsel. The lesson of the Croce case is that a lawyer who stands to profit from a business enterprise may find himself in a fiduciary relationship with a non-client by failing to advise independent counsel at the outset. The case has also inspired the inclusion of an acknowledgment in management contracts that the artist has been advised of the opportunity to seek independent counsel. **Croce v. Kurnit**, 565 F.Supp. 884 (S.D.N.Y. 1982), *aff’d.*, 737 F.2d 229 (2nd Cir. 1984).

33. See RPCC, Rule 3-300.
b. Payment for attorney fees by another. MRPC 1.8(f) permits someone other than the client to pay the lawyer for his services if the client gives informed consent and there is no interference with the lawyer’s independent professional judgment and relationship with client, including the need to protect client confidences. For example, a manager could pay a lawyer to represent an artist in divorce proceedings. It is even possible, although not especially advisable, that a manager could pay a lawyer to represent an artist and negotiate a personal management agreement with the manager’s lawyer. If the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with MRPC 1.7.34 (1.8 comment 12 says this).

c. Attorney interest in literary rights. MRPC 1.8(d) precludes a lawyer from making or negotiating an agreement with the client prior to the conclusion of the representation which gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. In the context of on-going litigation, the conclusion of representation occurs when there is a non-appealable final judgment. It is important to note that the rule does not prohibit a lawyer representing a client in a transaction concerning literary property from accepting as his fee an ownership interest in the property.35

d. Conflicts in representing former clients. Like practicing in small communities, the "incestuous" entertainment industry gives rise to potential conflicts of interest with respect to representing a party against a former client. MRPC Rule 1.9 and its Comments state that a conflict of interest arises with a former client when the lawyer’s representation of a new client bears a “substantial relationship” to the matter of the representation that the attorney provided to a former client.36 Disqualification of a lawyer from the subsequent representation is for the protection of the former client. The lawyer should either withdraw from representation or seek the former client’s informed consent regarding the conflict of interest, realizing that in

34. MRPC, Rule 1.8, Comment 12.

35. MRPC, Rule 1.8, Comment [9].

36. The “substantial relationship” test was developed in T.C. Theater Corp. v. Warner Brothers Pictures, 113 F.Supp.265 (S.D.N.Y.1953) (holding that if the matters or cause of action of the new representation are substantially related to the former representation, “the Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the [new] representation” Id. at 268-69). See MRPC, Rule 1.9, Comment [3].
some cases a waiver will be difficult because of the risk that the lawyer will harm the former client by using the former client’s confidences. The former client’s informed consent must be confirmed in writing.\textsuperscript{37} In this type of conflict of interest situation, the lawyer is advised to have as full and frank a discussion as possible with parties, keeping in mind the need to preserve each client’s secrets and confidences. [Conflicts of Interest Waiver is attached as Form IV].

C. AGENTS, MANAGERS AND LAWYERS

The practice of entertainment law is quite broad. It includes litigators, estate planners, tax professionals, in-house counsel, and deal makers - entrepreneurial attorneys who facilitate business deals. The functions of agents, managers, and entrepreneurial entertainment lawyers often overlap. These functions are not easily distinguishable. Personal managers are given powers-of-attorney and function much like a lawyer. They counsel their artists on business and career matters and enter into contracts on their behalf. Agents, who must be licensed in most states, endeavor to procure employment for the artist. The licensing requirement and the narrow definition of their job induces some agents to broaden their involvement and income by becoming agent or managers. Lawyers are often positioned to assume all these roles, as representative, counselor and attorney-in-fact.\textsuperscript{38}

A. Textbook Definitions of Roles\textsuperscript{39}

Agents procure employment for artists in the entertainment fields. At common law, "agents" are persons authorized by a principal to act on behalf of that principal under the principal’s control.\textsuperscript{40} A music agent's work, unlike an agent in the

\textsuperscript{37} MRPC, Rule 1.9(a) & (b)(2). An action was filed by Steve Fargnoli, a former manager for the musician, Prince, alleging a conflict of interest stemming from the Ziffren firm's formerly representing Fargnoli from 1981 to 1986, then later representing Prince during a time when Fargnoli sued the musician and his corporations. The suit alleged that the Ziffren firm disclosed to Prince some of Fargnoli's confidential communications protected under the attorney/client privilege. The Ziffren firm had helped Prince and Fargnoli settle a dispute during their representation of Prince and at the invitation of Fargnoli. In granting the law firm summary judgment, the Court noted that the parties had entered into a release including conflict of interest claims after the parties settled their dispute. Fargnoli v. Ziffren, Brittenham & Branca, 1992, Case No. BC068280 L.A. Sup. Ct.

\textsuperscript{38} Lawyers may have to obtain licenses if they procure employment. There are a number of articles providing guidance for the attorney who wishes to become an agent, manager, or both. See, e.g., RAYMOND L. WISE, LEGAL ETHICS 185 (2d ed. 1970); James O'Brien III, Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists, 80 CALIF. L. REV. 471 (1992); Bruce S. Stuart, Swifties, Shifties, and That E-Biz Jazz: The Ethical Roles of Attorney/Literary Agents, HASTINGS COMM/ENT.L.J. 245 (Winter, 1996).


\textsuperscript{40} W. EDWARD SELL, AGENCY, (1975). THE RESTATEMENT (SECOND) OF AGENCY §424, subd. 1 (1958) defines agency in any enterprise as a fiduciary relationship created from the client (principle)'s consent that the agent
film or book publishing industries, is generally limited to soliciting and procuring engagements for live performances, personal appearances and, perhaps, endorsements. Agents for musical talent are also subject to the strictures of the American Federation of Musicians ("AF of M"), an international trade union. The AF of M requires that agents confine their efforts to procuring employment, and require that they be licensed by the AF of M. Unlicensed agents are forbidden from doing business with the AF of M, and severe penalties are incurred for musicians doing business with unlicensed agents. Almost as important to this discussion is the AF of M's limits on the fees agents or personal managers can receive. Agents are allowed a maximum of fifteen percent of an artist's gross receipts. A personal manager, defined by the AF of M as having only to do with the development of the artist's career in giving advice and guidance, can only receive five percent over the agent's percentage of the artist's gross receipts. Related exploitations by agents may include merchandising deals at performances or arranging for films of live performances.

Personal Managers are the artist's principal career advisors in all business affairs, including daily management to strategic career development planning. Personal managers often oversee the hiring of other managers to deal with other aspects of the artist's career. Personal managers often hire the business manager. Business managers, usually accountants, manage business and personal finances. While the business manager manages the money, the personal manager focuses his/her efforts on how the money is earned. This focus often leads a personal manager to delve into the agent's realm of procuring employment. A personal manager involved in procuring employment may be subject to sanctions as an unlicensed agent.41

Lawyers are engaged to protect the legal interests of their clients. The rules of professional conduct may be the attorney's chief impediment stumbling to becoming establishing him or herself as an agent or manager. The MRPC govern conflicts of interest and the duty of loyalty. Both may be compromised when an attorney assumes the roles of counselor and agent/manager.42

41. See, e.g., Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997); Waishren v. Peppercorn Productions, Inc., 48 Cal. Rptr. 2d 437 (1996); Mandel v. Liebman, 303 N.Y. 88 (1951); Raden v. Laurie, 262 P. 2d 61 (Cal. 1953). See also Don Biederman, Agent or Manager? There is a Difference . . . Isn't There?, 15 No.9 ENT L. REP. 3 (Feb., 1994); Fred Jelin, The Personal Manager Controversy: Carving the Turf, 7 No.1 ENT L. REP. 3 (June, 1985) (hereinafter Jelin).

42. See also Joseph B. Anderson and Darrell D. Miller, Professional Responsibility 101, 11 ENT. & SPORTS LAW 8 (Summer 1993) (discussing an earlier article on legal ethics as applied to agent/managers, see McPherson, supra note 20).
B. Practical Roles\textsuperscript{43}

Practically speaking, the roles of agent, manager and lawyer are not easily distinguishable. Conflicts arise when the parties switch or merge roles. For example, the lawyer who also acts as a personal manager must proceed carefully given the potential for conflicts of interest and the possibility that the lawyer-client relationship will be adversely affected by the artist’s frustrations with unrealized career expectations.\textsuperscript{44}

Much like a lawyer or a personal manager, agents create or reject employment opportunities and influence an artist's career and image. Agents negotiate deals, or "package" deals, by using business and personal relationships to bring artists together with other creative talent for tours, sponsorships, recordings and other business. Agents are responsible for the collection, accounting, and distribution of money, just like a business manager. Agents are paid by commissioning the artist's gross income from employment procured by the agent usually at 10\% to 15\% rate.

Personal managers may procure employment like an agent. The music industry is a particularly appropriate setting for considering lawyers who also act like personal managers or agents because the role of a personal manager developed out of a need for business assistance by artists in the music industry.\textsuperscript{45} In addition, musicians need contracts and information which are often provided by the personal manager. Managers negotiate recording contracts while agents book the artist's performances or services.\textsuperscript{46} Finally, managers nurture the artist's career and often become a producer of the artist's talents. Managers have usually represented a coterie of talent and may use one or more of his clients to produce an event or to assist him in developing a particular artist's career.

Unlike agents, personal managers are not required to register with state administrative agencies. Unlike lawyers, there is no legally enforced code of professional conduct or licensing process for managers. Yet, managers do not


\textsuperscript{44} Who must and who need not be licensed often turns on whether the person in question is providing the services of an agent or of a manager, or both. For example, booking agents in New York are required to be licensed as employment agencies under N.Y.S. §171 (1997). However, personal managers need not have a license. \textit{See also} Friedkin v. Harry Walker, Inc., 395 N.Y.S. 2d 611 (1977) (holding that agents who did not manage their clients' careers but only secured employment for them were required to be licensed as employment agencies under §171, as procuring employment for their client was not merely incidental to their job); Gervis v. Knapp, 43 N.Y.S. 2d 849 (1943) (finding that infant singer's guardian could not disaffirm a contract as unenforceable which was entered into on infant's behalf by a personal manager who was not licensed because licensing was not required of a manager who was "primarily a manager").

\textsuperscript{45} \textit{See} Jelin, \textit{supra} note 41.

\textsuperscript{46} \textit{Id.}
operate wholly without restraints. In California, a manager who procures employment must be licensed as a "talent agency." The Labor Commission of California has jurisdiction over manager-artist contracts, subject to California Supreme Court review.\textsuperscript{47} Finding work for artists in New Jersey requires a manager to be licensed as a "booking agency."\textsuperscript{48} Unlike agents, managers may have powers of attorney to bind their artist to deals managers negotiate on their artist's behalf. Managers, therefore, commission a large percentage of the gross income of the artist earned in the entertainment fields, usually 15% to 25%.\textsuperscript{49}

Lawyers may package deals through relationships, shop talent and creative material, advise on money matters, recommend individuals or businesses for assistance, protect the client's financial interests, and intentionally or inadvertently exercise a greater degree of control over the client than is customary in other law practices. Lawyers may bill hourly or a contingency fee if work is done on a speculative basis (such as shopping and negotiating a record deal), or a combination of both. (Refer to section IV of this outline). Certain entertainment lawyers fit the textbook and practical definition of both agents and managers. This is not weird or wrong. It is a fact. Lawyers who wish to perform these services must do so within the applicable guidelines and restrictions governing all lawyers.

C. Licensing Regulations and Rules

Many states require agents - persons providing employment opportunities - to be licensed. California and New York have the most comprehensive laws regarding the licensing and regulation of entertainment agencies.\textsuperscript{50} In order to be licensed, agents must demonstrate, in part, their good character and competency in the business of providing work. Among other requirements, agents may also have to show proof of the nature and location of the agent's business. The statutes also address agency agreement forms, fees, disposition of grievances and penalties. Penalties for violating the statutes are court-enforced with criminal misdemeanor and/or civil penalties, which include voiding contracts and ordering the return of commissions. Cases establish that persons operating in violation of the statutes in New York and California\textsuperscript{51} are nevertheless exposed to statutory penalties whether they are licensed

\begin{footnotesize}
\begin{enumerate}
\item[47.] Id. at 4.
\item[48.] N.J.S. §34:8-43 (1997). This statute also governs agents.
\item[49.] This commission is subject to the guidelines established by the American Federation of Musicians ("AF of M"), an international trade union. The AF of M sets a ceiling of fifteen percent (of an artist's gross receipts) for agents working with members of the union. Personal managers are limited to five percent of the gross, over and above the agent's percentage. \textsc{By-Laws of the American Federation of Musicians of the United States and Canada, Art. 23, §2} (revised Sept. 15, 1987).
\item[50.] California Labor Code §§1700 \textit{et seq}; New York General Business Law §§170 \textit{et seq}.
\end{enumerate}
\end{footnotesize}
by the state or not. These cases demonstrate how talent can assert non-compliance with the applicable licensing statute and void management contracts \textit{ab initio}. Remedies available to the talent include recovering all commissions paid to managers proven to have in effect operated as unlicensed agents. State labor commissions (established for the protection of employees) issue licenses and enforce the statutes.

Managers who do not assume agency functions do not require licensing in California or New York.\(^52\) However, managers must be careful to structure their employment procuring activities so that they will comply with these and other requirements that such activities are permissible if they are "merely incidental" to their actions as manager. It is advisable to include language in a management contract to the effect that the artist acknowledges that the personal manager is not an employment agency or theatrical agent and that the personal management duties do not include securing or soliciting employment for the artist. Formally recognizing the cross-over function of agents and managers, the California statute exempts from its definition of "talent agency" (and, therefore, exempts from licensing) managers who procure, offer or promise to procure recording contracts for music artist. California further allows an unlicensed person to act in conjunction with and at the request of a licensed talent agency in the \textit{negotiation} of an employment (recording) contract (emphasis supplied). The New York statute specifically exempts from its definition of "theatrical employment agency" (and, therefore, exempts from licensing) the business of managing where such business only "incidentally" involves seeking employment. The California statute also specifically empowers talent agencies to "counsel or direct artists in the development of their professional careers." Therefore, California agents may manage while managers (with narrow exceptions) cannot function as agents without complying with the licensing requirements. By not enacting statutes specifically addressing the entertainment agencies, some states have left the regulation of agents and managers to general employment statutes and common law. Common law imposes fiduciary duties of loyalty, good faith, and fair and honest dealing on all agents and managers and lawyers.\(^53\)

Lawyers are licensed by the state judiciary, which is also responsible for promulgation and enforcement of the applicable rules of professional conduct and for deciding legal malpractice cases. As previously noted, most state rules emulate the provisions contained in the American Bar Association Model Rules of Professional Conduct (Model Rules) which are the reference standard in this discussion.


D. Music Lawyer as Manager or Agent

Lawyers can serve as managers or agents while simultaneously practicing law. In the music industry, lawyers procure recording contracts for their clients and help manage their career by participating in career strategy and deal making. Unlike agents, lawyers usually do not regularly book personal appearances for their clients. Thus, lawyers often tend to act more like managers than agents. Personal management requires daily and detailed attention to the personal affairs and logistics of an artist. Because an experienced music lawyer may know the business better than an inexperienced manager, the attorney who has a proactive relationship with the artist and manager may find himself or herself making recommendations, facilitating relationships, creating opportunities, and advising the manager as well as the artist. By doing so, the lawyer becomes, in effect, part of the management team. In some cases, the attorney may be invited by both artist and management to take on duties which are generally the prerogative of artist management. This usually means representation on a contingent fee basis and greater involvement with the artist's daily affairs in addition to providing general legal counsel. By limiting the work a lawyer can dedicate to other legal clients, the attorney may become more like a company general counsel or "in-house" lawyer.

Lawyers are agents and it is axiomatic that an attorney's authority to represent clients creates an agency and fiduciary relationship. Attorneys who regularly (and not "incidentally") make deals on a speculative basis in return for a contingent payment may still be required to be separately licensed as an agent under the applicable statute of the state in which the attorney's principal place of business is located. This should obviate the need for the attorney/agent to register as an agent elsewhere. However, should an attorney/agent establish an office or agency in a state in which he or she is not licensed to practice law, licensing under that state's rules as an agent (and certainly as an attorney, if the intention is to practice law) will be required.

In Chinn v. Tobin, the California Labor Commissioner ruled that an attorney who owned a production company was not procuring employment as an agent for an artist/client when he hired the artist to be in one of his productions. The Commissioner held that an attorney having an ownership interest in the employment is functioning as an employer, not as an agent "with third parties" within the meaning of the Act. However, conflict of interest issues were raised but not resolved by the Commissioner.

E. Special Considerations Regarding Lawyer Conduct

1. Merging the Roles of Various Entertainment Representatives:


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Lawyers’ ethical obligations are extensive and often long-lasting.\textsuperscript{55} These obligations also create challenges for entertainment lawyers who perform services often rendered by other personnel, such as agents. The general rule is that entertainment attorneys who also act as agents or managers are still subject to their states’ codes of professional conduct to the extent that any of their activities involve the delivery of legal services.\textsuperscript{56} Lawyers cannot merely switch titles to avoid their ethical responsibilities. As a result, lawyers have taken different approaches to dealing with what is perceived as a competitive disadvantage in the entertainment business when acting in these other roles.\textsuperscript{57} Some attorneys argue that when they act as an agent or a manager they are not providing legal services and, therefore, are not subject to the codes of professional conduct. This approach has some risk as lawyers’ professional liability policies may not cover all of their services. Other attorneys formally establish separate businesses that render financial advice, career advice, or solicit employment opportunities. The attorneys may incorporate the businesses and employ full-time personnel but they expressly do not provide legal services.

As long as attorneys are licensed to practice law, they are subject to their states’ codes of professional conduct for even their non-professional activities. Lawyers must be very careful when creating separate business enterprises to make sure that these are not used to circumvent the lawyer’s ethical obligations. For example, a lawyer could create a separate talent agency and then solicit in-person talent for the agency. The lawyer could not use such solicitation however to develop clientele for his law practice.

2. \textit{Advertising and solicitations.}

MRPC 7.2 and 7.3 governs lawyer advertisement and solicitation.\textsuperscript{58} In general, lawyers can mail written advertisements and solicitations directly to prospective clients providing they are truthful and non-deceptive.\textsuperscript{59}


\textsuperscript{56} It is also worth noting that Rule 5.4 of the MRPC prohibits lawyers from forming a partnership with a non-lawyer if any of the activities of the partnership or the professional corporation involves the practice of law. Similarly, a lawyer cannot permit non-lawyers to own shares of a professional corporation that he is involved in that delivers legal services. \textit{Id.}; see also RPCC Rule 1-310.

\textsuperscript{57} Some contend that the applicability of the law profession’s ethical codes to lawyers performing non-law services is not a settled area. See Robert E. Fraley & F. Russell Harwell, \textit{Sports Law and the “Evils” of Solicitation}, 9 Loy. L.A. Ent. L.J. 21 (1989).

\textsuperscript{58} See RPCC, Rule 1-400. See generally, Jack P. Sahl, \textit{The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment}, 34 St. Mary’s L. J. 795 (2003) (noting the increased emphasis on marketing by the legal profession and examining the history of lawyer advertising ).

\textsuperscript{59} MRPC, Rule 7.1; see Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); see also Florida Bar v.

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Lawyers may also advertise through recorded or electronic communication, including public media. 60 Lawyers “shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s . . .” contact is pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. 61 Lawyers also cannot state or imply that they are specialists in a field of law, such as entertainment law, unless the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association and the name of the certifying organization is clearly identified in the communication. 62

Entertainment lawyers can communicate or promote their legal services in several ways in hope of developing their practice. The most effective way is to establish a strong reputation for providing competent and efficient legal work with the general public as well as the profession. Satisfied clients will return with more work and they will refer new clients. Lawyers should create a profile in the arts and entertainment community by attending performances and other related events, for example, awards ceremonies and benefits. Lawyers should volunteer their service for arts organizations, for example, by serving on the board of directors. Authoring entertainment law articles, attending continuing legal education programs, speaking to groups, and traditional advertising - notices in trade magazines or firm brochures - are all ways to network and to develop an entertainment practice.

3. Referrals and fee splitting.

Many entertainment lawyers rely on referrals for their services from a variety of sources, including previous clients, lawyers, agents, managers, and personnel with entertainment companies. Referrals with conditions attached, for example, a desire to be retained as the client’s manager or agent, raise serious conflict of interest issues. In addition, lawyers are prohibited from paying persons to refer clients. 63 MRPC 1.5(e) does permit lawyers to refer

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60. MRPC, Rule 7.2(a).

61. See MRPC, Rule 7.3(a); see RPCC, Rule 1-400.

62. MRPC, Rule 7.4 (d).

63. MRPC, Rule 7.2(b); see RPCC, Rule, 1-320.
cases to other lawyers or to associate lawyers in their cases and share the fee. The clients must agree to the arrangement, including the share each lawyer will receive, and the agreement must be confirmed in writing. 64 The lawyers’ share must reflect their work or their assumption of joint responsibility in the case. 65 MRPC 1.5(e)(3) requires that the total fee be reasonable.

D. COMPENSATION FOR ATTORNEY SERVICES AND AGREEMENTS

Entertainment lawyers deal in the development of creative material. Their relationships with talent and entertainment companies are important to developing a successful practice. Lawyers market or “shop” talent and their creative properties to companies for purchase, license and ultimately for commercial exploitation. Shopping talent and their properties is highly speculative work - only a very small percentage of talent or their properties ever achieve commercial success. Since many entertainment clients cannot afford to retain lawyers on an hourly basis for their services, including shopping their creative work, clients and lawyers instead often agree to a contingency fee arrangement. A comprehensive retention agreement for legal services should unambiguously address scope of representation and the basis of payment. [See Engagement Letters, Forms I and II]. A separate shopping agreement may also be considered if this is the primary or only service provided by the attorney. [See Form III].

Unlike employment contracts with managers and agents [See Management Agreement, Form V], clients can terminate employment contracts with lawyers at any time. 66 If a client terminates his or her lawyer, the lawyer is generally entitled to only quantum meruit recovery. Lawyers offer a broad range of professional services and it may be useful to have a specific contractual provision regarding the lawyer’s shopping services and compensation. To help ensure that a lawyer’s work is covered by his or her professional liability insurance, the retention agreement should specify that the client is retaining the lawyer primarily for law-related services. 67 If the retention agreement provides for compensation based on an hourly rate, the rate for the lawyer’s services will vary depending on a several factors, including the complexity of the representation, the lawyer’s unique skills and experience, and the value for such services in a particular geographical area. Representation of a more national or international nature may generate higher hourly rates than for more local work. Lawyers’ hourly rates for entertainment work can range from $200 to 400 per hour - with lawyers on the east and west coasts earning more within the range.

A customary contingent fee ranges from 5% to 10% of the defined gross

64. MRPC, Rule 1.5(e)(2).
65. MRPC, Rule 1.5(e) (1)-(3).
66. MRPC, Rule 1.16, Comment [4] (stating that clients have the right to discharge, with or without cause, their attorneys).
67. See supra note 6.
compensation of the client and rarely exceeds 10%. The exact percentage depends, in part, on the client’s record for commercial or critical success and the likelihood that the lawyer’s efforts will be successful. For example, it is reasonable with a superstar to take a lower percentage of the gross compensation and with a new or “baby act” to insist on 10%. Successfully shopping a new artist to a recording contract with a small, local, independent record company is a situation in which a lawyer might charge 10% of the artist’s gross compensation. A lower contingency fee is expected if coupled with a reduced hourly fee. In both the hourly rate and the contingency fee arrangements, the client usually pays the out-of-pocket costs.

In the contingency fee circumstance, the definition of gross compensation is important and a source of great controversy. In many entertainment contracts, gross compensation is defined broadly. It may exclude, however, income that is not derived from or enhanced by the lawyer’s professional services. For example, when representing a book author, it may be appropriate for the lawyer to include in gross compensation income from book publishing and also proceeds from television, a motion picture, or personal appearances. The lawyer wants to apply the contingency rate or commission to as much of the client gross compensation that is reasonable in the industry and under the MRPC. This may be justified because first, the book deal created all the other commercial opportunities for the client-author and second, the lawyer’s legal services are being used in these other areas. It is worth noting, that it may be in the client-author’s best interests to exclude some streams of income, such as proceeds from music, theatrical, or other "unrelated" sources. Like managers, agents and entertainment companies, lawyers are reluctant to limit the possible sources or streams of income. They usually insist on a percentage of the gross compensation from any source, whether known or yet to be discovered, especially given the trend in multimedia and the crossover nature of entertainment products in new technology. Lawyer contingency agreements, like personal management contracts, may also contain a "sunset" provision. It requires the client to pay the contingency fee for the lawyer’s past services even after the representation is terminated, usually for a period of six to twelve months. In addition and distinct from the sunset provision, the lawyer may negotiate and receive an ongoing commission on the client’s proceeds derived from deals that the lawyer helped to procure for the client. The commission may be for a limited period or extend for so long as the artist receives royalties from that source.

Model Rule 1.5 requires hourly and contingent fees to be reasonable. Attorney can consider the following criteria in determining a reasonable fee: “the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly; . . . the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; . . . the experience, reputation, and the ability of the lawyer or lawyers performing the services required; and whether the fee is fixed or contingent.” These criteria offer attorneys great flexibility and protection in charging fees.

68. See RPCC, Rule 4-200.

69. MRPC, Rule 1.5(a)(1)-(8).
Thus, it is not unusual to find entertainment lawyers in different parts of the country charging similar fees for national or international projects because of the unique skill and experience they share in the field.

Contingent fee agreements must be in writing, signed by the client, and “state the method by which fees are to be determined, the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable, whether or not the client is the prevailing party.” Contingent fees tend to produce more income for attorneys than hourly fees. This is permissible, in part, because there is often a risk with contingent fees that the attorney will not be paid because the representation is unsuccessful. For many entertainment attorneys, the potential value of a deal or successful representation dictates the amount or reasonableness of a contingency fee.

Entertainment attorneys often assist in the personal management of a client. Managers frequently bill between 15% and 25% of a talent’s gross income for their services. Attorneys assuming managerial responsibilities may wish to consider the customary amounts that managers are paid in setting a reasonable contingency fee. [See Form VI: Legal Services Including Management Functions]

In some entertainment fields, it is customary for the talent’s services to be provided by a "loan-out" corporation, a "personal services" corporation, or some other entity, owned and controlled by the talent. Such entities include production, music touring and merchandise companies. The lawyer’s Engagement Letter of Agreement should either acknowledge or anticipate the representation of these entities by including them as parties or having a contractual provision that designates the lawyer as the counsel for the entities upon their formation.

E. SANCTIONS

State supreme courts regulate the right to practice law even for lawyers who never appear in court. These courts establish codes of professional conduct and disciplinary systems to protect the public and the bar. Federal courts usually defer to state admission standards in admitting lawyers and admission is only necessary for those lawyers who practice in a particular federal court. Both state supreme and federal courts can discipline

70. Id. at (c).
71. Some types of practices, such as personal injury or debt collection, have contingency fees that range from 33% to possibly 50%.
72. Morgan, supra note 8, at 41.
73. Id.
There are two principle methods by which the public can hold lawyers and judges accountable for their misconduct. The first method is filing a lawsuit against an attorney for civil liability. Most lawsuits filed against attorneys are for negligence, a fiduciary breach, breach of contract or fraud. Successful plaintiffs in lawyer liability cases are entitled to attorneys’ fees and to punitive damages when the attorney’s conduct involves gross negligence or malice.

The second method of holding lawyers accountable involves the states’ disciplinary systems. Clients and others can file a grievance against an attorney with the state authority responsible for reviewing lawyer conduct, for example, the statewide disciplinary counsel. These authorities often rely on assistance from state and local bar associations to receive, review, investigate, prosecute, and hear grievances. Grievances and sanctions against lawyers have increased in recent years. The range of sanctions for lawyer discipline include: disbarment, suspension, formal reprimand, informal reprimand and a fine. One or more of these sanctions may be applied to an attorney for one significant violation or an accumulation of lesser violations of a state’s professional conduct code.

Case Sera Sera

In May 1956, Jerome B. Rosenthal entered into a retainer Agreement with Doris Day Melcher and continued to present her as an attorney, business manager, business adviser and agent until his services were terminated in July 1968. Later that year, Doris Day Melcher and her son, Terrence Melcher, filed a complaint with the state bar against Rosenthal. Disciplinary proceedings resulted in the State Bar Court unanimously recommended that he be disbarred. The case presents facts instructive of what lawyers also functioning as an agent and manager should not do and what can happen when they do.

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74. Judicial immunity largely insulates judges from civil liability for their official conduct.

75. See Mallen, supra note 5, at 554-55. Lawsuits against lawyers for professional liability are generally referred to as malpractice actions. Although there is little consensus or discussion about the meaning of legal malpractice, it commonly describes a kind of tortious conduct. Id. at 2. Liability for professional negligence is certainly included within the meaning of malpractice. Id. at 3-5.

76. The most common action brought against attorneys is for negligence. The essential elements of a negligence claim are: “(1) the employment of the attorney or other basis for imposing a duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff;” and (4) actual damages. Id. at 607-08. As part of a lawyer malpractice action, courts have traditionally required the plaintiff to show that but for the attorney’s conduct the client would succeeded in the underlying claim. See, Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998) (holding that the uncollectability of a judgment in the underlying action is an affirmative defense to a malpractice claim against an attorney); see also Morgan, supra note 8, at 89 (discussing lawyer malpractice claims and the so-called “suit-within-a-suit” requirement).

The Supreme Court of California, in affirming the disbarment, held that Rosenthal engaged in transactions involving undisclosed conflicts of interest, took positions adverse to his former clients, overstated expenses, doubled billed for legal fees, failed to return client files, failed to provide access to records, failed to give adequate legal advice, failed to provide clients with an opportunity to obtain independent counsel, filed fraudulent claims, gave false testimony, engaged in conduct designed to harass his clients, delayed court proceedings, obstructed justice and abused legal process.\textsuperscript{78}