UNIVERSITY OF MIAMI SCHOOL OF LAW
CENTER FOR ETHICS & PUBLIC SERVICE

American Bar Association Forum on the Entertainment and Sports Industries
From Hollywood to South Beach:
The First Annual International Legal Symposium
on the World of Music, Film, Television and Sports

FONTAINEBLEAU MIAMI BEACH

Minding Your P's and "Karats."
Professional Responsibility, Conflicts, and Confidentiality
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PRESENTED BY
ETHICS & PROFESSIONAL RESPONSIBILITY PROGRAM

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PROGRAM OVERVIEW

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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-television show 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-television show. **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 **UBN**'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 **CLT**. **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 that **Esquiregot** has a lengthy history of drug abuse and has recently 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 news story. 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 (and the firm's) 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

[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.[3] 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 . . . ."[4] 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."[5]

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.[6] 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).

[6] Kenneth J. Abdo & Jack P. Sahl, *A Professional Responsibility Primer for Today's Entertainment Lawyer*, 18 ENT. & SPORTS. LAW. 3, 5-6 (2000).

forming client-lawyer relationship with respect to a matter,"[7] 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."[8] 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.[9]

Conflicts of interest in the entertainment and sports law practice often also 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 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

[7] R. 1.18(a).

[8] R. 1.3 cmt. 4.

[9] *Id.*

> 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.[10]

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.[11] 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."[12] 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.[13]

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.[14] Moreover, several influential state and local bars have produced opinions on the topic, variously emphasizing

[10] R. 1.7 cmt. 34.

[11] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995).

[12] *Id.* at 2.

[13] *Id.* at 3.

[14] *Id.* at 14-21.

different factors to measure a conflict.[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."[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.[17]

[15] *See*, *e.g.*, N.Y. City Op. 2007-03 (2007); Ill. Op. 95-15 (1996); Cal. State Bar Op. 1989-113 (1990).

[16] *Id.*

[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 the client are fidelity and maintaining client confidences.[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."[19] Further clarification is found in comment 3 to Model Rule 1.6, which indicates that the term is interpreted broadly and includes "all information relating to the representation, whatever its source."[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 confidentiality rule.[21] Obtaining the client's informed consent requires that the lawyer adequately explain the material risks and the reasonably available alternatives to the client.[22] Client consent must be provided in writing.[23] Implied authority pertains to a lawyer's authority to reveal information about the client during the course of representation if that information cannot properly be denied or facilitates a satisfactory conclusion to a matter.[24] Finally, the six

[18] ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 08-450 (2008).

[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.

[24] R. 1.6 cmt. 5.

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.[25]

It is important to note that the confidentiality restrictions apply to information obtained while representing former clients and during discussions with prospective clients.[26] 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.[27] Information exchanged in an initial consultation with a prospective client is deemed to be confidential.[28] 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 confidentially.[29]

Legal representation in the entertainment community is particularly vulnerable to the nuances in the ethics rules regarding confidentiality. Agents, performers, producers, and entertainment companies are a small community that repeatedly engage in business deals and generally seeks to retain the small number of lawyers who practice in this niche. This repetitive

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[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.*

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

Finally, there are also significant competency issues at play for an attorney in the entertainment industry. These issues permeate concerns about one's professional image and the public-relations problems that may arise from such 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 especially important when an attorney is involved with litigious entertainment clients. Model Rule 1.1 requires 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]

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

[30] Sahl, *supra* note 17, at 17 (citation omitted).

[31] R. 1.1.

[32] R. 1.1 cmt. 5.

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 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

[33] Sahl, *supra* note 17, at 17.

[34] R. 1.1 cmt. 1.

[35] Sahl, *supra* note 17, at 17.

[36] R. 1.1 cmt. 6.

[37] *Id*. at 45.

should be done at the outset and is permitted as long as the limitation is reasonable and the client has provided informed consent.[38] Finally, lawyers are "generally free to reject a client's offer of employment."[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 specialized area of practice 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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[38] R. 1.2(c).

[39] Kenneth J. Abdo & Jack P. Sahl, *Entertainment Law Ethics: Part 1*, 22 ENT. & SPORTS. LAW. 2, 3 (2004).

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.