University of Miami School of Law
Center for Ethics & Public Service
Ethics & Professional Responsibility Program
presents:

Minding Your P’s and “Karats”
Professional Responsibility, Conflicts, and Confidentiality

American Bar Association Forum on the Entertainment and Sports Industries
Fontainebleau Miami Beach

April 23, 2010
Lee is an entertainment lawyer in South Florida. Lee receives a call from Caitlin, 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 UBN.

Caitlin asks Lee to 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 MTN.

A direct offer by MTN, however, has yet to materialize.

Larry Lee = Lawyer  
Caitlin Cook = Client (TV Actress)  
Universal Broadcasting Network = UBN

Monument Television Network = MTN  
Monument TV14-Miami  
Star Cable Channel = owned by UBN
Lee knows that there is a significant amount of money to make for his firm, should he handle the matter. Lee begins the conflicts check.

The conflicts check uncovers that Lee and two junior associates represented TV14-Miami six months ago in a case relating to music-broadcasting rights on local programming. MTN owns and operates TV14-Miami, and all of its corporate decisions are subject to MTN’s oversight and approval.

FACTS

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Caitlin Cook = Client (TV Actress)
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QUESTIONS ACT ONE

1. May Lee represent Caitlin?

2. Has Lee and his firm formally terminated the relationship with 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?
PROSPECTIVE CLIENTS

1. May Lee represent Caitlin?

• First consider: Is Caitlin already a “client”? Prospective client?
  - Under Model Rule 1.18(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.”
  - A lawyer owes limited duties even to a client with whom no relationship forms. Model Rule 1.18(b)/(c)

• Then consider: Would representing Caitlin pose a conflict of interest?
  - Assess the source of a potential conflict
  - If the source of a potential client is one’s interest to another client, determine whether the client is a:
    * Prospective client - Model Rule 1.18(c)
    * Current client - Model Rule 1.7
    * Former client - Model Rule 1.9(a)/(b)
TERMINATING REPRESENTATION

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

- Model Rule 1.16 prescribes the grounds on which a lawyer mandatorily shall and optionally may terminate representation. A lawyer may optionally terminate representation, for example, where “withdrawal can be accomplished without material adverse effect on the interests of the client.” Model Rule 1.16(b)(1)

- Generally, a client remains a current client through the “conclusion of all matters undertaken for [the] client.” Model Rule 1.3, cmt. If the representation is limited to a specific matter, representation ends when the matter is resolved. Sometimes, however, clients continue to believe that a lawyer still serves them after the conclusion of a matter.
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?

• Conflict of interest vis-à-vis MTN and TV14-Miami

• No per-se rule that representation of one subsidiary represents all subsidiaries. Model Rule 1.7 cmt. 34

  - Corporate affiliation alone does not create attorney-client relationship
  - It is a fact-specific inquiry
  - Best practice is to obtain consent
  - Consider also:
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?

• Consider also:
Facts

• Parker, a famous television producer, requests that South Florida lawyer Adler represent Parker, who is negotiating the terms of a project with 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! in a copyright-infringement suit. Adler settled the case for Music Now!.

Patrick Parker = Producer
Amanda Adler = Attorney
Country Lifestyle Television = CLT
Music Now! = Mediacorp Subsidiary
Mediacorp = Major media corporation
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!.

Patrick Parker = Producer
Amanda Adler = Attorney
Country Lifestyle Television = CLT
Music Now! = Mediacorp Subsidiary
Mediacorp = Major media corporation
1. What should Adler tell the Mediacorp lawyer in the context of confidentiality?
2. Ethically and professionally, how should Adler proceed with Parker’s representation?
1. What should Adler tell the Mediacorp lawyer in the context of confidentiality?

- Confidentiality generally protects all information for current and former clients.

  - Current Client - Model Rule 1.6(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).”

  - Termination (continued) Model Rule 1.16 (c)/(d)

- Confidentiality

- Termination
CONFIDENTIALITY & FORMER CLIENTS

1. What should Adler tell the Mediacorp lawyer in the context of confidentiality?

• Confidentiality (continued)

- Former Client - Model Rule 1.9
  * (a) substantially related matter and material adversity
  * (b) waiver with consent
  * (c) exception to confidentiality where rules would permit or require


• Also, revealing public information can violate confidentiality rules if not commonly known.
PROSPECTIVE CLIENTS

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

• Current Client

  - Model Rule 1.7(a) - “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.”

  - Model Rule 1.7(b) – “A lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent 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.”

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

- **Prospective Client**

  - **Model Rule 1.18(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.”

  - **Model Rule 1.18(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.”


• **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**, without first 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 representation even though she is not ably versed in defamation defense law.

• The managing partner summons **Smith** to explain the incident.

• He wants to know why **Smith** is representing someone damaging to the firm’s reputation and whose representation is outside the scope of her (and the firm’s) practice areas.
1. How should Smith have handled this situation from the outset?
2. What lessons surface for all entertainment lawyers from this incident?
COMPETENCY

1. How should Smith have handled this situation from the outset?

• It’s important to know what cases not to take

• Was this an instance for Smith of a case not to take?
  - “gut-feeling”
  - firm-wide policy of screening procedures to specific standards (not only to conflicts but also competency)
  - consultation with a more senior attorney

• Adequate preparation or limiting the scope of representation to competent matters
1. How should Smith have handled this situation from the outset?

- **Model Rule 1.1** – A lawyer “shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

- **Model Rule 1.1 cmt. 5** – “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . [and] adequate preparation.”

- Under **Model Rule 1.1 cmt. 1 & 6**, it is acceptable and prudent to refer to a “lawyer with established competence in the field in question” and also to stay abreast of developments in the law.

- May also **limit the scope of representation** under **Model Rule 1.2(c)** – which “should be done at the outset” and as long as the “limitation is reasonable” and there is informed consent.

- **Model Rule 1.1 cmt 5** allows a lawyer to “limit the matters for which the lawyer is responsible.”
ATTORNEYS & REPUTATION

2. What lessons surface for all entertainment lawyers from this situation?

• Reputational costs – “gut feeling” again

• Actions of lawyers that are professionalism versus those that are ethical

• Understanding the *specific* needs of a client vis-à-vis an attorney’s competency.

• The average law school graduate will be the subject of three or more claims of legal malpractice before finishing a career.¹

¹ Jeffrey M. Smith & Ronald E. Mallen, Preventing Legal Malpractice x (1989).