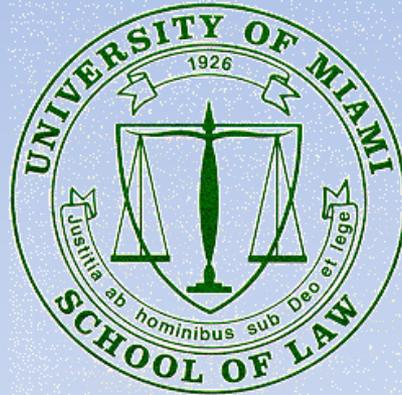


**University of Miami School of Law
Center for Ethics & Public Service
Ethics & Professional Responsibility Program
presents:**



**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

FACTS

- **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.

*Background
Act One*



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

FACTS

- **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.

Background
Act One



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

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.



CORPORATE FAMILY CONFLICTS

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**
- **ABA Comm. on Ethics Prof'l Responsibility, Formal Op. 95-390 (1995).**
 - Corporate affiliation alone does not create attorney-client relationship
 - It is a *fact-specific inquiry*
 - Best practice is to obtain consent
 - Consider also:
 - * **CA Standing Comm. on Ethics Prof'l Responsibility, Op. 1989-113 (1989).**
 - * **NYC Bar Ass'n Comm. on Prof'l and Judicial Ethics, Op. 2007-03 (2007).**



CORPORATE FAMILY CONFLICTS

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:

- Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 798 F. Supp. 612 (C.D. Cal. 1992).

- GSI Commerce Solutions, Inc. v. Babycenter, L.L.C.*, 644 F. Supp 2d 333 (S.D.N.Y. 2009).

- *Estate of Jones ex. rel. Gay v. Beverley Health and Rehabilitation Servs. Inc.*, 68 F. Supp. 2d 1304 (N.D. Fla. 1999).



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!**.

Background
Act Two



Patrick Parker = Producer
Amanda Adler = Attorney

Mediacorp = Major media corporation

Country Lifestyle Television = CLT
Music Now! = Mediacorp Subsidiary

FACTS

- **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!**.

Background
Act Two



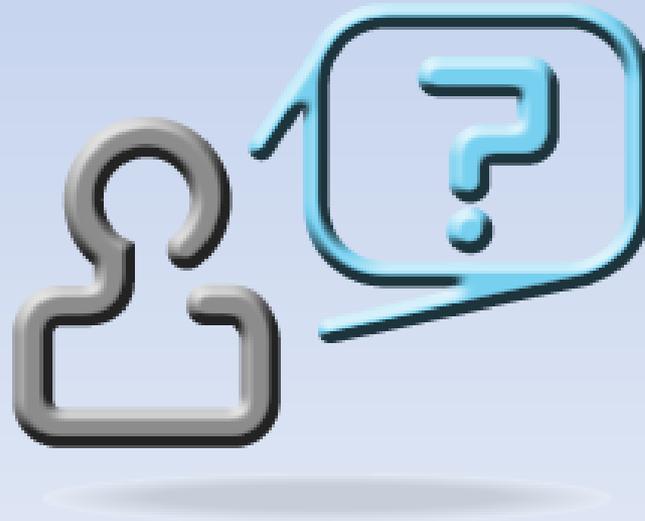
Patrick Parker = Producer
Amanda Adler = Attorney

Mediacorp = Major media corporation

Country Lifestyle Television = CLT
Music Now! = Mediacorp Subsidiary

QUESTIONS ACT TWO

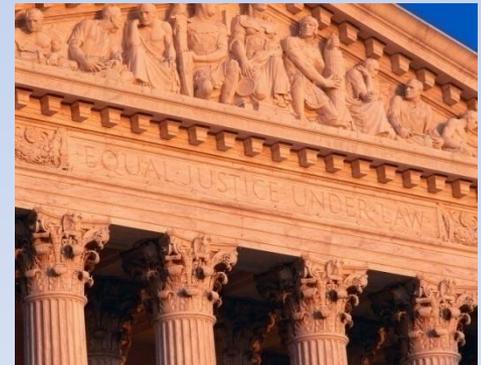
1. What should **Adler** tell the **Mediacorp** lawyer in the context of confidentiality?
2. Ethically and professionally, how should **Adler** proceed with **Parker's** representation?



CONFIDENTIALITY & FORMER CLIENTS

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
 - **ABA Comm. on Ethics Prof'l Responsibility, Formal Op. 08-459 (2008).**
- Termination
 - *Jans v. Gap Stores, Inc.*, 2006 U.S. Dist. LEXIS 67266 (M.D. Fla. Sept. 20, 2006).



CONFIDENTIALITY & FORMER CLIENTS

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

- Confidentiality (continued)

- Former Client - **Model Rule 1.9**

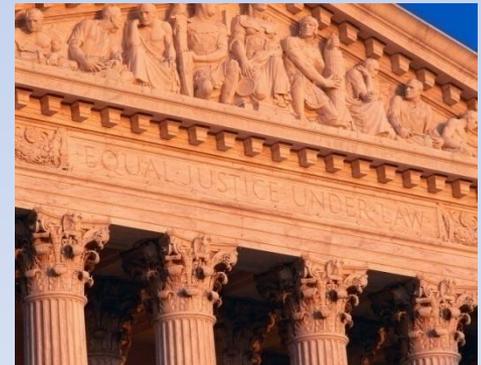
- * **(a)** substantially related matter and material adversity
 - * **(b)** waiver with consent
 - * **(c)** exception to confidentiality where rules would permit or require

- Former Clients - *RJSG Props., LLC v. Marbella Condo. Developers, LLC*, 2009 U.S. Dist. LEXIS 105605 (N.D. Fla. Oct. 28, 2009).

- Also, revealing public information can violate confidentiality rules if not commonly known .

- *Lawyer Discriminatory Board v. McGraw*, 461 S.E. 2d 850 (W. Va. 1995).

- *In re Anonymous*, 654 N.E. 2d 1128 (Ind. 1995).



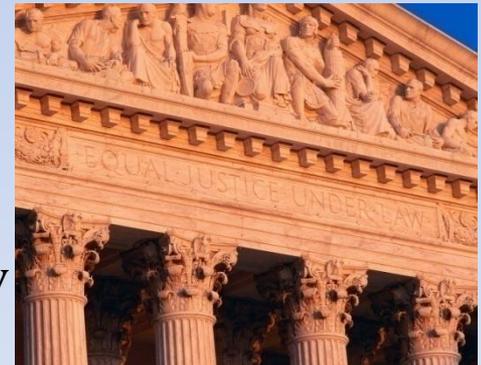
PROSPECTIVE CLIENTS

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.”



- Consider: *United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993).

PROSPECTIVE CLIENTS

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

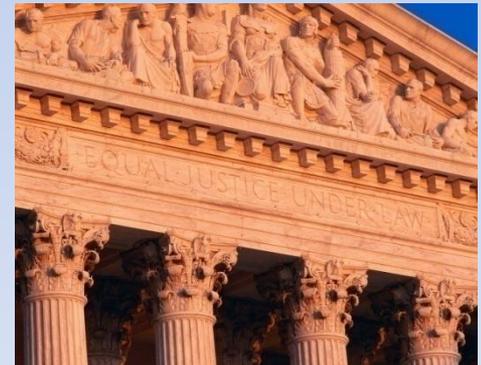
- Prospective Client

- **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.”

- *Maale v. Caicos Beach Club Charter, Ltd.*, 2010 U.S. Dist. LEXIS 10211 (S.D. Fla. Jan. 14, 2010).

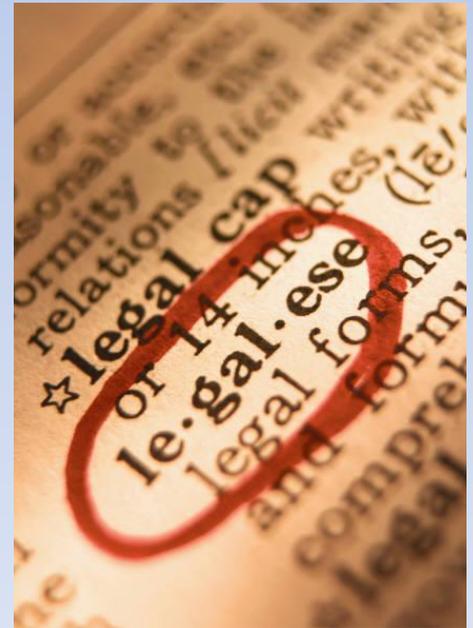
- Professionally, consider: **ABA Comm. on Ethics Prof'l Responsibility, Formal Op. 95-390 (1995).**



FACTS

- **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.

Background
Act Three



FACTS

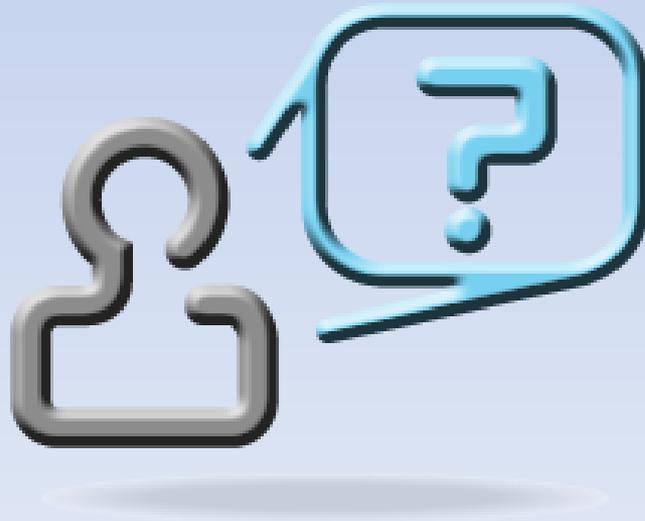
- **Smith** first learns of these issues after seeing the tabloids, which feature photos of a raid into **Esquiregot**'s home. After a series of embarrassing public-relations incidents, **Smith** realizes that she cannot resolve the defamation claim. The plaintiff files a lawsuit and **Smith** agrees 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.

Background
Act Three



QUESTIONS ACT THREE

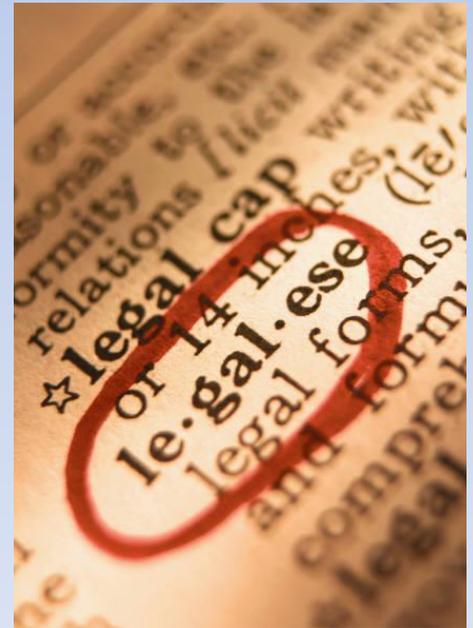
1. How should **Smith** have handled this situation from the outset?
2. What lessons surface for all entertainment lawyers from this incident?



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



COMPETENCY

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.”

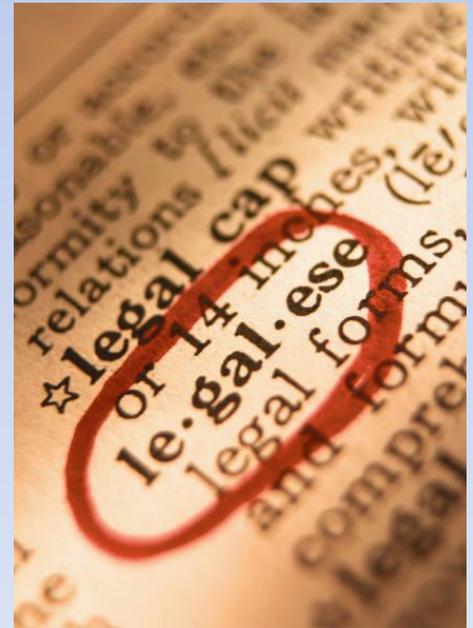
- **Model Rule 1.1 cmt. 5** – “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . [and] *adequate preparation*.”

- 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.”

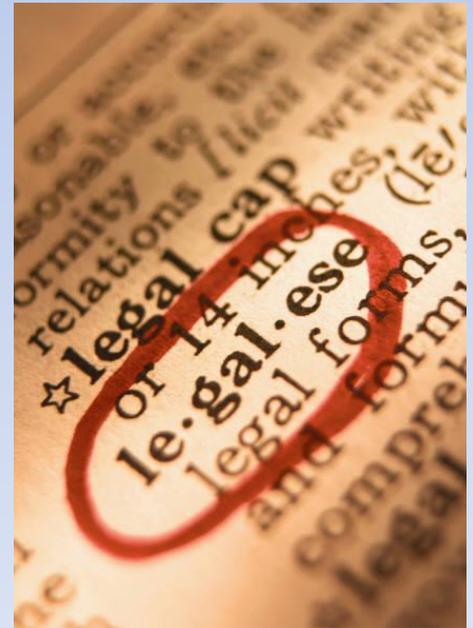
- **ABA Comm. on Ethics Prof'l Responsibility, Formal Op. 93-379 (1993).**



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. MALLIN, PREVENTING LEGAL MALPRACTICE x (1989).

