ETHICS AND THE ART OF ENTERTAINMENT LAW

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I. WHY ANOTHER ETHICS PIECE?

While reported malpractice cases involving entertainment lawyers (most of which are collected in this article) are relatively few, the practice of entertainment law is perceived as a high-risk gig by professional liability carriers. Some refuse coverage altogether. This is true because the vast majority of the claims are resolved through confidential settlements. The ones that go to court tend to be close encounters of the TMZ kind, and higher in profile than the garden variety business dispute.[1]

The publicity and popularity of malpractice claims have caused lawyers not only to pay higher insurance premiums but also to reflect on the propriety of their professional activities. This is more easily said than done in the field of entertainment law. While legal fields such as real estate and commercial law are slow to change, entertainment lawyers are required to apply "old school" ethical rules, which vary from state to state, to revolutionary technological changes which have turned the practice on its head and will continue to do so in the foreseeable future.[2] So while an article on ethics may be less well received than playing "La Macarena," a thorough understanding of the application of the disciplinary rules to the practice of entertainment law is essential.

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") serve as a model for the ethics rules in most states, including Georgia, Florida, New York, Tennessee, and Texas, but not California. The principles of confidentiality and the resulting "attorney-client privilege" are proscribed in the Model Rules. In each state's jurisdiction, the proscriptions are typically found in state codes. Like Robert Pirsig's protagonist in the iconic book, *Zen and the Art of Motorcycle Maintenance*, this article will travel cross-country in its search for the major court decisions in the field of entertainment law. Texas law is referenced throughout because it is usually consistent with the Model Rules, holds lawyers to a higher standard of conduct than other states, and has a rich body of case law.[3] Where possible, the citations in the article are to court decisions involving an entertainment law dispute.

In Texas, the Rules are found in the Disciplinary Rules of Professional Conduct ("TDRPC") and the Texas Rules of Evidence ("TRE"). These issues are joined at the hip with conflict of interest issues that arise when attorneys or their law firms attempt to represent clients with adverse positions. Although some conflicts are obvious, others are not. The focus of this article will not be on "garden variety" malpractice, such as improper solicitation of clients, barratry, inattention to client matters, the failure to segregate client funds, failure to communicate with clients, etc. which apply to all practice areas.[4] Instead it will discuss the rules and recent case law pertaining to client confidentiality issues and conflicts of interest, which are the most challenging issues in the practice of entertainment law, with a view to avoid a free listing in the former lawyers section of the State Bar Journal.

II. CONFIDENTIAL AND PRIVILEGED INFORMATION

One of the first things that lawyers tell a potential client at the first consultation is that your communications are confidential and privileged. This is true, but there's a lot more to it than that. The American Bar Association ("ABA") adopted the Model Rules in 1983 to serve as a model for the "regulatory law governing the legal profession."[5] In Texas, as in most states, the State Bar has promulgated rules in the TDRPC for the protection of clients and their confidences. These rules establish a "minimum standard of conduct, below which no lawyer can fall without being subject to disciplinary action."[6] The rules are also cited by the courts as "persuasive authority outside the context of disciplinary proceedings.[7]

Confidential information is not defined in the Model Rules, which generally prohibit a lawyer from revealing "information relating to the representation of a client."[8] In Texas, Rule 1.05 of the Rules of Professional Conduct defines "confidential information" to include both privileged and unprivileged information. Confidential information does not necessarily have to come from a client.[9] Rule 1.05 states that "privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence and Rule 501 of the Federal Rules of Evidence. "Unprivileged client information" refers to all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

A recent California case presented the court with the novel question of whether Warner Brothers and the Saul Zaentz Company, who had received a partial assignment of the agreements by which the rights to *The Lord of the Rings* and *The Hobbit* were granted to United Artists (UA later assigned the rights to Warner and Zaentz), was entitled to disqualify the lawyers for the plaintiff Tolkien Estate. Warner's basis for the motion was that the lawyers for the Tolkien Estate gained access to privileged information through the lawyers' contacts with the in-house United Artists' lawyers who were involved in negotiating the agreement some 45 years before, which was essentially an "in rem" argument. In July 2014, the court denied the motion, citing the "extremely attenuated relationship between Warner and Zaentz and United Artists…"[10]

A. Privileged Information and the Rules of Engagement

In federal cases, privileges are governed by the common law as interpreted by the federal courts. However, when a state cause of action is involved, the privilege is usually determined by state law.[11] A client can refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating an attorney's legal services.[12] In addition to the client, an attorney, the client's guardian or representative can also claim this privilege on the client's behalf.[13] These confidential communications can include communications between the client or her representatives and her attorney or the attorney's representatives, the client and her representatives, or the attorney and her representatives.[14]

A "representative of the client" is (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client. The Notes and Comments to Rule 503

state, "[t]he addition of subsection (a)(2)(B) adopts a subject matter test for the privilege of an entity, in place of the control group test previously used."[15]

The attorney-client privilege is a cornerstone of our jurisprudence. "While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few exceptions."[16] The attorney-client relationship is generally subject to the rules that govern the law of contracts.[17] Absent privity or a duty arising out of tort law, an attorney generally owes no duty to a third party.[18] In *Dimensional Music Publishing, LLP v. Kersey*, law firm Paul Weiss' motion to dismiss a music publisher's negligence action was denied, the court holding that, under New York law, "a relationship between the two that, if not rising to an attorney-client relationship, was at least a relationship of privity."[19]

There are also "ethical considerations overlaying the contractual relationship."[20] Lawyers must conduct their business with honesty and loyalty, always keeping the client's best interest in mind.[21] As such, the relationship of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client on the basis of the strictest fidelity "and honor."[22] Once a duty is established, the client has standing to sue the attorney for professional malpractice in contract and in tort, should there be a breach.[23]

Attorneys may unknowingly create an attorney-client relationship with a person just by consulting with them on a matter. An agreement to form an attorney client-relationship may be implied from the conduct of the parties.[24] However, there must be objective indications of the meeting of the minds (a/k/a the "kook test").[25] For example, in *Love v. The Mail on Sunday*, Brian Wilson's motion to disqualify Beach Boys Band member Mike Love's attorney was denied after the court found that no attorney-client relationship existed and, even if it did, the alleged matters were not substantially related.[26] Whether the contract is express or implied, there must be a meeting of the minds.[27] "Moreover, the relationship does not depend on the payment of a fee and may exist as a result of rendering services gratuitously."[28]

When there is an implied contract, the meeting of the minds that an attorney will render professional services to the client can be inferred from the conduct of the parties or the circumstances.[29] Sometimes individuals who are not clients call attorneys to seek legal advice over the telephone. The attorney should first confirm that there are no conflicts of interest with an existing client before rendering any gratuitous advice. Otherwise, even with minimal contacts, a conflict of interest could arise leaving the attorney open to a possible malpractice claim.[30]

An attorney and a client can create an attorney-client relationship either explicitly or implicitly by conduct manifesting an intention to create the attorney-client relationship.[31] In *City of El Paso v. Salas-Porras Soule*, the court reviewed the law firm billing statements and held that an attorney-client relationship existed even though the company was not billed and the firm did not meet with representatives of the company.[32] The court reasoned that the billing statements

were replete with references, conferences, and tax planning sessions made on behalf of the company. Also, when an attorney becomes the general counsel for a partnership, she also creates an attorney-client relationship with the general partner.[33] A different result was reached by a court where a partner in the *Violent Femmes* band was unable to show that he had a reasonable belief that he was previously represented by his partner's lawyer. Accordingly, his motion for disqualification was denied.[34]

Although a consultation does not establish an attorney client relationship *per se*, attorneys are still required to maintain confidentiality. Model Rule 1.18 provides strong protection for the rights of and information learned from "prospective clients." This rule is also supported by the common law.[35] "Even in the absence of an express attorney-client relationship... a lawyer may owe a fiduciary obligation to persons with whom he deals."[36] "(A) fiduciary duty arises when a lawyer deals with persons who, although not strictly her clients, she has or should have reason to believe or rely on her.[37]

B. Have No Privity, Still Can Sue

The privity requirement does not preclude tort-based causes of action against lawyers under §552 of the Restatement (2d) of Torts. Giving examples such as attorney opinion letters prepared for one party to a transaction in applying §552, the Texas Supreme Court has distinguished the negligent misrepresentation cause of action from traditional legal malpractice claims.[38] For example, in *Source Entm't Grp. v. Baldonado & Assoc., P.C*, the management company for artist Tiffany Evans was allowed by the court to maintain a tortious interference with contract and defamation lawsuit against Evans' lawyers based on the court's findings that New Jersey's "litigation privilege" did not apply to a letter sent by the lawyers to Sony Records and the William Morris Agency.[39]

Similarly, lawyers may be liable to third parties for the violation of certain statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO). This was the case in *Binghaw v. Zolt*, where Bob Marley's estate successfully sued the lawyers who helped Marley's wife divert royalty income from the estate after the singer's death.[40] However, even if their conduct is "frivolous or without merit," lawyers have qualified immunity from civil liability to non-clients if the attorney's conduct is part of the discharge of their duties in representing her or the client."[41] This rule has also been extended to attorney communications with potential clients.[42]

In a ruling that has had far-reaching implications in claims against accountants and lawyers, the United States Supreme Court denied a private cause of action under the federal securities fraud statutes to defrauded investors against defendants which had "agreed to arrangements that allowed the investors' company to mislead its auditors and issue a misleading financial statement affecting the stock price."[43] The Court rejected the investors' theory of "scheme liability" because there was no actual reliance on the defendants "own deceptive conduct" which, in any case, was "too remote to satisfy the requirement of reliance."[44]

C. Attorney Work Product

The work product privilege is closely related to the attorney-client privilege.[45] Litigation attorneys usually assert the work product privilege in response to discovery requests seeking, for example, an attorney's notes or correspondence from witness or client interviews. An attorney must be careful not to waive the work product and attorney-client privilege when responding to discovery requests, including government subpoenas.[46] Previously, this waiver could occur when responding to a document production request or a subpoena duces tecum by accidentally producing a privileged document.

D. Paradise Lost: *The Accidental Disclosure of Privileged Communications*

The Texas Rules of Civil Procedure now includes an "Oops" clause. Generally, a party who accidentally produces privileged documents has ten (10) days upon discovering the mistake to amend its discovery response, identifying the material or information produced and stating the privilege asserted.[47] If a party asserts a privilege in its amended response, the requesting party must promptly return the specified material or information and any copies, pending any ruling by the court denying the privilege. In any event, it is imperative that attorneys review the documents carefully before producing them to opposing counsel. The Model Rules go even further than the Texas Rules. Model Rule 4.4(b) requires that a "lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

In order to overcome the attorney-client privilege, the party seeking discovery of the communication must make a prima facie showing that one of the above exceptions applies. For example, an attorney must make a prima facie case of fraud in order for the crime-fraud exception to apply.[48] "Additionally, there must be a relationship between the documents for which the privilege is challenged and the prima facie proof offered."[49] Counsel should be very careful in these matters, as the legal landscape is strewn with land mines.[50]

E. True Disclosure of Confidential Information

Model Rule 1.6(a) prohibits a lawyer from revealing 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). Model Rule 1.6(b) provides that the attorney-client privilege does not apply 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;

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

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

The TDRPC afford many of the same exceptions to disclosure of confidential information as the TRE. All allow disclosure when an attorney is involved in a lawsuit with her client, and when the client uses the attorney's services in furtherance of a crime or fraud.[51]

Although not an everyday occurrence for entertainment lawyers, the TDRPC also **requires** a lawyer to reveal confidential information if the lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person.[52] In John Grisham's best-seller, *A Time to Kill*, the client revealed his intentions to commit a crime to his lawyer, but it was questionable how clear or likely it was that the client was going to commit the crime. The attorney did not reveal the confidential communication to the authorities and his client killed two people. Under Mississippi law, as in the Model Rules, the attorney may, but is not required, to disclose the information.[53] Then again, if the attorney had made the disclosure the movie would not have a plot.[54] A more common situation is where a litigator becomes aware that their client is going to commit perjury, thereby triggering the obligation to disclose.[55]

III. CONFLICTS OF INTEREST

A. A Man's Got to Know His Limitations: *Representation Adverse to a Client's Interests*

Clients may not be aware of the conflict of interest rules that govern our professional conduct. It's our job to educate them before they learn the rules from a malpractice lawyer. Our obligation to decline representation is one reason why the practice of law is a profession and not just a business. Many lawyers do not realize that the foundation of the rules governing conflicts of interest is the need to maintain confidentiality of client information. When we accept an engagement we have a fiduciary duty to disclose fully all facts which are material to the client's representation.[56]

Rule 1.07 of the Model Rules generally provides that a lawyer shall *not* represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (A)(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.[57]

1. What is "Directly Adverse"? Comment 6 to Rule 1.06 of the TDRPC identifies a representation of a client as being "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.[58]

A conflict of interest also exists where the lawyer's interest interferes with those of the client. For example, it would be improper for a lawyer to represent a client in connection with a valuable endorsement agreement being negotiated by a lawyer's management company where the management company's commission would be 10% of millions of dollars while the legal fees may only be thousands of dollars. "In the eyes of a disinterested lawyer, the management company's interest in closing the transaction would interfere with the law firm's ability to render independent legal advice with respect to the transaction."[59]

Lawyers may represent two clients if their interests are aligned. For example, legendary actress Mary Pickford was represented by a lawyer who regularly represented a "wannabe" management company in the effort to terminate the contract with her current management company. Pickford negotiated a new contract with her current management company. She then sued to avoid payment to her lawyer, claiming a conflict of interest. The court agreed that an attorney who represents two masters is not entitled to compensation from either one, but found for the lawyer, because the interests of the parties were in consonance.[60] Likewise, the motion to disqualify the law firm representing Disney and the screenwriter of *Bringing Down the House* was denied because the Plaintiff could not show that a conflict of interest existed between Disney and the screenwriter.[61]

Lawyers may also represent clients who are generally adverse in unrelated matters. It is not uncommon for lawyers or law firms to represent corporations which may be competitors, but whose representation involves generally unrelated matters. In these situations, it is advisable to notify a potential client that you represent a competitor. This could help prevent any potential conflicts and, at the same time, prevent any surprises which may upset clients.[62] Of course, lawyers cannot sue a current client, even if the lawsuit is unrelated to the subject matter of the

lawyer's representation.[63]

2. Attorney Employment: *A Kiss is not a Contract*. In order to determine if conflicts exist, lawyers should carefully interview their prospective clients. The interview should cover such areas as their background, previous lawsuits, business competition and partners, and of course, possible relationships with existing clients.[64] It is important to do this at the very beginning because, under certain circumstances, attorneys may also be disqualified based on conflicts of interest with prospective clients.[65]

If the engagement is accepted, there is no substitute for a clear written agreement. In Texas, if the contract provides for a contingent fee, it must be in writing.[66] It must also be in compliance with the disciplinary rules, especially the rules governing contingent fee contracts.[67] "Lawyers have a duty, at the outset of the representation, the 'inform a client of the basis or rate of the fee' and the contract's implications for the client."[68] An oral contingent fee contract is voidable by the client.[69] Unlike the TDRPC, the Model Rules authorize a lawyer to contract with a client for a reasonable contingent fee in a civil case, but do not require that the contract be in writing.[70] While a contingent fee agreement should not be unconscionable, some states (not including Texas) have held that an unconscionable agreement may be ratified by the client.[71]

Model Rule 1.8 generally does not permit lawyers to take an interest in the subject matter of the lawsuit, particularly when the interest may be adverse to the client. The purpose of the rule is to protect the client from overreaching by lawyers on their fees. This is what happened in the case of *In re Stover*, where the lawyer/manager was disbarred because she refused to take down an artist's website that was created by the lawyer after termination of the attorney-client relationship.[72]

Lawyers who do not want a trial before a jury of their clients' peers may include an arbitration provision, but it should first be cleared with their professional liability carriers.[73] The scope of representation should be defined as narrowly as possible to protect the attorney from possible malpractice and conflict of interest claims based on matters on which the attorney was not employed.[74] All things being equal, it's easier to show that a previous intermittent or limited relationship is not substantially related to a current representation, as opposed to a general retainer.

The Agreement can also provide that the attorney is representing a corporation and not its individual shareholders.[75] Otherwise, a fact issue may exist regarding who the attorney is representing and who is responsible for the fees.[76] Employment contracts are likely going to be construed against lawyers, who should plan accordingly.[77] For example, while the court in *McDonnell, Dyer, P.L.C. v. Select-O-Hits, Inc.*, found that the "the contract fee of $120,000.00 was excessive," it still awarded the amount of $89,685.00 against Select-O-Hits, a record distribution company based in Memphis, arising out of its non-payment of attorney fees.[78]

Attorneys who are **not** going to undertake representation should advise the person in writing. Attorneys have a duty to inform people of their non-representation when they are (or

should be) aware that the attorney's conduct could lead a reasonable person to believe that she is being represented.[79] Lawyers cannot leave people under the impression that they are representing them or the "transaction."[80] Of course, if the person understands that the attorney is not representing them, there is no duty.[81] The person should be advised of any applicable statutes of limitation and filing deadlines, not only for the benefit of the individual but also to protect the law firm from potential exposure.[82]

3. The Paper Chase: *Client Waivers*. Model Rule 1.07(b) allows lawyers to represent clients, notwithstanding the existence of a concurrent conflict if:

> (B)(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.

Lawyers can represent clients if they reasonably believe that the representation of each client will not be materially affected, and each consents to representation after full disclosure of the existence, nature, implications, and possible adverse consequences of common representation and any advantages involved.[83] Attorneys must disclose all possible conflicts before accepting employment and conflicts which arise during the course of employment. For example, lawyers must disclose the sources of their compensation, including finder's fees.[84] To accomplish this, lawyers should draft a detailed consent or waiver form to be signed by the clients. If one of the clients is a non-primary or "accommodation" client (a/k/a easy rider), the consent form should so state. It should also include the accommodation clients' acknowledgement that she understands that the information disclosed to the attorneys will be shared with the primary client.[85]

The lawyer's obligation does not end there. Lawyers must continue to keep clients informed of all material developments during the course of the representation.[86] The amount of disclosure required depends on the sophistication of the client. Comment 8 Rule 1.06 of the TDRCP states that "(d)isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." Of course, telling a client the truth, including an adverse development, is not malpractice, even if the client cannot handle the truth.[87]

Lawyers who obtain the client consents must reasonably believe that the representation of each client will not be materially affected.[88] Sometimes a conflict of interest cannot be overcome by a consent. In the case of *City of El Paso v. Salas-Porras Soule*, the client executed a waiver letter which admitted that the law firm did not represent Parallax.[89] However, the Court found that the waiver letter was invalid because it was inconsistent with the evidence and testimony heard in the case. Just because the letter said the firm did not represent the company did not

make it so.[90] But *Cf. Lessing v. Gibbons,*[91] where the court ruled against actress Dolores Del Rio's conflict of interest claims against her attorney based on her waivers and his effective client communications.

Lawyers may feel that they cannot represent a client fairly without breaching the confidences and privileges of another client. Lawyers may also feel that they cannot fairly and objectively represent a client because of the lawyer's own interests or responsibilities to others. Comment 4 of TDRPC 1.06 states that this type of conflict forecloses other alternatives, such as obtaining the client's consent, which would otherwise be available. In these situations, it is best to decline representation or withdraw from representation of the matter to avoid liability from a possible malpractice claim.[92] A lawyer can still represent the client in another matter where no conflicts exist.

4. You're Fired! If a lawyer determines that there is a conflict or a potential conflict in violation of the rules, she can do one of two things: abstain from representing the client or withdraw from the representation when a conflict arises. As soon as the attorney becomes aware of a conflict of interest, she should abstain or withdraw from representation.[93] For example, in *Cassidy v. Lourim*, the attorney for the parents of deceased vocalist Eva Cassidy and Blix Records, Inc. was disqualified from continuing representation in a copyright infringement action where a conflict of interest arose after suit was filed.[94]

If a lawyer is prohibited from representing a client, it is axiomatic that no other lawyer in the firm can do so. However, courts have ruled that one client cannot be dropped "like a hot potato" because the firm has found a case more to its liking, absent a conflict.[95]

B. Representation Adverse to Former Client's Interests

Model Rule 1.9 and its equivalent, Rule 1.09 of the TDRPC, are derived from the landmark case of *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, holding that "the former client need show no more than that matters embraced within the pending suit… are substantially related to the matters or cause of action when the attorney previously represented the former client."[96] They provide that a lawyer who has personally represented a client in a matter shall not thereafter represent another person in a substantially related matter which is materially adverse to the former client. This "side-switching" is precisely what John Travolta's former attorney did resulting in a three year suspension from the practice of law ordered by the Florida Supreme Court.[97]

These rules are extended to lawyers who are or have become associated with a firm whose attorneys are prohibited from representing a client. They also apply to a law firm whose former attorneys would be prohibited from representing a client. Just because an attorney leaves does not cleanse the firm of the conflict of interest. The firm still has a duty of confidentiality and loyalty to former clients.[98]

If there is a "reasonable probability" that the representation would cause the lawyer to violate the attorney-client privilege with the former client by an unauthorized disclosure of confidential information or use of that information to the former client's disadvantage, the representation would be improper.[99]

Comment 4A to TDRPC 1.09 explains that the "same" matter prohibition prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who disclosed confidences to the lawyer while seeking in good faith to retain the lawyer. This applies as long as an attorney-client relationship existed, even if the attorney later withdrew from the representation.

In the Fifth Circuit, the applicable test for disqualification of attorneys is articulated in *In re American Airlines, Inc*.[100] "To disqualify an attorney, or firm under the American Airlines test, a moving party must show: 1) an actual attorney-client relationship between the moving party and the attorney she seeks to disqualify and 2) substantial relationship between the subject matter of the former and present representations."[101] With respect to the first requirement, there is disagreement among the circuits as to whether clients and non-clients have standing to move for disqualification. The leading case on the question is also a fifth circuit opinion, *In re Yarn Processing Patent Validity Litigation*, where the court denied a patent assignee's motion to disqualify a lawyer that had previously advised a dismissed co-defendant on the patent that was at issue in the case.[102]

The "substantially related" prohibition involves situations where a lawyer may have acquired confidential information concerning a prior client that could be used either (a) to that prior client's disadvantage of for the advantage of the lawyer's current client or (b) some other person.[103] In *Prisco v. Westgate Entertainment, Inc.*, the former general counsel for a partnership created to explore the wreck of the Titanic and exploit it in a television show, was disqualified from representing the limited partners in a lawsuit against one of the general partners.[104] However, the court in *Cremmers v. Brennan* denied a motion to disqualify the attorney for singer Amber in a lawsuit against the Nightlife Productions booking agency for unpaid performances. Despite the fact that another member of the Plaintiff's law firm had represented Nightlife, the court found that the matters were not substantially related and the firm's representation of Nightlife had been "intermittent," "limited" and did not involve proprietary information.[105]

Although permissible, it is not generally advisable to sue a former client. In *NCNB Texas Nat. Bank v. Coker*,[106] the court held that a former client can disqualify an attorney if the matter involved in the case is substantially related to the matters in the former representation.[107] Comment 11 to TDRPC 1.06 also makes it clear that this is not advisable.[108] The cases turn on the "substantially related" test. For example, in *Bier v. Grodsky & Olecki*,[109] Marilyn Manson's law firm was able to defeat a conflict of interest claim when a former band member was not able to show that the previous representation was not substantially related.

C. Representing Two or More Clients in the Same Case

Attorneys representing multiple clients have to be especially careful to assure that all clients are kept informed and that each client's best interest is being represented. In *Bolton v. Weil, Gotshal, & Manges, LLP*, singer Michael Bolton sued the law firm representing him, Sony Music Entertainment, and Warner-Chappell Music Limited for breach of fiduciary duty arising out of their unsuccessful defense of the Isley Brothers' copyright infringement case against Bolton. In response, Weil, Gotshal followed the "sued attorney's playbook" and filed a third party action against Bolton's personal attorneys for contribution and indemnity.[110]

Attorneys have a responsibility to every client, regardless of their number and even if there is an aggregate settlement. An aggregate settlement occurs when an attorney who represents two or more clients settles the entire case without individual negotiations on behalf of any one client.[111] An attorney has a duty of loyalty and good faith to each individual client and is required to obtain individual settlements unless the clients are informed and consent otherwise in writing.[112]

D. Slippin' in the Darkness (or I Inadvertently Hired Someone with a Conflict and Woke Up with a Horse's Head in my Bed)

Conflict of interest situations may arise when attorneys are hired by a new firm which represents a party adverse to a former client. Before laterally hiring an attorney, (or even a law student) the firm should confirm that neither the attorney nor her former firm represents someone adverse to the firm's clients.[113] In *National Medical v. Godbey*,[114] the Texas Supreme Court held that two irrebuttable presumptions applied to a firm which laterally hired an attorney who held confidences of a client which the firm was suing. It held that: (1) it was presumed that the attorney had access to the former client's confidences; and (2) that knowledge was imputed to the attorneys in his new firm.[115] This "Typhoid Mary" Rule, as it's been dubbed by Judge John McClellan Marshall, has not been extended to disqualify lawyers who have represented a client's previous counsel in litigation against the same client.[116] The "Typhoid Mary" Rule has also not been extended to disqualify law firms where the alleged malpractice occurred before the new lawyer joined the firm and the firm did not represent the client thereafter.[117]

The Texas Supreme Court has also held that a lawyer who is an at-will employee of a law firm "may properly plan to go into competition with his employer and may take active steps to do so while still employed." However, the lawyer still has a "fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate's employer."[118]

Affiliated law firms are bound by the same rules.[119] This includes two law firms that have a lawyer common to both.[120] This rule also applies to contract lawyers.[121] Conflict of interest issues not only apply to the lawyer's associates, but also to the support staff. Texas courts have

decided a number of cases where a member of a firm's support staff is employed by another firm, and has possible conflicts of interest problems with the new firm's clients.

If a non-lawyer employee works on a matter and is later hired by another firm on the opposing side of the same matter, it is presumed the employee possesses confidences and secrets gained from the first employer.[122] If a secretary or paralegal changes firms and creates a conflict by going on the opposing side of the same matter, she is not automatically disqualified if the new firm establishes that the employee has been properly screened from the matter.[123] Of course, disqualification is mandatory if the information has been actually disclosed, or if screening would be ineffectual. The test for disqualification is not actual disclosure, but the threat of disclosure.[124]

The Texas Supreme Court has held that although the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that information was shared with a new employer may be overcome.[125] The only way this presumption may be overcome is: (1) to instruct the legal assistant "not to work on any matter which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation," and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with matters the paralegal worked during the prior employment, absent client consent."[126]

E. Screening Procedures. The over-rated "Chinese wall" is a well-known, but generally ineffective, screening procedure used by firms. In limited circumstances, states such as California, Delaware, Illinois, and New York, have permitted the Chinese wall procedure to be used as a way to rebut the presumption that confidential information has been shared with the law firm.[127] However, most courts have not approved Chinese walls with respect to lawyers under any circumstances. If one lawyer is tainted, the entire firm is also tainted.[128]

As to non-lawyer employees, the court will determine whether the practical effect of formal screening has been achieved by considering the following factors:

(1) the substantiality of the relationship between the former and current matters;
(2) the time elapsing between the matters;
(3) the size of the firm;
(4) the number of individuals presumed to have confidential information;
(5) the nature of their involvement in the former matter; and
(6) the timing and features of any measures taken to reduce the danger of disclosure.[129]

F. Stuck in the Middle with You: *Attorneys as Intermediaries*

Attorneys may be requested to help organize a band or entertainment company, or other family related business. Although these situations may be amicable at first, they may lead to malpractice claims. A lawyer acts as an "intermediary" if she represents two or more parties with

potentially conflicting interests. Rule 1.07 of the TDRPC concerns "intermediaries" or matters in which a lawyer may represent both parties. In order for a lawyer to represent both parties, she must: (1) explain the implications, including the advantages and risks involved, and get written consent from both clients; (2) reasonably believe the matter can be resolved without contested litigation; and (3) reasonably believe she can undertake the representation impartially. Depending on the circumstances, the lawyer may suggest that the parties seek a third party neutral.[130]

The general rule is that the attorney-client privilege does not attach between and among the jointly represented clients.[131] The lawyer should make this clear at the outset. "Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the client should be so advised."[132]

The lawyer must consult with each client concerning the decisions to be made and the relevant considerations. Each client must have equal input.[133] Naturally, a client must assume greater responsibility for her decisions than when she is independently represented. If a conflict develops, the lawyer must withdraw from the representation.[134] The key is lawyers to be able to balance each client's interests and maintain their impartiality between the clients. If this can no longer be achieved, the lawyer should withdraw from all representation.

G. The Lawyers in the Glass Booth: *Doing Business with Clients*

In the event of a dispute, lawyers who have business dealings with clients must overcome the presumption that the transaction with the client was unfair, which is a difficult obstacle to overcome. The seminal case in Texas is *Archer v. Griffith*.[135] In California, it's *Felton v. LeBreton*.[136] These cases are a must-read for all lawyers who are tempted to do business with clients, whether it be investing, trading equity for services, media rights contracts, or other lousy business deals offered by clients.[137] If it turns out that the business deal is profitable, the lawyer may still be out of luck. This is what happened to the California lawyer who entered into a joint venture with a client, sued the client for termination of the agreement and an accounting for lost profits…and lost.[138] This is a "tales I win, heads you lose" scenario all the way.

Lawyers should also avoid the temptation of setting up a "side" business, such as a record or publishing companies, to profit from the attorney-client relationship. Model Rule 1.8(a) describes the requirements for attorneys who want to do business with clients. To illustrate how much this is disfavored, Texas has not just one, but several, disciplinary rules which address this issue, including their Rules 1.02, 1.03, 1.04, 1.06, 1.07, 1.08, 2.01, and 2.02.[139] Lawyers must be convinced and prepared to prove that (1) they can maintain independent professional judgment and give detached advice despite their investment and (2) the fee was not objectively unfair at the time the agreement was made. Even if the attorney wins the breach of contract claim, the client can still pursue other causes of action, such as fraud, negligence, and DTPA claims.[140]

Lawyers should also review their professional liability policy before doing business with

a client because there may be applicable exclusions and restrictions. By pursuing a business relationship outside of the classic attorney-client relationship, lawyers open themselves up to claims not only from clients,[141] but also third party claims as, for example, interference with business relations.[142] The landmark *Doris Day* case, where the court awarded the actress/singer damages of $26 million judgment against her attorney for legal malpractice, breach of fiduciary duty, and fraud, provides an eye-opening lesson on what lawyers should **not** do.[143] *Que Será, Será.*

IV. APOCALYPSE NOW: *CONSEQUENCES OF LEGAL MALPRACTICE*

Attorneys are subject to disciplinary proceedings,[144] malpractice claims and court sanctions when they violate the attorney-client privilege, fail to disclose a conflict of interest, or file frivolous lawsuits.[145] Although attorneys do not *ipso facto* violate the law when they disobey a disciplinary rule, the consequences can be very serious.[146]

Under the doctrine of collateral estoppel, the findings made in a disciplinary proceeding may be used against lawyers or in a later judicial proceeding seeking damages against the lawyer. For example, in *A to Z Associates v. Cooper*, based on the findings and conclusions of a disciplinary proceeding, the Court upheld a summary judgment in favor of artist Gloria Vanderbilt's claims of fraud and breach of fiduciary duties against her attorney/manager and former psychiatrist who had formed a partnership that misappropriated her funds.[147]

A malpractice suit can take various forms. Clients can sue attorneys under several causes of action, including breach of fiduciary duty,[148] breach of contract, violation of the Texas Deceptive Trade Practice Act, actual and constructive fraud,[149] common law negligence,[150] negligent misrepresentation, and the tort of malpractice.[151] These claims may also be assignable by the client.[152] A breach of fiduciary duty, and possible fee forfeiture, can occur even without actual damages. However, causation[153] and damages are essential elements of other causes of action, such as fraudulent and negligent representation,[154] negligence,[155] negligence per se, and breach of contract.[156]

There is an ever increasing number of malpractice suits brought against attorneys and their law firms.[157] Small firms get sued more often than do large firms. Even non-clients can sue lawyers if the Court finds that the lawyer has acted in such a way that could lead a person to reasonably believe that she was a client.[158] Lawyers who are sued by clients can also file third party claims for contribution against other lawyers who may be partially responsible for the client's damages.[159]

Juries are not known for their Zen-like feelings toward lawyers. In a classic malpractice case, the client must prove that its damages were sustained because of the attorney's malpractice;[160] that goes wrong during the course of the representation.[161] However, unfair as it may seem, juries generally hold lawyers responsible for anything that goes wrong during the course of representation. On the bright side, we are fortunate that options such as flogging,

dismemberment, scalping, stoning, foot roasting, and other anatomical remedies are not available to juries against lawyers.

Many states require attorney fee forfeiture in cases of malfeasance or breach of faith.[162] Texas recognizes fee forfeiture for breach of fiduciary duty in the context of the attorney-client relationship.[163] To be entitled to forfeiture, the client need only prove the existence of a breach; proof of causation and/or damage is not necessary. However, the Texas Supreme Court has also held that, upon proof of the breach, total fee forfeiture is not automatic. The trial court must consider several factors to determine the amount of forfeiture, including, (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of the culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.[164] The Texas Supreme Court added another factor to consider; the public interest in maintaining the integrity of attorney-client relationships.[165] The Court also held that the amount of the fee to be forfeited is a question for the court, not the jury.[166] On the other hand, if the attorney has not committed legal malpractice and the client has terminated the lawyer without cause, the lawyer is entitled to compensation from the client in quantum merit.[167] However, quantum merit recovery is not available against the client if the employment contract provided for a "clearly excessive" fee.[168]

V. EPILOGUE

To paraphrase Robert Pirsig's thesis in *Zen and the Art of Motorcycle* Maintenance, legal ethics must be embraced and applied as they best fit the requirements of the situation. The starting point in this journey is to avoid ethical pitfalls by taking preventive measures. Attorneys should have well thought out employment, conflicts waver, and non-representation forms ready to be executed by clients. The forms then should be adapted to the specific conflict and contain clear, readable language that clients can understand.

Law firms should also have good screening procedures to avoid conflicts of interest. Some large firms do this through a computer screening program or a full-time attorney, which may not be feasible for a small firm. A good policy and procedures manual containing screening procedures and the steps attorneys should take should a conflict arise is also helpful. It is especially important to determine possible conflicts when hiring a new attorney. If a firm determines that a possible new hire has a conflict which cannot be screened, the firm may decide not to employ the attorney and avoid the conflict. If the proper procedures are not in place, it may not be possible to avoid a conflict.

A good screening procedure not only prevents conflicts from occurring, but also helps attorneys and their firms in malpractice suits. Courts will usually weigh all doubts and inferences in favor of the client because the attorney has the fiduciary duty to the client and is in the position of power and control.[169] Courts often look at the procedures which were in place at the time of the violation and consider the steps taken by an attorney to avoid conflicts. Finally, attorneys should think about the situations that were presented in this article and develop a personal strategy to resolve these situations as they arise.

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[1] As with business litigation, generally, the case eventually settles without a reported opinion. See, *e.g., Grisham v. Garon-Brooke Assocs., Inc.*, Action No. 3:96 CV045-B (N.D. Miss. 1996); *Adler v. Manatt, Phelps, Phillips, & Kantor*, L.A. Super. Ct. BC 053076 (1992). Sometimes "confidential" settlements are later made public as, for example, recording artist Billy Joel's malpractice lawsuit against his attorney, Allen Grubman. After the case was dismissed, it became public that Joel's record company, Sony Music (which was not a party to the case) paid Joel $3 million to drop the lawsuit against Grubman, perhaps out of fear that other Grubman Indursky clients would follow Joel's lead. See *The Media Business – A Tangled Web of a Suit, a Lawyer, and Billy Joel*, New York Times, May 3, 1995. For a punch-by-punch account of the Joel saga, see *Soocher, They Fought the Law: Rock Music Goes to Court* (1999); "Ethics Rules Changed to Halt L.A. Lawyers' Conflicts of Interest," Wall Street Journal, December 10, 1993.

[2] Indeed, attorneys may find themselves having to defend their actions in "foreign" jurisdictions where they have hired local counsel. *Simons v. Steverson*, 88 Cal. App. 4th 693 (Cal. Ct. App. 2001).

[3] With the notable exception of the ethical rules concerning lawyers' sexual relations with clients, which are prohibited in all states except Texas. See *Ex Parte Hood*, 2009 WL 2963854 (TX. Crim. App. 2009) (unpublished opinion).

[4] See *Kearney v. Unibay Co., Inc.*, 466 So. 2d 271 (Fla. Dist. Ct. App. 1985), where the lawyer purchased certificates of deposits with funds from the estate of Scott Joplin and put them in his own name, subjecting the funds to garnishment by a creditor; *Laird v. Blacker*, 828 P.2d 691 (Cal. Ct. App. 1992) (Discussing the statute of limitations defense in a television writer's lawsuit against television production company Spelling-Goldberg); *Attorney Grievance Comm. Of Maryland v. Gardner*, 430 Md. 280 (Md. App. 2013) (attorney who represented the White House "Gate Crashers" disbarred for overbilling and misuse of trust account funds).

[5] *Preface to the Model Rules*. Of course, until a rule is adopted into law, it does not have the force of law.

[6] *Preamble to the TDRPC ¶ 7*.

[7] *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006). See also *Moore v. Weinberg*, 373 S.C. 209 (S.C. Ct. App. 2007), where the court reviewed the decisions in other states and the South Carolina Rules of Professional Conduct in finding that an attorney may be liable to a third party for the wrongful distribution of trust funds.

[8] Model Rule 1.5.

[9] *Wingnut Films, Ltd. v. Katja Motion Pictures Corp*., 2007 WL 4800405 (C.D. Cal. 2007); (Plaintiff Wingnut Films' motion to disqualify attorney as expert witness on the *Lord of the Rings*' soundtrack agreement denied, based on the court's finding that the attorney had not been exposed to any material information from defendants Walden Media and New Line Cinema); *Nat'l Med. Ctr., Inc. v. Godbey*, 924

S.W.2d 123 (Tex. 1996).
[10] See Order Denying Motion to Disqualify Greenberg Glusker, *Fouth Age Ltd., et. al. v. Warner Bros Digital Distribution, et. al.*, Case No. cv-12-9912 ABC (SHx), in the United States District Court for the Central District of California, July 21, 2014.
[11] FRE 501
[12] Tex. R. Evid. 503(b).
[13] Tex. R. Evid. 503.
[14] Tex. R. Evid. 503(b).
[15] (Tex. R. Evid. 503(a)(2)(B)); *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993).
[16] *Solin v. O'Melveny & Myers*, 89 Cal. App. 4th 451, 457 (Cal. Ct. App. 2001), from *Mitchell v. Super. Ct.*, 37 Cal. 3d 591, 600 (Cal. 1984). Solin is cited in *Geragos v. Borer*, 2010 WL 60639 (Cal. App. 2d 2010), where the court reversed, remanded and remitted a judgment in favor of Michael Jackson's criminal lawyer Mark Geragos for the illegal (and inept) videotaping of his conversations with Jackson on the chartered flight to his date with the Santa Barbara Sheriff's Department for booking on child molestation charges.
[17] *Texas Emp'r Ins. Ass'n v. Wermske*, 349 S.W.2d 90 (Tex. 1961).
[18] *Draper v. Garcia*, 793 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1990, no writ); *Invictus Records, Inc. v. Am. Broad. Cos., Inc.*, 98 F.R.D. 419 (E.D. Mich. 1982); *Garrison Printing Co., Inc. v. Steven Mandarino Fine Arts, Inc.*, 1986 WL 13837 (E.D. Pa. 1986).
[19] *Dimensional Music Publishing, LLC v. Kersey*, 448 F. Supp. 2d 643, 655 (E.D. Pa. 2006).
[20] *Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 868 (Tex. 2000).
[21] *Lopez, supra* at 866-67.
[22] *Curb Records v. Adams & Reese, LLP.*, 203 F.3d 828 (5th Cir. 1999) (unpublished opinion), quoting from *Cattle Farm, Inc. v. Abercrombie*, 211 So. 2d 354, 365 (La. Ct. App. 1968).
[23] *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989).
[24] *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).
[25] *Vinson & Elkins v. Moran*, *supra*.
[26] *Love v. The Mail on Sunday*, 2006 WL 4046168 (C.D. Cal. 2006). Similarly, the details in Brian Wilson's $10 million private settlement of his lawsuit against A&M Records and the Law Firm of Mitchell, Silberberg and Knupp did not see the light of day until long afterwards. Appellant's Opening Brief, *In re Matter of Wilson*, 1998 WL 34351613 (Cal. App. [1st Dist.] 1998).
[27] *First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802 (5th Cir. 1998).
[28] *Id.*
[29] *Id.*
[30] *Baptist Mem'l Hosp. Sys. v. Bashara*, 685 S.W.2d 352 (Tex. App.—San Antonio 1984), *aff'd*, 685 S.W.2d 307 (Tex. 1985).
[31] *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).
[32] *Id.*
[33] *Prisco v. Westgate Entm't, Inc.*, 799 F. Supp. 266 (D. Conn. 1992).
[34] *Ritchie v. Gano*, 2008 WL 4178152 (S.D.N.Y. 2008).
[35] *E.F. Hutton & Co., Inc. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969).
[36] *Croce v. Kurnit*, 565 F.Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
[37] *Croce, ibid.*
[38] *McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests*, 991 S.W.2d 787 (Tex. 1999).
[39] *Source Entm't Grp. v. Baldonado & Assoc., P.C.*, 2007 WL 1580157 (D.N.J. 2007).
[40] *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1994).
[41] *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Of course, other causes of action may arise from a lawyer's communication with third parties. See, for example, *Friend v. Paisely Park Enter., Inc.*, 2004 WL 2211931 (Cal. Ct. App. 2004), where a

summary judgment in favor of Prince's attorney was affirmed against claims of defamation by Prince's ex-girlfriend.

[42] See *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d 830 (Cal. Ct. App. 1996), where Audrey Hepburn's lawyer won a lawsuit brought by a record company arising out of the lawyer's allegedly defamatory statements in a solicitation letter to other celebrities). However, in *Source Entm't Grp., supra*, the court held that under New Jersey law, lawyers may be liable where communications to third parties terminating the artist's management contract could be defamatory.

[43] *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766 (2008).

[44] *Stoneridge* at 770.

[45] See *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

[46] See *In Re Pacific Pictures Corp.*, 2012 WL 1640627 (9th Cir. 2012), where the court found that the attorney representing the heirs of Superman's creators had waived the privilege by requesting a government subpoena and failing to assert the privilege before turning documents over to the government.

[47] Tex. R. Civ. P. 193.3(d).

[48] *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

[49] *Id.*

[50] See *In re Nitla, S.A. de C.V., Relators*, 96 S.W.3d 419 (Tex. 2002); *Sobol v. E.P. Dutton, Inc.*, 112 F.R.D. 99 (S.D.N.Y. 1986).

[51] *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (Cal. Ct. App. 2001).

[52] TDRPC 1.05(e); Compare to Model Rule 1.6(b)(2), which provides that an attorney may reveal information if they have a reasonable belief that such disclosure is necessary to prevent reasonably certain death or substantial bodily injury.

[53] *Ibid.*

[54] *Shorter v. State*, 33 So.3d 512 (Miss. Ct. App. 2009).

[55] *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 2002 WL 59434 (S.D.N.Y. 2002).

[56] Model Rule 1.7; *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988).

[57] *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 36 Cal. App. 4th 1832 (Cal. Ct. App. 1996).

[58] See also *Lott v. Ayres*, 611 S.W.2d 473 (Tex. App.—Dallas 1980, writ ref'd n.r.e.).

[59] Model Rule 1.7(a)(2); N.Y. State Bar Ass'n., Committee on Prof. Ethics, OP. 724-1/12/05.

[60] *Field v. Moore*, 178 N.Y.S. 842 (1st Dept. 1919). *C.f. Harris v. 42 East 73rd St.*, 145 N.Y.S. 2d 365 (Sup. Ct. N.Y. Co. 1955).

[61] *Flaherty v. Filardi*, 2004 WL 1488213 (S.D.N.Y. 2004).

[62] Model Rule 1.7.

[63] *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., supra*.

[64] *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976).

[65] See *Cascades Branding Innovation, LLC v. Walgreen Co.*, 2002 WL 1570774 (N.D. Ill. 2012); *Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426 (N.D.N.Y. 2012).

[66] Tex. Gov't Code Ann. § 82.065 (Vernon 1998).

[67] See *Hoover Slovacek L.L.P. v. Walton, supra*, where the Texas Supreme Court held that the employment agreement could not supersede Texas law on contingent fee contracts. Compare to *Musburger v. Meier*, 914 N.E.2d 1195 (Ill. App. Ct. 2009), where the court awarded attorneys fees to discharged lawyer in quantum merit against radio personality client.

[68] *Hoover Slovacek L.L.P. v. Walton, supra*, quoting from *Levine v. Bayne, Snell & Krause, Ltd.* 40 S.W.3d 92, 96 (Tex. 2001).

[69] *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.—Austin 1994, no writ).

[70] Model Rule 1.8(i).

[71] *See King v. Fox*, 7 N.Y.3d 181 (N.Y. 2006), holding that attorneys for former Lynyrd Skynyrd bond member Edward King could raise a ratification defense under New York law, recognizing that this defense would not be permitted in California and Texas.

[72] *In re Stover*, 104 P.3d 394 (Kan. 2005).

[73] *Taylor v. Wilson,* 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, writ denied).
[74] *Estate of Hogarth v. Edgar Rice Buroughs, Inc.*, 2001 WL 515205 (S.D.N.Y. 2001).
[75] *Nelson v. Anderson*, 84 Cal. Rptr. 2d 753 (Cal. Ct. App. 1999).
[76] See *Arrow, Edelstein, & Gross, P.C. v. Rosco Productions, Inc.*, 581 F.Supp. 520 (S.D.N.Y. 1984), where a quantum merit recovery of attorneys fees was allowed against a corporation created for the band, but not against the band members individually, with the exception of personal legal services that were rendered. Quantum merit recovery was also allowed in *Filler v. Motta*, 951 N.Y.S.2d 85 (N.Y. Civ. Ct. 2012), involving the collection of proceeds from an album distribution by Select-O-Hits in Memphis.
[77] *In Re. Miller*, 447 A.2d 549 (N.J. 1982).
[78] *McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc.*, 2001 WL 400386 (Tenn. Ct. App. 2001).
[79] *Parker v. Carnahan*, 722 S.W.2d 151 (Tex. App.—Texarkana 1989, no writ).
[80] *Richardson v. Artrageous, Inc.*, 1994 WL 97222 (D.C. N.Y. 1994), citing *Croce v. Kurnit*, *supra*.
[81] *Dillard v. Broyles,* 633 S.W.2d 636 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd, n.r.e.).
[82] *Hansell, Post, Brandon & Dorsey v. Fouler*, 288 S.E.2d 227 (Ga. App. 1981); *Hallstrom v. Feldman* 2003 WL 21744094 (Cal. Ct. App. 2003) (unpublished opinion).
[83] *Cassidy v. Lourim*, 311 F.2d 456 (D. Md. 2004).
[84] See *Bar Ass'n of Greater Cleveland v. Nesbitt*, 69 Ohio St.2d 108 (Sup. Ct. 1982), (attorney suspended from the practice of law because of failure to disclose a finder's fee in a loan transaction).
[85] See *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000), for a good discussion of the "accommodation client" defense to a disqualification motion.
[86] *Lessing v. Gibbons*, 45 P.2d 258 (Cal. Ct. App. 1935); *Cream v. Chozick*, 714 S.W.2d 61 (Tex. App.—San Antonio 1986, writ ref'd. n.r.e).
[87] *Proskauer Rose, LLP v. Blix Street Records, Inc.*, 384 F. App'x 622 (9th Cir. 2010) (unpublished opinion).
[88] Model Rule 1.07(b)(4).
[89] *Salas-Porras, supra*, 6 F.S.2d at 625.
[90] *Id.*
[91] *Supra*.
[92] See also *Lott v. Ayres*, 611 S.W. 2d 473 (Tex. Civ. App.—Dallas 1980, writ ref'd, n.r.e).
[93] Model Rule 1.16.
[94] *Cassidy v. Lourim*, *supra*.
[95] *Universal City Studios, Inc. v. Reimerdes*, *supra*, finding that in this case Time Warner's motion to disqualify should be denied absent a showing of prejudice.
[96] *T.C. Theatre Corp. v. Warner Bros Pictures, Inc.*, 113 F.Supp. 265, 286-269 (S.D.N.Y. 1953). See also *Team Obsolete, Ltd. v. A.H.R.M.A. Ltd.*, 2006 WL 2013471 (D.C. N.Y. 2006) (plaintiff's motion for disqualification of attorney denied in the absence of a "substituted relationship" or breach of fiduciary duty). *Texaco, Inc. v. García*, 891 S.W.2d 255 (Tex. 1995).
[97] *The Florida Bar v. Keasler,* 133 So. 3d 528 (Fla. 2014) (unpublished opinion).
[98] Model Rule 1.9(c); *Canalt Image UK Ltd. v. Lutvak*, 792 F.S.2d 675 (D.C. N.Y. 2011) (Applying N.Y. Rule of Professional Conduct §1.10).
[99] Model Rule 1.9(b)(2); see also Comment 4 to TDRPC 1.09; *Cremers v. Brennan*, 764 N.Y.S.2d 326 (N.Y. 2003).
[100] *In re American Airlines, Inc.*, 972 F. 2d 605, 614 (5th Cir. 1992).
[101] *City of El Paso v. Salas-Porras Soule, supra* at 621; citing *American Airlines, supra* at 614.
[102] *In re Yarn Processing Patent Validity Litigation*, 530 F2d 83 (5th Cir. 1976); *Cf. Decaview Dist. Co. Inc. v. Decaview Asia Corp.*, 2000 WL 1175583 (N.D. Cal. 2000).
[103] Rule 1.09, Comment 4B.
[104] *Prisco v. Westgate Entm't, Inc., supra,* but *Cf. Team Obsolete, Ltd. v. A.H.R.M.A., Ltd., supra*, when the attorney was not disqualified because the breach of a fiduciary relationship was not alleged and a substantial relationship was not shown.

[105] *Cremers v. Brennan, supra.*
[106] *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398 (Tex. 1989)
[107] Model Rule 1.09(b); TDRPC 1.09, Comments 4 and 8; *Metropolitan Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319 (Tex. 1994); and *In re Troutman v. Ramsay*, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, no writ).
[108] See *Baptist Mem'l Hosp. Sys. v. Bashara*, *supra*.
[109] *Bier v. Grodski & Olecki*, 2009 WL 154 9546 (Cal. Ct. App. 2009) (unpublished opinion).
[110] *Bolton v. Weil, Gotshal, & Manges, LLP*, 806 N.Y.S.2d 443 (Sup. Ct. 2005).
[111] *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997), *aff'd.* as *modified*, 997 S.W.2d 229 (Tex. 1999).
[112] Model Rule 1.8(g).
[113] See *Allen v. Academic Gaves League of America, Inc.*, 831 F.Supp. 783 (C.D. Cal. 1993), where law firm which hired a law student with a conflict was disqualified in a copyright and trademark infringement case.
[114] *Nat'l Med. Ctr. v. Godbey*, *supra*; See also *In re Columbia Valley Healthcare Sys.*, 320 S.W.3d 819, 824 (Tex. 2010).
[115] *Id*. See also *Flatt v. Superior Court*, 9 Cal. 4th 275 (1994); *Pound v. DeMera DeMera Cameron*, 135 Cal. App. 4th 70 (2005).
[116] See *P&M Electric Co. v. Godard*, 478 S.W.2d 79 (Tex. 1972), citing *T.C. Theatre Corp. v. Warner Bros. Pictures*, *supra*.
[117] *Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein, & Gross, P.A.*, 2009 WL 2045259 (Sup. Ct. N.J. 2009) (law firm held not vicariously liable for malpractice by lawyer who represented client before joining the firm and billed client directly).
[118] *Johnson v. Brewer & Pritchard, P.C.* 73 S.W.3d 193 (Tex. 2002).
[119] ABA Formal Opinion 94-388 (December 5, 1994); *Mustang Enterprises, Inc. v. Plug-in Storage Systems, Inc.*, 874 F.Supp. 881 (D. Ill. 1995).
[120] *TVT Records v. Island Def Jam Music Group*, 250 F.S.2d 341 (D.C. N.Y. 2003).
[121] Texas State Bar Committee Opinion (July 1996).
[122] *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994).
[123] *Id.*
[124] *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 831 (Tex. 1994).
[125] *In re American Home Products Corp*., 985 S.W.2d 68, 75 (Tex. 1998).
[126] *Id*. citing *Phoenix Founders v. Marshall*, *supra* at 835.
[127] *Kassis v. Teacher's Inc. and Annuity Ass'n*, 93 N.Y. 2d 611 (Ct. App. N.Y. 1999); *Higdon v. Superior Court*, 227 Cal. App 3d 1667 (Ct. App. Cal. 1991).
[128] Model Rules 1.8(k) and 1.10; *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F.Supp. 821 (D. Conn. 191), aff'd. *per curian* 302 F.2d 268 (Cir. 1962); *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex. App.—Dallas 1998, orig. proceeding).
[129] *Phoenix Founders, Inc v. Marshall*, *supra* at 836. See Comment, The Chinese Wall Defense to Law-Firm Disqualification, 128 U.PA.L.R. 677, 711-715 (1980); See also Developments in the Law--Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1367-69.
[130] Model Rule 2.4.
[131] Tex. R. Evid. 503(d)(5).
[132] TDRPC 1.07, Comment 6.
[133] TDRPC 1.07(b).
[134] Model Rule 1.16(a)(1); TDRPC 1.07(c).
[135] *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964)
[136] *Felton v. LeBreton*, 28 P. 490 (Cal. 1891).
[137] See also *Black v. Sussman*, 2011 WL 2410237 (Tenn. Ct. App. 2011) (Accounting malpractice action by Clint Black against his CPA/Partner); *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (Assignment of

media rights from a criminal defendant).
[138] *Gold v. Greenwald*, 247 Cal. App. 2d 296 (Cal. Ct. App. 1966).
[139] See also *ABA Ethics Opinion 00-418, issued July 7, 2000*.
[140] *Lopez, Sr. et al. v. Muñoz, Hockema, & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000). See NY Eth. Op. 1988-6 (N.Y.C. Assn. B. Comm. Prof. Jud. Eth.), 1988 WL 490016 (1988) holding that a law firm representing a criminal defendant may not enter into a production rights contract for the story of the client's criminal trial; NY Eth. Op. 621 (N.Y. St. Bar Assn. Comm. Prof. Eth.), 1991 WL 164535 (1991), which reviews the opinion on client contracts with attorney-owned businesses, concluding that real estate attorneys may not employ attorney-owned abstract company for their clients; See also Ethics Opinion No. 643, issued in May 2014 by the Professional Ethics Committee of the State of Texas, ruling that it is "not permissible for a lawyer to arrange for a debt management services company owned by the lawyer to refer customers of the company to the lawyer's law firm for legal services..."
[141] See *In re O'brien*, 351 F3d 832 (8th Cir. 2003), where George Harrison won an $11.7 million judgment against his business manager attorney, only to have it discharged in bankruptcy after Harrison could not appear for his deposition shortly before passing away.
[142] *In Re. Pacific Pictures Corp., supra*.
[143] *Doris Day v. Rosenthal*, 217 Cal. Rptr. 89 (1985), cert. den'd, 975 U.S. 1048 (1986).
[144] See *In Matter of Crane*, 1990 WL 608663 (Rev. Dep. St. Bar of Cal. 1990), where an inside counsel for SEGA Corporation and an outside lawyer were suspended from the practice of law for making improper "side deals" in the marketing of video games.
[145] See *Humphrey v. Columbia Records*, 124 F.R.D. 564 (D.C.N.Y. 1989), where entertainment lawyer and author William Krasilosky and others were required to pay substantial attorneys fees in connection with a bogus copyright infringement case.
[146] See *In Re. Crane and DePew*, Cal. St. Bar. Ct., Nos. 84-0-14252 and 84-0014253 (L.A. Daily App. Rep., Aug. 15, 1990). *People v. Davis*, 911 P.2d 45 (Colo. 1996).
[147] *A to Z Associates v. Cooper*, 613 N.Y.S.2d 512 (N.Y. Sup. 1993).
[148] *Bingham v. Zolt, supra*, (Bob Marley estate administrator successfully sued for breach of fiduciary duty, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act [RICO]).
[149] *Brown v. Woolf*, 554 F.Supp. 1206 (S.D.Ind. 1983) (sports agent/attorney sued for constructive fraud arising out of contract negotiations with professional hockey team).
[150] *Curb Records v. Adams & Reese, L.L.P., supra*. See also *HNH Intern., Ltd. v. Pryor Cashman Sherman & Flynn, LLP.*, 63 AD 3d 534 (Sup. Ct. N.Y. 2009), where the court's dismissal of claims based on negligent advice regarding common law copyright issues was reversed on appeal and the case was allowed to go forward.
[151] *Hanlin v. Mitchelson*, 794 F.2d 834 (2d Cir. 1996). Summary Judgment denying negligence claims against celebrity palimony attorney Marvin Mitchelson affirmed in part and reversed in part.
[152] See *Even Street Productions, Ltd. v. Shkat Arrow Hafer & Weber, LLP*, 643 F.S.2d 317 (DC N.Y. 2008) where the Court denied a motion to dismiss made by law firm against copyright infringement claims made by Sly Stone's successor in interest.
[153] *Deep v. Boies*, 53 A.D. 3d 348 (Sup. Ct. N.Y. 2008). In a malpractice action arising against David Boies out of the unsuccessful defense of the AIMSTER file sharing litigation, the client's conflict of interest case was not allowed to go forward because of the failure to prove causation. See also *Resendez v. Maloney*, 2010 WL 5395674 (Tex. App.—Houston [1st Dist.] 2010) (Summary Judgment against concert promoter plaintiff affirmed due to lack of evidence on causation).
[154] *Snorkel Productions, Inc. v. Beckman Lieberman & Barandes, LLP*, 62 A.D.3d 505 (App. Div. N.Y. 2009) (Option holder's attorney's negligent advice regarding expiration of option to produce musical drama co-written by Barry Manilow held not to be the proximate cause of damages, except for defense costs in arbitration action brought by Marlow to terminate rights); *Jackson v. Broadcast Music, Inc.*, 2006 WL 250524 (D.C. N.Y. 2006) (Order granting motion to dismiss fraud case against William Krasilovsky affirmed because plaintiff who did not read agreement before signing it, cannot prove reasonable reliance;

Viner v. Sweet, 117 Cal. App. 4th 1218 (2004) (judgment for plaintiff owners of audio book company reversed where the trial court erred in ruling that they do not have to prove a "more favorable result" in a cause of action based on the "negligent negotiation" of the sale of their company).

[155] *Cappetta v. Lippman*, 913 F.Supp. 302 (S.D.N.Y. 1996) (wrestling announcer allowed only to recover fees for hiring new law firm, denied other compensatory damages and punitive damages).

[156] *Spera v. Fleming, Hovenkamp, & Grayson, P.C.*, 25 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000) (no writ hist.).

[157] See, for example, *Sherwood v. South*, *supra* at 809.

[158] *Parker v. Carnahan*, *supra*.

[159] *Bolton v. Weil, Gotshal, & Manges, LLP.*, *supra*.

[160] *Blanks v. Shaw*, 89 Cal. Rptr. 3d 710 (Cal. Ct. App. 2009); *Even Street Productions, LTD. v. Shkat Arrow Hafer & Weber, LLP.*, *supra*; *Proskaver Rose, LLP. v. Blix Street Records, Inc.*, *supra*.

[161] *Viner v.* Sweet, 117 Cal. App. 4th 1218 (Cal. 2004).

[162] *Mc Donnell Dyer P.L.C. v. Select-O-Hits, Inc.*, *supra*.

[163] *Id.*

[164] *Id.* at 250. See also Tex. Civ. Prac. & Rem. Code Ann. §41.011(a) (Vernon 1997).

[165] *Arce v. Burrow*, *supra* at 11.

[166] *Id.* at 13.

[167] *Sanchez v. MTV Networks*, 2012 WL 2094047 (D.C.N.Y. 2012), aff'd. *Sanchez v. MTV Networks*, 2013 WL 1876599 (2d Cir. 2013); *Filler v. Motta*, 951 N.Y.S.2d 85 (N.Y. Civ. Ct. 2012).

[168] *Mc Donnell Dyer P.L.C. v. Select-O-Hits, Inc.*, *supra* (Court awarded music distribution company's attorney fees in the amount of $89,685.00).

[169] *In re Miller*, *supra*.

ENTERTAINMENT LAW ETHICS

Kenneth J. Abdo, Esq.[1] Jack P. Sahl[2]

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.

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3. *See e.g.*, John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: The Struggle to Reform Ohio's Disciplinary System*, 68 U. Cinc. L. Rev. 65 (1999) (noting examples of criticism of lawyers and recommending disciplinary reforms).

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.[4] One source predicts that recent law school graduates "will be the subject of three or more claims of legal malpractice before finishing a career."[5] 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.[6]

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.[7] 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).

5. RON E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE x (1989) (hereinafter Mallen).

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

not give advice unless the attorney is prepared to accept responsibility for the consequences of the "client's" reliance thereon.[13] 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.[14] 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.[15] 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.

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.[16] 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.[17] 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

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the fee); *see also Id.* at (c) (requiring written contingent fee agreements that are signed by the client).

13. Togstad, et al. v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); *see* Croce v. Kurnit *infra* note 32.

14. Bridge Products, Inc. v. Quantum Chemical Corporation, 1990 WL103200 (N.D. Ill.); DCA Food Industries, Inc. v. Tasty Foods, Inc., 626 F.Supp. 54 (W.D. Wis. 1985).

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.").

16. As a matter of law, the attorney owes the client a fiduciary duty of care, diligence and loyalty. *See* Daniel J. Pope & Suzanne Lee, *Breach of Fiduciary Duties and Punitive Damages*, 66 Def. Couns. J. 257 (1999).

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.[18] 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?*[19]

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.[20]

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.[21] 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

18. *See* CBPC §6190.

19. The late, great Marvin Gaye, 1971, Tamala Records.

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).

21. In a TIME magazine article, super-agent Michael Ovitz was quoted, "[l]ook this industry created conflicts of interest." TIME, *The Ultimate Mogul*, p. 54, April 19, 1993.

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

22 McPherson, *supra* note 20.

23. *E.g.* Jack P. Sahl, *Ethics for Entertainment Lawyers: Avoiding Conflicts of Interest*, 12TH ANNUAL INTERNATIONAL FOLK ALLIANCE CONFERENCE. (Cleveland Rock & Roll Hall of Fame, 2/11/2000) (suggesting

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.[24] It is important to note that some conflicts are nonconsentable.[25] 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."[26]

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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.[27] 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."[28] 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 parities pursuant to MRPC 1.6. It

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)

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."[31] 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.[32] 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.[33]

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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 some cases a waiver will be difficult because of the risk that the

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].

lawyer will harm the former client by using the former client's confidences. The former client's informed consent must be confirmed in writing.[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.

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.[38]

A. Textbook Definitions of Roles[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.[40] A music agent's work, unlike an agent in the

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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.

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).

39. DONALD E. BIEDERMAN, ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES (3d ed. 1996).

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 may act on the client's behalf and subject to the client's control. This means that, besides being liable for breaches of statutorily-imposed duties, an agent is liable for the common law breach of the fiduciary duties of

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]

B. Practical Roles[43]

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good faith, fair dealing, and loyalty.

41. *See, e.g.*, Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997); Waisbren v. Peppercorn Productions, Inc., 48 Cal. Rprtr. 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).

43. Harold Orenstein & David Guinn, ENTERTAINMENT LAW & BUSINESS: A GUIDE TO THE LAW AND BUSINESS

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.[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.[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.[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 operate wholly without restraints. In California, a manager who procures

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PRACTICES OF THE ENTERTAINMENT INDUSTRY (1996).

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. *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").

45. *See* Jelin, *supra* note 41.

46. *Id.*

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.[47] Finding work for artists in New Jersey requires a manager to be licensed as a "booking agency."[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%.[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.[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[51] are nevertheless exposed to statutory penalties whether they are licensed

47. *Id.* at 4.

48. N.J.S. §34:8-43 (1997). This statute also governs agents.

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. BY-LAWS OF THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ART. 23, §2 (revised Sept. 15, 1987).

50. California Labor Code §§1700 et seq; New York General Business Law §§170 et seq.

[51]51. Waisbren v. Peppercorn Productions, Inc., et al., 48 Cal. Rptr.2d 437 (1996); Pine V. Laine, 321 N.Y.S. 2d 303 (1st Dept. 1971); Buchwald v. Superior Court of San Francisco, 62 Cal. Rptr. 364 (Ct.App. 1st Dist. 1967); Anita Baker v. BNB Associates, Ltd., Case No. TAC 12-96, California Labor Commission,

by the state or not. These cases demonstrate how talent can assert non-compliance with the applicable licensing statute and void management contracts *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 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

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determination date 12-27-96.

52. Mandel v. Liebman, 303 N.Y. 88 (1951); Raden v. Laurie, 262 P.2d 61 (Cal. 1953).

53. Detroit Lions, Inc. v. Argovitz, 580 F.Supp. 542 (E.D. Mich. 1984). A non-lawyer sports agent violated conflicts of interest standards when negotiating on behalf of a player with a team in which the agent was also part owner; Croce v. Kurnit, 565 F.Supp. 884 (S.D.N.Y. 1982), *aff'd* 737 F.2d 229 (2d Cir. 1984).

Lawyers can serve as agents or managers 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,[54] 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:*

54. Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997).

Lawyers' ethical obligations are extensive and often long-lasting.[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.[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.[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. *Advertising and solicitations.*

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

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55. *See* Swidler & Berlin and Hamilton v. United States, 524 U.S. 399 (1998) (holding that the attorney-client evidentiary privilege continues after the client's death).

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. *Id.*; *see* also RPCC Rule 1-310.

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, *Sports Law and the "Evils" of Solicitation*, 9 Loy. L.A. Ent. L.J. 21 (1989).

58. *See* RPCC, Rule 1-400. *See generally*, Jack P. Sahl, *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).

59. MRPC, Rule 7.1; s*ee* Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); *see also* Florida Bar v.

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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Went For It, Inc., 515 U.S. 618 (1995) (upholding a limited 30-day ban on written solicitation by lawyers to accident victims and their families to protect privacy of state's citizens and the "flagging reputation of state's lawyers"). *See generally* Bates v. State Bar of Arizona, 433 U.S. 351 (1977).

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. A separate shopping agreement may also be considered if this is the primary or only service provided by the attorney.

Unlike employment contracts with managers and agents, 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 compensation of the client and rarely exceeds 10%. The exact percentage depends, in part,

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.

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.[68] Attorneys 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."[69] These criteria offer attorneys great flexibility and protection in charging fees. Thus, it is not unusual to find entertainment lawyers in different parts of the country charging

68. *See* RPCC, Rule 4-200.

69. MRPC, Rule 1.5(a)(1)-(8).

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."[70] 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.[71]

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.

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.[72] 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.[73] Both state supreme and federal courts can discipline lawyers.

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70. *Id*. at (c).

71. Some types of practices, such as personal injury or debt collection, have contingency fees that the 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.[74] The first method is filing a lawsuit against an attorney for civil liability.[75] Most lawsuits filed against attorneys are for negligence, a fiduciary breach, breach of contract or fraud.[76] 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.[77]

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.

The Supreme Court of California, in affirming the disbarment, held that Rosenthal

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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. S*ee*, 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).

77. Patrick v. Ronald Williams, P.A., 402 S.E.2d 452 (N.C.App. 1991); *see* Togestad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); 4 DUNNELL MINN. DIGEST *Attorneys* §11.00 (4th ed. 1989).

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.[78]

78. Jerome B. Rosenthal v. State Bar of California, 43 Cal.3d 612, 238 Cal.Rptr. 377 (1987). Que Sera, Sera (Whatever Will Be, Will Be), Doris (Kappelhoff) Day, from the film "The Man Who Knew Too Much" (1955) (song also recorded for Columbia Records).