

## **LEGAL ETHICS FOR ENTERTAINMENT LAWYERS**

### I. Introduction of Panel

- a. Former Chief Justice of the Texas Supreme Court, Wallace Jefferson
- b. Steve McConnico, Partner, Scott Douglas McConnico
- c. Lawrence A. Waks, Partner, Jackson Walker – Moderator

### II. Perspective of Panel – Generally

- a. Chief Jefferson – as a justice, a judge, what type of legal ethics issues have you reviewed and opined on?
- b. Steve, you are one of the most well-known defenders of lawyers in malpractice and related claims, could you give us your general perspective on legal ethics issues as they might relate to the entertainment business?

### III. Conflicts of Interest

- a. Simultaneous representation, e.g., representing a band, a band company, a band and its management
- b. Label and artist
- c. Writer and publishing company
- d. Film production company, film financier, case and crew, distributor, P&A, etc.
- e. Former clients (departed band member, eg.)

### IV. Competence

- a. New York and California law – where do you need vs. have to be licensed?
- b. Unique regulations, eg., California talent agency rules; NY and California statutes on minor contracts
- c. Union/Guild issues
- d. International issues/laws – language and custom challenges

### V. Cutting Edge

- a. The law isn't keeping up with technology and digital content/delivery

- b. How do you get the law established in new areas, what can you ethically advocate?

VI. Fee Arrangements

- a. Often “novel” in entertainment area
- b. Who pays fees? Parents? Label or studio? Insurer? Who is client?
- c. Back-end? Deferrals, points, royalty shares [Hoover-Slovacek case], contingent interest in contracts

VII. Multiple Roles

- a. Lawyer/Agents
- b. Lawyer/Managers
- c. Lawyer/Band member/Actor

VIII. Confidentiality

- a. Unique confidentiality concerns
- b. Extraordinary precautions/measures

## ENTERTAINMENT LAW ETHICS

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Jack P. Sahl<sup>2</sup>

### 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.<sup>3</sup> A violation of the code threatens his or her reputation, license, and livelihood.

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

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

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

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.<sup>7</sup> 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. MALLIN & 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> For example, some states have particular rules concerning direct mail solicitation and advertising, which lawyers will want to review for compliance purposes.<sup>11</sup> 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.<sup>12</sup> At the initial meeting with the client, the attorney should

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

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

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

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

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

not give advice unless the attorney is prepared to accept responsibility for the consequences of the "client's" reliance thereon.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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?*<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup> It is not unusual for these individuals to be fired or to resign from their positions only to resurface in a similarly powerful position at another company. Informed entertainment lawyers follow the trade journals and other media to track the frequent movement of business people within the industry as such changes often create conflicts of interest and other potential ethical problems.

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

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18. See CBPC §6190.

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, “[I]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.<sup>22</sup>

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.<sup>23</sup> The parties' interests with

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22 McPherson, *supra* note 20.

23. E.g. Jack P. Sahl, *Ethics for Entertainment Lawyers: Avoiding Conflicts of Interest*, 12<sup>TH</sup> 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.<sup>24</sup> It is important to note that some conflicts are nonconsentable.<sup>25</sup> 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."<sup>26</sup>

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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.<sup>27</sup> 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."<sup>28</sup> Another less obvious example involves several parties forming a partnership. The safest practice is for each partner to secure separate counsel in negotiating or reviewing the partnership agreement. Alternatively, MRPC 1.7 expressly provides that after full disclosure of the potential conflicts of interest, the parties can waive such conflicts of interest by giving their informed consent, confirmed in writing, to multiple representation. Of course, if a direct conflict of interest does arise between the parties during the negotiation of the partnership agreement, or litigation erupts among the parties, the Comment to MRPC 1.7 suggests that unless the lawyer has obtained the informed consent of the client under the conditions of 1.7(b), the attorney ordinarily must withdraw in order to safeguard the confidentiality of the parties pursuant to MRPC 1.6. It

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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 . . . .”<sup>29</sup> 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.<sup>30</sup> 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

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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."<sup>31</sup> 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,<sup>32</sup> 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.<sup>33</sup>

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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.<sup>35</sup>

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.<sup>36</sup> 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

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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.<sup>37</sup> 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.<sup>38</sup>

### A. Textbook Definitions of Roles<sup>39</sup>

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.<sup>40</sup> 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 Fagnoli, a former manager for the musician, Prince, alleging a conflict of interest stemming from the Ziffren firm's formerly representing Fagnoli from 1981 to 1986, then later representing Prince during a time when Fagnoli sued the musician and his corporations. The suit alleged that the Ziffren firm disclosed to Prince some of Fagnoli's confidential communications protected under the attorney/client privilege. The Ziffren firm had helped Prince and Fagnoli settle a dispute during their representation of Prince and at the invitation of Fagnoli. 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. Fagnoli 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 (principal)'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.<sup>41</sup>

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.<sup>42</sup>

## B. Practical Roles<sup>43</sup>

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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. Rptr. 2d 437 (1996); Mandel v. Liebman, 303 N.Y. 88 (1951); Raden v. Laurie, 262 P. 2d 61 (Cal. 1953). See also Don Biederman, *Agent or Manager? There is a Difference . . . Isn't There?*, 15 No.9 ENT. L. REP. 3 (Feb., 1994); Fred Jelin, *The Personal Manager Controversy: Carving the Turf*, 7 No.1 ENT. L. REP. 3 (June, 1985) (hereinafter Jelin).

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

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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> Finding work for artists in New Jersey requires a manager to be licensed as a "booking agency."<sup>48</sup> 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%.<sup>49</sup>

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.<sup>50</sup> 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<sup>51</sup> are nevertheless exposed to statutory penalties whether they are licensed

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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.

<sup>51</sup>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.<sup>52</sup> 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.<sup>53</sup>

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,<sup>54</sup> the California Labor Commissioner ruled that an attorney who owned a production company was not procuring employment as an agent for an artist/client when he hired the artist to be in one of his productions. The Commissioner held that an attorney having an ownership interest in the employment is functioning as an employer, not as an agent "with third parties" within the meaning of the Act. However, conflict of interest issues were raised but not resolved by the Commissioner.

#### E. Special Considerations Regarding Lawyer Conduct

##### 1. *Merging the Roles of Various Entertainment Representatives:*

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

Lawyers' ethical obligations are extensive and often long-lasting.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> In general, lawyers can mail written advertisements and solicitations directly to prospective clients providing they are truthful and non-deceptive.<sup>59</sup>

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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; *see 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.<sup>60</sup> 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.”<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup> The lawyers' share must reflect their work or their assumption of joint responsibility in the case.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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,

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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.<sup>68</sup> 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."<sup>69</sup> 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

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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.”<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> The first method is filing a lawsuit against an attorney for civil liability.<sup>75</sup> Most lawsuits filed against attorneys are for negligence, a fiduciary breach, breach of contract or fraud.<sup>76</sup> 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.<sup>77</sup>

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. See, Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998) (holding that the uncollectability of a judgment in the underlying action is an affirmative defense to a malpractice claim against an attorney); see also Morgan, *supra* note 8, at 89 (discussing lawyer malpractice claims and the so-called "suit-within-a-suit" requirement).

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.<sup>78</sup>

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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).