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# ENTERTAINMENT AND SPORTS LAWYER

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## Chair's Column

Dear Forum Members,

This is my first message to you as the incoming Chair of the Forum. I look forward to seeing you all at the Forum's Annual Meeting at the Four Seasons Hotel in Las Vegas, October 11, 12 and 13.

We have an exciting program of panels on cutting edge issues including a Mock Negotiation on eSports Investment and Team Ownership; Legal Issues in Protecting a Client's Brand; a Fireside Chat with Seth Krauss, Chief Legal Officer of Endeavor; Mindfulness; Sports Gambling; a Digital Platforms roundtable; a Plenary with leading next GEN Entertainment and Sports Lawyers; and a Keynote Address by Merck Mercuriadis, CEO and Founder of Hipgnosis Songs Ltd.


Peter J. Strand

In addition, there will be great networking opportunities including a Nightcap Reception on Friday night, a conference wide luncheon on Saturday, the annual Ted Reid reception on Saturday night and several offsite Behind the Scenes activities.

This year the Forum instituted new CLE programming to coincide with our Spring Governing Committee meeting. In April, we met at the Guest House at Graceland in Memphis, Tennessee and presented a half-day CLE program at the Cecil C. Humphreys School of Law at the University of Memphis. This programming will continue in April 2020 when the Governing Committee meets in Milwaukee, Wisconsin next year.

I look forward to seeing you all in Vegas. ■

Best regards,

Peter J. Strand
*Chair, ABA Forum on the Entertainment & Sports Industries*

### IN THIS ISSUE

# To Have and Have Not

## Conflicts of Interest in Entertainment Law

Yocel Alonso

### I. ARE CONFLICTS OF INTEREST ISSUES QUAINT?

There is no shortage of media reporting on Power Lawyers, Super Lawyers, their wealth, and the stars they represent.[1] However, no mention is made of the Super-Duper Lawyers' conflicts of interest and legal entanglements, which may leave the impression that the ethical rules of our profession do not apply to these masters of the universe. This impression is wrong and is belied by the fact that sooner or later lawyers who disregard the rules find their way to Desolation Row and an unwelcome free listing in the "Former Lawyers" section of the state bar journal.

The practice of entertainment law is perceived as a high wire act by professional liability carriers—some refuse coverage altogether. This is true because a vast majority of claims are resolved through confidential settlements. Yet, when *Dimple's got the law looking for you*, as George Strait might say, and the dispute goes to court, they tend to be close encounters of the TMZ kind; not the garden variety business dispute.[2]

While legal fields such as real estate and commercial law are slow to change, entertainment lawyers are required to apply "old school" ethical rules to revolutionary technological changes. These rules have turned the practice on its head and will continue to do so in the foreseeable future.[3] So while an article on conflicts of interest 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[4] ("Model Rules") serve as a model for the ethics rules in most states, including Georgia (Georgia Rules),[5] Florida (Florida Rules),[6] New York (New York Rules),[7] Tennessee (Tennessee Rules),[8] and Texas (Texas Rules),[9] but not California (California Rules).[10] In each state's jurisdiction, the proscriptions are typically found in state codes. This article is a cross-country sashay through the landscape of the most important court decisions on conflicts of law in the entertainment world. New York, Tennessee, and Texas law are referenced throughout because they are usually consistent with the Model Rules, meaning they hold lawyers to a high standard of conduct, and have a rich body of case law.[11] Where possible, the citations in the article are to court decisions involving an entertainment law dispute.

The American Law Institute (ALI) publishes a Restatement of the Law Governing Lawyers. Now in its third edition, the Restatement notes that "professional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been approved in most states by the highest court in the jurisdiction in which the lawyer has been admitted."[12] For example, in Texas these rules are found in the Disciplinary Rules of Professional Conduct[13] ("Texas Rules") and the Texas Rules of Evidence[14] ("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.[15] Instead it will discuss the rules and recent case law pertaining to conflicts of interest, which are the most challenging issues in the practice of entertainment law.

### II. WHO ARE THOSE GUYS?

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 determined by state law.[16] The importance of maintaining client confidentiality is the foundation of conflict of interest jurisprudence. 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.[17] In addition to the client, an attorney, the client's guardian or representative can also claim this privilege on the client's behalf.[18] 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.[19]

The attorney-client privilege is a cornerstone of our jurisprudence and has no expiration date.[20] "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."[21] The attorney-client relationship is generally subject to the rules that govern the law of contracts.[22] Absent privity or a duty arising out of tort law, an attorney generally owes no duty to a third party.[23] In *Dimensional Music Publishing, LLP v. Kersey*,[24] 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."[25]

There are also "ethical considerations overlaying the contractual relationship."[26] Lawyers must conduct their business with "honesty and loyalty, always keeping the

client's best interest in mind."[27] 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."[28] 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.[29]

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."[30] However, there must be objective indications of the meeting of the minds ("Kook test").[31] For example, in *Love v. The Mail on Sunday,*[32] 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.[33] "Whether the contract is express or implied, there must be a meeting of the minds."[34] "Moreover, the relationship does not depend on the payment of a fee and may exist as a result of rendering services gratuitously."[35]

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.[36] 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.[37]

"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."[38] In rock star Trent Reznor's lawsuit against his manager and the manager's accountants, a New York District Court held that, "[s]ince Reznor was not Szekelyi's client, Szekelyi would be liable to Reznor for malpractice only where he was aware that the non-client would rely on his work for a particular purpose".[39] In *City of El Paso v. Salas-Porras Soule,*[40] 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.[41] The court reasoned that the billing statements were replete with references, conferences, and tax planning sessions made on behalf of the company.[42] Also, when an attorney becomes the general counsel for a partnership, she also creates an attorney-client relationship with the general partner.[43] The court reached a different result where a partner in the *Violent Femmes* band was unable to show he had a reasonable belief that he was previously represented by his partner's lawyer.[44] Accordingly, his motion for disqualification was denied.[45]

Although a consultation does not establish an attorney-client relationship *per se*, attorneys are still required to maintain confidentiality.[46] Model Rule 1.18 provides strong protection for the rights of and information learned from "prospective clients."[47] This rule is also supported by the common law.[48] "Even in the absence of an express attorney-client relationship . . . a lawyer may owe a fiduciary obligation to persons with whom he deals."[49] "[A] fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe or rely on her.[50]

### *A. Stir It Up: Exceptions to the Privity Requirement*

Of course, there cannot be a rule without exceptions to keep us awake at night. The privity requirement does not preclude tort-based causes of action against lawyers under section 552 of the Restatement (Second) of Torts.[51] For instance, the Texas Supreme Court has distinguished the negligent misrepresentation cause of action from traditional legal malpractice claims, including attorney opinion letters.[52] Not all jurisdictions follow this application, in *Source Entm't Grp. v. Baldonado & Assoc., P.C,*[53] 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. However, the court held the New Jersey's "litigation privilege" did not apply to a letter sent by the lawyers to Sony Records and the William Morris Agency.[54]

Similarly, lawyers may be liable to third parties for the violation of certain statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO).[55] This was the case in *Binghaw v. Zolt*,[56] 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.[57] 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 his or her client."[58] This rule has also been extended to attorney communications with potential clients.[59]

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."[60] 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."[61]

### *B. 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).[62] 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.[63]

The Texas Rules afford many of the same exceptions to disclosure of confidential information as the TRE.[64] All jurisdictions 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.[65]

The disciplinary rules also require 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.[66] 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.[67] The attorney did not reveal the confidential communication to the authorities and his client killed two people.[68] Under Mississippi law, as in the Model Rules, the attorney may, but is not required, to disclose the information.[69] Then again, if the attorney had made the disclosure the movie would not have a plot.

It is not easy for a third party to obtain presumably confidential information on the basis of the crime-fraud exception. In one of the Bill Cosby sexual assault cases, the court denied the plaintiff's request for Cosby's communications with attorney Martin Singer because she was not able to "make out a *prima facie* case that the lawyer was used in order to promote an intended, continuing criminal or fraudulent activity."[70] A more common situation is where a litigator becomes aware that their client is going to commit perjury, thereby triggering the obligation to disclose.[71]

### *C. Back Stabbers: Representation Adverse to a Client's Interests*

While clients can relate to the concepts of disloyalty and betrayal and of course the O'Jays' hit song, they may not be aware of the conflict of interest rules designed to prevent even the appearance of improper 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.[72]

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."[73] 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.[74]

#### 1. The Line in the Sand: What Does "Directly Adverse" Mean?

The Tennessee Rules of Professional Conduct do not specifically define "directly adverse" but explain that "a directly adverse conflict may arise when a lawyer is required to cross examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit."[75] General Principle No. 6 then provides specific examples of directly adverse actions by attorneys.[76]

However, Comment 6 to Rule 1.06 of the Texas Rules 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.[77] 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.[78] On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

In the very contentious Marvel Enterprises bankruptcy case, the Third Circuit addressed the question of whether the Trustee/Attorney's law firm was disqualified from representing the Trustee because of its prior representation of another creditor, Chase Bank.[79] The court held that the law firm was not disqualified, where Chase had executed a conflicts waiver and agreed to a termination of its representation by the Trustee's law firm.[80] Under the United States Bankruptcy Code, the appearance of impropriety was

insufficient cause for disqualification and that a potential or actual conflict must be shown.[81]

A conflict of interest also exists where the lawyer's interest interferes with those of the client.[82] 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 percent of millions of dollars while the legal fees may only be thousands of dollars. "[i]n 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."[83]

Lawyers may represent two clients if their interests are aligned.[84] 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.[85] Pickford negotiated a new contract with her current management company, and then sued to avoid payment to her lawyer, claiming a conflict of interest.[86] 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.[87] 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.[88]

With full disclosure, lawyers may also represent clients who are generally adverse in unrelated matters.[89] 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.[90] Of course, lawyers cannot sue a current client, even if the lawsuit is unrelated to the subject matter of the lawyer's representation.[91]

### 2. Attorney Employment: Getting to Know You.

In order to determine if conflicts exist, lawyers should interview their prospective clients carefully. The interview should cover such areas as their background, previous lawsuits, business competition and partners, and of course, possible relationships with existing clients.[92] 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.[93]

If the engagement is accepted, there is no substitute for a clear written agreement. Remembering in Texas, if the contract provides for a contingent fee, it must be in writing.[94] It must also be in compliance with the disciplinary rules, especially the rules governing contingent fee contracts.[95] "Lawyers have a duty, at the outset of the representation, to 'inform a client of the basis or rate of the fee' and the contract's implications for the client."[96] An oral contingent fee contract is voidable by the client.[97] 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.[98]

Model Rule 1.8 and Rule 1.8 of the Tennessee Rules of Professional Conduct generally do not permit lawyers to take an interest in the subject matter of the lawsuit, particularly when the interest may be adverse to the client.[99] The purpose of these rules is to protect the client from overreaching by lawyers on their fees. This is what happened in the case of *In re Stover,*[100] 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.[101] Before these rules were enacted, it was not uncommon for lawyers to take an interest in a client's book and media rights, particularly when the cases garnered national attention.

This was the case, for example, in *Ray v. Foreman,*[102] where James Earl Ray assigned the literary rights concerning Martin Luther King Jr.'s murder to famed defense lawyer Percy Foreman and then sued Foreman for breaking his contract and taking unfair advantage of him, even though Foreman had assigned back the rights when Ray agreed to a plea of guilty.[103]

Lawyers who prefer to avoid 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.[104] Also, 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.[105] 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,[106] although extreme care needs to be taken to make sure that all parties with potential conflicts sign the document. Even then, the lawyer may still have fiduciary duties to shareholders.[107]

Without a written agreement a fact issue may exist regarding who the attorney is representing and who is responsible for the fees.[108] Employment contracts are likely going to be construed against lawyers, who should plan accordingly.[109] For example, while the court in *McDonnell, Dyer, P.L.C. v. Select-O-Hits, Inc.*,[110] found that "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.[111] If the lawyer for whatever reason does not have a written agreement at the beginning of the representation, this should be handled as soon as possible. As a last resort, the courts have held that a client may ratify an employment agreement under certain circumstances.[112]

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.[113] Lawyers cannot leave people under the impression that they are representing them or the "transaction."[114] Of course, if the person understands that the attorney is not representing them, there is no duty.[115] 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.[116]

### 3. Client Waivers: Tell It Like It Is.

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.[117]

Lawyers can represent clients if they reasonably believe that the representation of each client will not be materially affected, and each client consents to representation after full disclosure of the existence, nature, implications, and possible adverse consequences of common representation and any advantages involved.[118] Attorneys must disclose all possible conflicts before accepting employment and conflicts which arise during the course of employment.[119]

An example of an effective conflicts waiver is the case of *Sharp v. Next Entertainment, Inc.*,[120] where the court affirmed an order denying the disqualification of the Rothner Law Firm, which was representing the Writers Guild of America and some of the plaintiff-members in a class action alleging that reality television producers were not complying with minimum labor standards, because the law firm filed effective conflict waivers signed by both the Writers Guild and the plaintiffs.[121] Having ruled that the waivers were sufficient, the appellate court did not reach the issue of propriety of the "ethical wall" between the attorney consulted by the Writers Guild and the other members of the Rothner Law Firm which had been ordered by the trial court.[122]

Another example of an effective waiver resulting in a summary judgment in favor of the attorney is the case of *Burton v. Selker*,[123] involving the purchase of the now defunct United States Wrestling Association.[124] The court found that the client has "expressly waived conflicts of interest when he signed and returned via fax (the attorney's) letter explaining the conflicts…"[125] For example, lawyers must disclose the sources of their compensation, including finder's fees.[126] 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 be as specific as possible and include the accommodation clients' acknowledgement that she understands that the information disclosed to the attorneys will be shared with the primary client.[127] If the client declines to sign the proposed waiver, the attorney should probably decline representation in the matter or otherwise face disqualification or worse.[128]

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.[129] The amount of disclosure required depends on the sophistication of the client. Comment 8 Rule 1.06 of the Texas Rules states that "[d]isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent."[130] Of course, telling a client the truth, including an adverse development, is not malpractice, even if the client cannot handle the truth.[131]

### 4. The Accidental Mummies Tour and Client Consents.

Lawyers who obtain the client consents must reasonably believe that the representation of each client will not be materially affected.[132] But sometimes a conflict of interest cannot be overcome by consent. In the case of *City of El Paso v. Salas-Porras Soule,*[133] the client executed a waiver letter which admitted that the law firm did not represent Parallax.[134] However, the court found that the waiver letter was invalid because it was inconsistent with the evidence and testimony heard in the case.[135] Just because the letter said the firm did not represent the company, did not make it so.[136] But in *Lessing v. Gibbons*,[137] the court, relying on actress Dolores Del Rio's waivers and her attorney's effective client communications, ruled against Del Rio's conflict of interest claims against her attorney.[138]

Even more troubling is the case of *Eternal Preservation Associates, LLC v. Accidental Mummies Touring Company, LLC,*[139] which involved a dispute between the two equal partners in a limited liability company involved in the United States tour of 36 mummies from Mexico.[140] The company sued one of the partner's companies and the disgruntled partner moved to disqualify the company's attorney.[141] A waiver had been executed by the company, but not signed by the disgruntled partner.[142] The court, applying Michigan common law, declined to disqualify the lawyer for the limited liability company but issued the following *post mortem*: "[t]hat is not to say that [he disgruntled partner] may not have recourse against [the lawyer] directly. An attorney who represents a closely held corporation and a controlling shareholder may also have a fiduciary to the other shareholder[s]."[143]

Lawyers may feel that they cannot represent a client fairly without breaching the confidences and privileges of another client. And lawyers may also feel that they cannot fairly and objectively represent a client because of the lawyer's own interests or responsibilities to others. If so, Comment 4 of Texas Rule 1.06 states that this type of conflict forecloses other alternatives, such as obtaining the client's consent, which would otherwise be available.[144] In these situations it is best to decline representation or withdraw from representation of the matter to avoid liability from a possible malpractice claim.[145] A lawyer can still represent the client in another matter where no conflicts exist.

### 5. Hot Potatoes.

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.[146] For example, in *Cassidy v. Lourim*,[147] 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.[148] The federal courts for the Southern District of New York also allow attorneys to withdraw if there are irreconcilable differences between the attorney and the client or if the client refuses to pay her bill.[149]

The failure to withdraw from representation after a conflict arises between clients can also get entertainment lawyers sued. For instance, attorney Dina LaPolt was sued by lead singer Steven Tyler, artist management company Kovac Media Group, Inc. d/b/a Tenth Street Entertainment ("TSE") for breach of fiduciary duty, breach of the duty of confidence, intentional interference with contract, and intentional interference with prospective economic advantage for allegedly undermining the management of band *Aerosmith*.[150] The Complaint alleged, *inter alia*, that LaPolt "provided legal advice to both [Tyler] and TSE on negotiations, deal points, agreements, and various other matters."[151] LaPolt countered with a motion to strike the complaint under the California's anti-SLAPP statute (strategic lawsuits against public participation).[152] LaPolt's motion was granted by the trial court and overturned on appeal in an unpublished and nonciteable opinion.[153]

If a lawyer is prohibited from representing a client, it is axiomatic that no other lawyer in the firm can do so. Courts have also followed the so-called "Hot Potato Doctrine" which provides one client cannot be dropped "like a hot potato" because the firm has found a case more to its liking, absent a conflict.[154] For example, in a suit by an artist against the record company, attorney Russell Frackman and his law firm, Mitchell, Silberberg & Knupp LLP, experienced the opposite result.[155] Frackman and his law firm were disqualified where, after the client declined to sign a waiver, they proceeded anyway to represent the defendant record company, EMI Group Limited.[156] The court based its disqualification on the basis that Frackman's firm had represented the client for 10 years, including the negotiation of the recording contracts that were at issue in the case and one of the law firm's partners still owned an ownership interest in the artist that Frackman was opposing.[157]

## *D. It All Comes Back: Representation Adverse to Former Client's Interests*

Model Rule 1.9[158] and its equivalent, Rule 1.09 of the Texas Rules,[159] are derived from the landmark case of *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*,[160] 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."[161] The black letter rules 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."[162] Ignoring this rule can result in a contract being voided by a court, as Pamela Anderson successfully did in a contract dispute concerning a proposed motion picture titled *Hello, She Lied*.[163] This "side-switching" also earned John Travolta's former attorney a three year suspension from the practice of law ordered by the Florida Supreme Court.[164]

These rules are extended to lawyers who are or have become associated with a firm whose attorneys are prohibited from representing a client.[165] They also apply to a law firm whose former attorneys would be prohibited from representing a client.[166] 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.[167]

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.[168]

In the Fifth Circuit, the applicable test for disqualification of attorneys is articulated in *In re American Airlines, Inc*.[169] "to disqualify opposing counsel on the ground of former representation must establish two elements: '1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2) substantial relationship between the subject matter of the former and present representations.'"[170]

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*,[171] 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.[172]

The "substantially related" prohibition "involves situations where a lawyer may have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage of for the advantage of the lawyer's current client or some other person."[173] In *Prisco v. Westgate Entertainment, Inc.*,[174] 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.[175] However, the court in *Cremmers v. Brennan*[176] denied a motion to disqualify the attorney for singer Amber in a lawsuit against the Nightlife Productions booking agency for unpaid performances.[177] 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.[178]

Although permissible, it is not generally advisable to sue a former client. In *NCNB Texas Nat. Bank v. Coker*,[179] 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.[180] Comment 11 Texas Rule 1.06 also makes it clear that this is not advisable.[181]

Most cases turn on the "substantially related" test. For example, in *Bier v. Grodsky & Olecki*,[182] 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.[183]

### *E. You Can't Always Get What You Want: Representing Too Many Clients in the Same or Related Matter*

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. Even if there is no actual conflict of interest, lawyers have a duty to explain the implications of joint representation to the extent "reasonably necessary to permit the client[s] to make informed decisions regarding the representation."[184] For example, Victory Lane Productions, LLC, a NASCAR collectibles merchandiser, claimed that it had been damaged by Paul, Hastings, Janofsky & Walker LLP for undisclosed conflict of interest.[185] Victory Lane alleged that the law firm wrongfully represented it and another creditor against the same defendant.[186] After the defendant filed bankruptcy, Victory Lane filed suit against the law firm, alleging that the firm did not disclose its representation of the other creditor, thereby breaching its contract and fiduciary duties and committing professional malpractice.[187] The law firm's motion for summary judgment was mostly denied by the court, which reasoned that "[the lawyer's] actual knowledge of the alleged conflict of interest need not be proven for Victory Lane to succeed on its breach of fiduciary duty claim."[188] "Victory Lane need[ed] only [to] prove that under the circumstances, Defendants reasonably should have known of the alleged conflict, and should have informed Victory Lane of said conflict."[189] As such, Victory Lane was entitled to a jury trial for its damages, including the possible acceptance of a settlement offer made by the defendant and the $60,000.00 in fees it had paid to the firm.[190]

Another example comes from *Bolton v. Weil, Gotshal, & Manges, LLP,*[191] where 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.[192] In response, Weil, Gotshal, & Manages followed the "sued attorney's playbook" and filed a third party action against Bolton's personal attorneys for contribution and indemnity.[193]

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.[194] 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.[195]

### *F. Ramblin' Man: Hiring Lawyers That Create Client Conflicts*

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.[196] In *National Medical v. Godbey*,[197] 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.[198] The court ruled: (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.[199]

This "Typhoid Mary" type 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.[200] 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.[201]

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."[202] 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."[203]

Affiliated law firms are bound by the same rules.[204] This includes two law firms that have a lawyer common to both.[205] This rule also applies to contract lawyers.[206] Conflict of interest issues not only apply to the lawyer's associates, but also to the support staff.[207] 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.[208]

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.[209] 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.[210] 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.[211]

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."[212] The only way this presumption may be overcome is: (1) to instruct the legal assistant "not to work on any matter on 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 on which the paralegal worked during the prior employment, absent client consent."[213]

### *G. Screening Procedures: Chinese Wall or Maginot Line?*

The overrated "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.[214] 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.[215]

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

> the substantiality of the relationship between the former and current matters; the time elapsing between the matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their Involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure.[216]

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

Attorneys may be requested to help organize a band, entertainment company, or other family related business. Although these situations may be amicable at first, they may lead to malpractice claims.

Rule 2.2 of the Tennessee Rules of Professional Conduct provides that "[a] lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them."[217] Like Tennessee, the Texas Rules places strict obligations on lawyers acting as intermediaries, including that they: (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 the necessity of contested litigation[;]" and (3) reasonably believe (s)he can undertake the representation impartially.[218] Depending on the circumstances, the lawyer may suggest that the parties seek a third party neutral.[219]

The general rule is that the attorney-client privilege does not attach between and among the jointly represented clients.[220] 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."[221]

The lawyer must consult with each client concerning the decisions to be made and the relevant considerations—each client must have equal input.[222] Naturally, a client must assume "greater responsibility for [her] decisions than when [she] is independently represented.[223] If a conflict develops, the lawyer must withdraw from the representation.[224] The key is for lawyers to be able to balance each client's interests and maintain their impartiality between the clients.[225] If this can no longer be achieved, the lawyer should withdraw from all representation.

### *I. The Year of Living Dangerously: 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.[226] The seminal case in Texas is *Archer v. Griffith*.[227] In California, it is *Felton v. LeBreton*,[228] and in New York it is *Greene v. Greene*.[229] 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 wonderful business deals offered by clients.[230] 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.[231] This is a "tales I win, heads you lose" scenario all the way.

Lawyers should also be wary of setting up a "side" business, such as a record publishing companies, and talent agencies to profit from the attorney-client relationship. Model Rule 1.8(a) describes the requirements for attorneys who want to do business with clients.[232] If attorneys choose to proceed with a side business regardless, then they need to make sure that clients know that they are not being engaged as attorneys.[233] Otherwise, attorneys may find themselves in the predicament of the Winogradsky/Sobel (W/S) music clearance firm.

W/S and one of its principals, entertainment lawyer Steven Winogradsky, were sued for negligence and malpractice for their inability to obtain the grand rights for the use of two Ray Davies/Kinks songs.[234] The client alleged that Winogradsky was retained as its counsel for legal advice, that W/S shared the same name as the law firm, maintained the same address, and shared a checking account with Winogradsky's law firm. Winogradsky responded that he and W/S were not retained as attorneys and moved for summary judgment.[235] The United States District Court denied Winogradsky's motion, except for the client's speculative $10 million damages claim, and the case was settled soon thereafter at a mandatory settlement conference.[236] New York attorney Rachel Rodgers obtained a better result when she was sued in connection with an e-book joint venture with a client.[237] By having most of her paper-work in order, she was able to win a summary judgment on all of the client's claims, with exception of a $1,345.00 claim concerning the filing of an S-corporation election form.[238]

Another example of a "side business" misadventure is the case of *Lenhoff v. Svatek*,[239] where Los Angeles entertainment lawyer Charles Lenhoff agreed to represent Svatek as a talent agent before Lenhoff had obtained his agency

license.[240] When Lenhoff sued for unpaid commissions, the Labor Commission rejected Lenhoff's argument that his *ex post facto* license was legally sufficient and voided the agency agreement.[241]

To illustrate how much attorney side businesses with clients are disfavored, Texas has not just one, but several, disciplinary rules which address this issue—including Texas Rules 1.02, 1.03, 1.04, 1.06, 1.07, 1.08, 2.01, and 2.02.[242] 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.[243]

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,[244] but also third party claim—for example, interference with business relations.[245] The landmark Doris Day case, *Doris Day v. Rosenthal*,[246] 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.[247] *Qué Será, Será.*

## III. A WALK ON THE WILD SIDE: CONSEQUENCES OF LEGAL MALPRACTICE

Attorneys are subject to disciplinary proceedings,[248] malpractice claims, disqualification, and court sanctions when they violate the attorney-client privilege, fail to disclose a conflict of interest, or file frivolous lawsuits.[249] Although attorneys do not *ipso facto* violate the law when they disobey a disciplinary rule, the consequences can be very serious.[250]

Under the doctrine of collateral estoppel, the findings made in a disciplinary proceeding may be used against lawyers in a later judicial proceeding seeking damages against the lawyer.[251] For example, in *A to Z Associates v. Cooper*,[252] 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 duty against her attorney/manager and former psychiatrist who had formed a partnership that misappropriated her funds.[253]

A malpractice suit can take various forms. Clients can sue attorneys under several causes of action including: breach of fiduciary duty,[254] breach of contract,[255] violation of the Texas Deceptive Trade Practice Act,[256] actual and constructive fraud,[257] common law negligence,[258] negligent misrepresentation,[259] and the tort of malpractice.[260] These claims may also be assignable by the client.[261] A breach of fiduciary duty, and possible fee forfeiture, can occur even without actual damages. However, causation and damages are essential elements of other causes of action,[262] such as fraudulent and negligent representation,[263] negligence,[264] negligence per se, and breach of fiduciary duty.[265]

There is an ever-increasing number of malpractice suits brought against attorneys and their law firms.[266] 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.[267] 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.[268]

Juries are not known for their warm and fuzzy feelings toward lawyers. In a classic malpractice case, the client must prove that its damages were sustained because of the attorney's malpractice;[269] that goes wrong during the course of the representation.[270] 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.[271] Most jurisdictions recognize fee forfeiture for breach of fiduciary duty in the context of the attorney-client relationship.[272] 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.[273] 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.[274] The Texas Supreme Court added another factor to consider—the public interest in maintaining the integrity of attorney-client relationships.[275] The court also held that the amount of the fee to be forfeited is a question for the court, not the jury.[276]

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 meruit.[277] However, quantum meruit recovery is not available against the client if the employment contract provided for a "clearly excessive" fee.[278]

## IV. *AMARILLO BY MORNING*

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.[279] 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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## ENDNOTES

1. *See* THR Staff, *Power Lawyers 2018: Hollywood's Top 100 Attorneys,* The Hollywood Reporter (April 4, 2018, 6:30 AM) (https://www.hollywoodreporter.com/lists/power-lawyers-2018-hollywoods-top-100-attorneys-1097287 [http://perma.cc/4AL8-TARU] (indicating he top "power" lawyers in Hollywood for 2018).

2. As with business litigation, the case eventually settles without a reported opinion. *See* Richard E. Flamm & Joseph B. Anderson, *Conflict of Interest in Entertainment Law Practice, Revisited*, 14 Ent. & Sports Law. 3, 4 (1996) (citing Grisham v. Garon-Brooke Assocs., Inc., Action No. 3:96 CV045-B (N.D. Miss. 1996) and Adler v. Manatt, Phelps, Phillips & Kantor, No. BC 053076 (Cal. S. Ct. 1992)) ("Reported decisions involving conflict-based allegations against entertainment attorneys are few and far between. Of course, not every conflict of interest based claim results in a reported decision."). 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—a non-party—paid Joel $2.4 million to withdraw the suit, perhaps out of fear that other Grubman Indursky clients would follow Joel's lead. *See* Geraldine Fabrikant, *The Media Business – A Tangled Web of a Suit, a Lawyer, and Billy Joel*, N. Y. Times (May 3, 1995) https://www.nytimes.com/1995/05/03/business/the-media-business-a-tangled-tale-of-a-suit-a-lawyer-and-billy-joel.html [http://perma.cc/9PPW-9LPB] ("Copies of the $2.4 million check and the two agreements have been obtained by the New York Times."). For a punch-by-punch account of the Joel saga, *see* Stan Soocher, They Fought the Law: Rock Music Goes to Court 2142 (1998) (recounting the legal troubles of Billy Joel of the 1990's); "Ethics Rules Changed to Halt L.A. Lawyers' Conflicts of Interest," Wall Street Journal, December 10, 1993 (EP).

3. Indeed, attorneys may find themselves having to defend their actions in "foreign" jurisdictions where they have hired local counsel. *See* Simons v. Steverson, 88 Cal. App. 4th 693, 713–14 (Cal. Ct. App. 2001) ("[T]he crucial fact is that defendant Rudolph & Beer, a New York law firm, employed Steverson, an attorney licensed to practice law in California, and not in New York, to represent plaintiff's.").

4. Model Rules of Prof'l Conduct (Am. Bar. Ass'n 2018).

5. Ga. Rules of Prof'l Conduct (2001).

6. Fl. Rules of Prof'l Conduct (2018).

7. N. Y. Rules of Prof'l Conduct (2017).

8. Tenn. Rules of Prof'l Conduct (2018).

9. Tex. Disciplinary Rules Prof'l Conduct, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtitle. G, app. A.

10. California Rules of Professional Conduct (2018).

11. *See* McIntyre v. Comm'n for Lawyer Discipline, 169 S.W. 3d 803, 810 (Tex. App.—Dallas 2005) (upholding disciplinary sanctions for attorney with some experience because "appellant knew or should have known he was not competent to accept and continue employment. . . ."); Cavender v. U. S. Enter., Inc., 191 F. Supp 2d 962, 965 (E.D. Tenn. 2002) (explaining the courts duty to hold attorneys to the highest ethical standard to protect client's interest, confidence, and the integrity of the judicial process). Although there is a notable lack of an express rule in Texas concerning lawyers' sexual relations with clients, sexual relationships with clients is prohibited in all states. *See* Tex. Disciplinary Rule Prof'l Conduct R ?, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A. (showing an absence of a rule governing sexual relationship with clients); *see also* Model Rules of Prof'l Conduct r. 1.08(j) (Am. Bar Ass'n 2018) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between the when the client-lawyer relationship commenced.").

12. Restatement (Third) of Law Governing Lawyers §1 cmt. b (Am. L. Inst. 2000).

13. Tex. Disciplinary Rule Prof'l Conduct, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

14. *See, e.g.*, Tex. R. Evid. 503 (governing privilege in an attorney-client relationship).

15. *See* Kearney v. Unibay Co., 466 So. 2d 271, 271 (Fla. Dist. Ct. App. 1985) (indicating 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, 692 (Cal. Ct. App. 1992) *aff'd*, 2 Cal.4th 606 (1992) (discussing the statute of limitations defense in a television writer's lawsuit against television production company Spelling-Goldberg); Attorney Grievance Comm'n Of Maryland v. Gardner, 60 A.3d 456, 474–75 (Md. 2013) (demonstrating an attorney who represented the White House "Gate Crashers" was disbarred for overbilling and misuse of trust account funds).

16. *See* Fed. R. Evid. 501 ("The common law —as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.").

17. *See, e.g.* Tex. R. Evid. 503(b)(1) (explaining the client's rights governing privilege).

18. *See, e.g.* Tex. R. Evid. 503(c) (expanding the reach of privilege to other authorized individuals).

19. *See, e.g.* Tex. R. Evid. 503(a)(5) (indicating the types of conversations covered under privilege).

20. Simon v. Northwestern Univ., 321 F.RD. 328, 333 (N.D. Ill. 2017).

21. Solin v. O'Melveny & Myers, 89 Cal. App. 4th 451, 457 (Cal. Ct. App. 2001) (citing Geragos v. Borer, No. B208827, 2010 WL 60639, at *1

(Cal. Ct. App. Jan. 11, 2010). The *Solin* 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. Solin v. O'Melveny & Myers, 89 Cal. App. 4th 451, 457 (Cal. Ct. App. 2001) (citing Geragos v. Borer, No. B208827, 2010 WL 60639, at *1 (Cal. Ct. App. Jan. 11, 2010).

22. Texas Emp'r Ins. Ass'n v. Wermske, 349 S.W.2d 90, 93 (Tex. 1961).

23. *See* Draper v. Garcia, 793 S.W.2d 296, 301 (Tex. App.—Houston [14th Dist.] 1990, no writ) (finding attorney owed no duty to a third party absent provity); Invictus Records, Inc. v. Am. Broad. Cos., Inc., 98 F.R.D. 419, 428 (E.D. Mich. 1982) (establishing attorney owes no duty of care to opposing party); Garrison Printing Co. v. Steven Mandarino Fine Arts, Inc., No. CIV.A. 86-2489, 1986 WL 13837, at *7 (E.D. Pa. Dec. 5, 1986) (dismissing breach of duty claims for failure to allege privity).

24. Dimensional Music Publ'g, LLP v. Kersey, 488 F. Supp 2d 643, 655 (E.D. Pa. 2006).

25. Dimensional Music Publ'g, LLP v. Kersey, 488 F. Supp 2d 643, 655 (E.D. Pa. 2006); *see also* Candela Entm't, Inc., v. Davis & Gilbert, L.L.P., 39 Misc.3d 1232(A), at *1 (N.Y. Sup. Ct. 2013) (granting Defendant's motion to dismiss for lack of privity).

26. Lopez v. Muñoz, Hockema & Reed, LLP, 22 S.W.3d 857, 868 (Tex. 2000).

27. Lopez v. Muñoz, Hockema & Reed, LLP, 22 S.W.3d 857, 866–67 (Tex. 2000).

28. Curb Records v. Adams & Reese, LLP, No. 98_31360, 203 F.3d 828, at *4 (5th Cir. Nov. 29, 1999) (unpublished opinion) (quoting Cattle Farm, Inc. v. Abercrombie, 211 So. 2d 354, 365 (La. Ct. App. 1968)).

29. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 663 (Tex. 1989) (holding client was entitled to relief in a malpractice action against attorney).

30. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

31. *See* Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, no writ) (finding sufficient evidence to support existence of attorney-client relationship).

32. Love v. The Mail on Sunday, No. CV05-7798, 2006 WL 4046168 (C.D. Cal. Apr. 17, 2006).

33. *Love v. The Mail on Sunday*, No. CV05-7798, 2006 WL 4046168, at *5 (C.D. Cal. Apr. 17, 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. *See* Appellant Brief, *In re Matter of Wilson*, No. B113259, 1998 WL 34351613, at *i (Cal. App. [1st Dist.] 1998) (requesting reversal of trial court orders).

34. First Nat'l Bank of Durant v. Trans Terra Corp., 142 F.3d 802, 808 (5th Cir. 1998).

35. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

36. First Nat'l Bank of Durant v. Trans Terra Corp., 142 F.3d 802, 808 (5th Cir. 1998).

37. See 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) (EP).

38. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).

39. Reznor v. J. Artist Management, Inc., 365 F. Supp. 2d 565, 580 (S.D.N.Y. 2005).

40. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616 (W.D. Texas 1998).

41. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).

42. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).

43. Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266, 270 (D. Conn. 1992).

44. *See* Ritchie v. Gano, No. 07 Civ. 7269(VM)(JCF), 2008 WL 4178152, at *7–8 (S.D.N.Y. 2008) (demonstrating the reasonable belief that an attorney-client relationship existed).

45. Ritchie v. Gano, No. 07 Civ. 7269(VM)(JCF), 2008 WL 4178152, at *7–8 (S.D.N.Y. 2008)

46. *See* Model Rules of Prof'l Conduct R. 1.6(a) (Am. Bar Ass'n 2018) (outlining duty of confidentiality with non-clients).

47. Model Rules of Prof'l Conduct R. 1.18 (Am. Bar Ass'n 2018).

48. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 (S.D. Tex. 1969) (explaining attorney general duties to clients once a relationship exists).

49. Croce v. Kurnit, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

50. Croce v. Kurnit, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

51. Restatement (Second) of Torts § 552(1) (Am. Law Inst. 1977).

52. *See* McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests, 991 S.W.2d 787, 793 (Tex. 1999) (establishing an attorney cannot give out evaluations, like opinion letters, unless through furthering representation and having client consent).

53. Source Entm't Grp. v. Baldonado & Assoc., P.C., No. 06–2706(JBS), 2007 WL 1580157 (D.N.J. May 31, 2007).

54. Source Entm't Grp. v. Baldonado & Assoc., P.C., No. 06–2706(JBS), 2007 WL 1580157, at *22–23 (D.N.J. May 31, 2007).

55. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1970); *also see* Bingham v. Zolt, 66 F.3d 553, 558 (2d Cir. 1995) (alleging violations of the RICO Act in the case of Bob Marley's estate).

56. Bingham v. Zolt, 66 F.3d 553 (2d Cir. 1994).

57. Bingham v. Zolt, 66 F.3d 553, 562 (2d Cir. 1994).

58. *See* Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (focusing on the type of conduct committed). Of course, other causes of action may arise from a lawyer's communication with third parties. *But see* Friend v. Paisely Park Enter., Inc., No. B1699989, 2004 WL 2211931, at *4 (Cal. Ct. App. Oct. 4, 2004) (affirming summary judgment in favor of Prince's attorney was affirmed against claims of defamation by Prince's ex-girlfriend).

59. See Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 54 Cal. Rptr. 2d 830, 833 (Cal. Ct. App. 1996) (highlighting when 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. Source Entm't Grp. v. Baldonado & Assoc., P.C., No. 06–2706(JBS), 2007 WL 1580157, at *22 (D.N.J. May 31, 2007).

60. Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 555 U.S. 148, 152–53 (2008).

61. Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 555 U.S. 148, 149 (2008).

62. Model Rules of Prof'l Conduct R. 1.6(a) (Am. Bar Ass'n 2018).

63. Model Rules of Prof'l Conduct R. 1.6(b) (Am. Bar Ass'n 2015).

64. *See* Tex. Disciplinary Rules Prof'l Conduct R.

1.05(c), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app A (exemplifying when a lawyer may reveal confidential information); Tex. R. Evid. 503(d) (demonstrating the different privileges that exist and exceptions to when privileges do not apply).

65. *See, e.g.* Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 302 (Cal. Ct. App. 2001) (holding an attorney has the ability to reveal confidential information to respond to material presented by client).

66. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05(e), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app A (showing the attorneys ability to reveal confidential information to prevent a crime that would result in death or substantial bodily harm); Model Rules of Prof'l Conduct R. 1.6(b)(2) (Am. Bar Ass'n 2015) (providing 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).

67. *See generally* John Grisham, Time To Kill (1988) (illustrating confidential communication between attorney and client).

68. *See generally* John Grisham, Time To Kill (1988) (showing, at time, the failure to reveal confidential can result reasonably certain death or substantial bodily injury).

69. *See* Miss. Rules of Prof'l Conduct R. 1.6(b)(1) (amended 2005) (explaining an attorney may reveal confidential information but is not required); Model Rules of Prof'l Conduct r. 1.6(b)(1) (Am. Bar Ass'n 2015) (showing the exceptions for revealing confidential information by a lawyer).

70. Constandt v. Cosby, 232 F.R.D. 494, 500 (E.D. Penn. 2006) (citing *In re* Westinghouse, 76 F.R.D. 47, 57 (W.D. Pa. 1977) (showing the belief of participation in criminal activity does not automatically remove the privilege) (emphasis added).

71. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, *5 (S.D.N.Y. Jan. 16, 2002) (demonstrating the importance that an attorney assures that client does not obstruct justice).

72. *See* Model Rules of Prof'l Conduct R. 1.7(a)(1) (Am. Bar Ass'n 2015) (explaining the lawyers duty to identify conflicts of interests); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (showing how an attorney needs to be open with all facts material to a client's representation).

73. Model Rules of Prof'l Conduct R. 1.7(a)(1) (Am. Bar Ass'n 2015) (emphasis added).

74. Model Rules of Prof'l Conduct R. 1.7(a)(1)(2) (Am. Bar Ass'n 2015); *see also* Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 43 Cal. Rptr. 2d 327, 331 (Cal. Ct. App. 1996) (explaining the different rules governing different times of representation).

75. Tenn. Rules of Prof'l Conduct R. 1.7 cmt. 6 (2018).

76. Tenn. Rules of Prof'l Conduct R. 1.7 cmt. 6 (2018).

77. Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 6, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app A.

78. *See also* Lott v. Ayres, 611 S.W.2d 473, 474 (Tex. App.—Dallas 1980, writ ref'd n.r.e.) (demonstrating the matter of representation needs to be "substantially related").

79. *In re* Marvel Entm't Grp., 140 F.3d 463, 467 (3d. Cir.1998).

80. *In re* Marvel Entm't Grp., 140 F.3d 463, 469 (3d. Cir.1998).

81. *In re* Marvel Entm't Grp., 140 F.3d 463, 477 (3d. Cir.1998).

82. *See* Model Rules of Prof'l Conduct R. 1.7(a)(2) (Am. Bar Ass'n 2015) (identifying the personal interest of an attorney as a potential conflict of interest if it is likely to materially limit the representation of a client).

83. N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 784 (2005); *see also* Model Rules of Prof'l Conduct R. 1.7(a)(2) (Am. Bar Ass'n 2015) (showing an attorney's personal interest in a matter could materially affect the representation).

84. Model Rules of Prof'l Conduct R. 1.7 cmt. 29 (Am. Bar Ass'n 2015).

85. Field v. Moore, 178 N.Y.S. 842, 843–844 (N.Y. App. Div. 1919).

86. *See* Field v. Moore, 178 N.Y.S. 842, 843–845 (N.Y. App. Div. 1919) (narrating how defendant sought to avoid paying plaintiff on the grounds of conflicting interests after the latter secured a re-negotiated contract with defendant's management company).

87. Field v. Moore, 178 N.Y.S. 842, 845 (N.Y. App. Div. 1919).

88. Flaherty v. Filardi, No. 03Civ.2167 (LTS)(HBP), 2004 WL 1488213, at *5 (S.D.N.Y. July 1, 2004).

89. Model Rules of Prof'l Conduct R. 1.7(b) (AM. BAR ASS'N 2015).

90. Model Rules of Prof'l Conduct R. 1.7(b) (AM. BAR ASS'N 2015).

91. Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 43 Cal. Reptr. 2d 327, 332 (Cal. Ct. App. 1995) ("'Something seems radically out of place if a lawyer sues one of the lawyer's own present clients [on] behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is appearently jeopordized, the client sued can obviously claim that the lawyer's sense of *loyalty* is askew.'" (emphasis in original) (citing Flatt v. Superior Ct., 885 P.2d 950, 956 (Cal. 1994) (citing Charles W. Wolfram, Modern Legal Ethics § 7.3.2 (1986)))).

92. *See* Mary Beth Robinson, *Putting Clients To The Test*, 84-NOV A.B.A. J. 80 (1998) (describing the steps of screening a potential client to avoid a troublesome representation).

93. *See* Cascades Branding Innovation, LLC v. Walgreen Co., No. 11 C 2519, 2002 WL 1570774, at *10 (N.D. Ill. May 3, 2012) (holding that because an attorney learned confidential information compromising to the other party during client negotiations, the attorney was disqualified from representing the other party); Zalewski v. Shelroc Homes, LLC, 856 F. Supp. 2d 426, 437 (N.D.N.Y. 2012) (mandating the disqualification of an attorney from representing an opposing party when the attorney could have been biased by privileged, sensitive information procured from client negotiations with the other party).

94. *See* Tex. Gov't Code Ann. § 82.065(a) (West 2018) (explaining the requirements for a contingency fee contract).

95. *See* Hoover Slovacek L.L.P v. Walton, 206 S.W.3d 557, 565 (Tex. 2006) (holding that a lawyer's employment agreement could not supersede Texas law on contingent fee contracts). *But see* Musburger, Ltd. V. Meier, 914 N.E.2d 1195, 1212–13 (Ill. App. Ct. 2009) (affirming the trial court's attorney fee award to discharged lawyer in quantum merit action against radio personality client when the contingency arrangement was not in writing because the client refused to sign updated agreement).

96. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 565 (Tex. 2006) (quoting Levine v. Bayne, Snell & Krause, Ltd. 40 S.W.3d 92, 96 (Tex. 2001)); *see also* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c), *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G, app. A (laying out the procedures to be followed by attorneys when explaining fees to clients in Texas); Model Rules of Professional Conduct r. 1.5(b) (Am. bar Ass'n 2015) (explaining the qualifications laid out for attorneys regarding fees).

97. Enochs v. Brown, 872 S.W.2d 312, 318 (Tex. App.—Austin 1994, no writ) (citing Mason v. Abel, 215 S.W.2d 377, 381–82 (Tex. Civ. App.—Dallas 1948, writ ref'd n.r.e.)) (holding that oral contingent fee agreements are voidable against whom it is being enforced).

98. *See* King v. Fox, 851 N.E.2d 1184, 1190 (N.Y. 2006) (holding that attorneys for former Lynyrd Skynyrd band member Edward King could

raise a ratification defense under New York law, recognizing that this defense would not be permitted in California and Texas).

99. Model Rules of Prof'l Conduct R. 1.8 (Am. Bar Ass'n 2015); Tennessee Rules of Prof'l Conduct R. 1.8 (2011).

100. *In re* Stover, 104 P.3d 394 (Kan. 2005).

101. *In re* Stover, 104 P.3d 394, 397–98 (Kan. 2005).

102. Ray v. Foreman, 441 F.2d 1266 (6th Cir. 1971).

103. *See* Ray v. Foreman, 441 F.2d 1266, 1267 (6th Cir. 1971) (narrating how the counsel for assassin, James Earl Ray obtained literary rights as the price of legal services).

104. *See* Taylor v. Wilson, 180 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2005, writ denied) (reversing the trial court's denial of motion to compel arbitration).

105. *See* Hogarth v. Edgar Rice Buroughs, Inc., No. 00 Civ. 9569(DLC), 2001 WL 515205, at *6 (S.D.N.Y. May 15, 2001) (denying a motion to disqualify an attorney because his previous representation of the moving party was unrelated to the present action).

106. *See* Nelson v. Anderson, 84 Cal. Rptr. 2d 753, 768 (Cal. Ct. App. 1999) (determining that a lawyer represented a corporation, but not its individual shareholders).

107. Eternal Preservation Associates, LLC v. Accidental Mummies Touring Company, LLC, 759 F. Supp. 2d 887, 894 (E.D. Mich. 2011).

108. *See* Arrow, Edelstein, & Gross, P.C. v. Rosco Productions, 581 F. Supp. 520, 524 (S.D.N.Y. 1984) (allowing a quantum merit recovery of attorney's 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); Filler v. Motta, No. CV–008532/RI, 35 Misc. 3d 1215(A), at *8 (N.Y. Civ. Ct. Apr. 2, 2012) (showing quantum merit recovery was allowed and involved the collection of proceeds from an album distribution by Select-O-Hits in Memphis).

109. *In re* Estate of Miller, 447 A.2d 549, 555 (N.J. 1982).

110. McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386 (Tenn. Ct. App. Apr. 20, 2001).

111. McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *6–7 (Tenn. Ct. App. Apr. 20, 2001).

112. King v. Fox, 851 N.E.2d 1184, 1192 (N.Y. App. 2006) (allowing the ratification of unconscionable fee agreements by clients with equal bargaining power, and full understanding of their rights as well as the ramifications and voidability of the contract).

113. *See* Parker v. Carnahan, 722 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, no writ) (mandating a duty to clarify known misunderstandings of whom an attorney represents).

114. *See* Richardson v. Artrageous, Inc., No. 93 Civ. 5221 (RPP), 1994 WL 97222, at *3 (D.C. N.Y. Mar. 8, 1994) (citing Croce v. Kurnit, 565 F. Supp. 884, 890 (S.D.N.Y 1982) *aff'd* 737 F.2d 229 (2d Cir. 1984)) (explaining that an attorney had a duty to inform a woman seeking and relying on his advice that she should seek independent counsel, as he did not represent her).

115. *See* Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd, n.r.e.) (holding that an attorney for one party was under no affirmative duty to deny he was an attorney for another party when there was no indication of misunderstanding).

116. *See* Hansell, Post, Brandon & Dorsey v. Fouler, 288 S.E.2d 227, 227–228 (Ga. Ct. App. 1981) (detailing how a law firm was sued for not informing the client of the statute of limitations); Hallstrom v. Feldman, No. B159016, 2003 WL 21744094, at *6 (Cal. Ct. App. July 29, 2003) (unpublished opinion) (reciting the misfortune of a client whose lawyer failed to inform her of a potential disability discrimination claim).

117. Model Rules of Prof'l Conduct r. 1.7(b) (Am. Bar Ass'n 2015).

118. Model Rules of Prof'l Conduct r. 1.7 cmt. 18 (Am. Bar Ass'n 2015); *see also* Cassidy v. Lourim, 311 F.2d 456, 460 (D. Md. 2004) (narrating a disastrous joint representation between famous singer's heirs and a record company).

119. Model Rules of Prof'l Conduct r. 1.7(b)(4) (Am. Bar Ass'n 2015).

120. Sharp v. Next Entm't, Inc., 78 Cal. Reptr. 3d 37 (Ct. App. 2008).

121. Sharp v. Next Entm't, Inc., 78 Cal. Reptr. 3d 37, 48 (Ct. App. 2008).

122. Sharp v. Next Entm't, Inc., 78 Cal. Reptr. 3d 37, 47 (Ct. App. 2008).

123. Burton v. Selker, 36 F. Supp. 2d 984 (N.D. Ohio 1999).

124. Burton v. Selker, 36 F. Supp. 2d 984, 985 (N.D. Ohio 1999).

125. Burton v. Selker, 36 F. Supp. 2d 984, 988 (N.D. Ohio 1999).

126. *See* Bar Ass'n of Greater Cleveland v. Nesbitt, 431 N.E.2d 323, 323–324 (Ohio 1982) (suspending attorney from the practice of law because of failure to disclose a finder's fee in a loan transaction).

127. *See* Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 453 (S.D.N.Y. 2000) (discussing of the "accommodation client" defense to a disqualification motion).

128. *See* Davis v. EMI Group, No. 12–cv–1602 YGR, 2013 WL 75781, at *1 (N.D. Cal. Jan. 4, 2013) (unpublished opinion) (disqualifying attorney and law firm who continued to represent defendant after plaintiff declined to waive conflict of interest); Kovac Media Group v. La Polt, No. B247579, 2015 WL 800380, at *1 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion) (demonstrating the vulnerability to suit for breach of duty and intentional interference an attorney opens when she represents, without waiver, clients with possible conflicting interests); *see also* Restatement (Third) of the Law Governing Lawyers, §§ 122, 132 (Am. Law Inst. 2001) (prohibiting a lawyer from representing a client in a same or similar matter which would be materially adverse to the interest of a former client without obtaining both clients' consent)

129. *See* Lessing v. Gibbons, 45 P.2d 258, 261 (Cal. Dist. Ct. App. 1935) (prevailing attorney in wrongful discharge case kept client constantly apprised of representation until the client's abrupt termination of contract); Crean v. Chozick, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd. n.r.e) (categorizing omissions in communication to client as malpractice).

130. Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 8, *reprinted in* Tex. Gov't Code Ann, tit. 2, subtit. G, app A ("[d]isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent.").

131. *See, e.g.* Proskauer Rose, LLP v. Blix Street Records, Inc., 384 F. App'x 622, 624 (9th Cir. 2010) (unpublished opinion) (affirming summary judgment for attorney who told client he wasn't looking forward to trial).

132. Model Rules of Prof'l Conduct r. 1.7(b) (Am. Bar Ass'n 2015).

133. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616 (W.D. Tex. 1998).

134. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 620 (W.D. Tex. 1998).

135. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 625 (W.D. Tex. 1998).

136. City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 625(W.D. Tex. 1998).

137. Lessing v. Gibbons, 45 P.2d 258 (Cal. Dist. App. 1935).

138. Lessing v. Gibbons, 45 P.2d 258, 261 (Cal. Dist. App. 1935).

139. Eternal Preservation Assocs., v. Accidental Mummies Touring Co.,

759 F. Supp. 2d 887 (E.D. Mich. 2011).

140. Eternal Preservation Assocs., v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 888 (E.D. Mich. 2011).

141. Eternal Preservation Assocs., v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 890 (E.D. Mich. 2011).

142. Eternal Preservation Assocs., v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 892 (E.D. Mich. 2011).

143. Eternal Preservation Assocs., v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 894 (E.D. Mich. 2011).

144. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 4, *reprinted in* Tex. Gov't Code Ann, tit. 2, subtit. G, app A (emphasizing that the problem with fundamental conflict—involving the interests of other clients or the attorney's self-interest—is that it effectively removes from consideration options and actions which should otherwise be pursued on behalf of a client).

145. *See* Lott v. Ayres, 611 S.W.2d 473, 474 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (examining a malpractice claim against an attorney who represented a wife in a damage suit against a medical care provider and then later in her divorce from husband who then claimed a conflict existed based on knowledge from previous representation).

146. *See* Model Rules of Prof'l Conduct r. 1.16 (Am. Bar. Ass'n 2015) (prohibiting an attorney from accepting or continuing representation of a client when it violates other model rules, including improper conflict of interest).

147. Cassidy v. Lourim, 311 F. Supp. 2d 456 (D. Md. 2004).

148. Cassidy v. Lourim, 311 F. Supp. 2d 456, 460 (D. Md. 2004).

149. TufAmerica, Inc. v. Codigo Music LLC, No. 11 Civ. 1434 (ER), 2017 WL 3475499, at *7 (S.D.N.Y. Aug. 11, 2017).

150. Kovac Media Group, Inc. v. La Polt, No. B247579, 2015 WL 800380, at *1 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

151. Kovac Media Group, Inc. v. La Polt, No. B247579, 2015 WL 800380, at *2 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

152. Kovac Media Group, Inc. v. La Polt, No. B247579, 2015 WL 800380, at *2 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion); *see also* Cal. Civ. Proc. Code § 425.16 (West. 2018) (codifying California's Anti-SLAPP motion statute).

153. Kovac Media Group, Inc. v. La Polt, No. B247579, 2015 WL 800380, at *12 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

154. Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 453–455 (S.D.N.Y. 2000) (finding that in this case Time Warner's motion to disqualify should be denied absent a showing of prejudice).

155. Davis v. EMI Group, No. 12–cv–1602 YGR, 2013 WL 75781, at *5 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

156. Davis v. EMI Group, No. 12–cv–1602 YGR, 2013 WL 75781, at *1 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

157. Davis v. EMI Group, No. 12–cv–1602 YGR, 2013 WL 75781, at *5 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

158. Model Rules of Prof'l Conduct R. 1.9 (Am. Bar Ass'n 2018).

159. Tex. Disciplinary Rules of Prof'l Conduct R. 1.09, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

160. T.C. Theatre Corp. v. Warner Bros Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

161. T.C. Theatre Corp. v. Warner Bros Pictures, Inc., 113 F. Supp. 265, 286–69 (S.D.N.Y. 1953); *see also* Team Obsolete, Ltd. v. A.H.R.M.A. Ltd., No. 01CV1574(ILG(RML), 2006 WL 2013471, at *6–*7 (E.D.N.Y. July 18, 2006) (denying plaintiff's motion for disqualification of attorney in the absence of a "substituted relationship" or breach of fiduciary duty); Texaco, Inc. v. García, 891 S.W.2d 255, 256 (Tex. 1995) (determining district court judge abused his discretion in denying Texaco's motion to disqualify plaintiff's attorney–who had worked with Texaco's long-time counsel–under Rule 1.09, and granting mandamus).

162. *See* Tex. Disciplinary Rule Prof'l Conduct R 1.09, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . ."); *see also* Model Rule of Professional Conduct 1.9 (Am. Bar Ass'n 2018) ("[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

163. *See generally* Private Movie Co., Inc. v. Anderson, No. BC136805, 1997 WL 465467 (Cal. Ct. App. May 27, 1997) (voiding entertainment contract because attorney had not disclosed conflict of interest to Pamela Anderson prior to negotiating the contract and not disclosing the substantive terms of the agreement).

164. *Compare* The Florida Bar v. Keasler, 133 So. 3d 528, 528 (Fla. 2014) (approving and adopting the report of the Florida State Bar referee and suspending Frank Ray Keasler, Jr. for three years and ordering restitution), *with* Daniel Winters, *Travolta's Laywer Dances to a New Tune*, Folknews (Jan. 17, 2014) https://www.lawyersweekly.com.au/folklaw/15036-travolta-s-lawyer-dances-to-a-new-tune [http://perma.cc/E6A5-JEU8] (reporting the conflict of interest for Keasler when representing a set of clients, and desire of John Travolta to stay out of the litigation against his attorney).

165. Model Rules Prof'l Conduct R. (Am. Bar Ass'n 2018).

166. Model Rules Prof'l Conduct R. (Am. Bar Ass'n 2018).

167. *See* Model Rules Prof'l Conduct R. 1.9(c) ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.") *But see* Canal+ Image UK Ltd. v. Lutvak, 792 F .Supp. 2d 675, 688–89 (D.C. N.Y. 2011) (mem. op.) (applying New York Rule of Professional Conduct 1.10 and finding Loeb & Loeb was not tainted by the confidential information held by a former member of the firm in order to be disqualified from representation of a client with an adverse position to a former client).

168. Model Rules Prof'l Conduct R. 1.9(b)(2) (Am. Bar Ass'n 2018); *see also* Tex. Disciplinary Rule Prof'l Conduct R 1.09 cmt. 4, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("Paragraph (a)'s second limitation on undertaking a representation against a former client is that it may not be done if there is a reasonable probability that the representation would cause the layer to violate the obligations owed the former client under Rule 1.05."); Cremers v. Brennan, 764 N.Y.S.2d 326, 331 (N.Y. 2003) (holding defendant's prior attorney-client relationship with plaintiff's counsel discrete and unrelated to cause of action—and thus, insufficient to warrant disqualification of plaintiff's attorney or law firm).

169. *In re* American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992).

170. *In re* American Airlines, Inc., 972 F.2d 605, 614 (5th Cir. 1992) (quoting Johnston v. Harris Cty. Flood Control Dist., 869 F.2d 1565, 1569 (5th Cir. 1989).

171. *In re* Yarn Processing Patent Validity Litigation, 530 F2d 83 (5th Cir. 1976).

172. *In re* Yarn Processing Patent Validity Litigation, 530 F2d 83, 91 (5th Cir. 1976); *see also*. Decaview Dist. Co. Inc. v. Decaview Asia Corp., No. C99-02555 MJJ (ME) 2000 WL 1175583, at *16 (N.D. Cal. Aug. 14 2000) ("[Allowing] a third party standing if the litigation will be so infected by the presence of opposing counsel so as to impact the moving party's interest in a just and lawful determination of its claims." (citing *In*

*re* Appeal of Infotechnology, Inc., 583 A2d 215, 21819 (Del. 1990)).

173. Tex. Disciplinary Rule Prof'l Conduct R 1.09 cmt. 4B, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

174. Prisco v. Westgate Entertainment, Inc, 799 F. Supp. 266 (D. Conn.1992).

175. Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266, 268 (D. Conn. 1992) *But see* Team Obsolete, Ltd. v. A.H.R.M.A., Ltd., No. 01 CV 1574(ILG)(RML), 2006 WLL 2013471, at *9 (E.D.N.Y. July 18, 2006) (attorney was not disqualified because the breach of a fiduciary relationship was not alleged and a substantial relationship was not shown).

176. Cremers v. Brennan, 764 N.Y.S.2d 326 (N.Y. Civ. Ct. 2003).

177. Cremers v. Brennan, 764 N.Y.S.2d 326, 330 (N.Y. Civ. Ct. 2003).

178. Cremers v. Brennan, 764 N.Y.S.2d 326, 329 (N.Y. Civ. Ct. 2003).

179. NCNB Texas Nat. Bank v. Coker, 765 S.W.2d 398 (Tex. 1989)

180. NCNB Texas Nat. Bank v. Coker, 765 S.W.2d 398, 400401 (Tex. 1989); *see also* Metropolitan Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 321 (Tex. 1994) (concluding district court did not abuse discretion by finding no substantial relationship existed between former and current represented clients); Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, no pet.) ("An attorney should not accept representation adverse to a former client if such representation deals with matters substantially related to the factual matters involved in the former representation." (citing Tex. Disciplinary Rule Prof'l Conduct R. 1.09(a)(3) *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A); Tex. Disciplinary Rule Prof'l Conduct R. 1.09 cmt. 4, 8, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (noting some courts, though not required to do so under Rules 1.05 or 1.09, may disqualify a lawyer for representing a present client against a former client if the "substantial relationship" test is met); Model Rules of Prof'l Conduct r. 1.09(b) (Am. Bar Ass'n 2018) ("A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.").

181. Tex. Disciplinary Rule Prof'l Conduct R 1.06 cmt. 11, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A; *see also* Bashara v. Baptist Mem'l Hosp. Sys., 685 S.W.2d 307, 308 (Tex. 1985) (disallowing a conflicted attorney to recover fees under the doctrine of quantum meruit).

182. Bier v. Grodski & Olecki, No. B204887, 2009 WL 1549546 (Cal. Dist. Ct. App., June 4, 2009).

183. Bier v. Grodski & Olecki, No. B204887, 2009 WL 1549546, at *11 (Cal. Dist. Ct. App., June 4, 2009).

184. Model Rules of Prof'l Conduct r. 1.4(b) (Am. Bar Ass'n 2018); *see also* N.Y. State Bar Ass'n Prof'l Ethics Comm., Formal Op. 2017-7 (2017) ("When a joint representation does not involve a conflict of interest between the joint clients that would require the lawyer to obtain the client's 'informed consent' to the joint representation, the lawyer must nevertheless explain the implications of the joint representation to the extent 'reasonably necessary to permit the client[s] to make informed decisions regarding the representation.").

185. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

186. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

187. Victory Lane Productions, LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 77678 (S.D. Miss. 2006).

188. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

189. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 781 (S.D. Miss. 2006).

190. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 782 (S.D. Miss. 2006). *But see* Frazee v. Proskauer Rose, LLP, No. B254569, 2016 WL 6236400, at *6 (Cal. Ct. App. Oct. 25, 2016) (finding no harm and therefore no foul arising out from the law firm's joint representation).

191. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470 (N.Y. Sup. Ct. July 13, 2005).

192. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470, at *1 (N.Y. Sup. Ct. July 13, 2005).

193. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470, at *12 (N.Y. Sup. Ct. July 13, 2005).

194. Tex. Disciplinary Rule Prof'l Conduct R 1.08(f), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A; Model Rules of Prof'l Conduct r. 1.08(g) (Am. Bar Ass'n 2018); *see also* 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) (discussing the duty owed by attorney to clients in regard to aggregate settlements).

195. Model Rules of Prof'l Conduct R. 1.08(g) (Am. Bar Ass'n 2018).

196. *See* Model Rules of Prof'l Conduct T. 1.9(b) (Am. Bar Ass'n 2018) ("A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person . . . .); *see also* Allen v. Acad. Games Leagues of Am., Inc., 831 F.Supp. 785, 78789 (C.D. Cal. 1993) (finding no conflict of interest for when the law student had not passed the bar, but carrying over the knowledge and experience gained pre-licensing to disqualify lawyer and firm after the lawyer gained licensure).

197. Nat'l Med. Enter., Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996).

198. Nat'l Med. Enter., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996); *see also In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819, 824 (Tex. 2010) (establishing there is an "irrebuttable presumption that the lawyer obtained confidential information during representation" and if a lawyer moves to a firm representing opposing party in an ongoing litigation, "a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm").

199. National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996); *see also* Flatt v. Superior Court, 885 P.2d 950, 95960 (Cal. Dist. Ct. App.1994) (examining the "insoluable ethical dilemma raised by imposing on a fiduciary to provide advice against the interests of existing client"); Pound v. DeMera DeMera Cameron, 36 Cal. Rptr. 2d 933, 928 (Cal. Dist. Ct. App. 2005) (suggesting a presumption of an attorney's access to privileged and confidential matters relevant to a certain representation extends to disqualify entire firm).

200. *P&M Electric Co. v. Godard*, 478 S.W.2d 79 (Tex. 1972), citing *T.C. Theatre Corp. v. Warner Bros. Pictures*, *supra*.

201. *See* Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein, & Gross, P.A., No. L-1469-99, 2009 WL 2045259, at *11(N.J. Sup. Ct Feb. 11, 2009) (announcing law firm not vicariously liable for malpractice by lawyer who represented client before joining the firm and billed client directly).

202. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 201 (Tex. 2002).

203. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 203 (Tex. 2002).

204. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 94-388 (1994) (emphasizing clients are entitled to know whether a second firm, currently affiliated with the first, represents interest adverse to their

interests); Mustang Enter., Inc. v. Plug-in Storage Systems, Inc., 874 F.Supp. 881, 88990 (N.D. Ill. 1995) ("Under the circumstance here, where two firms involved have chosen to hold their 'affiliated firm' relationship out to the world without limitation," should expect to have "all of the same principles and policies that have led courts to that approach operate with equal force.").

205. *See* Source Needed (EP).

206. *See* Tex. Comm. On Prof'l Ethics, Op. 515, 59 Tex. B.J. 646, ? (1996) (establishing the rules regarding an attorney entering into an agreement with a contract lawyer placement agency).

207. Model Rules of Prof'l Conduct r. 5.7 cmt. 3 (Am. Bar Ass'n 2018) ("Even when the law-related and legal services are provided in circumstance that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer . . . .).

208. *See, e.g.*, Occidental Chemical, Corp. v. Brown, 877 S.W.2d 27, 29 (Tex. App.—Corpus Christi-Edinburg 1994, no.writ) (reviewing whether a law firm should be disqualified after a secretary who previously worked for the firm representing the opposing).

209. *See* Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994) (citing Coker v. , 765 S.W.2d 398, 400 (Tex. 1989) ("We agree that a paralegal who has actually worked on a case must be subject to the presumption set out in *Coker*, that is, a conclusive presumption that confidences and secretes were imparted during the course of the paralegal's work on the case.")

210. Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 835 (Tex. 1994).

211. *See* Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 476 (Tex. 1994) (reiterating the test for disqualification is a genuine threat of disclosure—not an actual, materialized disclosure).

212. *In re* Am. Home Prod. Corp., 985 S.W.2d 68, 75 (Tex. 1998).

213. *In re* Am. Home Prod. Corp., 985 S.W.2d 68, 75 (Tex. 1998) (quoting Phoenix Founders v. Marshall, 887 S.W.2d 831, 835 (Tex. 1994).

214. *See* Kassis v. Teacher's Inc. and Annuity Ass'n, 717 N.E.2d 674, 678 (N.Y. 1999) ("In [a] factual scenario, with presumption rebutted, a "Chinese Wall" around the disqualified lawyer would be sufficient to avoid firm disqualification."). *But see* Higdon v. Superior Court, 227 Rptr. 588, 595 (Ct. App. Cal. 1991) ("California precedent has not rushed to accept the concept of disqualifying the attorney but not the firm, nor has it enthusiastically embarked upon erecting Chinese walls." (quoting Klien v. Superior Court, 244 Cal. Rptr. 226 (Cal. Dist. Ct. App. 1988)).

215. *See* Model Rules of Prof'l Conduct R. 1.8(k) (Am. Bar Ass'n 2018) ("While lawyers associated in a firm, a prohibition . . . that applies to any one of them shall apply to all of them."); Model Rules of Prof'l Conduct R. 1.10 (Am. Bar Ass'n 2018) (establishing associated lawyers in a firm cannot represent clients if they would be prohibited from doing so in solo practice); *see also* W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821, 825 (D. Conn. 1961), aff'd. *per curiam* 302 F.2d 268 (2d Cir. 1962) (stating the court has a duty above that of counsel to uphold the integrity and good name of the bar and of the administration of law); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 30001 (Tex. App.—Dallas 1998, orig. proceeding) (noting presumption that an attorney who gains confidences of a client will share them with other member of the attorney's firm).

216. Phoenix Founders, Inc v. Marshall, 887 S.W.2d 831, 836 (Tex. 1994) (citing *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. Rev. 677, 71115 (1980)).

217. Tenn. Rules of Prof'l Conduct R. 2.2 (2011).

218. Tex. Disciplinary Rule Prof'l Conduct R 1.07(a)(1),(2),(3), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

219. *See* Tex. Disciplinary Rule Prof'l Conduct R 1.07 cmt. 2, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence the requirement of written consent. Moreover, a lawyer should not permit his personal interest to influence his advice relative to a suggestion by his client that additional counsel be employed.").

220. *See* Tex. Disciplinary Rule Prof'l Conduct R 1.07 cmt. 6, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("With regard to the attorney-client privilege, the general rule is that between commonly represented clients the privilege does not attach."); *see also* Tex. R. Evid. 503(d)(5) ("If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (c) is relevant to a matter of common interest between the clients . . ." the information is admissible).

221. Tex. Disciplinary Rule Prof'l Conduct R 1.07 cmt. 6, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

222. Tex. Disciplinary Rule Prof'l Conduct R 1.07(b), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

223. Tex. Disciplinary Rule Prof'l Conduct R 1.07 cmt. 9, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

224. Tex. Disciplinary Rule Prof'l Conduct R 1.07(c), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A; Model Rules of Prof'l Conduct r. 1.16(a)(1) (Am. Bar Ass'n 2018).

225. Tex. Disciplinary Rule Prof'l Conduct R 1.07 cmt. 6, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A.

226. *See* Model Rules of Prof'l Conduct R. 1.8 (Am. Bar Ass'n 2015) (stating a lawyer shall not enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to the client unless the transaction and terms of the agreement are fair and reasonable and fully disclosed in writing; client is advised to seek third-party counsel; and client gives informed consent).

227. *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) ("There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney").

228. *See* Felton v. Le Breton, 28 P. 490, * (Cal. 1891) (stating an attorney must "show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect" and "the burden of proof is always upon the attorney to show that the dealing was fair and just").

229. *See* Greene v. Greene, 436 N.E.2d 496, * (Cal. Ct. App. 1982) (explaining that business agreements with clients may be invalid if it appears the attorney "got the better of the bargain," unless the attorney can show that the client's confidence was not exploited and the client was fully aware of the consequences).

230. *See* Beets v. Scott, 65 F.3d 1258, 1261, 1299 (5th Cir. 1995) (finding assignment of media rights from a criminal defendant to attorney's son as payment of attorney's fee posed only a potential conflict of interest); Black v. Sussman, No. M2010-01810-COA-R3-CV, 2011 WL 2410237, at *12 (Tenn. Ct. App. June 9, 2011) (remanding malpractice action by Clint Black against his CPA/Partner to trial court to determine extent of Black's reliance on representations of partnership);

231. *See* Gold v. Greenwald, 247 Cal. App. 2d 296, 299, 313 (Cal. Ct. App. 1966) (holding attorney's failure to fully disclose the legal consequences and the rights and liabilities under the agreement created a presumption of undue influence and lack of consideration, due to his fiduciary relationship with defendant).

232. Model Rules of Prof'l Conduct R. 1.8(a) (Am. Bar Ass'n

2018).

233. Model Rules of Prof'l Conduct R. 1.8 cmt. 2 (Am. Bar Ass'n 2018).

234. Unichappell Music, Inc. v. Modrock Prod., LLC, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at *1 (C.D. Cal. Mar. 16, 2016).

235. Unichappell Music, Inc. v. Modrock Prod., LLC, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at *4–5 (C.D. Cal. Mar. 16, 2016).

236. Unichappell Music, Inc. v. Modrock Prod., LLC, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at *17 (C.D. Cal. Mar. 16, 2016).

237. *See* Small Bus. Bodyguard, Inc. v. House of Moxie, Inc., 230 F. Supp. 3d 290, * (S.D.N.Y. 2017) (granting attorney's motion for summary judgment because an essential element for New York malpractice claims—an assertion that attorney's actions caused pecuniary loss—was not met).

238. Small Bus. Bodyguard, Inc. v. House of Moxie, Inc., 230 F. Supp. 3d 290, * (S.D.N.Y. 2017).

239. Lenhoff v. Svatek, TAC 20-99, 2000 WL 36111604 (Cal. Dep't Indus. Relations 2000).

240. Lenhoff v. Svatek, TAC 20-99, 2000 WL 36111604, at *1–2 (Cal. Dep't Indus. Relations 2000)

241. Lenhoff v. Svatek, TAC 20-99, 2000 WL 36111604, at *3 (Cal. Dep't Indus. Relations 2000).

242. *See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.02, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."); Tex. Disciplinary Rules Prof'l Conduct R. 1.03, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."); Tex. Disciplinary Rules Prof'l Conduct R. 1.04, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee."); Tex. Disciplinary Rules Prof'l Conduct R. 1.06, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (covering conflicts of interest, such as representing opposing parties to the same litigation and withdrawing in cases of multiple representation that is or becomes improper under the Rule); Tex. Disciplinary Rules Prof'l Conduct R. 1.07, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (advising lawyers to avoid conflicts of interest unless "the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients."); Tex. Disciplinary Rules Prof'l Conduct R. 2.01, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); Tex. Disciplinary Rules Prof'l Conduct R. 2.02, *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A ("A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless: (a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and (b) the client consents after consultation."); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000) ("In providing legal services to the client's business while owning its stock, the lawyer must take care to avoid conflicts between the client's interests and the lawyer's personal economic interests as an owner.").

243. *See* Lopez v. Muñoz, Hockema & Reed, LLP, 22 S.W.3d 857, * (Tex. 2000) ("[A] law firm may breach its fiduciary duty if it provides little or no services, but still collects a substantial part of its clients recovery in the face of a pending settlement."); s*ee also* N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 1988-6 (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); N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 621 (1991) (reviewing the opinion on client contracts with attorney-owned businesses; concluding that real estate attorneys may not employ attorney-owned abstract company for their clients); Tex. Comm. On Prof'l Ethics, Op. 643, (2014) (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 . . . .").

244. *See In re* O'Brien, 351 F.3d 832, 838–40 (8th Cir. 2003) (describing facts such as appear in this case, 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).

245. *See In re* Pac. Pictures Corp., 679 F.3d 1121, 1127 (9th Cir. 2012) ("If clients themselves divulge such information to parties, chances are that they would also have divulged it to their attorneys.").

246. Doris Day v. Rosenthal, 170 Cal. App. 3d 1125 (Cal. Ct. App. 1985), *cert. denied*, 975 U.S. 1048 (1986).

247. Doris Day v. Rosenthal, 170 Cal. App. 3d 1125, 114252(Cal. Ct. App. 1985), *cert. denied*, 975 U.S. 1048 (1986).

248. See *In Matter of* Crane, No. 84-O-14252 & 84-O-14253, 1990 WL 608663, at *145(Rev. Dep't. St. Bar of Cal. Aug. 3, 1990) (discussing a case where 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).

249. *See* Humphrey v. Columbia Records, 124 F.R.D 564, 569 (S.D.N.Y. Mar. 17, 1989) ("Noble [attorney] has handled this case unprofessionally both in practice and in principle. . . . This case had no sound factual or legal foundation and should not have been brought. . . . While an attory is not required to conserve his opponent's expenditures, he or she is at risk when the attorney deliberately causes an opponent to expend needlessly, as was done here."). In *Comden v. Superior Court*, the court disqualified Doris Day's attorney because a member of his law firm was a fact witness and the client's right to counsel "must yield . . . to considerations of ethics which run to the very integrity of the judicial process." Comden v. Superior Court, 20 Cal. 3d 906, 915 (Cal. 1978) (en banc) (quoting Hull v. Celanese Corp., 512 F.2d 568, 572 (2d Cir. 1975).

250. *In Matter of* Crane, No. 84-O-14252 & 84-O-14253, 1990 WL 608663, at *145 (Rev. Dep't. St. Bar of Cal. Aug. 15, 1990); People v. Davis, 911 P.2d 45, 47–8 (Colo. 1996).

251. *See, e.g.*, A to Z Assoc. v. Cooper, 613 N.Y.S.2d 512, 519 (N.Y. Sup. Ct. 1993) (concluding, as a matter of law, administrative disciplinary findings against a lawyer may be used, to the extent applicable, as dispositive of those issues in a civil action) (citing Ryan v. N.Y. Tele. Co., 62 N.Y.2d 494, 499 (N.Y. 1984) and Johnson v. Penn. Mut. Life Ins. Co., 184 A.D.2d 230, 231 (N.Y. App. Div. 1992))..

252. A to Z Assoc. v. Cooper, 613 N.Y.S.2d 512 (N.Y. Sup. Ct. 1993)

253. A to Z Assoc. v. Cooper, 613 N.Y.S.2d 512, 515 (N.Y. Sup. Ct. 1993)

254. *See* Bingham v. Zolt, 66 F.3d 553 , 560 (2d Cir. 1995) (affirming district court's award of damages to Bob Marley estate administrator for breach of fiduciary duty, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act [RICO] (citing Long Island Lighting Co. v. IMO Indust., 6 F.3d 876, 887 (2d. Cir.1993)).

255. Source Needed

256. *See* Streber v. Hunter, 221 F.3d 701, 727 (5th Cir. 2000) (EP).

257. *See* Brown v. Woolf, 554 F, Supp. 1206, 1209 (S.D. Ind. 1983)

(concerning sports agent/attorney's lawsuit for constructive fraud arising out of contract negotiations with professional hockey team).

258. *See* Curb Records v. Adams & Reese, LLP, No. 98-31360, 203 F.3d 828, at *6–7 (5th Cir. 1999) (unreported opinion under FED. R. APP. PRO. 32.1) (holding an inherent and nondelegable duty exists under Louisiana law, requiring local counsel to directly inform client of any known instances of malfeasance or misfeasance on the part of lead counsel); *see also* HNH Int'l., Ltd. v. Pryor Cashman Sherman & Flynn, LLP, 63 A.D.3d 534, 534–35* (N.Y. App. Div. 2009) (reversing the court's dismissal of claims based on negligent advice regarding common law copyright issues on appeal, and allowing the case to go forward).

259. Source Needed

260. *See* Hanlin v. Mitchelson, 794 F.2d 834, 838 (2d Cir. 1996) (citing Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983) and Eastway Const. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985) (denying negligence claims against celebrity palimony attorney Marvin Mitchelson in summary judgment, affirmed in part and reversed in part).

261. *See* Even St. Prod., Ltd. v. Shkat Arrow Hafer & Weber, LLP, 643 F. Supp. 2d 317, 323 n. 5 (S.D.N.Y. 2008) (Need an better EP here).

262. *See* Deep v. Boies, 53 A.D.3d 948, 949–51 (N.Y. App. Div. 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. Deep v. Boies, 53 A.D.3d 948, 949–51 (N.Y. App. Div. 2008); *see also* Resendez v. Maloney, No. 01-08-00954-CV, 2010 WL 5395674, at * (Tex. App.—Houston [1st Dist.] 2010, pet. filed) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) and Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no. writ) ("The plaintiff must demonstrate that any alleged damages, including attorney's fees, were proximately caused by the breach of a duty by the defendant.").

263. *See* Snorkel Prod., Inc. v. Beckman Lieberman & Barandes, LLP, 62 A.D.3d 505, 506 (N.Y. App. Div. 2009) (holding attorney's negligent advice regarding lapse date of option to produce musical drama co-written by Barry Manilow was not the proximate cause of damages, except for defense costs in arbitration action brought by Marlow to terminate rights); Jackson v. Broad. Music, Inc., No. X 04 CV 5948(TPG), 2006 WL 250524, ay * 9 (S.D.N.Y. 2006) (granting motion to dismiss fraud case against William Krasilovsk because plaintiff did not read agreement before signing it, so cannot prove reasonable reliance); Viner v. Sweet, 12 Cal. Rptr. 3d 553, 538 (Cal. Rptr. 3d 2004) (reversing judgment for plaintiff-owners of audio book company 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).

264. *See* Cappetta v. Lippman, 913 F. Supp. 302, 307 (S.D.N.Y. 1996) (allowing wrestling announcer recovery of only the fees for hiring new law firm, and denying other compensatory and punitive damages).

265. *See* Spera v. Fleming, Hovenkamp & Grayson, PC, 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing various circumstances where "damages are an essential element" of the claim, including negligence per se and fraudulent misrepresentation).

266. *See, e.g. Sherwood v. South*, at 809 (EP).

267. *See* Parker v. Carnahan, 722 S.W.2d 151, 151, 159 (Tex. App.—Texarkana 1989, no writ) (remanding case to district court to determine whether attorneys were negligent in failing to advise former wife of client that they were not representing her interests).

268. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470, at *3 (N.Y. Sup. Ct. July 13, 2005). ("An action for contribution is predicated upon a third party's breach of a duty owed to either the plaintiff or the defendant." (citing Sommer v. Fed. Signal Corp., 79 N.Y.2d 540 (N.Y. 1992)).

269. *See* Blanks v. Shaw, 89 Cal. Rptr. 3d 710, (Cal. Ct. App. 2009) (EP); Even St. Prod., Ltd. v. Shkat Arrow Hafer & Weber, LLP, , 643 F. Supp. 2d 317, 323 n. 5 (S.D.N.Y. 2008) (EP); Proskauer Rose, LLP v. Blix St. Records, Inc., 384 F. App. 622, pincite (9th Cir. 2010) (concluding "Blix Street records failed to establish the elements of causation and damages critical to a malpractice claim.").

270. *See* Viner v. Sweet,12 Cal. Rptr 3d 533, 537 (Cal. Ct. App. 2004) (We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm." (quoting Viner *II*).

271. *See, e.g.*, *See* McDonnell Dyer PLC v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *7 (Tenn. Ct. App. Apr. 20, 2001) ("[H]olding that malfeasance or breach of faith by an attorney against his client during the performance of services may support a complete forfeiture of fees" (citing Crawford v. Logan, 656 S.W.2d 360, (Tenn. 1983)).

272. McDonnell Dyer PLC v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *7 (Tenn. Ct. App. Apr. 20, 2001)*; see also In re* Marvel Entertainment Group, Inc., 140 F.3d 463, pincite (3d Cir. 1998) (EP).

273. *See* McDonnell Dyer PLC v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *6 (Tenn. Ct. App. Apr. 20, 2001) (explaining the importance of taking into account different circumstances when evaluating each fee forfeiture case).

274. *See* McDonnell Dyer PLC v. Select-O-Hits, Inc., No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *6 (Tenn. Ct. App. Apr. 20, 2001) ; *see also* TEX. CIV. PRAC. & REM. CODE ANN., Sec. 41.011(a) (West 1997) ("In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of 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.").

275. *See* Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.–Houston [14th Dist.] 1997, pet. granted), *rev'd in part sub nom. Burrow v. Arce*, 997 S.W.2d 229, 245–46 (Tex. 1999) (citing *S.V. v. R.V.,* 933 S.W.2d 1, 34 (Tex.1996) (J. Owen, dissenting) (citing *Courseview, Inc. v. Phillips Petroleum Co.,* 158 Tex. 397, 312 S.W.2d 197, 205 (1Tex. 958)); *Murphy v. Canion,* 797 S.W.2d 944, 948 (Tex. App.—Houston [14th Dist.] 1990, no writ) (citing *Johnson v. Peckham,* 132 Tex. 148, 120 S.W.2d 786, 788 (1938)).). ("When parties enter a fiduciary relationship, each consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity.").

276. Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.–Houston [14th Dist.] 1997, pet granted), *rev'd in part sub nom. Burrow v. Arce*, 997 S.W.2d 229, 245–46 (Tex. 1999).

277. *See* Sanchez v. MTV Networks, No. 10 Civ. 7854(TPG), 2012 WL 2094047, PINCITE (S.D.N.Y. June 11, 2012), *aff'd* Sanchez v. MTV Networks, Nos. 12-1860-cv, 12-2670-cv, 12-2671-cv, 2013 WL 1876599 (2d Cir. May 7, 2013) (deferring to district court's findings that attorney's fee of a portion of settlement was reasonable and that attorney was entitled to intervene to defend fee award); Filler v. Motta, 951 N.Y.S.2d 85, PINCITE (N.Y. Civ. Ct. 2012) (allowing lawyer to recover judgment for work performed under a theory of quantum meruit).

278. *See* McDonnell Dyer PLC v. Select-O-Hits, Inc.,

No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *6 (Tenn. Ct. App. Apr. 20, 2001) (awarding fees in the amount of $89,685.00 to music distribution company's attorney).

279. *See In re* Miller, 447 A.2d 549, 555–56 (N.J. 1982) ("Especially where, as here, the agreement in question was drawn by a party who had a greater sophistication in drafting legal documents, the Court must examine all the evidence with an eye toward determining the true intent of the parties.").