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ETHICS AND THE ART OF ENTERTAINMENT LAW

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WHY ANOTHER ETHICS PIECE?

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

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

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

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

CONFIDENTIAL AND PRIVILEGED INFORMATION

The American Bar Association (ABA) adopted the Model Rules in 1983 to serve as a model for the "regulatory law governing the legal profession."[5] In Texas, as in most states, the state bar has promulgated rules in the TDRPC for the protection of clients and their confidences. These rules establish a "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action."[6] The rules are also cited by the courts as "persuasive authority outside the context of disciplinary proceedings.[7]

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

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

Privileged Information and the Rules of Engagement

In federal cases, privileges are governed by the common law as interpreted by the federal courts. However, when a state cause of action is involved, the privilege is usually determined by state law.[11] A client can refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating an attorney's legal services.[12] In addition to the client, the client's guardian, representative, or attorney can also claim this privilege on the client's behalf.[13] These confidential communications can include communications between the client or her representatives and her attorney or the attorney's representatives, the client and her representatives, or the attorney and his representatives.[14] A "representative of the client" includes "any other person who, for the purpose of effectuating legal representation for the client, makes or receives ***10** a confidential communication while acting in the scope of employment for the client."[15]

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

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

Attorneys may unknowingly create an attorney-client relationship with a person just by consulting with him or her on a matter. An agreement to form an attorney client-relationship may be implied from the conduct of the parties.[24] However, there must be objective indications of the meeting of the minds (a.k.a. the "kook test").[25] For example, in *Love v. Mail on Sunday*, Brian Wilson's motion to disqualify Beach Boys band member Mike Love's attorney was denied after the court found that no

attorney-client relationship existed and, even if it did, the alleged matters were not substantially related.[26] Whether the contract is express or implied, there must be a meeting of the minds.[27] "Moreover, the relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously."[28]

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

An attorney and a client can create an attorney-client relationship either explicitly or implicitly by conduct manifesting an intention to create the attorney-client relationship. In *City of El Paso v. Salas-Porras Soule*, the court reviewed the law firm billing statements and held that an attorney-client relationship existed even though the "client" company was not billed and the firm did not meet with representatives of the company.[31] The court reasoned that the billing statements were replete with references, conferences, and tax planning sessions made on behalf of the company. Also, when an attorney becomes the general counsel for a partnership, he or she creates an attorneyclient relationship with the general partner.[32] A different result was reached by a court where a partner in the Violent Femmes band was unable to show that he had a reasonable belief that he was previously represented by his partner's lawyer. Accordingly, his motion for disqualification was denied.[33]

Although a consultation does not establish an attorney-client relationship per se, the attorney is still required to maintain confidentiality. Model Rule 1.18 provides strong protection for the rights of and information learned from ""prospective clients." This rule is also supported by the common law.[34] "Even in the absence of an express attorney-client relationship ... a lawyer may owe a fiduciary obligation to persons with whom he deals. [A] fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe rely on him."[35]

Have No Privity, Still Can Sue

The privity requirement does not preclude tort-based causes of action against lawyers under § 552 of the Restatement (Second) of Torts. Giving examples such as attorney opinion letters prepared for one party to a transaction in applying § 552, the Texas Supreme Court has distinguished the negligent misrepresentation cause of action from traditional legal malpractice claims.[36] For example, in *Source Entertainment Group, LLC v. Baldonado & Associates, P.C.*, the management company for artist Tiffany Evans was allowed by the court to maintain a tortious interference with contract and defamation lawsuit against Evans's lawyers based on the court's findings that New Jersey's "litigation privilege" did not apply to a letter sent by the lawyers to Sony Records and the William Morris Agency.[37]

Similarly, lawyers may be liable to third parties for the violation of certain statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO). This was the case in *Bingham v. Zolt*, where Bob Marley's estate successfully sued the lawyers who helped Marley's wife divert royalty income from the estate after the singer's death.[38] However, even if their conduct is "frivolous or without merit," lawyers have qualified immunity from civil liability to nonclients if the attorney's conduct "is part of the discharge of the lawyer's duties in representing his or her client."[39] This rule has also been extended to attorney communications with potential clients.[40]

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 auditor and issue a misleading financial statement affecting the stock price."[41] 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."[42]

Attorney Work Product

The work product privilege is closely related to the attorneyclient privilege.[43] Litigation attorneys usually assert the work product privilege in response to discovery requests seeking, for ***11** example, an attorney's notes or correspondence from witness or client interviews. An attorney must be careful not to waive the work product and attorney-client privilege when responding to discovery requests, including government subpoenas.[44] Previously, this waiver could occur when responding to a document production request or a subpoena duces tecum by accidentally producing a privileged document.

Paradise Lost: The Accidental Disclosure of Privileged Communications

The Texas Rules of Civil Procedure now include an "oops" clause. Generally, a party who accidentally produces privileged documents has 10 days upon discovering the mistake to amend its discovery response, identifying the material or information produced and stating the privilege asserted.[45] If a party asserts a privilege in its amended response, the requesting party must promptly return the specified material or information and any copies, pending any ruling by the court denying the privilege. In any event, it is imperative that attorneys review the documents carefully before producing them to opposing counsel. The Model Rules go even further than the Texas rules. Model Rule 4.4(b) requires that a "lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

In order to overcome the attorney-client privilege, the party seeking discovery of the communication must make a prima facie showing that one of the above exceptions applies. For example, an attorney must make a prima facie case of fraud in order for the crime-fraud exception to apply. "Additionally, there must be a relationship between the document for which the privilege is challenged and the prima facie proof offered."[46] Counsel should be very careful in these matters, as the legal landscape is strewn with land mines.[47]

True Disclosure of Confidential Information

Model Rule 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b). Model Rule 1.6(b) provides that the attorney-client privilege does not apply to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

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

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

The TDRPC afford many of the same exceptions to disclosure of confidential information as the TRE. All state ethics rules allow disclosure when an attorney is involved in a lawsuit with his or her client, and when the client uses the attorney's services in furtherance of a crime or fraud.[48]

Although not an everyday occurrence for entertainment lawyers, the TDRPC 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.[49] In John Grisham's best-seller, *A Time to Kill*, the client revealed his intentions to commit a crime to his lawyer, but it was questionable how clear or likely it was that the client was going to commit the crime. The attorney did not reveal the confidential communication to the authorities, and his client killed two people. Under Mississippi law, as in the Model Rules, the attorney may, but is not required, to disclose the information.[50] Then again, if the attorney had made the disclosure, the movie would not have a plot.[51] A more common situation is where a litigator becomes aware that his or her client is going to commit perjury, thereby triggering the obligation to disclose.[52]

CONFLICTS OF INTEREST

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

Clients may not be aware of the conflict of interest rules that govern our professional conduct. It's our job to educate them before they learn the rules from a malpractice lawyer. Our obligation to decline representation is one reason why the practice of law is a profession and not just a business. Many lawyers do not realize that the foundation of the rules governing conflicts of interest is the need to maintain confidentiality of client information. When we accept an engagement, we have a fiduciary duty to disclose fully all facts that are material to the client's representation.[53]

Model Rule 1.7 generally provides that a lawyer shall *not* represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
***12** (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.[54]

What Is "Directly Adverse"?

Comment 6 to TDRPC 1.06 identifies a representation of a client as being ""directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend, or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.[55]

A conflict of interest also exists where the lawyer's interest interferes with those of the client. For example, it would be improper for a lawyer to represent a client in connection with a valuable endorsement agreement being negotiated by a lawyer's management company where the management company's commission would be 10 percent of millions of dollars while the legal fees may only be thousands of dollars. "In the eyes of a disinterested lawyer, the management company's interest in closing the transaction would interfere with the law firm's ability to render independent legal advice with respect to the transaction."[56]

A lawyer may represent two clients if their interests are aligned. For example, legendary actress Mary Pickford was

represented by a lawyer who regularly represented a "wannabe" management company in the effort to terminate the contract with her current management company. Pickford negotiated a new contract with her current management company. She then sued to avoid payment to her lawyer, claiming a conflict of interest. The court agreed that an attorney who represents two masters is not entitled to compensation from either one, but found for the lawyer because the interests of the parties were in consonance.[57] 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.[58]

A lawyer may also represent clients who are generally adverse in unrelated matters. It is not uncommon for lawyers or law firms to represent corporations that 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 that may upset clients.[59] Of course, lawyers cannot sue a current client, even if the lawsuit is unrelated to the subject matter of the lawyer's representation.[60]

Attorney Employment: A Kiss Is Not a Contract

In order to determine if conflicts exist, lawyers should carefully interview their prospective clients. The interview should cover such areas as the attorney's background, previous lawsuits, business competition and partners, and of course, possible relationships with existing clients.[61] 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.[62]

If the engagement is accepted, there is no substitute for a clear written agreement. In Texas, if the contract provides for a contingent fee, it must be in writing.[63] It must also be in compliance with the TDRPC, especially the rules governing contingent fee contracts.[64] "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.'"[65] An oral contingent fee contract is voidable by the client.[66] Unlike the TDRPC, the Model Rules authorize a lawyer to contract with a client for a reasonable contingent fee in a civil case, but do not require that the contract be in writing.[67] 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.[68]

Model Rule 1.8 generally does not permit lawyers to take an interest in the subject matter of the lawsuit, particularly when the interest may be adverse to the client. The purpose of the rule is to protect the client from overreaching by lawyers on their fees. This is what happened in the case of *In re Stover*, where the lawyer/manager was disbarred because she refused to take down an artist's website that was created by the lawyer after termination of the attorney-client relationship.[69]

Lawyers who do not want a trial before a jury of their clients' peers may include an arbitration provision, but it should first be cleared with their professional liability carriers.[70] 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.[71] 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.[72] Otherwise, a fact issue may exist regarding whom the attorney is representing and who is responsible for the fees.[73] Employment contracts are likely going to be construed against lawyers, who should plan accordingly.[74] For example, while the court in *McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc.*, found that the "the contract fee of $120,000.00 was excessive," it still awarded the amount of $89,685 against Select-O-Hits, a record distribution company based in Memphis, arising out of its nonpayment of attorney fees.[75]

Attorneys who are *not* going to undertake representation should advise the person in writing. Attorneys have a duty to inform people of their nonrepresentation when they are (or should be) aware that the attorney's conduct could lead a reasonable person to believe that he or she is being represented.[76] Lawyers cannot leave people under the impression that they are representing them or the "transaction."[77] Of course, if the person understands that the attorney is not representing him or her,

there is no duty.[78] 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.[79]

13** ***The Paper Chase: Client Waivers

Model Rule 1.7(b) allows lawyers to represent clients, notwithstanding the existence of a concurrent conflict if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Lawyers can represent clients if they reasonably believe that the representation of each client will not be materially affected, and each consents to representation after full disclosure of the existence, nature, implications, and possible adverse consequences of common representation and any advantages involved.[80] Attorneys must disclose all possible conflicts before accepting employment and conflicts that arise during the course of employment. For example, lawyers must disclose the sources of their compensation, including finder's fees.[81] 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 nonprimary or "accommodation" client (a.k.a. easy rider), the consent form should so state. It should also include the accommodation client's acknowledgment that he or she understands that the information disclosed to the attorneys will be shared with the primary client.[82]

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.[83] The amount of disclosure required depends on the sophistication of the client. Comment 8 to TDRPC 1.06 states that "[d]isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." Of course, telling a client the truth, including an adverse development, is not malpractice, even if the client cannot handle the truth.[84]

Lawyers who obtain the client consents must reasonably believe that the representation of each client will not be materially affected.[85] Sometimes a conflict of interest cannot be overcome by a consent. In *Salas-Porras Soule*, the client executed a waiver letter admitting that the law firm did not represent Parallax.[86] However, the court found that the waiver letter was invalid because it was inconsistent with the evidence and testimony heard in the case. Just because the letter said the firm did not represent the company did not make it so. But in *Lessing v. Gibbons*, the court ruled against actress Dolores del Rio's conflict of interest claims against her attorney based on her waivers and his effective client communications.[87]

Lawyers may feel that they cannot represent a client fairly without breaching the confidences and privileges of another client. Lawyers may also feel that they cannot fairly and objectively represent a client because of the lawyer's own interests or responsibilities to others. Comment 4 to TDRPC 1.06 states that this type of conflict forecloses other alternatives, such as obtaining the client's consent, which would otherwise be available. In these situations, it is best to decline representation or withdraw from representation of the matter to avoid liability from a possible malpractice claim.[88] A lawyer can still represent the client in another matter where no conflicts exist.

You're Fired!

If a lawyer determines that there is a conflict or a potential conflict in violation of the rules, he or 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, he or she should abstain or withdraw from representation.[89] For example, in *Cassidy v. Lourim*, the attorney for the parents of deceased vocalist Eva Cassidy and Blix Records Inc. was disqualified from continuing representation in a copyright infringement action where a conflict of interest arose after the suit was filed.[90]

If a lawyer is prohibited from representing a client, it is axiomatic that no other lawyer in the firm can do so. However, courts have ruled that one client cannot be dropped "like a hot potato" because the firm has found a case more to its liking, absent a conflict.[91]

REPRESENTATION ADVERSE TO FORMER CLIENT'S INTERESTS

Model Rule 1.9 and its equivalent, TDRPC 1.09, are derived from the landmark case of *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, holding that "the former client need show no more than that the matters embraced within the pending suit ... are substantially related to the matters or cause of action wherein the attorney previously represented ... the former client."[92] They provide that a lawyer who has personally represented a client in a matter shall not thereafter represent another person in a substantially related matter that is materially adverse to the former client. This "side-switching" is precisely what John Travolta's former attorney did, resulting in a three-year suspension from the practice of law ordered by the Florida Supreme Court.[93]

These rules are extended to lawyers who are or have become associated with a firm whose attorneys are prohibited from representing a client. They also apply to a law firm whose former attorneys would be prohibited from representing a client. Just because an attorney leaves does not cleanse the firm of the conflict of interest. The firm still has a duty of confidentiality and loyalty to former clients.[94]

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.[95]

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

***14** In the Fifth Circuit, the applicable test for disqualification of attorneys is articulated in *In re American Airlines, Inc.*[96] "To disqualify an attorney or firm under the *American Airlines* test, a moving party must show: '1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2) a substantial relationship between the subject matter of the former and present representations.'"[97] With respect to the first requirement, there is disagreement among the circuits as to whether clients and nonclients have standing to move for disqualification. The leading case on the question is also a Fifth Circuit opinion, *In re Yarn Processing Patent Validity Litigation*, where the court denied a patent assignee's motion to disqualify a lawyer who had previously advised a dismissed codefendant on the patent that was at issue in the case.[98]

The "substantially related" prohibition involves situations where a lawyer may have acquired confidential information concerning a prior client that could be used either (1) to that prior client's disadvantage or for the advantage of the lawyer's current client, or (2) for some other person.[99] In *Prisco v. Westgate Entertainment, Inc.*, the former general counsel for a partnership created to explore the wreck of the *Titanic* and exploit it in a television show was disqualified from representing the limited partners in a lawsuit against one of the general partners.[100] However, the court in *Cremers v. Brennan* denied a motion to disqualify the attorney for singer Amber in a lawsuit against the Nightlife Productions booking agency for unpaid performances.[101] 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.

Although permissible, it is not generally advisable to sue a former client. In *NCNB Texas National Bank v. Coker*, 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.[102] Comment 11 to TDRPC 1.06 also makes it clear that this is not advisable.[103] The cases turn on the "substantially related" test. For example, in *Bier v. Grodsky & Olecki*, 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.[104]

Representing Two or More Clients in the Same Case

Attorneys representing multiple clients have to be especially careful to assure that all clients are kept informed and that each client's best interest is being represented. In *Bolton v. Weil, Gotshal & Manges LLP*, singer Michael Bolton sued the law firm representing him, Sony Music Entertainment, and Warner-Chappell Music Limited for breach of fiduciary duty arising out of their unsuccessful defense of the Isley Brothers' copyright infringement case against Bolton.[105] In response, Weil, Gotshal & Manges followed the ""sued attorney's playbook" and filed a third-party action against Bolton's personal attorneys for contribution and indemnity.

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.[106] 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.[107]

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

Conflict of interest situations may arise when attorneys are hired by a new firm that 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 his or her former firm represents someone adverse to the firm's clients.[108] In *National Medical Enterprises, Inc. v. Godbey*, the Texas Supreme Court held that two irrebuttable presumptions applied to a firm that laterally hired an attorney who held confidences of a client that the firm was suing.[109] It held that: (1) it was presumed that the attorney had access to the former client's confidences; and (2) such knowledge was imputed to the attorneys in his new firm.[110] This "Typhoid Mary" rule, as it's been dubbed by Judge John McClellan Marshall, has not been extended to disqualify lawyers who have represented a client's previous counsel in litigation against the same client.[111] 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.[112]

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."[113] 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."[114]

Affiliated law firms are bound by the same rules.[115] This includes two law firms that have a lawyer common to both.[116] This rule also applies to contract lawyers.[117] Conflict of interest issues not only apply to the lawyer's associates, but also to the support staff. Texas courts have decided a number of cases where a member of a firm's support staff is employed by another firm, and has possible conflicts of interest problems with the new firm's clients.

If a nonlawyer 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.[118] However, if a secretary or paralegal changes firms and creates a conflict by going on the opposing side of the same matter, he or she is not automatically disqualified if the new firm establishes that the employee has been properly screened from the matter.[119] 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.[120]

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. 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 ***15** 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."[121]

Screening Procedures

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.[122] 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.[123]

As to nonlawyer employees, the court will determine whether the practical effect of formal screening has been achieved by considering the following factors:
1. the substantiality of the relationship between the former and current matters;

2. the time elapsing between the matters;

3. the size of the firm;

4. the number of individuals presumed to have confidential information;

5. the nature of their involvement in the former matter; and

6. the timing and features of any measures taken to reduce the danger of disclosure.[124]

Stuck in the Middle with You: Attorneys as Intermediaries

Attorneys may be requested to help organize a band or entertainment company, or other family-related business. Although these situations may be amicable at first, they may lead to malpractice claims. A lawyer acts as an "intermediary" if her or she represents two or more parties with potentially conflicting interests. TDRPC 1.07 concerns "intermediaries" or matters in which a lawyer may represent both parties. In order for a lawyer to represent both parties, he or she must: (1) explain the implications, including the advantages and risks involved, and get written consent from both clients; (2) reasonably believe the matter can be resolved without contested litigation; and (3) reasonably believe he or she can undertake the representation impartially. Depending on the circumstances, the lawyer may suggest that the parties seek a third-party neutral.[125]

The general rule is that the attorney-client privilege does not attach between and among the jointly represented clients.[126] 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."[127]

The lawyer must consult with each client concerning the decisions to be made and the relevant considerations. Each client must have equal input.[128] Naturally, a client must assume greater responsibility for his or her decisions than when independently represented. If a conflict develops, the lawyer must withdraw from the representation.[129] The key is lawyers must be able to balance each client's interests and maintain impartiality between the clients. If this can no longer be achieved,

the lawyer should withdraw from all representation.

The Lawyers in the Glass Booth: Doing Business with Clients

In the event of a dispute, lawyers who have business dealings with clients must overcome the presumption that the transaction with the client was unfair, which is a difficult obstacle to overcome. The seminal case in Texas is *Archer v. Griffith*.[130] In California, it's *Felton v. LeBreton*.[131] These cases are a mustread for all lawyers who are tempted to do business with clients, whether it be investing, trading equity for services, media rights contracts, or other lousy business deals offered by clients.[132] 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.[133] This is a "tales you win, heads you lose" scenario all the way.

Lawyers should also avoid the temptation of setting up a "side" business, such as a record or publishing company, to profit from the attorney-client relationship. Model Rule 1.8(a) describes the requirements for attorneys who want to do business with clients. To illustrate how much this is disfavored, Texas has not just one, but several, disciplinary rules that address this issue, including TDRPC 1.02, 1.03, 1.04, 1.06, 1.07, 1.08, 2.01, and 2.02.[134] 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 Deceptive Trade Practices Act (DTPA) claims.[135]

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,[136] but also third-party claims, for example, interference with business relations.[137] The landmark *Doris Day* case, where the court awarded the actress/singer damages of $26 million against her attorney for legal malpractice, breach of fiduciary duty, and fraud, provides an eye-opening lesson on what lawyers should *not* do.[138] Qué será, será.

APOCALYPSE NOW: CONSEQUENCES OF LEGAL MALPRACTICE

Attorneys are subject to disciplinary proceedings,[139] malpractice claims, and court sanctions when they violate the attorney-client privilege, fail to disclose a conflict of interest, or file frivolous lawsuits.[140] Although attorneys do not ipso facto violate the law when they disobey a disciplinary rule, the consequences can be very serious.[141]

Under the doctrine of collateral estoppel, the findings made in a disciplinary proceeding may be used against lawyers or in a later judicial proceeding seeking damages against the lawyer. For example, in *A to Z Associates v. Cooper*, based on the findings and conclusions of a disciplinary proceeding, the court upheld a summary judgment in favor of artist Gloria Vanderbilt's claims of fraud and breach of fiduciary duties against her attorney/manager and former psychiatrist, who had formed a partnership that misappropriated her funds.[142]

***16** A malpractice suit can take various forms. Clients can sue attorneys under several causes of action, including breach of fiduciary duty,[143] breach of contract, violation of the Texas DTPA, actual and constructive fraud,[144] common law negligence,[145] negligent misrepresentation, and the tort of malpractice.[146] These claims may also be assignable by the client.[147] A breach of fiduciary duty, and possible fee forfeiture, can occur even without actual damages. However, causation[148] and damages are essential elements of other causes of action, such as fraudulent and negligent representation,[149] negligence,[150] negligence per se, and breach of contract.[151]

There is an ever-increasing number of malpractice suits brought against attorneys and their law firms.[152] Small firms get sued more often than do large firms. Even nonclients 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 he or she was a client.[153] 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.[154]

Juries are not known for their Zen-like feelings toward lawyers. In a classic malpractice case, the client must prove that its damages were sustained because of the attorney's malpractice[155]--that something went wrong during the course of the representation.[156] 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 duty. Texas recognizes fee forfeiture for breach of fiduciary duty in the context of the attorney-client relationship.[157] To be entitled to forfeiture, the client need only prove the existence of a breach; proof of causation and/or damages is not necessary. However, the Texas Supreme Court has also held that, upon proof of the breach, total fee forfeiture is not automatic. The trial court must consider several factors to determine the amount of forfeiture, including: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of the culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, (5) the extent to which such conduct offends a public sense of justice and propriety, and (6) the net worth of the defendant.[158] The Texas Supreme Court added another factor to consider: the public interest in maintaining the integrity of attorney-client relationships.[159] The court also held that the amount of the fee to be forfeited is a question for the court, not the jury. On the other hand, if the attorney has not committed legal malpractice and the client has terminated the lawyer without cause, the lawyer is entitled to compensation from the client in quantum merit.[160] However, quantum merit recovery is not available against the client if the employment contract provided for a ""clearly excessive" fee.[161]

EPILOGUE

To paraphrase Robert Pirsig's thesis in *Zen and the Art of Motorcycle Maintenance*, legal ethics must be embraced and applied as they best fit the requirements of the situation. The starting point in this journey is to avoid ethical pitfalls by taking preventive measures. Attorneys should have well thought out employment, conflicts waiver, and nonrepresentation 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 that 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.[162] Courts often look at the procedures that 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 presented in this article and develop a personal strategy to resolve such situations as they arise.

Footnotes

a1 *Yocel Alonso is a wannabe conga drummer and adjunct professor of law at the University of Houston Law Center, where he teaches entertainment law. He has been in private practice of law for over 30 years and is the former chair of the State Bar of Texas Entertainment and Sports Law Section and the Houston Bar Association Entertainment and Sports Law Section. Un abrazo to Nadeline N. Aragon, Professor Michael Olivas, and Jennifer Perez Gerhard, without whose assistance this article would still be going sideways.*

[1] As with business litigation, generally, the case eventually settles without a reported opinion. *See, e.g.*, Grisham v. Garon-Brooke Assocs., Inc., No. 3:96 CV045-B (N.D. Miss. 1996); Adler v. Manatt, Phelps, Phillips, & Kantor, L.A. Super. Ct. BC 053076 (Apr. 1992). Sometimes "confidential" settlements are later made public as, for example, recording artist Billy Joel's malpractice lawsuit against his attorney, Allen Grubman. After the case was dismissed, it became public that Joel's record company, Sony Music (which was not a party to the case), paid Joel $3 million to drop the lawsuit against Grubman, perhaps out of fear that other Grubman Indursky clients would follow Joel's lead. *See* Geraldine Fabrikant, *The Media Business; A Tangled Tale of a Suit, a Lawyer, and Billy Joel*, N.Y. TIMES, May 3, 1995. For a punch-by-punch account of the Joel saga, see STAN SOOCHER, THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT (1999); *Ethics Rules Changed to Halt L.A. Lawyers' Conflicts of Interest*, WALL ST. J., Dec. 10, 1993.

[2] Indeed, attorneys may find themselves having to defend their actions in "foreign" jurisdictions where they have hired local counsel. Simons v. Steverson, 106 Cal. Rptr. 2d 193 (Ct. App. 2001).

[3] With the notable exception of the ethical rules concerning lawyers' sexual relations with clients, which are prohibited in all states except Texas. *See Ex Parte* Hood, No. WR-41168-11, 2009 WL 2963854 (Tex. Crim. App. Sept. 16, 2009) (unpublished opinion).

[4] *See* Laird v. Blacker, 828 P.2d 691 (Cal. 1992) (discussing the statute of limitations defense in a television writer's lawsuit against television production company Spelling-Goldberg); Kearney v. Unibay Co., 466 So. 2d 271 (Fla. Dist. Ct. App. 1985) (upholding garnishment of certificates of deposit purchased by attorney with funds from the estate of Scott Joplin and put in the attorney's own name); Attorney Grievance Comm'n of Md. v. Gardner, 60 A.3d 456 (Md. 2013) (disbarring attorney who represented the White House "gate crashers" for overbilling and misuse of trust account funds).

[5] MODEL RULES OF PROF'L CONDUCT preface. Of course, until a rule is adopted into law, it does not have the force of law.

[6] TEX. DISCIPLINARY RULES OF PROF'L CONDUCT pmbl. ¶ 7.

[7] Hoover Slovacek, LLP v. Walton, 206 S.W.3d 557, 561 n.6 (Tex. 2006); *see also* Moore v. Weinberg, 644 S.E.2d 740 (S.C. Ct. App. 2007) (reviewing decisions in other states and the South Carolina Rules of Professional Conduct in finding that an attorney may be liable to a third party for the wrongful distribution of trust funds).

[8] MODEL RULES OF PROF'L CONDUCT R. 1.6.

[9] Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. 05-1516, 2007 WL 4800405 (C.D. Cal. Jan. 17, 2007) (denying plaintiff Wingnut Films' motion to disqualify attorney as expert witness on the *Lord of the Rings'* soundtrack agreement based on the court's finding that the attorney had not been exposed to any material information from defendants Walden Media and New Line Cinema); Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996).

[10] *See* Order Denying Motion to Disqualify Greenberg Glusker, Fourth Age Ltd. v. Warner Bros. Digital Distribution, No. 2:12-cv-09912-ABC (SHx) (C.D. Cal. July 21, 2014).

[11] FED. R. EVID. 501.

[12] TEX. R. EVID. 503(b).

[13] TEX. R. EVID. 503(c).

14 TEX. R. EVID. 503(b).

15 TEX. R. EVID. 503(a)(2). The notes and comments to Rule 503 state, "The addition of subsection (a)(2)[] adopts a subject matter test for the privilege of an entity, in place of the control group test previously used." *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993).

16 Solin v. O'Melveny & Myers, LLP, 107 Cal. Rptr. 2d 456, 461 (Ct. App. 2001) (footnote omitted) (quoting Mitchell v. Superior Court, 691 P.2d 642, 646 (Cal. 1984)). *Solin* is cited in *Geragos v. Borer*, No. B208827, 2010 WL 60639 (Cal. Ct. App. Jan. 11, 2010), where the court reversed, remanded, and remitted a judgment in favor of Michael Jackson's criminal lawyer Mark Geragos for the illegal (and inept) videotaping of his conversations with Jackson on the chartered flight to his date with the Santa Barbara Sheriff's Department for booking on child molestation charges.

17 Tex. Emp'rs Ins. Ass'n v. Wermske, 349 S.W.2d 90 (Tex. 1961) (unpublished opinion).

18 Garrison Printing Co. v. Steven Mandarino Fine Arts, Inc., No. 86-2489, 1986 WL 13837 (E.D. Pa. Dec. 5, 1986); Invictus Records, Inc. v. Am. Broad. Cos., 98 F.R.D. 419 (E.D. Mich. 1982); Draper v. Garcia, 793 S.W.2d 296 (Tex. App. 1990).

19 Dimensional Music Publ'g, LLC v. Kersey, 448 F. Supp. 2d 643, 655 (E.D. Pa. 2006).

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

21 *Id.* at 866-67.

22 Curb Records v. Adams & Reese, LLP, 203 F.3d 828 (5th Cir. 1999) (unpublished opinion) (quoting Cattle Farm, Inc. v. Abercrombie, 211 So. 2d 354, 365 (La. Ct. App. 1968)).

23 Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

24 Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App. 1991).

25 Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App. 1997).

26 No. CV05-7798, 2006 WL 4046168 (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 & Knupp LLP did not see the light of day until long afterward. Appellant's Opening Brief, *In re* Matter of Wilson, No. B113259 (Cal. Ct. App. Apr. 16, 1998), 1998 WL 34351613.

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

28 *Perez*, 822 S.W.2d at 265.

[29] *Id.*

[30] Baptist Mem'l Hosp. Sys. v. Bashara, 685 S.W.2d 352 (Tex. App. 1984), *aff'd*, 685 S.W.2d 307 (Tex. 1985).

[31] 6 F. Supp. 2d 616, 622 (W.D. Tex. 1998).

[32] Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266 (D. Conn. 1992).

[33] Ritchie v. Gano, No. 07 Civ. 7269, 2008 WL 4178152 (S.D.N.Y. Sept. 8, 2008).

[34] E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969).

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

[36] McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999).

[37] No. 06-2706, 2007 WL 1580157 (D.N.J. May 31, 2007).

[38] 66 F.3d 553 (2d Cir. 1995).

[39] Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406 (Tex. App. 2005). Of course, other causes of action may arise from a lawyer's communication with third parties. *See, e.g.*, Friend v. Paisely Park Enters., Inc., No. B169989, 2004 WL 2211931 (Cal. Ct. App. Oct. 4, 2004) (unpublished opinion) (affirming summary judgment in favor of Prince's attorney against claims of defamation by Prince's ex-girlfriend).

[40] See *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d 830 (Ct. App. 1996), where Audrey Hepburn's lawyer won a lawsuit brought by a record company arising out of the lawyer's allegedly defamatory statements in a solicitation letter to other celebrities. However, in *Source Entm't Grp.*, 2007 WL 1580157, 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.

[41] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 152-53 (2008).

[42] *Id.* at 159-61.

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

[44] *See In re* Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (finding that the attorney representing the heirs of Superman's creators had waived the privilege by requesting a government subpoena and failing to assert the privilege before turning documents over to the government).

45 TEX. R. CIV. P. 193.3(d).

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

47 *See* Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99 (S.D.N.Y. 1986); *In re* Nitla, S.A. de C.V., 92 S.W.3d 419 (Tex. 2002).

48 *See, e.g.*, Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906 (Ct. App. 2001).

49 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.05(e); *cf.* MODEL RULES OF PROF'L CONDUCT 1.6(b)(1) (providing that an attorney may reveal information if he or she has a reasonable belief that such disclosure is necessary to prevent reasonably certain death or substantial bodily injury).

50 MISS. RULES OF PROF'L CONDUCT 1.6(b)(1).

51 Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. 2009).

52 Patsy's Brand, Inc. v. I.O.B. Realty, Inc., 62 U.S.P.Q.2d 1014 (S.D.N.Y. 2002).

53 MODEL RULES OF PROF'L CONDUCT 1.7; *see* Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988).

54 MODEL RULES OF PROF'L CONDUCT 1.7(a); Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 43 Cal. Rptr. 2d 327 (Ct. App. 1995).

55 *See also* Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App. 1980).

56 N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 784 (Jan. 12, 2005); *see* MODEL RULES OF PROF'L CONDUCT 1.7(a)(2).

57 Field v. Moore, 178 N.Y.S. 842 (App. Div. 1919); *cf.* Harris v. 42 E. 73rd St., 145 N.Y.S.2d 361 (Sup. Ct. 1955).

58 Flaherty v. Filardi, No. 03Civ.2167, 2004 WL 1488213 (S.D.N.Y. July 1, 2004).

59 MODEL RULES OF PROF'L CONDUCT 1.7.

60 Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 43 Cal. Rptr. 2d 327 (Ct. App. 1995).

61 Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

62 *See* Cascades Branding Innovation, LLC v. Walgreen Co., No. 11 C 2519, 2012 WL 1570774 (N.D. Ill. May 3, 2012); Zalewski v. Shelroc Homes, LLC, 856 F. Supp. 2d 426 (N.D.N.Y. 2012).

63 TEX. GOV'T CODE ANN. § 82.065.

64 *See* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557 (Tex. 2006) (holding that the employment agreement could not supersede Texas law on contingent fee contracts); *cf.* Todd W. Musburger, Ltd. v. Meier, 914 N.E.2d 1195 (Ill. App. Ct. 2009) (awarding attorney fees to discharged lawyer in quantum merit against radio personality client).

65 *Hoover Slovacek*, 206 S.W.3d at 565 (quoting Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 96 (Tex. 2001)).

66 Enochs v. Brown, 872 S.W.2d 312, 318 (Tex. App. 1994).

67 MODEL RULES OF PROF'L CONDUCT 1.8(i).

68 *See* King v. Fox, 851 N.E.2d 1184 (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).

69 104 P.3d 394 (Kan. 2005).

70 Taylor v. Wilson, 180 S.W.3d 627 (Tex. App. 2005).

71 Estate of Hogarth v. Edgar Rice Burroughs, Inc., No. 00 Civ. 9569, 2001 WL 515205 (S.D.N.Y. May 15, 2001).

72 Nelson v. Anderson, 84 Cal. Rptr. 2d 753 (Ct. App. 1999).

73 *See* Arrow, Edelstein & Gross, P.C. v. Rosco Prods., Inc., 581 F. Supp. 520 (S.D.N.Y. 1984) (allowing a quantum merit recovery of attorney fees against a corporation created for the band, but not against the band members individually, with the exception of personal legal services that were rendered). Quantum merit recovery was also allowed in *Filler v. Motta*, 951 N.Y.S.2d 85 (Civ. Ct. 2012), involving the collection of proceeds from an album distribution by Select-O-Hits in Memphis.

74 *In re* Miller, 447 A.2d 549 (N.J. 1982).

75 No. W2000-00044-COA-R3-CV, 2001 WL 400386 (Tenn. Ct. App. Apr. 20, 2001).

76 Parker v. Carnahan, 772 S.W.2d 151 (Tex. App. 1989).

77 Richardson v. Artrageous, Inc., No. 93 Civ. 5221, 1994 WL 97222 (S.D.N.Y. Mar. 18, 1994) (citing Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982)).

78 Dillard v. Broyles, 633 S.W.2d 636 (Tex. App. 1982).

79 Hallstrom v. Feldman, No. B159016, 2003 WL 21744094 (Cal. Ct. App. July 29, 2003) (unpublished opinion); Hansell, Post, Brandon & Dorsey v. Fowler, 288 S.E.2d 227 (Ga. Ct. App. 1981).

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

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

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

83 Lessing v. Gibbons, 45 P.2d 258 (Cal. Ct. App. 1935); Cream v. Chozick, 714 S.W.2d 61 (Tex. App. 1986).

84 Proskauer Rose, LLP v. Blix St. Records, Inc., 384 F. App'x 622 (9th Cir. 2010) (unpublished opinion).

85 MODEL RULES OF PROF'L CONDUCT 1.7(b)(4).

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

87 45 P.2d 258.

88 *See also* Lott v. Ayres, 611 S.W.2d 473 (Tex. Civ. App. 1980).

89 MODEL RULES OF PROF'L CONDUCT 1.16.

90 311 F. Supp. 2d 456 (D. Md. 2004).

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

92 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); *see also* Team Obsolete, Ltd. v. A.H.R.M.A. Ltd., No. 01 CV 1574, 2006 WL 2013471 (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. Garcia, 891 S.W.2d 255 (Tex. 1995).

93 Fla. Bar v. Keasler, 133 So. 3d 528 (Fla. 2014) (unpublished opinion).

94 MODEL RULES OF PROF'L CONDUCT 1.9(c); Canal+ Image UK Ltd. v. Lutvak, 792 F. Supp. 2d 675 (S.D.N.Y. 2011) (applying N.Y. RULE OF PROF'L CONDUCT 1.10).

95 MODEL RULES OF PROF'L CONDUCT 1.9(b)(2); *see also* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.09 cmt. 4; Cremers v. Brennan, 764 N.Y.S.2d 326 (Civ. Ct. 2003).

96 972 F.2d 605, 614 (5th Cir. 1992).

97 City of El Paso v. Salas-Porras Soule, 6 F. Supp. 2d 616, 621 (W.D. Tex. 1998) (quoting *American Airlines*, 972 F.2d at 614).

98 530 F.2d 83 (5th Cir. 1976); *cf.* Decaview Distribution Co. v. Decaview Asia Corp., No. C 99-02555, 2000 WL 1175583 (N.D. Cal. Aug. 14, 2000).

99 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.09 cmt. 4B.

100 799 F. Supp. 266 (D. Conn. 1992); *but cf.* Team Obsolete, Ltd. v. A.H.R.M.A., Ltd., No. 01 CV 1574, 2006 WL 2013471 (E.D.N.Y. July 18, 2006) (not disqualifying attorney because the breach of a fiduciary relationship was not alleged and a substantial relationship was not shown).

101 764 N.Y.S.2d 326 (Civ. Ct. 2003).

102 765 S.W.2d 398 (Tex. 1989); *see* MODEL RULES OF PROF'L CONDUCT 1.9(b); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.09 cmts. 4, 8; Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319 (Tex. 1994); *In re* Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App. 1997).

103 *See* Baptist Mem'l Hosp. Sys. v. Bashara, 685 S.W.2d 352 (Tex. App. 1984), *aff'd*, 685 S.W.2d 307 (Tex. 1985).

104 No. B204887, 2009 WL 1549546 (Cal. Ct. App. June 4, 2009) (unpublished opinion).

105 806 N.Y.S.2d 443 (Sup. Ct. 2005).

106 Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App. 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999).

107 MODEL RULES OF PROF'L CONDUCT 1.8(g).

108 *See* Allen v. Academic Games Leagues of Am., Inc., 831 F. Supp. 785 (C.D. Cal. 1993) (disqualifying in a copyright and trademark infringement case a law firm that hired a law student with a conflict).

109 924 S.W.2d 123 (Tex. 1996); *see also In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010).

110 *Godbey*, 924 S.W.2d at 132; *see also* Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994); Pound v. DeMera DeMera Cameron, 36 Cal. Rptr. 3d 922 (Ct. App. 2005).

111 *See* P&M Electric Co. v. Godard, 478 S.W.2d 79 (Tex. 1972) (citing T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953)).

112 *See* Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A., No. C00390, 2009 WL 2045259 (N.J. Super. Ct. App. Div. July 16, 2009) (unpublished opinion) (holding law firm not vicariously liable for malpractice by lawyer who represented client before joining the firm and billed client directly).

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

114 *Id.* at 203.

115 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-388 (Dec. 5, 1994); Mustang Enters., Inc. v. Plug-In Storage Sys., Inc., 874 F. Supp. 881 (D. Ill. 1995).

116 TVT Records v. Island Def Jam Music Grp., 250 F. Supp. 2d 341 (S.D.N.Y. 2003).

117 Tex. Comm. on Prof'l Ethics, Op. 515 (July 1996).

118 Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994).

119 *Id.*

120 Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466 (Tex. 1994).

121 *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998) (citing *Phoenix Founders*, 887 S.W.2d at 835).

122 Higdon v. Superior Court, 278 Cal. Rptr. 588 (Ct. App. 1991); Kassis v. Teacher's Ins. & Annuity Ass'n, 717 N.E.2d 674 (N.Y. 1999).

123 MODEL RULES OF PROF'L CONDUCT 1.8(k), 1.10; W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821 (D. Conn. 1961), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295 (Tex. App. 1998).

124 *Phoenix Founders*, 887 S.W.2d at 836; *see* Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 711-15 (1980); *Developments in the Law--Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1247, 1367-69 (1981).

125 MODEL RULES OF PROF'L CONDUCT 2.4.

126 TEX. R. EVID. 503(d)(5).

127 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.07 cmt. 6.

128 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.07(b).

129 MODEL RULES OF PROF'L CONDUCT 1.16(a)(1); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.07(c).

130 390 S.W.2d 735 (Tex. 1964).

131 28 P. 490 (Cal. 1891).

132 *See also* Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (assignment of media rights from a criminal defendant); Black v. Sussman, No. M2010-01810-COA-R3-CV, 2011 WL 2410237 (Tenn. Ct. App. Oct. 18, 2011) (accounting malpractice action by Clint Black against his CPA/partner).

133 Gold v. Greenwald, 55 Cal. Rptr. 660 (Ct. App. 1966).

134 *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-418 (July 7, 2000).

135 Lopez v. Muñoz, Hockema & Reed, LLP, 22 S.W.3d 857 (Tex. 2000); *see* N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1988-6 (July 14, 1988), 1988 WL 490016 (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 Comm. on Prof'l & Judicial Ethics, Op. 621 (Apr. 18, 1991), 1991 WL 164535 (reviewing the opinion on client contracts with attorney-owned businesses and concluding that real estate attorneys may not employ attorney-owned abstract company for their clients); Tex. Comm. on Prof'l Ethics, Op. 643 (May 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").

136 See *In re O'Brien*, 351 F.3d 832 (8th Cir. 2003), where George Harrison won an $11.7 million judgment against his business manager attorney, only to have it discharged in bankruptcy after Harrison could not appear for his deposition shortly before passing away.

137 *In re* Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012).

138 *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986).

139 *See In re* Crane, Nos. 84-O-14252, - 14253, 1990 WL 608663 (Rev. Dep't State Bar Ct. of Cal. Aug. 3, 1990) (suspending an inside counsel for SEGA Corporation and an outside lawyer from the practice of law for making improper "side deals" in the marketing of video games).

140 *See* Humphrey v. Columbia Records, 124 F.R.D. 564 (S.D.N.Y. 1989) (requiring entertainment lawyer and author William Krasilovsky and others to pay substantial attorney fees in connection with a bogus copyright infringement case).

141 *See In re Crane*, Nos. 84-O-14252, - 14253; People v. Davis, 911 P.2d 45 (Colo. 1996) (en banc).

142 613 N.Y.S.2d 512 (Sup. Ct. 1993).

143 Bingham v. Zolt, 66 F.3d 553 (2d Cir. 1995) (affirming judgment for Bob Marley's estate administrator against his former legal and financial advisors for breach of fiduciary duty, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO)).

144 Brown v. Woolf, 554 F. Supp. 1206 (S.D. Ind. 1983) (denying sports agent/attorney's motion for summary judgment in constructive fraud action brought by professional hockey player).

145 Curb Records v. Adams & Reese, LLP, 203 F.3d 828 (5th Cir. 1999) (unpublished opinion); *see also* HNH Int'l, Ltd. v. Pryor Cashman Sherman & Flynn LLP, 881 N.Y.S.2d 86 (App. Div. 2009) (reversing trial court's dismissal of claims based on negligent advice regarding common-law copyright issues).

146 Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir. 1986) (reversing district court's grant of summary judgment denying negligence claims against celebrity palimony attorney Marvin Mitchelson).

147 *See* Even St. Prods., Ltd. v. Shkat Arrow Hafer & Weber, LLP, 643 F. Supp. 2d 317 (S.D.N.Y. 2008) (denying a motion to dismiss made by law firm against copyright infringement claims made by Sly Stone's successor-in-interest).

148 Deep v. Boies, 863 N.Y.S.2d 269 (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. *See also* Resendez v. Maloney, No. 01-08-00954-CV, 2010 WL 5395674 (Tex. App. Dec. 30, 2010) (affirming summary judgment against concert promoter plaintiff due to lack of evidence on causation).

149 Jackson v. Broad. Music, Inc., No. 04 CV 5948, 2006 WL 250524 (S.D.N.Y. Feb. 1, 2006) (affirming grant of motion to dismiss fraud case against William Krasilovsky because plaintiff, who did not read agreement before signing it, could not prove reasonable reliance); Viner v. Sweet, 12 Cal. Rptr. 3d 533 (Ct. App. 2004) (reversing judgment for plaintiff owners of audio book company because the trial court erred in ruling that they did not have to prove a "more favorable result" in a cause of action based on the ""negligent negotiation" of the sale of their company); Snorkel Prods., Inc. v. Beckman Lieberman & Barandes, LLP, 880 N.Y.S.2d 8 (App. Div. 2009) (holding option holder's attorney's negligent advice regarding expiration of option to produce musical drama cowritten by Barry Manilow not to be the proximate cause of damages, except for defense costs in arbitration action brought by Marlow to terminate rights).

150 Cappetta v. Lippman, 913 F. Supp. 302 (S.D.N.Y. 1996) (allowing wrestling announcer only to recover fees for hiring new law firm and denying other compensatory and punitive damages).

151 Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863 (Tex. App. 2000).

152 *See, e.g.*, Sherwood v. South, 29 S.W.2d 805, 809 (Tex. Civ. App. 1930).

153 Parker v. Carnahan, 772 S.W.2d 151 (Tex. App. 1989).

154 Bolton v. Weil, Gotshal & Manges LLP, 806 N.Y.S.2d 443 (Sup. Ct. 2005).

155 Proskaver Rose, LLP. v. Blix Street Records, Inc., 384 F. App'x 622 (9th Cir. 2010) (unpublished opinion); Even St. Prods., Ltd. v. Shkat Arrow Hafer & Weber, LLP, 643 F. Supp. 2d 317 (S.D.N.Y. 2008); Blanks v. Shaw, 89 Cal. Rptr. 3d 710 (Ct. App. 2009).

156 Viner v. Sweet, 12 Cal. Rptr. 3d 533 (Ct. App. 2004).

157 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).

158 Arce v. Burrow, 958 S.W.2d 239, 250 (Tex. App. 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a).

159 Burrow v. Arce, 997 S.W.2d 229, 244 (Tex. 1999).

160 Sanchez v. MTV Networks, No. 10 Civ. 7854, 2012 WL 2094047 (S.D.N.Y. 2012), *aff'd*, 525 F. App'x 4 (2d Cir. 2013); Filler v. Motta, 951 N.Y.S.2d 85 (Civ. Ct. 2012).

161 *McDonnell Dyer*, 2001 WL 400386 (awarding music distribution company $89,685 in attorney fees).

162 *In re* Miller, 447 A.2d 549 (N.J. 1982).