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# Legal Ethics

## in the Practice of Music Law

— Rules & Realities —

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## Background

- 2004 - Middle Tennessee State University
- 2009 - Loyola Law
- 2009 - 2013 Solo Practice in Nashville
- 2013 - 2019 Of Counsel to several Nashville firms
- 2019 - joined Pierson // Wells and opened New Orleans office
- 2021 - launched Wells & Kappel LLP

## Teaching Experience

- 2012 - 2015 **Adjunct Professor of Law**
  - 2016 - Present **Music Industry Studies**
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# Ethics

## Source of Obligations

### Rules of Professional Conduct

- Disciplinary Proceedings
  - Client reporting
  - Attorney/3rd Party reporting
- Judicial Proceedings
  - Substantive rights enforceable by client (only 4 states)
    - This is not what's envisioned by the MRPC

### Fiduciary Duties

- Substantive Rights
  - Enforceable by clients

### Personal Integrity

- Moral obligations
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# Rule 1.1 Competence

*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

## complex and specialized

- Entertainment Law
  - Other bodies of law as applied to an industry and its participants
    - Agency, Antitrust, Bankruptcy, Constitutional, Contract, Copyright, Corporate, Criminal, Employment, Estate, Immigration, Insurance, Labor, Personality Rights, Privacy, Securities, Tax, Tort, Trademark and Unfair Competition
  - International in scope
- Custom
  - “In-Context” application of law
  - Accepted practices
  - Expectations and norms

## association and consultation

- Expertise “may be required”
  - Competence (particularly in the context of custom) comes with time and experience
- Temptation to “do it all”
  - Client expectations
  - Fear of losing clients to referral
  - \$\$\$ Realities \$\$\$ (see 1.5(a))
- Consultation
  - Other lawyers (your competition)
  - Other business professionals
  - No substitute for association
  - Confidentiality considerations (see 1.6)
- Association
  - Requires informed consent of client
  - Fee sharing considerations (see 1.5(e))

# Rule 1.2 Scope of Representation

**1.2(c) - A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.**

## reasons to limit

- Limited objective
  - Particularly useful in receiving referrals
  - Initial consultations
- Competence
- Conflicts
  - Former clients materially adverse in a “substantially related”
  - Avoid conflicts with current clients
- Fee arrangements
  - fee structure for different matters
    - e.g., 5% for “general entertainment legal” representation -- must define what falls within the scope of that
  - staged fee structure
    - e.g., \$X for review, \$Y for negotiation

## methods to limit

- Must be communicated to client
  - Engagement documents
    - Initial consult agreement
    - Non-representation agreement
    - Retainer agreement
    - Closing letters
- Specific exclusions
  - e.g., no tax advice, fee doesn't cover appeal, etc.
- Specific inclusions
  - “As needed and available”
  - Each matter must be agreed

# Rule 1.5 Fees

***1.5(a) - A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.***

## fee structure

- Hourly
  - \$150 - \$1,000+/hour
    - Prior Work Product - ABA Op. 93-379
    - Advance payment retainer (IOLTA)
- Fixed Fee
  - \$X for a document or task
    - Useful when relying on prior work product
  - “Value Billing” % of the value of agreement
    - Often based on the Advance or a specific “legal fee” advance
- Ongoing Representation Retainer
  - \$X (usually for first priority availability)
  - 5 - 10% of Gross Revenue
    - Post representation revenues?

## reasonableness factors

- Requisite time, labor, and skill
- Novelty and difficulty involved
- Preclusion of other employment
- Customary fees
- Amount involved and the results obtained
- Time limitations imposed
- Nature and length of the professional relationship with the client
- Experience, reputation, and ability of the lawyer or lawyers performing the services
- Whether the fee is fixed or contingent

# Rule 1.5 Fees

*An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.*

## payment issues

- Adverse Payors
  - Label or Publisher
- Nonadverse Payors
  - Parents
  - Joint client
- Others via Letters of Direction
  - Placing business manager in the middle
  - Sometimes attorneys attempt to have fees forwarded at the source
- Requirements (Rule 1.8(f))
  - the client gives informed consent;
  - no interference with the lawyer's independence of professional judgment or the loyalty owed to client
  - confidentiality maintained

## other issues

- Business Transactions with a Client
  - Ownership (equity), possessory, security or other pecuniary interest adverse to client
    - fair and reasonable
    - fully disclosed in writing
    - advised in writing of the desirability of seeking advice of independent legal counsel on the transaction
    - the client gives informed consent
- Fee Splitting (1.5(e))
  - Assume responsibility for representation
  - Proportional to the services performed
  - Client must agree in writing
  - Must be reasonable

# Rule 1.6 Confidentiality

***1.6(a) - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation***

## scope

- Very broad
  - The confidentiality rule is broader than attorney client privilege
  - all information relating to the representation, whatever its source (not just information disclosed in confidence)
- Hypotheticals
  - Use to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.
- Prospective and Former Clients
  - Exception for “generally known” info (note this is more than public record)

## implications

- Representatives
  - Managers, Agents, Business Managers
- “Who else do you represent?”
  - Client identity is covered by Rule 1.6
- War stories
  - Public record doesn’t mean it’s not subject to the rules
- Third party payors
  - Billing statements very clearly disclose matters of representation
- Consent
  - Disclosure requires that client give informed consent
  - The disclosure may be impliedly authorized in order to carry out the representation



# Rules 1.7, 1.8, 1.9, and 1.18 Conflicts of Interest

*Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.*

## identifying client

- Current
  - Agreement to render professional services
  - Implied when lawyer gives legal advice and the lawyer can reasonably foresee that the prospective client will rely on that advice, or the client reasonably believes he was being represented by the lawyer
- Former
  - Express withdrawal or termination
  - Implied when assistance has concluded
  - Ongoing relationship may lead to mistaken belief of continuing representation
- Prospective
  - A person who consults about the possibility of forming a client-lawyer relationship

## identifying conflict

- Determine if a conflict of interest exists
  - Current - 1.7, 1.8
    - Direct adversity
  - Former - 1.9 and Prospective 1.18
    - Materially adverse
    - Substantially related matter
    - Unless screened (prospective only)
- Consentable
  - Reasonable belief that the lawyer can provide competent and diligent representation
- Non-consentable
  - Prohibited by law
  - Current client against current client in litigation

# Rules 1.7, 1.8, 1.9, and 1.18 Conflicts of Interest

*Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.*

## informed consent

- Material risks
  - Loyalty
  - Confidentiality
  - Privilege
  - Costs
- Advantages
  - Costs
  - Leverage
- Reasonably available alternatives
  - Obtain separate counsel
- Consider the sophistication of the client
- Advise to obtain independent counsel to review waiver

## confirmed in writing

- Agreement confirmed in writing.
  - Document executed by the client
  - Writing prepared by lawyer transmits to the client following an oral consent
- Revoking consent
  - Client may revoke at anytime
  - Effect on representation of other clients depends
    - Material change in circumstance?
    - Expectations of other client
    - Detriment to other client or lawyer?
- Prospective waivers
  - Reasonable understanding of material risk
  - Specific drafting and discussion crucial
  - Client sophistication matters!

# Rule 1.7 Conflicts (current clients)

***1.7(a) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest [without first getting the informed consent of the affected clients]***

## simultaneous representation

- Direct Adversity
  - Advocating against a client
    - Related or unrelated matter
    - Requires more than economic adversity (competitors are not inherently in direct adversity)
- Litigation
  - Client v. Client (nonconsentable)
- Transactions
  - Agreement between clients
    - fundamentally antagonistic (nonconsentable)
    - generally aligned, but differing interests (e.g., co-write agreement; operating agreement; WFH)

## joint representation

- Material Limitation
  - Significant risk (not just possibility) that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.
- Litigation
  - Clients v. Someone
    - Substantial discrepancy in the parties' testimony
    - Likely incompatibility in positions
    - Substantially different possibilities of settlement of the claims or liabilities
- Transactions
  - Representing multiple clients in agreement with another party

# Rule 1.9 Conflicts (former clients)

**1.9(a) - A lawyer shall not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client.**

## substantially related matter

- Matter
  - Look to scope of representation
  - When the lawyer's representation is not limited to a particular matter a question of fact can arise about whether the representation has terminated (client's reasonable subjective belief)
- Substantially related
  - Involve the same transaction or legal dispute
  - Substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter

## materially adverse

- Freivogel on Conflicts says: "Materially adverse" under 1.9 means that there is a significant risk that the client information you have could be used in a manner that would harm that client.
  - More permissive standard than "direct adversity".
  - Split of authority on "playbook" information

# Rule 1.18 Conflicts (prospective clients)

**1.18(a) - A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.**

## duties owed

- When does the a/c relationship arise?
  - “Reasonable reliance” on advice
  - “Reasonable subjective belief” of representation
- Confidentiality
  - Information from a prospective client shall not be used or revealed except as Rule 1.9 would permit with respect to information of a former client.
- Conflicts
  - Materially adverse
  - Same or a substantially related matter
  - Lawyer received information from the prospective client that could be significantly harmful to prospective client

## exceptions

- When the lawyer has received disqualifying information, representation is permissible if:
  - both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  - the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary
  - the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
  - written notice is promptly given to the prospective client.

# Rule 1.13 Organizational Client

***1.13(a) - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents***

## identify the client

- Legal entity is the client
  - Entity acts through its constituents
  - Representing an entity does not mean that the lawyer necessarily represents any constituent or affiliated organization, such as a parent or subsidiary.
- Loan Out / Furnishing Entities
  - company is wholly-owned by the artist
  - the company “loans out” or furnishes the services of the artist to a third party.
  - historically, loan-out companies have been corporations, but more recently artists are using limited liability companies as well.
- Group Entity
  - Band members

## duties owed

- Dual Representation
  - A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.
- Clarifying Role
  - Must explain the identity of the client when organization's interests are adverse to those of the constituents with whom the lawyer is dealing
- Complicating Traditional Rules
  - Loyalty
  - Confidentiality (1.6) and Privilege
  - Communication (1.4)

# Rule 1.14 Diminished Capacity (Minors)

**1.14(a) - When capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client**

## identify the client

- Minor is the client
  - Even if the minor has a representative, the lawyer should as far as possible accord the represented person the status of client particularly in maintaining communication
- Role of Parents
  - The client *may* wish to have family members participate in discussions
  - When *necessary* to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client privilege.
  - Conflicts of interest
    - Parental Guarantee / Assent?
    - Loyalty
    - Confidentiality (1.6) and Privilege

## duties owed

- Decision Making
  - Lawyer should not assume that children lack capacity to make decisions
    - Ability to articulate reasoning leading to a decision
    - Ability to appreciate consequences of a decision;
    - Substantive fairness of a decision;
    - Consistency of a decision with the known long-term commitments and values of the client.
  - Whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

# Rule 5.5 Multijurisdictional Practice

*5.5(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so*

## general restrictions

- Unless licensed in a jurisdiction
  - No law office
  - No other systematic and continuous presence for the practice of law
    - Does not require physical presence
  - hold out to the public or otherwise represent that the lawyer is admitted
    - Some states allow “dining room” practice in a state that you’re not licensed with disclaimer (so long as it’s not clients in unlicensed state)
- Rules are generally easier to apply in the context of litigation as opposed to transactions.
- Protectionism over “client choice”

## exceptions

- Associate with licensed lawyer
- Reasonably related to the lawyer's practice in a licensed jurisdiction
  - Previously represented the client.
  - Client is a resident in or has substantial contacts in the licensed state
  - Matter has a significant connection with the licensed jurisdiction
  - The client’s activities or the legal issues involve multiple jurisdictions
  - Services involve body of federal law, nationally-uniform, foreign, or international
  - Generally no “prior relationship” exception!
- In house counsel



# Rule 7.3 Solicitation

*A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain*

## prohibited conduct

- Solicitation
  - Communication initiated by a lawyer that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
- No in-person solicitation allowed
  - Face-to-face, live telephone and other real-time visual or direct personal encounter without time for reflection.
- Known to be represented (4.2)

## exceptions

- In person solicitation is permissible when person:
  - Is a lawyer
  - Has a family, close personal, or prior business or professional relationship with the lawyer
  - Routinely uses for business purposes the type of legal services offered by the lawyer.
- ALLOWED in most states (not all): emails, text messages, direct messages, or similar communications
- No pecuniary gain
- Solicitation through representatives?

# Engagement Documents

## initial consult

- Scope / general information only
- No reliance
- Right to terminate
- Revealing confidential information
- Conflict waiver (prospective)
- Fee

## declining representation

- Responsibility to protect interest
- No reliance
- Deadlines and/or statutes of limitation
- Need to retain counsel

## representation

- Scope
- Fee basis
- Conflict waiver
- Marketing
- Dispute resolution (ADR)
- Monitoring deadlines

## termination

- Confirming scope and conclusion
- Need to withdraw from proceedings
- Deadlines and/or statutes of limitation
- Right to files
- Return of unbilled retainer / other funds
- Conflict waiver (or reminder of waiver)

# Intersection of Ethics and Professionalism

## rule 3.4 - litigation fairness

- unlawfully obstruct another party's access to evidence
- alter, destroy or conceal a document
- falsify evidence
- knowingly disobey an obligation
- make a frivolous discovery request or fail to make reasonably diligent effort to comply with a proper discovery request
- allude in a trial to any matter that the lawyer does not reasonably believe is relevant
- request a person other than a client (or relative, employee, or agent) to refrain from voluntarily giving relevant info

## rule 4.1 - truthfulness in statements

- make a false statement of material fact or law to a third person
  - no affirmative duty to inform an opposing party of relevant facts.
- Puffing and posturing is permissible
  - Estimates of price or value placed on the subject of a transaction
  - party's intentions as to an acceptable settlement of a claim
  - existence of an undisclosed principal

# Intersection of Ethics and Professionalism

## rule 4.2 - known to be represented

- A lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer
- Applies even though the represented person initiates or consents to the communication.
- A lawyer must immediately terminate communication with a person once representation is known
- May not make a prohibited communication through another person

## rule 4.4 - respect for 3rd party rights

- A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- 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.

**Questions?**