

# MUSIC LAWYERS TAKING THE RAP<sup>1</sup>: THE MUSICALIZATION<sup>2</sup> OF LEGAL ETHICS

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*"The music business is a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free, and good men die like dogs. There's also a negative side."*

♪ *Hunter S. Thompson, Rolling Stone*

## I. Introduction

### a. The Nature of the Business

*"I wish there had been a music business 101 course I could have taken."*

♪ *Kurt Cobain, Nirvana*

The music industry is a stage notorious for its glamour, impropriety and sensationalism—upon which key players follow rules which at times appear to apply only to the “fast-paced, highly competitive and intense” music business.<sup>3</sup> “It is commonly described as ‘incestuous’ with a premium attached to ‘who you know’ as much as ‘what you know.’”<sup>4</sup> Lawyers who dare enter the music realm often find themselves engaging in practices divergent from the traditional roles of attorneys<sup>5</sup> and are faced with ethical dilemmas unlike those encountered by attorneys in more traditional practice areas. Music lawyers represent clients in a vast array of matters including drafting and negotiating recording contracts, music publishing agreements, endorsement and sponsorship deals, touring and live performances, agreements among members of bands, licensing

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<sup>1</sup> The term “rap” is a slang term defined in this context as “legal responsibility for a criminal act.” BLACK’S LAW DICTIONARY 591 (3rd Pocket ed. 1996).

<sup>2</sup> The term “musicalization” means, “to set to music.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 767 (10th ed. 1995).

<sup>3</sup> Kenneth J. Abdo & Jack. P. Sahl, *Entertainment Law Ethics*, Mar. 15, 2001, available at [http://www.lommen.com/news\\_detail.asp?RecordNumber=125](http://www.lommen.com/news_detail.asp?RecordNumber=125).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

agreements, distribution agreements and agreements with agents and managers. Conflicts of interest lurk around every corner in this small community of actors where relationships and connections prove paramount.<sup>6</sup> The intimate nature of the industry presents attorneys with ethical dilemmas at every impasse, particularly due to the prevalence of conflicts of interest among clients and potential clients.<sup>7</sup> In a world where “most of the big deals closed in recent years have been negotiated by a small clique of law firms that frequently represent both artists and the companies that market their music—occasionally at the same time,”<sup>8</sup> a music lawyer may be prized for his ability to create “package deals” by uniting his connections for success. An entertainment lawyer who represents a powerful producer and also represents a successful musician may create a package deal by bringing his clients together, thereby ensuring a successful and financially beneficial outcome for all involved.<sup>9</sup> While package deals may entice clients and attorneys alike, serious conflicts of interest arise when an attorney represents adverse clients. This is merely one of the many ethical conflicts that plague the music business.<sup>10</sup>

### **b. Raising the Bar: Lawyers Under Scrutiny**

***“A lawyer should avoid even the appearance of professional impropriety.”***  
**♪ MODEL CODE OF PROF’L RESPONSIBILITY Canon 9**

Lawyers, unlike other players in the music business, are subjected to scrutiny ad infinitum regarding their qualifications, character and reputation. Requisite educational

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<sup>6</sup> SHERRI BURR & WILLIAM HENSLEE, ENTERTAINMENT LAW: CASES AND MATERIALS ON FILM, TELEVISION AND MUSIC 683 (Thomson/West 2004).

<sup>7</sup> Edwin F. McPherson, *Conflicts in the Entertainment Industry?...Not!*, 10 ENT. & SPORTS L. 993, available at [http://www.m-klaw.com/articles/article\\_esl93.html](http://www.m-klaw.com/articles/article_esl93.html).

<sup>8</sup> Chuck Philips, *Joel Lawsuit an ‘Alarm Bell’ for Music Industry Pop: The suit against attorney Allen Grubman highlights an ethical dilemma: Can a lawyer represent a pop client as well as the firm that markets the music?* L.A. TIMES, Oct. 14, 1992 at 1.

<sup>9</sup> McPherson, *supra* note 7.

<sup>10</sup> Burr, *supra* note 6, at 683.

standards which vary by state serve as the first hurdles in a lifelong steeplechase.

Attorneys are expected to first obtain undergraduate degrees followed by matriculation to law school to earn Juris Doctor degrees. Finally, prospective attorneys must pass a state-administered bar exam unique to each jurisdiction. Before state bar admission, an applicant's entire background is reviewed and his moral fitness evaluated to determine the applicant's character. For example, "in addition to passing the required examination, applicants seeking admission to practice law in California must file an Application for Determination of Moral Character."<sup>11</sup>

Once an applicant is licensed by a particular state to practice law, the attorney's behavior will continue to face relentless scrutiny. Each state has adopted and codified ethical guidelines prescribing appropriate behavior for attorneys practicing within the jurisdiction. If an attorney fails to comply with the ethical guidelines, his conduct may subject him to review by the state bar in addition to liability incurred regarding civil claims. Mere compliance with the ethical provisions may not protect an attorney from state bar review; many state bars reserve the authority to subject attorneys to physical and mental health evaluations. In California, "a member of the State Bar is subject to a physical or mental examination if his or her physical or mental condition is at issue in an investigation or disciplinary proceeding."<sup>12</sup>

An attorney's reputation both in the legal community and among clients plays a determinant role regarding the attorney's continued success. Clients often select attorneys through referrals and recommendations from past clients. The music business

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<sup>11</sup> The State Bar of California Moral Character Determination, <http://calbar.xap.com/applications/CalBar/info/moral.html>.

<sup>12</sup> California Senate Bill 479 (Burton), *Legislative Counsel's Digest*, (February 22, 2001).

epitomizes a field where reputation may serve as one's most valuable asset or most detrimental liability.

Legal malpractice claims have scourged both lawyers and legal insurers for decades.<sup>13</sup> The perceived aggrandizement in legal malpractice claims may evidence an increase in attorney culpability for negligent conduct or a diminution in the reluctance of dissatisfied clients to file malpractice claims.<sup>14</sup> The ramifications of attorney misconduct are felt throughout a profession which is often characterized by the general public in a negative light. Public policy concerns arise from the potential for serious harms to clients resulting from inappropriate conduct exhibited by attorneys entrusted with their representations. Due to the grave implications of attorney misconduct, "legal malpractice should not be viewed as simply a business risk to be allocated between the lawyer and his client or spread among a wider group by means of insurance. Malpractice has harmful effects on the legal system itself, and thus should be a subject of more general concern."<sup>15</sup>

Participants in the music industry interact on a public stage where media coverage ensures that gossip is rampant, controversies are spotlighted and indiscretions are celebrated. With such public focus on the industry, any attorney-client conflicts are certain to command the attention of the ravenous audience, poised to feed upon the failures of others while laudable acts of music lawyers rarely make headlines. The ramifications of attorney misconduct in the music industry threaten further detriment to the public perception of lawyers and foster mistrust of those sworn to uphold the law.

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<sup>13</sup> *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## II. Key Players in the Music Business—Lawyers, Agents & Managers

### a. The Role of the Music Lawyer & Rules of Professional Conduct

*“You’re a local band until you get a record contract, then all of a sudden Bruce Springsteen is your competition.”*

♪ *Sammy Llana, The BoDeans*

Music lawyers serve their clients in myriad capacities, frequently extending beyond the legal context, into the assumption of multitudinous non-legal roles. Opportunities for legal employment in the music industry may arise in-house, representing record and music publishing companies for whom attorneys are hired to travail, often performing a variety of non-legal, business oriented roles in addition to legal duties.<sup>16</sup> As “every band needs a music lawyer to help the band get the best record and music publishing deals possible,”<sup>17</sup> attorneys who choose to forego in-house employment and instead represent musicians often procure and draft contracts for the artists. In addition to drafting and negotiating recording and publishing deals, music lawyers are also charged with the creation of endorsement and sponsorship deals, agreements pertaining to touring and live performances, contracts among musicians, licensing agreements, distribution agreements and agreements with agents or managers. Thus, the financial success as well as the dissemination of the musician’s material to the public often hinge upon the musician’s critical initial selection of a lawyer.<sup>18</sup>

In some situations, the music lawyer may serve roles resembling those of agents and managers, breeding serious complications for attorneys required to act within the confines of ethically permissible conduct for lawyers. This presents a significantly higher benchmark than the limited standards imposed upon businesspeople, agents,

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<sup>16</sup> Burr, *supra* note 6, at 691.

<sup>17</sup> *Id.* at 682.

<sup>18</sup> *Id.* at 683.

managers or fans. Even when acting in non-legal capacities, lawyers who act as agents or managers are still required to comply with the rules of professional conduct for attorneys. The state-specific ethical standards are patterned after model rules and codes promulgated by the American Bar Association.

Although agents and managers may have professional standards imposed by their respective jurisdictions, none are as stringent as those pertaining to attorney conduct. For example, a member of the California State bar is required by law “to comply with certain requirements and rules of professional conduct in order to avoid being subject to disciplinary action by the Board of Governors of the State Bar of California.”<sup>19</sup> This duty exists regardless of which “hat” the attorney dons in a specific situation; he remains a representative of the bar and the legal community in all roles.

#### **b. The Role of the Agent & Mandatory Licensing Requirements**

*"Being a manager or agent is similar to renting an apartment. Having a record company is like owning a home."*

♪ *Rob Kahane, Trauma Records*

According to Black’s Law Dictionary, the term “agency” is defined as “a fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions.”<sup>20</sup> In the music business, agents serve the primary function of procuring employment or professional engagements for musicians. Agents are often charged with the marketing and promotion of musicians they represent. Essentially, agents are salespeople who sell their clients’ talents to the consuming public. While

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<sup>19</sup> *Supra* note 12.

<sup>20</sup> *Supra* note 1, at 26.

agents are not subject to a professional code of ethics akin to that imposed upon attorneys, agents are often required to comply with various procedural requirements which vary by jurisdiction. Any attorney who acts in the capacity of an agent may be subject to licensing requirements and potentially liable for failing to procure such licenses.

The California Labor Act states, “[N]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner.”<sup>21</sup> According to the Act, the term “talent agency” includes the following:

*“a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists except that the activities of procuring, offering, or promising to procure contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.”*<sup>22</sup>

To obtain a talent agency license in California, applicants must file a written application accompanied by fingerprints and affidavits from “reputable residents” to serve as references regarding the applicant’s good moral character and reputation for fair dealing.<sup>23</sup> Although these standards are considerably less stringent than the ethical guidelines for attorneys practicing in California, talent agents are granted licenses only if they exhibit upstanding moral character and a reputation for fair dealing. To ensure fair and honest practices once granted agencies acquire licenses, the California Labor Code requires that all talent agencies submit any standard contract forms that they plan to use

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<sup>21</sup> CAL. LAB. CODE § 1700.5 (2008).

<sup>22</sup> CAL. LAB. CODE § 1700.4 (2008).

<sup>23</sup> CAL. LAB. CODE § 1700.6 (2008).

to the Labor Commissioner for review. Furthermore, talent agencies are required to file fee schedules and maintain detailed records of all funds received on behalf of their clients.<sup>24</sup>

New York has similar requirements for agents codified in the New York General Business Law statutes which state, “no person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefore as provided in this article.”<sup>25</sup> The licensing provisions apply to employment agencies including:

*“any person who, for a fee, renders vocational guidance or counseling services and who directly or indirectly: 1) procures or attempts to procure or represents that he can procure employment or engagements for persons seeking employment or engagements; 2) represents that he has access, or has the capacity to gain access, to jobs not otherwise available to those not purchasing his services; or 3) provides information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than himself.”<sup>26</sup>*

The New York statutes specifically address agents in the art and entertainment realms, defining a “theatrical employment agency” to include *“any person... who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances.”<sup>27</sup>* Managers are not subject to the New York licensing requirements

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<sup>24</sup> CAL. LAB. CODE § 1700.23-§ 1700.25 (2008).

<sup>25</sup> N.Y. GEN. BUS. LAW § 172 (2008).

<sup>26</sup> N.Y. GEN. BUS. LAW § 171(2)(c) (2008).

<sup>27</sup> N.Y. GEN. BUS. LAW § 171(8) (2008).

which explicitly exempt “the business of managing such entertainments...where such business only incidentally involves the seeking of employment therefore.”<sup>28</sup> According to New York case law, without proof of a proper license, an agency cannot prevail in a suit seeking compensation for services rendered to an artist.<sup>29</sup>

Punishment for failure to obtain a license differentiates the New York licensing standards from those in California. In New York, any person required to obtain a license who fails to do so “shall be guilty of a misdemeanor” and subsequently fined up to \$1,000, sentenced to imprisonment up to one year or both.<sup>30</sup> Furthermore, the inclusion of mere dicta in a management contract classifying acts to secure employment on behalf of an artist is incidental to the underlying agreement and is not conclusive to establish exemptions from licensing requirements. Courts will look to the specific facts in relation to a challenged document.<sup>31</sup>

### c. The Role of the Manager and Permissible Acts Sans Licensure

*“I think the most poetic way of putting it is that when I got them to where they wanted to be, the air became rarified, they became deified, and I became nullified.”*

♪ *Jay Bernstein, Hollywood Manager*<sup>32</sup>

There are few concrete requirements for managers who do not act as agents or attorneys. The roles of managers vary significantly according to the specific needs of the artists they manage.<sup>33</sup> While some artists are highly self-sufficient in business and self-

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<sup>28</sup> *Id.*

<sup>29</sup> *Meyers v. Walton*, 135 N.Y.S. 574 (1912).

<sup>30</sup> N.Y. GEN. BUS. LAW § 190 (2008).

<sup>31</sup> *Farnum v. O’Neill*, 252 N.Y.S. 900 (1931).

<sup>32</sup> Hollywood producer, publicist and manager Jay Bernstein, commenting on his career as a celebrity representative. S.F. CHRON., Nov. 23, 1989, at A8, *reprinted in* ROBERT FREMLIN & MICHAEL LANDAU, ENTERTAINMENT LAW 1218 (Thomson West 1995) (2006).

<sup>33</sup> *Croce v. Kurnit*, 565 F.Supp. 884, 893 (1982).

promotion with minimal exigency for management contribution,<sup>34</sup> other musicians “seek to concentrate solely on their artistic efforts”<sup>35</sup> and demand significant management benefactions. In California, unlike talent agents who must apply for licenses, personal managers may work in conjunction with talent agencies to negotiate employment contracts for artists without obtaining licenses.<sup>36</sup> Furthermore, the California Labor Code exempts from the licensing requirements activities directed at procuring recording contracts.<sup>37</sup> This exemption signifies a legislative acknowledgement that “entertainment business artists usually hire personal managers to obtain recording contracts and not talent agents, who ordinarily handle booking tours, club dates and other personal appearance employment.”<sup>38</sup> Regardless, without additional checks and balances for managers, there is increased likelihood of unethical behaviors creeping into management practices. Attorneys who serve management roles must exercise diligence to support clients only through management practices consistent with the applicable standards of professional responsibility for attorneys.

### **III. The Attorney-Client Relationship**

#### **a. Fiduciary Nature of the Attorney-Client Relationship**

The relationship between an attorney and his clients is that of a fiduciary. Largely a result of public policy concerns for the protection of legally uneducated clients reliant upon their attorneys, this fiduciary duty binds attorneys to act in the best interest of their

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Fremlin, *supra* note 32.

<sup>37</sup> *Id.* at 1220.

<sup>38</sup> *Id.*

clients. In *Croce v. Kurnit*, the court defines the fiduciary relationship implicit in the attorney-client relationship as follows:

*“Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another.”*<sup>39</sup>

Controversy arose in *Croce v. Kurnit* when the widow of musician Jim Croce filed a complaint seeking damages for breach of contracts, contract rescission on the grounds of fraud and breach of fiduciary duty.<sup>40</sup> Early in Jim Croce’s career, the couple had entered into contracts including a recording contract, publishing contract and personal management contract with companies led by businessmen and an attorney, thereafter named as defendants in the complaint.<sup>41</sup> At the initial contract signing which occurred early in Jim Croce’s career, Kurnit, the attorney who represented the business entities involved in the agreements, outlined for the unrepresented Croces the contractual provisions, meanings and legal ramifications of the contracts. Kurnit then signed the documents on behalf of the businesses, failing to advise the Croces to procure independent legal representation to protect their interests.<sup>42</sup>

Despite facts evidencing the absence of a retainer agreement between the Croces and Kurnit, the lack of subsequent bills from Kurnit to the Croces for services rendered at

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<sup>39</sup> Croce, *supra* note 33.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 887.

the contract signing, and the acknowledgement that the Croces understood Kurnit to be signing the contracts on behalf of the businesses he represented, the court ruled that Kurnit owed and subsequently breached his fiduciary duty to the Croces.<sup>43</sup> Kurnit's fiduciary duty to the couple arose from his introduction as "the lawyer," his explanations of the contractual provisions, his vested interest in the transactions, his failure to advise the Croces to obtain outside counsel, and the Croces' actual lack of independent representation at the signing.<sup>44</sup> Though Kurnit's breach was not so egregious as to elicit contract rescissions, the court nonetheless ordered Kurnit to pay Croce's attorneys fees.<sup>45</sup>

### **b. Birth of the Attorney-Client Relationship—Beware!**

Once a fiduciary relationship has been established, the responsibly party is "bound by a standard of fairness, good faith, and loyalty."<sup>46</sup> Often, the fiduciary relationship comes into existence without an express agreement between the attorney and the client. Lawyers must take cognizance of the potential for the emergence of fiduciary obligations in communications with potential clients; fiduciary obligations may be born sans formal attorney-client agreements.<sup>47</sup> "An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice."<sup>48</sup> Thus, attorneys must exercise extreme caution when offering casual advice to potential clients, even in the context of initial interviews. The duty to protect client confidentiality, particularly

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<sup>43</sup> *Id.* at 893.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 894.

<sup>46</sup> *Id.* at 892.

<sup>47</sup> *Id.* at 893.

<sup>48</sup> *Togstad, et. al. v. Vesely*, 291 N.W.2d 686 (1980).

regarding conflicts of interest, may preclude future representations of the potential clients' adversaries even in the absence of future representations of the potential client.<sup>49</sup>

### **c. Protections on Paper: Follow-up Letters and Retainer Agreements**

Attorneys may best ward themselves from liability by diligently documenting in writing all communications with potential clients and ensuring that both parties receive copies. The nature of the relationship between the parties must be explicitly detailed in the documents. If the parties agree to enter into a formal attorney-client relationship, retainer agreements should be employed to memorialize formation of the agreement and elucidate party expectations and responsibilities. This record-keeping procedure is in accordance with the requirements of the MODEL RULES OF PROF'L CONDUCT R. 1.5(b), which states "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."<sup>50</sup> Furthermore, it is the duty of the attorney to communicate to the client in writing any modifications or changes in expectations to protect the interests of all involved parties.<sup>51</sup>

## **IV. A Lawyer's Duty of Competence**

*"I want you to understand that this man at the wheel is my attorney. He's not just some dingbat I found on the strip, man."*

*♪ Raoul Duke, Fear and Loathing in Las Vegas*

The MODEL RULES OF PROF'L CONDUCT impose on attorneys a general duty to provide clients with competent representation.<sup>52</sup> According to Rule 1.1, "a lawyer shall provide competent representation" which requires that the lawyer possess "the legal

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<sup>49</sup> DCA Food Indus., Inc. v. Tasty Foods, Inc., 626 F.Supp. 54 (1985).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002).

<sup>51</sup> *Id.*

<sup>52</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>53</sup> Factors relevant to determine if a lawyer is appropriately equipped with the requisite knowledge and skill to achieve competent client representation in a particular matter include the following:

*“the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.”*<sup>54</sup>

While the knowledge and skill level expected of a general practitioner is often the standard for competency, some legal representations may require expertise in a specific field.<sup>55</sup> Practitioners in the music law realm must possess knowledge and skill of a different nature to attain the level of competency requisite for successful practice in the music industry:

*“Knowing the law isn't enough. In order to be a competent lawyer, you must understand the music business and what the record companies are looking for in order to effectively represent music industry clients. You must study the contract forms and know what you can and can't negotiate. You need to understand the music business and the current industry standards...you have to be familiar with the past and present recording artists...You have to be able to give your client honest feedback on his or her prospects of getting a record deal. The only way to be able*

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<sup>53</sup> *Id.*

<sup>54</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2002).

<sup>55</sup> *Id.*

*to do that is to listen to music and be familiar with the vocalists who already have music deals.*”<sup>56</sup>

The duty to maintain competency both encompasses an attorney’s behaviors while actively engaged in client representations and extends beyond the realm of professional engagements. Lawyers are responsible for the acknowledgement and eradication of any personal habits such as substance abuse that may threaten professional performance or prove injurious to the attorney’s reputation. In 2001, the California State Bar’s Lawyer’s Assistance Program was established to aid attorneys suffering from substance abuse or mental health problems.<sup>57</sup> The program was enacted “to enhance public protection, maintain the integrity of the legal profession, and support recovering attorneys in their rehabilitation and competent practice of law.”<sup>58</sup>

## **V. Conflicts of Interest**

*“We’ll take advantage of the changes going on in the music business because we’re lean and mean.”*

*♪ Miles Copeland, I.R.S. Records*

Brian Wilson, a musician in the band The Beach Boys, sued his former publishing company and his attorney following a sale conducted by Wilson’s father of Wilson’s publishing and facilitated by Wilson’s attorney.<sup>59</sup> The purchaser at the sale was Wilson’s publisher who allegedly acquired the materials “for a ridiculously low amount, which

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<sup>56</sup> Willian Henslee, *Evolving Role of the Lawyer in the Representation of Talent in the Music Business*, in Sherri Burr & William Henslee, *Entertainment Law: Cases and Materials on Film, Television and Music* 691, 695 (2004).

<sup>57</sup> The California State Bar’s Lawyer’s Assistance Program was established in 2001 by California Senate Bill 479. The resolutions were codified as amendments to CAL. BUS. & PROF. CODE § 6140.0 and § 6230 through §6238. *See supra* note 12.

<sup>58</sup> California Lawyer’s Assistance Program—“Prevention, Detection & Treatment of Substance Abuse” MCLE Quiz, [http://www.netforlawyers.com/substance\\_abuse\\_mcle.htm](http://www.netforlawyers.com/substance_abuse_mcle.htm).

<sup>59</sup> McPherson, *supra* note 7.

was then squandered by the father.”<sup>60</sup> In the suit, Wilson alleged that the sale was conducted without his knowledge or permission. Furthermore, Wilson claimed that his attorney had represented both Wilson and the publishing company at the sale.<sup>61</sup> Though the case was reportedly settled prior to trial for a substantial sum of money,<sup>62</sup> it typifies lawsuits asserted against lawyers in the music industry who juggle simultaneous representations of clients with serious conflicts of interest.

**a. General Rules Regarding Concurrent Conflicts of Interest**

Awareness of potential conflicts of interest is imperative for attorneys and the clients who may be adversely affected by the conflicting interests. Complete knowledge and disclosure to all involved parties is the sole mechanism through which attorneys may represent parties with conflicting interests without incurring substantial liability for ethical misconduct. Identification of all potential conflicts of interest and elucidation of the relationships at the outset of client representations is compulsory in order to “prevent ill will and litigation at the end of the relationship.”<sup>63</sup>

The general rule regarding conflicts of interest involving current clients is articulated in MODEL RULES OF PROF’L CONDUCT R. 1.7(a) which instructs, “A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”<sup>64</sup> According to the Rule, a concurrent conflict of interest arises if “the representation of one client will be directly adverse to another client or 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

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Burr, *supra* note 6.

<sup>64</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2002).

personal interest of the lawyer.”<sup>65</sup> Representing clients who may present conflicts of interest is discouraged both by ethical standards for attorneys as well as general public policy to protect the public from lawyers who will not exhibit the appropriate loyalty and zealous advocacy for their clients due to commitments to other clients or personal interests.

In a recent case, the Supreme Court of Kentucky determined that a New York attorney was subject to personal jurisdiction in Kentucky resulting from his disregard for clear conflicts of interest in his representation of Betty Kern Miller, widow of songwriter Jerome Miller.<sup>66</sup> The attorney, Andrew Boose, served as a co-trustee of a trust created to manage the literary property owned by the widow including copyrights and royalties derived from Jerome Miller’s musical creations.<sup>67</sup> The widow, a Kentucky resident, agreed to trust provisions which granted the trustees significant powers including:

*“Power to deal with Literary Property...with the same freedom and to the full extent as if they were the sole and absolute owners...and without limitation, make any and all agreements, contracts or arrangements which they, in their discretion, shall determine, and employ and compensate any attorneys, managers and/or agents (including any person who is serving as Trustee), for or in connection with the sale, lease, licensing, exploitation, utilization, turning to account, or other disposition of, or dealing with, Literary Property.”*<sup>68</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Stan Soocher, *Counsel Concerns*, 23 ENT. LAW & FIN. 4 (Jan. 2008).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Furthermore, a codicil to Betty Kern Miller's will later bequeathed all of her "right, title and interest in and to any Literary Property" to the Trustees.<sup>69</sup> After Betty Kern Miller died, her daughter and trust beneficiary filed suit in Kentucky alleging that Boose exerted undue influence regarding the creation of the codicil, engaged in unauthorized practice of law, ignored clear conflicts of interest and violated his fiduciary duties.<sup>70</sup> Boose claimed that Kentucky lacked jurisdiction as his only Kentucky contact for jurisdictional purposes was his visit to the state for the signing. The Supreme Court disagreed, ruling that the facts established a course of conduct sufficient to establish minimum contacts "culminating in alleged conflicts of interest and claims of 'a scheme for acquisition of ownership' of the decedent's property."<sup>71</sup> As a result, Boose faces the aforementioned charges in Kentucky.<sup>72</sup>

#### **b. Simultaneous Representations of Adverse Parties**

MODEL RULES OF PROF'L CONDUCT R. 1.6(a) regarding client confidentiality states, "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 or the disclosure is permitted by paragraph (b)."<sup>73</sup> This commitment to confidentiality underlies the prohibition against representing parties with conflicting interests. Although the general rule regarding conflicts of interest prohibits simultaneous representations of adverse parties, exceptions to the general rule are allowed if certain conditions are met. Although MODEL RULES OF PROF'L CONDUCT R.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

1.7(a) prohibits simultaneous representations involving concurrent conflicts of interest, part (b) offers an exception to the general rule:

*“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.*

Through the creation of an effective waiver following full disclosure, an attorney may obtain consent from affected clients and may subsequently represent those clients whose simultaneous representation would otherwise be prohibited. Such a waiver in the context of music law “must be detailed and thorough and created for that particular client...Conflicts can appear subtle and insignificant, and so letters regarding waiver of conflicts must be detailed and comprehensive.”<sup>74</sup> Accordingly, form letters are insufficient protections in situations involving the slippery slope of conflicts of interest.<sup>75</sup>

When drafting conflict of interest waivers, attorneys should consider and address in a detailed writing a variety of factors, including the scope of representation of the party first represented, whether or not such representation occurs on a regular or occasional basis, expectations regarding future representations of the original party, and the

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<sup>74</sup> Richard J. Wallace, III, *Conflicts of Interest in the Entertainment Law Context*, Nov. 27, 2001, available at [http://www.passmanjones.com/resources/PJArticles.aspx?contenttype=Article&Article\\_ID=29](http://www.passmanjones.com/resources/PJArticles.aspx?contenttype=Article&Article_ID=29).

<sup>75</sup> *Id.*

implications of simultaneous representation for the former party.<sup>76</sup> Attorneys must identify any matters for which the initial client elicited legal aid which may be considered substantially related to matters arising in the latter representation.<sup>77</sup> Attorneys must consider past exchanges of confidential information to or from the former party that could relate to the work of the latter party as well as any confidential information exchanged with the latter party relating to the former party.<sup>78</sup> An attorney considering simultaneous representation must determine whether or not representation of the latter party could prove detrimental to the ability to represent the former party.<sup>79</sup> Discussions to make parties aware of the conflicting interests and obtaining informed consent prove pivotal in determining whether or not simultaneous representation will be permitted in a given situation.<sup>80</sup>

Some conflicts of interest constitute prohibited representations and cannot be waived despite disclosure and informed consent by the parties. The Comments to the MODEL RULES OF PROF'L CONDUCT R. 1.7 address such conflicts, explaining, "some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."<sup>81</sup> When such conflicts arise, the question of consentability must be determined on a per client basis.<sup>82</sup>

Just as lawyers working in the music industry may incur professional liability by performing a variety of non-traditional roles such as acting in the capacity of an agent or

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

<sup>82</sup> *Id.*

manager, they may also encounter professional liability when representing closely related parties. Conflicts of interest frequently arise when lawyers represent a musician as well as the musician's manager, agent or even a record label working with the musician. Both the advocates and critics of dual representation present persuasive arguments, though some dual representations may be prohibited regardless their profit potential. Critics of dual representation focus largely on the inability to effectively represent clients when representing adverse parties.

*“Because a lawyer is expected to exercise independent professional judgment on behalf of a client, he/she should not be engaged by the manager or agent, whom the lawyer may be called on to negotiate with or even litigate against on behalf of the performer, writer or artist. Such dual representation can provide the appearance of a conflict of interest and may serve as prima facie grounds for a legal malpractice action.”*<sup>83</sup>

While critics of dual representation argue that attorneys are incapable of maintaining the required undivided loyalty to clients in simultaneous representations, proponents emphasize the benefits that parties may glean from such representations.<sup>84</sup> A lawyer's conflict of interest may prove beneficial in music industry negotiations where maintaining close relationships with key players in the industry leads to better results for clients.<sup>85</sup> In fact, some musicians actively seek representation by attorneys known for cross-representations.<sup>86</sup> Technically, the parties may not be truly adverse or against each other even though their interests diverge:

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<sup>83</sup> Wallace, *supra* note 74.

<sup>84</sup> Philips, *supra* note 8.

<sup>85</sup> *Id.*

<sup>86</sup> McPherson, *supra* note 7.

*“...The key word here is ‘against.’ In an entertainment context is the entertainment attorney (who, unlike a litigator, is acting much less as legal counsel and much more as a negotiator) really representing an actor ‘against’ a producer or recording artist ‘against’ a label? Is there really a conflict of interest in representing both?”<sup>87</sup>*

Although disclosing the existence or potential for a conflict and obtaining informed consent often decreases the likelihood of future malpractice claims, representing parties who may later engage in litigation as opponents places the attorney in an ethically dangerous realm.

In 1992, musician Billy Joel sued his attorney Allen Grubman, one of the most powerful figures in the music industry, in a \$90 million civil suit alleging fraud and breach of contract.<sup>88</sup> Joel accused Grubman and his firm, Grubman, Indursky, Schindler & Goldstein, of engaging in representations with undisclosed conflicts of interest.<sup>89</sup> Joel claimed that the attorney failed to inform Joel of his simultaneous representations of Joel, Joel’s record company, CBS, and Joel’s manager (and brother-in-law) between 1980 and 1989.<sup>90</sup> Grubman maintained that his firm was not employed by CBS at the time he negotiated Joel’s contract, though he acknowledged that his firm had represented the record company in the past.<sup>91</sup> Eventually, Sony Records, an entity not named as a party to the suit, settled with Joel, allegedly enticing him to drop claims for a \$3 million settlement.<sup>92</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> Philips, *supra* note 8.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Burr, *supra* note 6, at 691.

Though Joel's suit accused Grubman of "never fully revealing the extent of his allegiance to the singer's former manager or record company," Grubman openly represented other performers and their managers in situations presenting similar conflicts of interest. One such example was Grubman's simultaneous representation of both Madonna and her manager during negotiations with Time Warner following a retainer agreement between Grubman's firm and a subsidiary of Time Warner.<sup>93</sup>

*"Many rock stars apparently view Grubman's flair for cross-representation as an attribute rather than an impediment during negotiations. His clients...are convinced that Grubman's long-standing relationships with the industry's most powerful executives actually help them obtain the best deals possible."*<sup>94</sup>

While the benefits realized from cross-representation may be worth the gamble for some attorneys, the potential for malpractice suits and culpability for violations of the ethical guidelines imposed upon attorneys is not lessened by the possible financial gain as evidenced by Grubman's history of malpractice claims in an industry where conflicts of interest are "rampant."<sup>95</sup>

### **c. Obligations to Former Clients: The Substantial Relationship Test**

The ABA Model Rules of Professional Conduct address the duty owed to former clients in Rule 1.9(a):

*"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which*

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<sup>93</sup> Philips, *supra* note 8.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

*that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”*<sup>96</sup>

Furthermore, Rule 1.9(c) explicitly bars attorneys from revealing or using information acquired in past representations to the disadvantage of the past clients unless required by other ethical rules (such as for prevention of an imminent violent crime) or when the information has been disseminated into the public domain.<sup>97</sup>

The “substantial relationship test” is the standard for judging when involvements with former clients prohibit representations of potential clients.<sup>98</sup> According to the substantial relationship test, developed in *T.C. Theater Corp. v. Warner Bros. Pictures, Inc.*,

*“To prohibit an attorney from disclosing matters revealed to him by reason of his former representation of a client, or from representing a new client adverse to the former client’s interests, the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. A court will assume that during the course of the representation confidences were disclosed to the attorney bearing on the subject matter of the representation.”*<sup>99</sup>

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<sup>96</sup> ABA Model Rules of Professional Conduct Rule 1.9(a).

<sup>97</sup> ABA Model Rules of Professional Conduct Rule 1.9(c).

<sup>98</sup> *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.* 113 F. Supp. 265 (1953).

<sup>99</sup> *Id.*

Therefore, before an attorney agrees to represent a new client with interests adverse to those of a former client, he must first determine whether or not the matters involved in the representations are substantially related.<sup>100</sup>

In a recent California case, UMG Recordings filed a motion to disqualify O'Melveny & Myers (OMM) from representing MySpace, an online social networking website, in a copyright infringement suit due to OMM's previous representation of UMG in litigation involving the Napster file-sharing service.<sup>101</sup> In consideration of UMG's motion to disqualify, the U.S. District Court for the Central District of California examined Rule 3-310 of the California Rules of Professional Conduct which provides that an attorney "shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment."<sup>102</sup> Despite the fact that the attorneys employed by OMM in the previous representation differed from those involved in the MySpace representation and despite OMM's earlier procurement of a waiver by UMG of any future conflict of interest issues, the court ruled that the two representations were "substantially related."<sup>103</sup> Though the court did not disqualify OMM from the representation, an order requiring OMM to pay the fees incurred by UMG in pursuit of the disqualification was entered due to OMM's overriding "duty of loyalty to its former client" which supersedes the "flatly unreasonable and inconsistent" waiver.<sup>104</sup>

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<sup>100</sup> Soocher, *supra* note 66.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

**d. Conflicts of Interest Due To Business Transactions and Attorney Compensation**

The ABA Model Rules of Professional Conduct do not prohibit attorneys from engaging in business transactions with clients, though Rule 1.8 prescribes specific guidelines an attorney must follow to ensure fairness to the client in business dealings:

*“(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction.”<sup>105</sup>*

In business transactions with clients, attorneys must exercise fair and reasonable business practices. The attorney has the duty to disclose all terms of the business transaction to the client in a written document composed to ensure the client’s full understanding. Furthermore, the attorney should alert the client to seek independent counsel regarding the transaction. The client must freely give his informed consent to the transaction in a signed writing in order for the business engagement to move forward.

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<sup>105</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002).

The heightened duties imposed on attorneys who engage in business transactions with clients address public policy concerns that arise from such transactions. As the Comments to Rule 1.8 explain, “A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client...”<sup>106</sup> It is in the best interest of both the client and the attorney to follow the prescribed procedures to ensure that both parties are in accord and there are no misunderstandings that may lead to future claims against the attorney.

According to Rule 1.8(f) of the MODEL RULES OF PROF'L CONDUCT, attorneys are barred from accepting monetary compensation for services rendered from third parties unless three conditions are met.<sup>107</sup> The client must give his informed consent regarding the transaction.<sup>108</sup> The lawyer must ensure that financial involvement of a third party does not affect the lawyer's “independence of professional judgment” or interfere with the relationship between the lawyer and the client.<sup>109</sup> Finally, the information relating to the representation (i.e. confidential information) must remain protected as confidential attorney-client communications.<sup>110</sup>

The attorney must never forget that the attorney-client relationship is not established by payments for services rendered, but it instead arises in the context of the fiduciary relationship, founded upon trust placed by one person in the integrity of another.<sup>111</sup> For example, if a parent pays the legal fees incurred by his child, the attorney

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<sup>106</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. (2002).

<sup>107</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(1) (2002).

<sup>108</sup> *Id.*

<sup>109</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2) (2002).

<sup>110</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(3) (2002).

<sup>111</sup> Croce, *supra* note 33, at 893.

is in a fiduciary relationship with the child despite the payment of legal fees by the parent.

Though the MODEL RULES OF PROF'L CONDUCT do not prohibit attorneys from negotiating agreements which grant a lawyer literary or media rights arising from a representation, Rule 1.8(d) controls the timing of such negotiations. According to the Rule, "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."<sup>112</sup> Limiting agreements for literary and media rights until the conclusion of representation ensures that the attorney's loyalty to the client and duty to maintain confidentiality are not breached due to the attorney's potential for personal financial gain. If attorneys were not hindered from exchanging literary or media rights for representations and then selling the acquired rights prior to the conclusions of the representations, the attorneys' personal financial gains could be influenced by the outcomes of the pending representations. Conflicts of interest would thereby arise between the attorneys and clients. As a result, negotiations regarding grants of literary or media rights are permitted only after the conclusion of representations, thus preventing such conflicts.

## **VI. Can I Prevaricate When I Negotiate? The Ethics of Negotiation**

*"The whole music business in the United States is based on numbers, based on unit sales and not on quality. It's not based on beauty, it's based on hype and it's based on cocaine. It's based on giving presents of large packages of dollars to play records on the air."*

*♪ Frank Zappa, Musician and Composer*

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<sup>112</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2002).

According to MODEL RULES OF PROF'L CONDUCT, "a lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued."<sup>113</sup> According to this rule, when considering the objectives of a representation, a lawyer "shall abide," following the client's direction and represent the client with the goal of meeting the client's chosen objectives.<sup>114</sup> In terms of the manner in which the objectives will be realized, an attorney "shall consult" the client but is not required to abide by the client's chosen means.<sup>115</sup> Thus, attorneys who employ different styles of negotiation (i.e. cooperative, competitive, or somewhere in between) are free to negotiate in the manner they choose provided they first consult their clients. Furthermore, attorneys should be candid with their clients regarding the negotiation techniques they employ.<sup>116</sup>

Lawyers are required to maintain the confidentiality of their clients in the majority of situations.<sup>117</sup> One exception to the confidentiality rules arises when the client has given informed consent for disclosure.<sup>118</sup> Although Rule 1.2(a) grants attorneys permission to "take such action on behalf of the client as is impliedly authorized to carry out the representation," an attorney must be sentient in negotiations regarding the difference between taking action on a client's behalf with implied consent and revealing confidential information that attorneys are barred from disclosing under Rule 1.6.<sup>119</sup> Thus, in negotiations, an attorney must convey information necessary for the realization of the client's objectives in the negotiation without revealing privileged information.

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<sup>113</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

<sup>118</sup> *Id.*

<sup>119</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

In addition to the informed client consent exception, attorneys are also granted permission to disclose confidential information in the limited circumstances enumerated in Rule 1.6(b) which states:

*“(b) A lawyer may reveal information relating to the representation of a client 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; or (6) to comply with other law or a court order.”<sup>120</sup>*

Although lawyers are permitted to disclose confidential information in the above-listed limited circumstances, they are not required to disclose any confidential information. This is true even if such disclosure would prevent “reasonably certain death or substantial bodily harm.”<sup>121</sup> Thus, the formal rules do not mandate disclosure when

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<sup>120</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2002).

<sup>121</sup> *Id.*

third parties face imminent harm, but attorneys as humans may possess ethical and moral obligations to disclose. This dilemma must be resolved by each attorney individually and serves as an example where one's personal ethics may impose duties beyond those codified by state bars.

It is important to note the exceptions in Rule 1.6(b) which may prove vital to the preservation a lawyer's reputation should the need to establish a defense to a criminal charge or civil claim regarding the attorney's potential ethical liability arise from a representation.<sup>122</sup> The Rule establishes exemptions for disclosures of confidential information in order for an attorney to secure legal advice regarding his compliance with the Rules.<sup>123</sup> Should a lawyer find himself in an ambiguous ethical situation or facing potential liability, the lawyer may hire independent counsel for representation regarding his compliance with the ethical guidelines. The attorney now assumes the role of the client whose confidentiality must be protected. Furthermore, Rule 1.6 grants an attorney permission to disclose confidential information when necessary for defense against charges instigated by a client or pertaining to the attorney's behavior regarding conduct in which the client was involved.<sup>124</sup> In the latter case, such disclosure may be the only mechanism available for attorneys to defend themselves against client charges to protect their reputations, careers, bank accounts or status as members of state bar associations.

When lawyers negotiate on behalf of clients in the music industry, they must follow the aforementioned Rules. These Rules do not always harmonize and often prescribe multifarious behaviors or offer cryptic guidance. Not only must an attorney strictly adhere to the client's objectives, consult with the client regarding the means to

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<sup>122</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) and (6) (2002).

<sup>123</sup> MODEL RULES OF PROF'L CONDUCT R 1.6(b)(5) (2002).

<sup>124</sup> MODEL RULES OF PROF'L CONDUCT R 1.6(b)(6) (2002).

employ,<sup>125</sup> and protect the client's confidentiality,<sup>126</sup> the attorney is also charged with discerning the client's implied authorization.<sup>127</sup> Rule 4.1 which addresses "Truthfulness in Statements to Others" further complicates the rules of negotiations for attorneys:

*In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*"<sup>128</sup>

Clients often expect their attorneys to negotiate competitively with steadfast resolve, demanding inflated requisitions while offering meaningless concessions, adducing false "bottom lines"<sup>129</sup> and proffering specious "best offers." Rule 4.1 prohibits attorneys from making false statements regarding "material fact or law" though safe harbor is found in the inclusion of the word "knowingly" as long as the attorney's lack of knowledge is paired with good faith.<sup>130</sup> Whether or not statements regard material fact or law is an inquiry dependent upon the circumstances.<sup>131</sup>

*"Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an*

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<sup>125</sup> MODEL RULES OF PROF'L CONDUCT R 1.2(a) (2002).

<sup>126</sup> MODEL RULES OF PROF'L CONDUCT R 1.6 (2002).

<sup>127</sup> MODEL RULES OF PROF'L CONDUCT R 1.2 (2002).

<sup>128</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

<sup>129</sup> "The bottom line is the point below you simply won't accept any offers." Juuso Hietalahti, *The Most Important Guideline to Remember in Negotiations and Sales Meetings*, (July 8, 2007), available at <http://www.gameproducer.net/2007/07/08/the-most-important-guideline-to-remember-in-negotiations-and-sales-meetings/>.

<sup>130</sup> MODEL RULES OF PROF'L CONDUCT ADD CODE NUMBER.

<sup>131</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt.

*undisclosed principal except where nondisclosure of the principal would constitute fraud.”*<sup>132</sup>

Essentially, lawyers may lie in negotiations without violating the Rules if the lies are considered to constitute “puffing.”<sup>133</sup> This approbation for dishonesty in negotiations presents lawyers with a personal moral dilemma. A lawyer has three basic courses of action from which to choose when presented with similar situations in negotiations. He may tell the truth about his client’s position to avoid puffing or misrepresenting the facts to the adversary, but in so doing he will be violating his duty to maintain the client’s confidentiality<sup>134</sup> and sabotaging his client’s objectives.<sup>135</sup> The attorney may engage in the “puffing” which is considered ethically permissible according to the MODEL RULES OF PROF’L CONDUCT,<sup>136</sup> but in so doing may contravene his personal morals. Furthermore, if the materiality of facts is ambiguous, the attorney may subject himself to liability for criminal and tortious misrepresentations.<sup>137</sup> The attorney’s third option is to remain silent because “an attorney has no affirmative duty to inform an opposing party of relevant facts.”<sup>138</sup> Appropriate resolution of these moral conflicts is left to the attorney, but he must effectively manage his client’s expectations while elucidating the interdictions regarding false statements by lawyers pertaining to material facts.

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<sup>132</sup> *Id.*

<sup>133</sup> “Puffing” is defined as “the expression of an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service. Puffing involves expressing opinions, not asserting something as fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say that they have attributes that they do not possess. *Supra*, note 1, at 582.

<sup>134</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

<sup>135</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 (2002).

<sup>136</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. (2002).

<sup>137</sup> MODEL RULES OF PROF’L CONDUCT R. Rule 4.1 cmt. (2002).

<sup>138</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 (2002).

## VII. Attorney Advertising and Compensation for Legal Services

Attorneys must exercise caution when advertising legal services. Unlike agents or managers who are free to identify and target potential clients, courting them to sign management contracts, attorneys are prohibited from such solicitations:

*“a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.”<sup>139</sup>*

The forbiddance regarding targeted solicitations by lawyers renders the importance of an attorney's reputation even more consequential because the majority of music law clients seek legal representation based on word-of-mouth recommendations and proven results and relationships in the music industry.

Lawyers must charge “reasonable” fees for the legal services they render.<sup>140</sup> In fact, the MODEL RULES OF PROF'L CONDUCT not only prohibit lawyers from collecting unreasonable fees, but also forbid attorneys from entering agreements with clients that include unreasonable fee provisions.<sup>141</sup> Attorneys should consider the following factors when gauging the reasonableness of legal representation fees:

*“(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee*

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<sup>139</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2002).

<sup>140</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2002).

<sup>141</sup> *Id.*

*customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.”*<sup>142</sup>

When more than one lawyer is involved in the representation of a client in the music industry, the division of fees between lawyers not employed by the same firm is permitted by Rule 1.5(e).<sup>143</sup> Fees charged by a single billing to the client may be divided either based on the proportionality of services rendered by each attorney to the client’s representation as a whole. Alternately, the fees may be divided if all lawyers involved agree to assume full responsibility for the entirety of the representation.<sup>144</sup> “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”<sup>145</sup> In order to effectuate agreements involving the division of legal fees, the client involved in the representation must consent to the specific arrangement in writing and must countenance the division of shares between the attorneys retained.<sup>146</sup> Clients who agree to division of fee arrangements benefit from the collaboration of multiple lawyers, enhancing the quality of legal representation beyond that which could be achieved through representation by a sole practitioner.<sup>147</sup>

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<sup>142</sup> MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2002).

<sup>143</sup> MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2002).

<sup>144</sup> MODEL RULES OF PROF’L CONDUCT R. 1.5(e) cmt. (2002).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

## VIII. Lawsuits and Sanctions

*“Music is the real place where democracy lives. Every note is equal.”  
-Vince Gill*

Each year, an increasing number of musicians challenge their initial music contracts, “seeking rescission and adjustment.”<sup>148</sup> Musicians embarking upon careers in the music industry who lack legal knowledge and business savvy fall prey to their “intense desire to obtain a recording contract.”<sup>149</sup> These nascent musicians, driven by desire but ill-equipped and lacking adequate representation in contract negotiation, often find themselves contractually bound in agreements which are neither “legally sound” nor “financially fair.”<sup>150</sup> Subsequently, “increased success leads to dissatisfaction over time.”<sup>151</sup> One remedy to indemnify a music client harmed by his or her attorney’s breach of fiduciary duty is disgorgement, “such as the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests.”<sup>152</sup> In other suits, plaintiffs may seek to regain rights to their musical compositions or other non-monetary remedies.<sup>153</sup>

In a suit alleging fraudulent behavior by an attorney, the father and sole heir of Jimi Hendrix sued Leo Branton, Jr., a prominent attorney for the estate responsible for “restructuring assets and settling legal claims against the estate.” Hendrix initiated the suit, accusing Branton of fraudulently selling the rights of Hendrix’s music to third parties without the father’s permission after “learning that MCA Music Entertainment

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<sup>148</sup> Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 817 (2002).

<sup>149</sup> *Id.* at 808.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Wallace, *supra* note 74.1.

<sup>153</sup> *Jimi Hendrix’s father wins control of the late rocker’s musical legacy*, JET, Aug. 14, 1995, available at <http://www.encyclopedia.com/doc/1G1-17210263.html>.

was planning to purchase publishing and recording copyrights from two companies that allegedly had ownership of the music.” The settlement agreement reached by Hendrix and the defendants provided Hendrix abandon the suit against Branton in exchange for reclamation of the rights to the music, thereby avoiding trial and allowing Hendrix to regain all of Jimi Hendrix’s possessions. In addition, the agreement provided that written consent for any deals relating to the deceased musician be granted by his father who would pay the former defendants to resolve the residual financial issues in the dispute.<sup>154</sup>

“Misconduct” is defined as “a dereliction of duty; unlawful or improper behavior.” Attorney misconduct consists of “an attorney’s dishonesty or attempt to persuade a court or jury by using deceptive or reprehensible methods.”<sup>155</sup> In addition to charges brought in civil lawsuits against attorneys for legal malpractice, disciplinary action by individual state bar courts may be initiated against attorneys. State bar disciplinary action for egregious attorney misconduct includes various punishments of which disbarment constitutes the most severe.

In 1968, singer and actress Doris Day [Melcher] and her son filed a complaint against their former attorney with the California State Bar, alleging misconduct in the attorney’s representation of the Melcher family in personal matters as well as in their business matters. Simultaneously, the Melcher parties were engaged in a civil suit against the attorney arising from the same facts as those presented to the Bar.<sup>156</sup> The State Bar Court hearing panel determined that the attorney was guilty of misconduct on 13 separate accounts, recommended disbarment and the attorney appealed the decision.

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<sup>154</sup> *Id.*

<sup>155</sup> *Supra* note 1, at 460.

<sup>156</sup> *Samet v. Day, aff’d Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985).

The Supreme Court, before whom the case was heard, also recommended disbarment and held that “the egregious nature of the misconduct and the need to protect the public from further injury warranted disbarment.” The attorney was found culpable of misconduct including representing parties with undisclosed conflicts of interest, practicing adverse to former clients, charging unreasonable, overstated fees, failing to return client property, failing to offer adequate legal advice, filing of fraudulent claims and false testimony, and harassing former clients. In addition, the attorney was determined to have intentionally delayed proceedings, obstructing justice and abusing the legal process which he was sworn to uphold.

## **IX. Conclusion**

*“There is a road, no simple highway,  
Between the dawn and the dark of night,  
And if you go no one may follow,  
That path is for your steps alone.”*

*♪ Robert Hunter, Grateful Dead*

The lack of ethical practices by attorneys in the music industry has led to the detriment of attorney-client relationships and negative implications for attorneys in the industry who strive to safeguard their integrity and good reputations. Inconsistency in court decisions serves only to exacerbate problems spotlighted in the public media.

*“As the amount of revenue in the music industry increases, so does the need for the courts to become more consistent in their examination of these contracts and their formation. As artists increasingly oppose the unfairness and inequity in*

*music contract formation, there is a possibility that new artists will have more control over their artistic futures.”<sup>157</sup>*

A cataclysm inundating the music industry with standards for contractual fairness, implementation of alternative dispute resolution methods to resolve conflicts and an exigent commitment to uphold legal ethics must be administered to lustrate the music industry and restore integrity to the business of music.

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<sup>157</sup> Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 817 (2002).