ESTABLISHING THE LAWYER-CLIENT RELATIONSHIP WITH A MUSIC GROUP

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CHAPTER 15
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PART I – WHO IS THE CLIENT?

RETENTION AGREEMENT

- MR 1.2, 1.4, 1.5; TX R. 1.02, 1.03, 1.04

- Establishing the client-lawyer relationship: Client’s reasonable reliance

- Lawyer to clearly notify, preferably in writing, of decision to accept or decline representation of the group

- Declination letters should include a reference to applicable statutes of limitations

- Lawyer should have a written retention contract identifying the client(s), scope of legal services, basis for compensation, and the repayment of expenses

• Plaintiff-Even Prod. possesses all rights & interests of musical career of Sly Stone & receives all royalties generated from his music.

• Showtime, NY Times TV & Diamond Time Ltd. produced & aired documentary in 2000 about Sly Stone using his music without copyright owners – Sony’s and Warner/Chappell’s – permission.

• Deft.-Shkat firm handles copyright infringement action for Sony & W/C. Shkat & opposing firm agree in writing to toll the statute of limitations but agreement expired & Sony & W/C could no longer bring an action.

Even Street (cont.)

• Even Prod. expected benefit from resolution of copyright infrng’t actions which Sony & W/C could no longer bring bec/ any amounts awarded would produce royalties payable to Even Prod.

• Even Prod. sued Shkat for legal malpractice, even though Shkat wasn’t law firm representing Even Prod.

• Court held Even Prod’s. contracts w/ Sony & W/C could be reasonably construed as assigning not only copyright claims to Even Prod. but also legal malpractice claims thus it had standing.
Representing an Entity

- MR 1.13; TX R. 1.12
  a) Lawyer represents the entity
  
  b) Lawyer may report up the chain of command of the entity if knows that person associated with entity is involved in matter related to representation that violates a legal obligation to the entity, or a law that might be imputed to the entity, and is likely to result in substantial injury to the entity
  
  c) Lawyer may report outside the entity if highest authority that can act on behalf of entity fails to act and lawyer reasonably believes that violation is reasonably certain to result in substantial injury to the organization

Representing an Entity (cont.)

- Paragraph (c) doesn’t apply to info. that relates to lawyer’s representation of entity to investigate an alleged violation of law or to defend entity/officer/employee against a claim arising out of an alleged violation of law
  
  e) Lawyer who reasonably believes he was discharged because of actions lawyer took in (b) or (c) can inform the entity’s highest authority that lawyer was discharged or withdrew
PART II – CONFLICT OF INTERESTS

MR 1.7 – 1.11; TX R.1.06, 1.08-1.10 (TX does not have separate rule for imputation of conflicts (MR 1.10) – TX R. 1.06 and 1.09 have imputation provisions; TX R. 1.10 is the counterpart to MR 1.11)

- Lawyer may represent one or more members of the music group
- Often represents the entire group—possibility for a conflict of interests
  - Ethical and fiduciary responsibilities to the group as an entity
  - Individual interests may be inconsistent with the group’s interests

Conflict of Interests

- E.g., Lead vocalist in the group may want to be solo performer and her departure may harm the group. To assist her, group’s lawyer must obtain informed written consent of the entire group and possibly others.

- E.g., Group seeking to remove a member who consults with the group’s lawyer about filing a lawsuit against the remaining group members. Group’s lawyer should not assist the member in suing the group.

- Group’s lawyer may represent an individual member of the group (e.g., handle a divorce, represent a member in a traffic offense), provided the representation is not inconsistent with the group’s interests
Conflict of Interests

• MR 1.7, Comment 8:

“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”

Compare MR 1.7 with TX R. 1.06

• Lawyer prohibited from representing adverse parties to the same litigation – 1.06(a)

• Lawyer may represent one client against another client in litigation that does not “involve[] a substantially related matter” – 1.06(b)(1)

• May represent if interests of each client “will not be materially affected” and if each client gives informed consent – 1.06(c) – The informed consent does not have to be in writing
If a lawyer engages in joint representation of multiple parties the lawyer may not represent any of those parties in a later action arising out of that representation without prior consent – 1.06(d)

If a lawyer accepts representation that is prohibited or representation that is permitted but then becomes improper, the lawyer must withdraw from representing one or more parties – 1.06(e)

Conflict imputed to members of firm – 1.06(f) (as in the model rules – MR 1.10)

In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992)

Attorneys currently representing Dresser represent plaintiff in separate action against Dresser

District Court denied Dresser’s motion to disqualify under TX R. 1.06

Fifth Circuit reversed – “Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law”

Fifth Circuit used ABA Model Rule of Prof. Conduct 1.7 and Code of Prof. Resp. EC 5-2 “to first consider whether th[e] dual representation amount[ed] to impropriety.”
**In re Dresser** (cont.)

- Court granted the motion to disqualify
- The Court recognized that “[e]xceptional circumstances may sometimes mean that what is ordinarily a clear impropriety will not, always and inevitably, determine a conflicts case.”
  - E.g. Attorney may have been able to avoid disqualification “if he could have shown some social interest to be served by his representation that would outweigh the public perception of his impropriety”
- “However a lawyer’s motives may be clothed, if the sole reason for suing his own client is the lawyer’s self interest, disqualification should be granted.”

**Recent Conflict of Interest Examples:**
**Michael Bolton Case**

- In 2003, pop star Michael Bolton sued Weil, Gotshal & Manges for $30 million in damages.
- Conflict of interest alleged when law firm represented him and his music publisher in copyright infringement case where the Isley Brothers alleged that Bolton’s 1991 hit, “Love is a Wonderful Thing,” infringed on the copyright of their 1964 song with the same name. The case had ended with a $5.4 million verdict for the Isley Brothers.
Bolton (cont.)

– Bolton alleged that Weil Gotshal and his lawyer (who led the defense) cooperated in the "secret agenda" of the publisher's insurance company, which sought to push the matter to a final verdict rather than settle, thereby triggering an indemnification provision in Bolton's contract with the publisher.

– CLAIM: Law firm and lawyer "intentionally abused their positions of trust and confidence; failed to provide Bolton with their undivided loyalty; and acted with gross indifference to Bolton's welfare." Bolton claimed lawyer didn't discuss the disadvantages of joint representation; told Bolton the copyright deltas were a team; and didn't discuss the Isley Brothers' offer to settle for around $700,000.


FACTS: π brought suit alleging that δ Filardi's screenplay for motion picture, "Bringing Down the House," infringed on copyright of her screenplay "Amoral Dilemma." π also named Disney in her suit.

CLAIM: π wanted to disqualify law firm based on potential conflict of interest due to firm's joint representation of δs Filardi and Disney: claimed joint representation was improper because of Filardi's potential obligation to indemnify Disney and the appearance of impropriety.
**Flaherty (cont.)**

**HOLDING:** Motion to disqualify denied because of

1. Absence of an actual conflict between Filardi and Disney because uniform theory for joint defense—
independent;
2. Law firm’s expectation that no conflict would arise in future;
3. Both parties had provided informed consent to joint representation;
4. Appearance of impropriety insufficient basis for disqualification (choice of counsel trumps).

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**Haraguchi v. Superior Court,**


- **Facts:**
  - The district attorney had self-published a novel that she was promoting while prosecuting an identical charge against the petitioner-Δ.
- **The court found:**
  - Sufficient factual similarities between the novel and the Δ’s case to suggest that the district attorney “is relying on petitioner’s case for plot lines.”
  - A disabling conflict of interest because there is a “reasonable possibility that the [district attorney] may not exercise her discretionary functions in an evenhanded manner.”
The court noted that:

- “[n]o current public employee should be permitted to exploit his or her official position as a lever to earn extra private income where such will inure to the detriment of the employer.”
- Also: Her interest in seeing “her book succeed will trump her duty as a prosecutor to see that justice is done and to accord to Δs their constitutional rights.”

### Conflict of Interest Waivers

- MR 1.7(b), 1.8(a); TX R. 1.06, 1.08

- Lawyer may represent other parties with interests adverse to a present client when the lawyer fully informs the other parties and the present client about any potential conflict of interests and obtains everyone’s consent to the multiple representations

- Courts are more likely to uphold waivers signed by clients when the statements provide specific and complete information about all possible conflicts

- Significant change in circumstances concerning the multiple representation may require the lawyer to provide the client with a new or revised disclosure statement and to obtain client consent again

- E.g., Group’s lawyer should inform group that it can consult with independent counsel before signing the waiver (not required).
  - C.f., 1.8(a)—Lawyer and client in business transaction (client must get chance for independent counsel and sign waiver)
Conflict of Interest Waivers

• MR 1.7, Comment 20:

“Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. See Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Writing impresses upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”

Van Kirk v. Miller, 869 N.E.2d 534 (Ind. 2007)

• Attorney represented both parties to a contract to purchase a bar

• Parties agreed that conflict existed but disagreed about whether the conflict could be waived
  - Court found the conflict to be consentable – parties had “common goal”

• Court “found [the] disclosure to be adequate under a mix of factors, involving a sophisticated client and a limited role of the lawyer, essentially, in acting [as] a scrivener.” (Mallen & Smith)
PART III – ADVANCE WAIVERS

• Sources: Michael J. DiLernia, Advance Waivers of Conflicts of Interest in Large Firm Practice, 22 Geo. J. Legal Ethics 97 (2009); RONALD E. MALLEN AND JEFFREY M. SMITH, LEGAL MALPRACTICE v. 2 (2010)

• An advance waiver is a client’s consent to conflicts of interest that may occur in the future

• “[B]ecause an advance waiver anticipates conflicts that have not yet arisen, a client’s informed consent is more difficult to attain for an advance waiver than for a concurrent one.” (DiLernia)

Circumstances Under Which Advance Waivers May be Valid

• General
  – ABA Formal Opinion 05-436
    • ABA Model Rule of Prof. Conduct 1.7, Comment 22: “advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b)”
    • General waiver may be valid if
      – “experienced user of legal services”
      – “opportunity to be represented by independent counsel”
      – “limited to matters not substantially related to the subject of the prior litigation”
Circumstances Under Which Advance Waivers May be Valid

• Specific
  - American Law Institute – ABA Continuing Legal Education, ALI-ABA Course of Study (June 3-4, 2010)
    • “Whether an advance waiver will be found effective depends in large part on the degree of specificity of the waiver”
    • Generally, less specificity is tolerated with more sophisticated clients
    • “A ‘matter-specific’ advance waiver will typically be effective”

Celgene Corp. v. KV Pharmaceutical Co., 2008 WL 2937415 (D.N.J.)

• Celgene proved that the adverse parties are clients of same firm

• Burden then shifted to firm to prove that it “obtain[ed] informed consent for [the] conflicted representation”

• Court cited to In re Congoleum Corp., 426 F.3d 675, 691 (3rd Cir. 2005)
  - “[T]he effect of a waiver, particularly a prospective waiver, depends upon whether the clients have given truly informed consent”

• Firm did not meet burden
  - “open-ended and vague”
  - “no adequate information or explanation…[of] risks”
  - no explanation of “reasonably available alternatives”

- Retainer agreement: The firm “shall not by this retainer be prevented or barred from taking other employment of a similar or other legal character by reason of the employment herein specified.”

- Judge Tom: “[A] law firm may not evade its professional responsibilities to a client by the expedient of inserting contractual limitations on the firm’s ethical duties into the retainer agreement.”
  - Cannot “transform the attorney-client relationship into an arm’s length commercial affiliation”


- Waiver letter from attorney to plaintiff
  - “I advised you that there was a conflict of interest in my representing you….This would preclude my representing you”
  - “I also explained to you…if you waived the conflict of interest, I would undertake the representation”
  - “I still must reserve the right to withdraw at any time if I feel there is a potential or real conflict”

- Plaintiff claims waiver was invalid “because it [did] not contain every detail of the prior and anticipated relationship”

- Court held that “[s]uch detail is not necessary, especially when the surrounding facts provide context. The facts demonstrate that [plaintiff] was informed of certain existing and potential conflicts posed by [the firm’s] representation at the time he signed the waiver letter”


- Waiver letter “identify[d] the adverse client, Visa, and disclose[d] as fully as possible the nature of any potential conflict that could arise between the two parties”

- The firm instituted “an intra-firm ethical wall…which barred contact between the…attorneys representing First Data and the…attorneys representing Visa”

- Motion to disqualify denied – “no breach of the duty of confidentiality”
General as to Client

- Does not limit the waiver to particular clients (DiLernia)
- Does not anticipate who the clients may be (DiLernia)
- Examples:
  - McKesson Information Solutions v. Duane Morris, LLP
    - Both cases critical of general waivers


- PA office of Duane Morris represented subsidiaries of McKesson – MMM and MIA
- The Smiths sold software to HBOC
- McKesson acquired HBOC and renamed it MIS
- GA office of Duane Morris represented the Smiths at arbitration against MIS over royalties
McKesson (cont.)

• The waiver:
  “We understand that McKesson has no objection to our representation of parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson. We agree, however, that McKesson’s consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary or confidential information of a non-public nature that…could be used…to McKesson’s material disadvantage or potential material disadvantage….”

McKesson (cont.)

• “The Court finds that the…future waiver is inadequate and thus invalid as a matter of Georgia law because it is not a knowing waiver that identifies the specific adverse clients and details of adverse representation”

• Court grants plaintiff’s motion to disqualify Duane Morris
  “Court finds that there is no prejudice to the Smiths in disqualifying Duane Morris, LLP from representation at this time.”

• The waiver:

“[Y]ou have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN we have obtained as a result of representing WORLDSPAN.”

Worldspan (cont.)

• The court held that “any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information”
Worldspan (cont.)

- Questions length of time for which consent may be valid
  - “While the significant lapse of time, and, indeed, an apparent on-again, off-again, series of representations in the interval would seem to make it most difficult for a consent that may have been informed in 1992 to be informed in 1998, in view of the pace and change in the world…it is not impossible, but as one court has said, ‘such standing consent must by necessity be exceedingly explicit.’” (quoting Florida Ins. Guaranty Assn., Inc. v. Carey Canada, 749 F.Supp. 255, 260 (S.D. Fla. 1990)).

General as to Subject Matter

- Does not limit the waiver to particular types of representation (DiLernia)

- Example:
  - DiLernia, quoting State Bar of Arizona, Arizona Attorney (model language):
    “Therefore, as a condition to our undertaking this matter, Clients must agree that the Firm may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for Clients, even if the interests of such entities in those other matters are directly adverse to Clients…”
Specific as to Client

- Waiver identifies specific clients that may cause a conflict (DiLernia)

- Example
  - General Cigar Holdings v. Altadis
    - Upholding advance waiver specific as to client

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**General Cigard Holdings v. Altadis, 144 F.Supp.2d 1334 (S.D. Fla. 2001)**

- Latham & Watkins was representing the predecessors of Altadis, General Cigar, and four other corporations in an action in Massachusetts challenging tobacco advertising and other regulations

- The waiver:
  
  "Our firm has in the past and will continue to represent clients listed on the attached Exhibit A...in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future representation of any of the Exhibit A Clients, its respective parent, subsidiaries and affiliates in any matter not substantially related to this representation. Of course, we will not accept any representation that is adverse to you in this matter"
General Cigar (cont.)

- The engagement letter did not disclose that it was representing General Cigar in an antitrust action against Altadis

- The Court found that the advance conflicts waiver was valid
  - “The engagement letter…was reviewed by outside counsel and the respective representative of the corporations….It is clear that advance consent was obtained from knowledgeable and sophisticated parties.”

Specific as to Subject Matter

- Waiver identifies specific conflicting areas of representation (DiLernia)

- DiLernia, quoting example of waiver from Douglas L. Hendricks, Waivers of Future Conflicts of Interest (Jan. 13, 2005):
  "In the course of our representation of one client we may encounter a need for determining whether the intellectual property rights of another client are infringed. We would, of course, always refrain from advising a client with respect to the intellectual property rights of another client in any case where we have been actively involved in the procurement, prosecution, or defense of such rights…." (cont. on slide #43)
Specific as to Subject Matter

“….However, in other situations, such as those involving evaluation of the rights of a second client for whom our counseling has been limited to specific intellectual property matters that are unrelated to those being evaluated and that have not entailed our receipt of confidential information relating to such rights, we believe we may appropriately undertake such an evaluation for the first client. In such situations, we normally do not notify the second client that a study has been requested by the other client, nor of the results of that investigation. Our engagement by you is understood to allow such evaluations of another client under the described circumstances.”

PART IV – CONFLICT OF INTEREST WITH A FORMER CLIENT

• MR 1.9; TX R. 1.09
• Conflict of interest for group’s lawyer to represent group in a matter with lawyer’s former client when the matter is substantially related to the lawyer’s previous work done for the former client

• Substantial relationship test
  – Highly fact specific
  – Focuses on similarities of the instant matter with the lawyer’s work for the former client and the nature of the lawyer’s relationship (e.g., scope of responsibilities) with the clients
  – Protects clients against lawyers who would abuse their confidences

• Lawyer disqualified if substantial relationship unless former client gives written consent after consultation
  – Lawyer must be careful not to breach any confidences with the group when seeking former client’s permission
Compare MR 1.9 with TX R. 1.09

- No writing requirement for informed consent in TX rule (lawyer must obtain client’s “prior consent”)
  - MR 1.9 (a) & (b) both require informed consent in writing

- 1.09(a) prohibits representation of client adverse to former client if
  1. current client “questions the validity of the lawyer’s services or work product for the former client”
  2. “reasonable probability” that TX R. 1.05 (MR 1.6) will be violated
  3. “same or substantially related matter”

- Conflict imputed to members of firm (as in the model rules – MR 1.10)

Stan Soocher, *Counsel Concerns*, 20 No. 11 Ent. L. & Fin. 5 (Feb. 2005).


- Warner/Chappell represented by MS&K. Goldberg moved to disqualify MS&K, claiming that she revealed confidential information to former MS&K partner, Salomon, when she consulted with him in 1997 about her employment with Warner-Chappell. Goldberg also claims she has personal and professional relationships with other MS&K lawyers.

- Trial court denied Goldberg’s motion to disqualify, noting that MS&K never billed her, opened a file for her, phoned her, or took notes. The meeting was just to discuss the meaning of the employment K and the provisions she might discuss. Salomon left MS&K three years before this matter began.

- The Court of Appeal of California affirmed, noting that if Salomon was still practicing at MS&K, MS&K would likely have to be disqualified because there was no practical way of ensuring that Salomon would not convey some confidential information he may not even be aware he possesses. But—Salomon was no longer with MS&K.

- **Facts:**
  - πs invested in NAMS (Δ) allegedly based on material misrepresentations concerning its capabilities and ability to obtain patent rights in new technologies in the field.

- **Conflict of Interest:**
  - Attorney Ronald J. Benjamin represented the πs.
  - He also represented the Δ, NAMS, in its earlier lawsuit after a proposed merger of two companies failed eight years before this case.
  - During the merger negotiations, NAMS shared information concerning its current and future technology.

- **The district court found:**
  - Despite eight years, there was a substantial relationship between the issues raised in both cases.
  - There was also a high probability that Benjamin had access to confidential information about NAMS that would be harmful to it in the current case.

- The court granted NAMS’ disqualification motion against Benjamin.


- Singer brought action against her booking company and its employees to recover fees allegedly owed pursuant to the terms of five separate contracts.

- Δs moved to disqualify π’s counsel, Mr. Collins, and his firm, Serling, Rooks & Ferrara.

- **Claim:** One of firm’s associates, Mr. Weis, had previously had a 3 year relationship with Δs which ended shortly before this litigation and that there was, at the very least, the appearance of impropriety in allowing Mr. Collins or the firm to represent the π.
• **Δas claim:** Mr. Weis represented us in music industry business, became intimately familiar with our business, learned confidential information, and presumably conferred with other members of his firm. (Weis didn’t represent the Δs in the present action regarding the K claims).

• **Mr. Weis claims:** No ongoing relationship or exchange of confidential information, he was not retained by Δs, but rather was hired to do certain discrete negotiations, did limited, intermittent work unrelated to specific transactions at issue.

• **Holding:** πs failed to establish a reasonable probability of a conflict of interest. It is insufficient to offer “generalized assertions” of “access to confidences and secrets.”

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• Suit by Ritchie against Gano, both members of band Violent Femmes, for breach of contract

• Ritchie moved to disqualify Gano’s attorney, Meloni, claiming that
  – Ritchie and/or Violent Femmes is former client of Meloni
  – Meloni’s representation of Gano and non-party witness, Skiena, is a “concurrent conflict”
  – Meloni likely to be necessary fact witness — involved in signing of contract at issue and “other band business”

• Court denies Ritchie’s motion to disqualify

• “The Second Circuit has instructed district courts to take a ‘restrained approach that focuses primarily on preserving the integrity of the trial process’ when deciding disqualification motions.” (quoting Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980, vacated on other grounds 449 U.S. 1106 (1981)))
Ritchie v. Gano (cont.)

• Former Client Issue
  - Plaintiff failed to prove both that he and/or the band was a former client of Meloni and that Meloni had access to any relevant confidential information

• Concurrent Conflict Issue
  - Plaintiff claimed that it was possible that Gano could have claims against Skiena and also possible that Skiena and Gano may adopt “adverse positions on one of the central claims in the suit”
    - Court determined that both potential conflicts were “still somewhat hypothetical…and…not so severe that [they] may not be waived”
  - Both Gano and Skiena executed a conflicts waiver
  - Plaintiff claimed that waivers were invalid because “they [did] not sufficiently articulate how the two will present a unified defense, indicate that they did not obtain independent legal advice…and do not adequately demonstrate that they understand the implications of separate representation.”
    - Court said “could…be more specific” but “not required”

Ritchie v. Gano (cont.)

• Attorney as Witness Issue
  - Plaintiff’s motion to disqualify for this reason was based on the danger that Meloni’s testimony “would be prejudicial to his clients” but there is no such evidence
  - Maybe “more appropriate[ ]” under rule prohibiting attorney acting as trial counsel when he/she will be called as a necessary witness
    - Lawyer not necessary witness when testimony will be “cumulative”
    - Defendant listed other parties involved in the transaction that could testify
    - While “plaintiff claims that none of the parties listed…is likely to have as much knowledge about the” transactions, it is too soon to determine whether this is true

- Plaintiffs appeal after trial court disqualified their only expert witness because defense counsel had represented expert 10 years prior “creating an irreconcilable conflict of interest”

- Defendant made motion to disqualify expert witness to prevent plaintiff from later making a motion to disqualify defense counsel based upon his previous representation of the expert witness
  - Therefore, “the correctness of the resulting order rests on whether [defense counsel] should have been disqualified had such a motion been made”

Montgomery (cont.)

- Expert witness waived conflict; however, waiver must be “unqualified” to be valid
  - The attorney “must feel free to conduct a thorough and comprehensive cross-examination of [the expert] without trying to steer clear of the danger zone of confidentiality” (quoting Goldstein v. Lees (1975) 46 Cal.App.3d 614, 120 Cal.Rptr. 253).

- Appellate court held that expert shall be given the opportunity to give an unqualified waiver and if such a waiver is given, the trial court shall deny the motion to disqualify
Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust,
2010 WL 1172947 (N.D. Tex.)

• Vinewood filed suit against Dar Al-Maal Al-Islami Trust (DMI) in 2006
  – Claimed that DMI “failed to adhere to the proposal and the later representations…that DMI would do business with Vinewood”

• More than three years later, after delay tactics by both parties, Vinewood filed suit against defense counsel for breach of fiduciary duty, based on defense counsel’s brief prior representation of Vinewood
  • “draft[ed] documents, aid[ed] in the development of Vinewood’s business plan, and ensure[d] Vinewood’s compliance with state and local law”

• Vinewood claimed that defense counsel was using confidential information gained through the prior representation

Vinewood (cont.)

• Defendants filed a motion to declare that defense counsel not be disqualified

• Issues:
  – Is there a conflict of interest?
  – Did plaintiff waive the conflict by waiting until more than three years after the start of the litigation to file the breach of fiduciary duty claim?

• The court found that there had been an attorney-client relationship between Vinewood and defense counsel, then considered whether the representation was “substantially related” to [the] current representation of Defendants
  – Not substantially related – drafting documents and developing business plan not related to representations by DMI and DMI’s counterclaims of “tortious interference with business relationship and business disparagement”
• Court also determined that there was no “reasonable probability’ that the representation [would] involve the disclosure of [the] former client’s confidential information”

• Court found no conflict

• Even if there was a conflict based on “substantial relationship,” it can be waived by delay

• Court found that in this case Vinewood’s delay waived the conflict of interest
  − “[A] finding of waiver is particularly appropriate when, as in this case, the attempt at disqualification appears abusive or is being used as a delaying tactic”

• Some courts only allow waiver with informed consent, but other courts treat waiver by delay as alternative means of waiving conflict
  − Either way, Vinewood has “implie[d] that it was aware of the potential for a conflict since the outset of [the] case”

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**PART V – BUSINESS TRANSACTIONS**

• MR 1.8(a)(1)-(3); TX R. 1.08(a)(1)-(3)

• Lawyers should avoid entering into a business relationship with the client

• Lawyer who agrees to “shop” a client’s music may include language in the retention agreement disclaiming the parties’ intentions to enter into a joint venture and therefore a business relationship that may violate the ethical rule against such relationship.

• Business or financial interest in a client’s matter creates potential for a conflict of interest
  ◆ E.g., Lawyer becomes partner in group by investing funds or lawyer becomes partner with the group in purchasing real estate.
Business Transactions (cont.)

- Lawyers may enter business transactions with clients even when they have adverse interests if:
  1. Transactions and terms are fully disclosed in writing and are fair and understandable to the client;
  2. Client is advised in writing of the desirability of consulting independent counsel and has an opportunity to consult independent counsel; and
  3. Client consents in writing to the essential terms of the transaction, including the lawyer's role, and then signs the consent.

MR 1.8, Comment 3:

“The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.”
### Compare MR 1.8 with TX R. 1.08

- No business relationship with client unless the terms are “fair and reasonable” and “fully disclosed” but no requirement that disclosure be in writing (however, client must consent to transaction in writing) – 1.08(a)

- TX R. omits MR 1.8(b): Lawyer prohibited from using “information relating to representation of a client to the disadvantage of the client unless the client gives informed consent”

- Lawyer may not “make or negotiate an agreement” for literary rights “with a client, prospective client, or former client” until “all aspects of the matter giving rise” to the representation have concluded – 1.08(c)

- A lawyer may “advance or guarantee…reasonably necessary medical and living expenses” – 1.08(d)

### TX R. 1.08 (cont.)

- No writing requirement for aggregate settlements/plea agreements – 1.08(f)

- Prohibits lawyer from attempting to settle malpractice claim without “first advising that person in writing that independent representation is appropriate” but unlike MR 1.8, it does not mention giving the individual reasonable time to obtain representation – 1.08(g)

- TX adds 1.08(j): definition of business transaction “does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others”

- TX omits MR 1.8(i) (no interest in cause of action or subject matter of litigation, with exception for lien and contingent fee & 1.8(j) (no sexual relationship with client)
Compensation

- MR 1.5; TX R. 1.04
- Lawyers are ethically prohibited from charging excessive or unreasonable fees

- May represent clients on the basis of an hourly rate or contingency fee. MR 1.5(c)

- Lawyer can also value bill or charge the client a fixed fee for the representation
  - E.g., charge a manager $2,000 for drafting & negotiating an artist-management contract

- New lawyers may wish to consult with more experienced entertainment lawyers about appropriate compensation for legal services


- Facts:
  - Jimmy Swaggart Ministries (JSM) hired attorney John Midlen Jr. to represent JSM for royalty distributions by the Librarian of Congress for cable TV broadcasts.

  - Midlen & JSM agreed that Midlen would deduct his fees from the distribution checks & remit the remaining balance to JSM.
    - Later, JSM instructed Midlen that it no longer wanted Midlen to do this.
    - Midlen continued to deduct his fees & was fired.
Midlen (cont.)

- JSM claims: Midlen took months to return its client filed & failed to provide “understandable legal bills” & an accounting of funds collected on JSM’s behalf.

- Sanctions:
  - The District of Columbia Court of Appeals suspended him from practice for 18 months.
  
  - The Court of Appeals of Maryland imposed reciprocal discipline but found insufficient evidence to have the suspensions run concurrently.