

Spring 2010

Entertainment Law - The Specter of Malpractice Claims and Disciplinary Actions

Jack P. Sahl

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Jack P. Sahl, *Entertainment Law - The Specter of Malpractice Claims and Disciplinary Actions*, 20 Marq. Sports L. Rev. 377 (2010)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol20/iss2/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

ENTERTAINMENT LAW – THE SPECTER OF MALPRACTICE CLAIMS AND DISCIPLINARY ACTIONS

JACK P. SAHL*

I. INTRODUCTION

There is significant risk today that lawyers will become the target of a disciplinary or legal malpractice action, especially given the complexity of the law and advances in technology that reduce the amount of time that lawyers have to reflect about client matters.¹ This risk is heightened by the increased competition in the bar to deliver legal services in a cost-effective manner, the sophistication of clients who expect competent, efficient and reasonably priced services, and the litigious nature of consumers.² The risk is further

* Professor of Law and Faculty Director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law. I would like to thank my research assistants, Tracy Signet and Shane McCammon, who assisted me in researching and writing this article, and Danielle Moskos, Brenna Fasko, William Shelly, Mike Rasor, and Stephanie Haight who helped with annual revisions. This article is a revised version of an earlier work that was originally published by the Practising Law Institute in March of 2010, and has since been edited by the *Marquette Sports Law Review* editorial staff.

1. Kenneth J. Abdo & Jack P. Sahl, *Entertainment Law Ethics: Part 1*, 22 ENT. & SPORTS LAW 2 (2004). See generally Ameet Sachdev, *Total Attorneys: Chicago-Based Firm Under Fire*, CHI. TRIB., Dec. 13, 2009, at Business Section, 1 (reporting that Connecticut is investigating, for possible violation of its advertising rules, a legal information website, TotalBankruptcy.com, that provides certain lawyers the exclusive rights to contact consumers generated by the site in return for lawyers paying sixty-five dollars per contact).

2. Sachdev, *supra* note 1. Consumers may be more litigious concerning certain types of legal or business services. See *Stewards of James Brown Estate Sue Morgan Stanley*, N.Y. TIMES, Apr. 24, 2008, at C3 (discussing a dispute over the estate of the legendary soul singer, James Brown, and stating “it is not atypical for estate lawyers or court-appointed trustees to sue former business managers, [although] it is unusual for them to sue the banks that managed the accounts overseen by the former business managers . . .”). See also *Washington v. Escobar*, No. 103027/09, 2009 N.Y. Misc. LEXIS 2596 (N.Y. Sup. Ct. 2009) (concerning, in part, a common dispute in the entertainment industry where talent refused to pay for the services of a personal manager claiming that he acted as an employment agency in violation of the state’s “theatrical employment agency” statute) [hereinafter *Escobar*]. The statute involved in *Escobar*, N.Y. Gen. Bus Law Section 171 section (8), was held to apply to a booking agent who secured lectures and other engagements for a prominent theatrical and motion picture industry personality. See generally *Friedkin v. Harry Walker, Inc.*, 395 N.Y.S.2d 611 (N.Y. Civ. Ct. 1977) *cf.* *Park v. Deftones*, 84 Cal Rptr.2d 616 (1999) (voiding a contact under the California Labor Code between a band and a personal manager because he secured performance engagements without being licensed as a talent agency); Stan Soocher, ‘*Unlicensed Agent*’ Won’t

exacerbated by the ever-changing methods and rules for electronic communication and the storage of information.³ The magnitude of the risk is underscored by the prediction that law school graduates will be the subject of three or more claims of legal malpractice before finishing a career.⁴

This article examines some good practice standards that minimize the risk that a lawyer will become the target of a legal malpractice or disciplinary action. These standards should also reduce the risk of a lawyer becoming the object of a disqualification or Rule 11 motion.⁵ This article discusses these

Stop Suit by Manager, 25 ENT. L. & FIN. 5 (2009) (discussing *Escobar*, No. 103027/09, 2009 N.Y. Misc. LEXIS 2596).

3. Experts have noted the new landscape concerning electronic communication and the storage of information. See generally George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1 (2007). For example,

There has been a civilization-wide morph, or pulse, or one might say that information has evolved. But quite recently there has been an evolutionary burst in writing technology—a jagged punctuation on a 50 century-long sine wave. A quick succession of advances clustered or synced together, to emerge into a radically new and more powerful writing technology. These include digitization; real time computing; the microprocessor; the personal computer; e-mail; local and wide-area networks leading to the Internet; the evolution of software, which has “locked in” seamless editing as an almost universal function; the World Wide Web; and of course people and their *technique*. These constituents have swirled into an information complex, now known as the “Information Ecosystem.”

Id. at 1, 5-7. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D 309 (S.D.N.Y. 2003), which is generally considered the first definitive case dealing with the wide range of electronic discovery issues in litigation. In this case, the court held that a plaintiff was entitled to discover all relevant emails which had been deleted and were now only on back up disks on the defendant’s computers. See also, Jack P. Sahl, *The New Era—Qua Vadis* 43 AKRON L. REV. 1, (2010) (discussing the Miller-Becker Institute for Professional Responsibility Inaugural Symposium, “Lawyers Beyond Borders” and “Practicing Law in the Electronic Age”).

4. Ronald, E. Mallen, *Legal Malpractice: A Look at the Trends*, TRIAL, Jul. 1, 1997, available at <http://www.thefreelibrary.com/Legal+malpractice:+a+look+at+the+trends.-a019634474>. See generally JEFFREY M. SMITH & RONALD E. MALLEEN, PREVENTING LEGAL MALPRACTICE 2 § 1.1 (2nd ed.1996) [hereinafter SMITH & MALLEEN].

5. *Haraguchi v. Superior Court*, 49 Cal. Rptr. 3d 590, 591 (2006) (providing an example of a successful disqualification motion in an entertainment related case, albeit in an unusual setting involving a prosecutor and her office). In *Haraguchi*, the court upheld the disqualification of a Santa Barbara County district attorney from working on a rape by intoxication case because of her entertainment activities. The district attorney had self-published a novel, “Intoxicating Agent,” that concerned rape by intoxication which she was promoting while prosecuting an identical charge against the petitioner-defendant. The court found “sufficient factual similarities between the novel and the petitioner-defendant’s case to suggest that the district attorney [relied] on petitioner’s case for plot lines.” *Id.* at 596. 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.” *Id.* The court found a disabling conflict of interest in *Haraguchi* because, in part, there is a “reasonable possibility that the [district attorney] may not exercise her discretionary functions in an evenhanded manner.” *Id.* at 597. The district attorney’s interest in seeing “her book succeed will trump her duty as a prosecutor to see that justice is done and to accord

standards in the entertainment law context but they also apply to a variety of practice areas, for example, sports law.⁶

II. SCREENING THE CASE AND CLIENT

One of the most important and difficult decisions an entertainment lawyer makes is the decision to represent a particular client.⁷ Client representation may subject the lawyer to a variety of risks, for example, third-party lawsuits for tortious interference with contract,⁸ tortious interference with prospective economic advantage,⁹ defamation,¹⁰ and Rule 11 sanctions.¹¹ Lawyers

to defendants their constitutional rights.” *Id.*

6. Many courts have held that attorney-agents are bound by their state’s lawyer ethical rules when representing athletes. *See generally* Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 129 (2007) (discussing conflicts of interest and reasonableness of fees as they apply to sports attorneys and agents); *see also* Gary P. Konn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You’re Qualified*, 6 ENT. & SPORTS LAW 1, 7, 15 (1988) (suggesting, in part, ways to avoid incompetency in the area of sports representation). *See generally* *In re Dwight*, 573 P.2d. 481, 484 (Az. 1977) (holding in a non-sports context that an attorney who is engaged in the practice of law “may not defend his actions by contending that he was engaged in some other kind of professional activity”).

7. *See* David A. Hyman, *Professional Responsibility, Legal Malpractice and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 373 n.89 (1997/1998) (quoting Robert E. O’Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325, 361 (1989) (proposing that “[s]ome of the worst claims in the history of the legal profession are directly attributable to the bad judgment of an individual partner in accepting a new client”).

8. *Source Entm’t Group, LLC v. Baldonado & Assocs, P.C.*, 2007 U.S. Dist. LEXIS 39209 (D.N.J. 2007). *Source Entertainment*, a management and entertainment company, signed a management agreement with a minor, Tiffany Evans. *Id.* at *1. The management agreement was subsequently approved by a New Jersey Superior Court. *Source* obtained a record deal with Sony Music, agency representation with William Morris, and a steady stream of acting jobs and singing performances. *Id.* at *2. Evans allegedly became unhappy with *Source* and contracted with Baldonado & Associates (Baldonado), the defendant law firm, to represent Evans in all aspects of her entertainment career. *Id.* Baldonado sent a letter to *Source* purportedly terminating its management contract with Evans. *Id.* The district court dismissed Baldonado’s motion for a judgment on the pleadings and ruled that at this stage *Source* had stated a valid claim for tortious interference of existing contractual relations, tortious interference with existing and prospective economic advantage, and defamation. *Id.* at *8. In New Jersey, a tortious interference with contract claim requires the plaintiff to show “(1) it was a party to an existing contractual relationship; (2) the defendant intentionally interfered with that contractual relationship; (3) the interference was undertaken with malice; and (4) plaintiff suffered damages resulting from the interference.” *Id.* at 4. *See Tortious-Interference Claims*, 5 ENT. L. & FIN. 7 (Aug. 2007) (explaining briefly the holding in *Source Entm’t Group, LLC*).

9. *See generally* *Source Entm’t Group, LLC*, 2007 U.S. Dist. LEXIS 39209 (D.N.J. 2007). For a “tortious interference with existing and prospective economic advantage” claim, the plaintiff must prove “(1) it had a continuing or prospective economic relationship or reasonable expectation of economic advantage; (2) the defendant knew of the contract or relationship of expectance; (3) the interference was done intentionally or without justification or excuse; (4) it is reasonably probable that the plaintiff’s loss was a result of defendant’s interference and (5) damages resulted from the

nevertheless often expose themselves to the risks associated with client representation by accepting employment based on inadequate information about the client and his or her effect on the firm's practice.¹²

interference." *Id.* at 6.

10. *Id.* In *Source Entertainment Group, LLC*, the defendant law firm sent a letter purportedly terminating Source's management contract with the artist, Tiffany Evans, to third parties, such as Sony Records and the William Morris Agency. The district court permitted the plaintiff to proceed with its defamation claim and noted that defendant's letter stated that Source "continually mistreated Tiffany." *Id.* at *7. The district court also rejected the defendants' arguments that they were immune from liability under the so-called "litigation privilege" because they were attempting to protect Tiffany's right to disaffirm the management contract. *Id.* "Under the litigation privilege, an attorney is absolutely privileged to publish defamatory matters concerning another so long as the communication was "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) have some connection or logical relation to the action." *Id.* (citing *Hawkins v. Harris*, 141 N.J. 207, 216 (1995) (quoting *Devlin v. Greiner*, 147 N.J. Super. 446, 460 (Law Div. 1977)). The district court held that the defendants' defamatory statements were not made in a judicial or quasi-judicial proceeding. Although New Jersey law does not limit the litigation privilege to courtroom statements, none of the other contexts in which the litigation privilege attaches, such as statements made during settlement negotiations and private conferences with an attorney regarding litigation, were applicable. *Id.* at 7.

11. *See generally* *Atlantic Recording Corp. v. Heslep*, 2007 WL 1435395 (N.D. Tex. 2007). The plaintiffs, recording companies that owned or controlled copyrighted sound recordings, sued Diane Heslep for copyright infringement by peer-to-peer file sharing. *Id.* at *3. Heslep argued that the plaintiffs' attorneys should be sanctioned under Rule 11 because Heslep "established that she was at work at the exact date [January 6, 2005] and time the amended complaint alleges she was online infringing on Plaintiffs' copyrights, that AOL has confirmed that she was not herself online at the specific date and time in question, and that AOL could not identify the specific computer in use at the date and time in question." *Id.* at *5. The district court found evidence that suggested that Heslep's assertions were disingenuous, and it noted that Heslep did not deny infringing on the plaintiffs' copyrights "on other occasions on or before January 6, 2005." *Id.* at **4, 6. The court ruled that the plaintiffs' attorneys acted reasonably in attempting to resolve the dispute with Heslep and that their conduct did not merit sanctioning. *Id.* at 6. However, the court sanctioned Heslep's lawyer under Rule 11 because she filed a frivolous Rule 11 motion against the plaintiffs' lawyers for the purpose of harassment. The frivolous motion also unnecessarily increased litigation costs. *Id.* at *8. *See also* *Downloading Suits/Rule 11 Sanctions*, 23 ENT. L. & FIN. 7 (2007) (briefly discussing the holding in *Atlantic Recording Corp.*).

12. SMITH & MALLEN, *supra* note 4, § 2.7, at 83. "A significant cause of claims against attorneys is the acceptance of new matters, whether from new, current or former clients, without sufficient analysis of the clients and the transactions." *Id.* One of the risks confronting lawyers is that they may be criticized because of the type of clients they represent or their clients' conduct. For example, the music industry in piracy cases was portrayed in the media as the "heavy" for prosecuting teenage offenders. *See* Samantha Chang, *Legal Matters: Piracy Showdown Likely in High Court*, BILLBOARD, Oct. 12, 2003 (quoting entertainment lawyer and associate professor Stan Soocher). The entertainment lawyers who represented the music industry risked being viewed in a similar light. Another significant risk is that the client will not pay the lawyer's fee. *See e.g.*, *Musburger v. Meier*, 914 N.E.2d 1195 (Ill. App. Ct. 2009). In *Musburger*, the lawyer represented a radio personality who agreed to pay attorney fees, expenses, and five percent of the gross amount of the contracts that he negotiated for Meier. *Id.* at 1201-02. In affirming a jury award of \$68,750, the court held that an attorney who is representing a client on a contingent fee basis is entitled to quantum meruit recovery when discharged. *Id.* at 1209; Stan Soocher, *Radio Personality Must Pay for Lawyer's Services*, ENT.

There are several considerations and steps at the intake stage of the lawyer-client relationship that can provide lawyers with more information about the risks associated with accepting specific employment.¹³ This information and an understanding of the profession's ethics rules will help lawyers avoid becoming the target of a malpractice or disciplinary action.¹⁴

The first step for minimizing the likelihood of a malpractice or disciplinary action is for the lawyer to conduct the initial client interview in a manner that elicits a good understanding of the client's concerns and objectives.¹⁵ As the professional, the lawyer bears significant responsibility for effectively communicating with the client given the lawyer's training, knowledge, and authority to act on behalf of the client. The balance of power in the initial lawyer-client interview is often skewed heavily in favor of the lawyer, so it is incumbent upon him or her to be sensitive, resourceful, and professional during the interview to gain not only important information but also the client's confidence. The lawyer's use of non-leading and open-ended questions and the encouragement of client narratives about his or her situation are often effective approaches for promoting full disclosure and understanding.¹⁶ The lawyer's use of leading questions and follow-up comments should help the lawyer shape the direction of the interview and facilitate greater disclosure.¹⁷

LAW & FIN. 1, 3 (2009).

13. See SMITH & MALLIN *supra* note 4, § 2.7, at 87-88.

14. This article primarily cites provisions of the ABA Model Rules of Professional Conduct (the "Model Rules") adopted in 1983 by the ABA House of Delegates [hereinafter MODEL RULES OF PROF'L CONDUCT]. The Model Rules have been amended over the years and were substantially modified in August 2001, and February and August 2002 "as a result of changes proposed by the ABA Commission on Evaluation of the Rules of Professional Conduct, popularly called 'Ethics, 2000.'" See MORGAN & ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (2008). Some version of the Model Rules is followed by almost every state, although some states have retained concepts found in the predecessor code, the ABA Code of Professional Responsibility (the "Code") adopted in 1969 [hereinafter MODEL CODE PROF'L RESPONSIBILITY]. See MORGAN & ROTUNDA, PROFESSIONAL RESPONSIBILITY MATERIALS AND PROBLEMS 12-13 (2006).

15. It is important that the lawyer attempt to avoid interruptions during the interview, demonstrate an interest in the client's story, and where appropriate, express support for the client's predicament. This should build trust and rapport with the client. During the interview, the lawyer should also note important facts or questions in writing and apprise the client that subsequent communications or interviews may be necessary before undertaking representation. See NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT xi (1996) (discussing communication techniques at the initial interview stage and emphasizing that "[t]he key to delivering legal services in a way that ensures client cooperation and satisfaction is communication").

16. *Id.* at 32-33 (recommending "[o]pen-ended questions [that] allow clients to talk about their problems or concerns from their point of view").

17. *Id.* at 35 (reporting that once the lawyer has established a rapport with the client "by asking open-ended questions and appreciating the answers," the lawyer should "move on to narrowly focused questions to get the specific answers you need").

Determining the client's objectives is particularly important for the entertainment lawyer who also may be working as an agent or manager while practicing law.¹⁸ For example, an artist may want a lawyer to provide legal representation on a contingent fee basis while also managing the artist's personal affairs.¹⁹ Because the roles of a manager and a lawyer can differ, the lawyer should ascertain the precise nature and scope of services the client wishes the lawyer to perform to preclude any confusion.²⁰

Second, the lawyer should ascertain the client's reasons for seeking the lawyer's services.²¹ The client's reasons may range from reports about the firm's strong reputation for good work to its reasonable fee structure and policy regarding the advancement of litigation-related expenses.²² Educating the client about the firm's policies is especially critical at the intake stage because it diminishes the likelihood that the client may feel deceived or betrayed about the basis for employment. The lawyer should correct any misconceptions about the firm—for example, that a particular lawyer will staff the case or that the firm's relationship with another party, such as a film or record company, will produce success.

Lawyers also should consider the intake stage a valuable opportunity to assess the effectiveness of their marketing efforts. For example, a client may inform the lawyer that the firm's advertising prompted the client's visit. If the

18. See Kenneth J. Abdo & Jack P. Sahl, *Entertainment Law Ethics Part 2: Agents, Managers and Lawyers*, 22 ENT. & SPORTS LAW. 2, 4 (2005); Kenneth J. Abdo, *Shopping Record Deals for Lawyers: A&R Approach and Ethics Issues*, 23 ENT. & SPORTS LAW. 3, 4-5 (2005). This is also an important consideration for attorneys working in the sports law field. See Neiman, *supra* note 6, at 125 (reporting that more than fifty percent of all agents for professional athletes are lawyers).

19. Abdo & Sahl, *supra* note 18. The fiduciary duty of non-lawyer managers may be more circumscribed than that of lawyer-managers who understand contractual terms. See generally *Reznor v. J. Artist Mgmt.*, 365 F. Supp. 2d 565 (S.D.N.Y. 2005) (dismissing Nine Inch Nails lead singer Trent Reznor's motion for summary judgment). In the motion, Reznor claimed that his manager had breached his fiduciary duty, but the court held that that a jury could find that, because his manager was not a lawyer, "he did not understand" the terms now at issue and he thus "fulfilled whatever duty he owed Reznor by disclosing all the material terms and facts of which he was aware." *Id.* at 575. See also *Recent Cases*, 27 ENT. L. RPTR. 7 (2005) (reporting that the court also dismissed Reznor's claim that the management contract was unconscionable).

20. See Abdo & Sahl, *supra* note 18, at 3 (explaining that managers negotiate contracts, provide business assistance, and often "nurture the artist's career," while lawyers shop talent and creative material, provide financial advice, and protect the client's interests under the governance of applicable ethical guidelines). See generally *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Cal. Ct. App. 1985), *superseded by statute on other grounds*, CA. CODE ANN. §340.6, *as recognized in Laird v. Blacker*, 279 Cal. Rptr. 700 (Cal. Ct. App. 1991) (deciding one of the more egregious cases involving a lawyer who performed multiple roles, including serving as the business manager and financial advisor, for a client—in this case, the actress, Doris Day).

21. SMITH & MALLIN, *supra* note 4, § 2.7, at 87.

22. *Id.*

lawyer learns that the client was referred to the firm, the firm should thank the referring party.²³

Third, effective client screening at the intake stage involves some assessment of the client's character traits.²⁴ Lawyers may not want to represent difficult clients. Difficult clients may be those who: (1) unduly criticize lawyers and the legal system; (2) insist on ethically questionable strategies;²⁵ (3) possess unrealistic expectations about the success or value of a controversy;²⁶ and (4) have terminated former counsel.²⁷ Lawyers should learn the circumstances surrounding the termination or withdrawal of former counsel in hope of avoiding a similar fate. On the other hand, the client's willingness to honestly communicate and listen to the lawyer and consider his or her advice are important traits favoring the lawyer's acceptance of employment.²⁸ Clients need to understand that effective communication is a two-way street and that the client bears some of the responsibility for ensuring good communication. A client should apprise the lawyer of any material changes in the client's personal and professional life that may affect the representation—ranging from the client's change of address to his or her discovery of relevant information or evidence. The lawyer also should note any questions the lawyer has about the client's personality that pose a risk to the firm and that warrant additional investigation.²⁹

23. See Abdo & Sahl, *supra* note 18, at 5 (noting that “[m]any entertainment lawyers rely on referrals for their services from . . . previous clients, lawyers, agents, managers and personnel with entertainment companies” and cautioning lawyers not to provide compensation of any kind for the referral).

24. SMITH & MALLEEN, *supra* note 4, § 2.7, at 87-88.

25. *Id.* A good example of clients requesting lawyers to pursue a questionable ethical strategy involves an artist pressuring the lawyer who is negotiating a deal on his behalf to exaggerate the interest by competitors in acquiring the artist-client's services in hope of starting a bidding war for the artist-client's services. Lawyers need to inform clients that although some commercial puffery is generally permitted, lawyers cannot make any misrepresentations during the deal negotiations. See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 4.1(a) (2007) (prohibiting a lawyer from knowingly “mak[ing] a false statement of material fact or law to a third person”) and (b) (prohibiting a lawyer from knowingly “fail[ing] 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”).

26. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 56 (1999) [hereinafter ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY].

27. SMITH & MALLEEN, *supra* note 4, § 2.7, at 89.

28. *Id.* § 2.7, at 88; see also, NELSON, *supra* note 15, at 78-82. Honest and full communication with the lawyer is promoted by educating the client about the attorney-client evidentiary privilege and the lawyer's ethical obligation to protect information relating to representation. It is important that the lawyer discuss these concepts and his or her limitations with the client as soon as possible.

29. SMITH & MALLEEN, *supra* note 4, § 2.7, at 88.

Fourth, the lawyer should consider the client's financial background to determine the sources and level of financial support for the representation. Information concerning a client's outstanding and potential debts as well as a list of the entertainment client's assets may help the lawyer understand possible financial constraints to the representation.³⁰

Fifth, the lawyer should investigate whether the firm can competently represent the client.³¹ The firm may have to expend resources to develop or enhance its competency before undertaking representation—including the hiring of experienced lawyers or support staff, or attending a continuing education program in the field.³² Even after representation has begun, the law firm may need to enhance its competency. For example, the law firms representing the music industry in the well-known copyright infringement case, *MGM Studios, Inc. v. Grokster*,³³ added a team of partners and several associates—including the hiring of former United States Solicitor General Ken Starr as co-counsel—once the parties decided to seek Supreme Court review.³⁴

Sixth, the lawyer needs to consider what, if any, possible ethical or business conflicts of interest might arise that could cause a loss of business to the firm.³⁵ This consideration militates against a lawyer hastily accepting a new client or matter without adequate time to reflect upon possible conflicts, especially in the context of a large firm where the lawyer may need to consult with several colleagues. The consultation may take several days and require

30. See *id.*; see also Abdo & Sahl, *supra* note 18, at 5 (noting that lawyers often represent entertainment clients on a contingency fee basis because of their clients' limited financial resources).

31. SMITH & MALLEEN, *supra* note 4, § 2.7, at 88. Model Rule 1.1's competency standard requires lawyers who are also sports agents to be knowledgeable about sports. See Konn, *supra* note 6, at 15; see also David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31, 40-41 (2003); see generally David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L REV. ___, __ (2010) (discussing competency and other ethical issues regarding non-attorney sports agents and attorney-sports agents involved in cross-border representation of athletes).

32. Abdo & Sahl, *supra* note 1, at 3. Lawyers should attend continuing legal education programs in the entertainment field to help ensure they provide competent representation. *Id.*

33. *MGM Studios, Inc. v. Grokster*, 125 S.Ct. 2764 (2005).

34. Susan Butler, *Legal Matters: Supreme Team*, BILLBOARD, July 9, 2005.

35. SMITH & MALLEEN, *supra* note 4, § 2.7, at 88. For example, a lawyer who defends a record company regarding employment matters may not be precluded ethically from representing a plaintiff in a wrongful termination of employment action against another record company. However, as a business matter, the lawyer's current record company-client may not want the lawyer to represent the plaintiff against the second record company because the lawyer might establish precedent that could harm the current record company-client in some future employee dispute.

the lawyer to send a firm-wide memo identifying the proposed employment.

Lawyers should inform clients that their professional code of ethics may preclude them from accepting employment where a conflict of interest exists in certain circumstances. This approach provides two benefits to lawyers: it gives the lawyer time to step back and reflect upon whether the lawyer should accept employment, and also underscores to the layperson that the lawyer's professional services are governed by a code of professional norms.

Finally, entertainment lawyers must remember that accepting client representation may be dangerous to their professional well-being. Refusing an offer of employment may represent the best business and personal decision that a lawyer makes all year. Even after accepting employment, lawyers still need to be prepared to say "no" to clients. For example, a lawyer should reject a vindictive client's insistence that the lawyer adopt a "scorch and burn" strategy in litigation or engage in unethical behavior.

III. BUSINESS DEALINGS WITH CLIENTS

Given the highly competitive and entrepreneurial nature of the entertainment business, it is not surprising that lawyers have opportunities to become involved with their clients' businesses.³⁶ Significant risk often accompanies a lawyer's decision to enter into business transactions with a client. A disgruntled client-partner may be likely to file a grievance with the bar's disciplinary authority or institute a malpractice action against the lawyer.³⁷ A lawyer may be subject to third-party suits, such as those filed by investors in the business who feel harmed by the lawyer's actions. A business venture with a client may also create conflicts of interest with the lawyer's current or future clients that could result in a loss of business for the lawyer.

The first step to avoiding the problems intrinsic to lawyer-client business transactions is to be sure to recognize them. There are generally two types of

36. See Kenneth J. Abdo & Jack P. Sahl, *Entertainment Law Ethics*, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 149-50 (R. Thorne ed. 2004-05).

37. See generally e.g., *In re Stover*, 104 P.3d 394 (Kan. 2005). In *Stover*, the attorney was disbarred in part for acquiring an ownership interest that was adverse to her client. Attorney Kathy Stover offered to serve as a business manager and attorney for Michael Jahnz, a musician. Stover created websites that used Jahnz's name and likeness without obtaining Jahnz's written permission. Stover refused to remove the websites after Jahnz terminated Stover's representation. The Kansas Supreme Court held that Stover had "acquired an interest adverse to the Jahnzes by creating websites that used Michael's name and likeness without his written permission" and that this violated Rule 1.8(a) of the Kansas Rules of Professional Conduct (KRPC). *Id.* at 838. The rule prohibits a lawyer from "knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to the client unless . . . the client consents in writing thereto." *Id.*; see MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.8(a) (providing ethical standards the equivalent of KRPC 1.8).

lawyer-client business transactions.³⁸ The first type stems from the subject matter of the lawyer's representation for the client, such as when a music lawyer and his or her artist-client each contribute fifty percent of the start up capital for a recording company. The second type of lawyer-client business transaction may be entirely unrelated to the subject matter of the representation—for example, when a music-lawyer who represents his or her artist-client only in entertainment matters becomes a partner with the client in a real estate venture.³⁹ Both types of client-business transactions raise important questions about the lawyer's loyalty to the client and are governed by each state's lawyer code of conduct. The fear is that the lawyer's self-interest in the joint business enterprise with the client will undermine the lawyer's ability to exercise independent judgment on behalf of the client.

Model Rule 1.8(a) of the American Bar Association's Model Rules of Professional Conduct lists specific requirements a lawyer-client business transaction must meet to avoid an ethical violation.⁴⁰ First, the lawyer must ensure that the transaction and terms are fair and reasonable to the client and are fully disclosed in writing in a manner understood by the client. Second, the lawyer must inform the client in writing about seeking independent advice regarding the transaction and provide the client with a reasonable opportunity to procure such advice.⁴¹ Third, the lawyer must procure the client's written

38. See ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 58 (identifying several forms of "Inappropriate Involvement in Client Interests," such as "[a]cting as a director or officer of a client company[,] [i]nvesting in client securities[,] [b]ecoming involved in one-to-one business deals with a client[,] [a]ccepting stock from a client in lieu of a cash fee[,] [a]greeing to contingent cash fees[,] [and] [s]oliciting other investors on behalf of a client's enterprise"). *Id.*

39. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, AT R. 1.8(a) cmt. 1. Comment 1 provides another example of a client-lawyer business transaction unrelated to the subject matter of the representation: a lawyer, preparing a will for a client, learns that the client needs money for a matter unrelated to the subject of the representation, and the lawyer loans the money to the client. *Id.*

40. Although not completely coextensive, DR 5-104(A) is the Code's counterpart to Rule 1.8(a). DR 5-104 (A) provides: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at DR 5-104(A); see *id.* at EC 5-3 (cautioning lawyers from accepting or continuing employment when some interest interferes with the lawyer's ability to exercise independent judgment on behalf of his client); see also *id.* at EC 5-5 (noting that lawyers should not suggest to the client that he make a gift to the lawyer).

41. See generally *Croce v. Kurnit*, 565 F. Supp. 884 (S.D.N.Y. 1982). In *Croce*, the widow of the late songwriter and singer, Jim Croce, sought damages from several defendants, including Kurnit, who was an entertainment lawyer. Kurnit was introduced to the Croces by the other defendants as "the lawyer." *Id.* at 887, 889. Kurnit outlined the terms of the recording, publishing, and management contracts that were executed by the Croces. *Id.* The parties never negotiated the terms of the contracts. *Id.* at 887. Kurnit was a shareholder and participant in the management and publishing businesses that signed the Croces. *Id.* Although the court found that the Croces were not Kurnit's clients, it held that they reasonably relied on Kurnit's explanation of the "legal

and informed consent, signed by the client, to all the essential terms of the agreement, including the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction.⁴² The lawyer may need to seek additional informed consent waivers regarding the same transaction if new circumstances create conflicts of interest unknown to the client when he last consented to the lawyer's involvement. Even if a lawyer-client business transaction is not a "per se" violation of the ethical rules, ethical and unethical behavior is a thin line that the lawyer may cross inadvertently.⁴³ The lawyer who engages in a lawyer-client business transaction that complies with the requirements of Model Rule 1.8(a) still must ensure that he or she maintains "independent professional judgment" as required under Model Rule 2.1, and avoid any conflicts of interest between the lawyer and client.⁴⁴

Lawyers and their firms need to remember that developing a good professional relationship with a client requires work.⁴⁵ The maintenance of that relationship becomes even more challenging when it also becomes a business relationship.⁴⁶ Before a lawyer agrees to enter into a business transaction with a client, a comprehensive client and subject matter-screening process is key.⁴⁷ Every business transaction with a client contains some risk,

ramifications" of the contracts. *Id.* at 890. This explanation together with his introduction as "the lawyer," his interest as a principal in the transactions, "the Croces lack of independent representation," and the failure of the Croces to have independent counsel, created a fiduciary duty between the Croces and Kurnit. *Id.* This duty required Kurnit to act fairly and to advise the Croces to obtain independent advice about the contracts with the defendants. *Id.* at 893-94. However, Kurnit never advised the Croces to seek independent counsel. *Id.* As a result, the court ruled that Kurnit breached his fiduciary duty to the Croces and was liable for their legal fees. *Id.*; see also, Abdo & Sahl, *supra* note 1, at 5 n.30 (explaining that *Croce* inspired entertainment lawyers to include an acknowledgement provision in contracts that the artist was advised to seek independent counsel).

42. See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.8(a) cmt. 3 (reporting, in part, that "[t]he risk to the client is [the] 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," and noting that Model Rule 1.7 may preclude the lawyer from "seeking the client's consent to the transaction").

43. Jodi Brandenburg & David Coher, *Going for the Gold: Equity Stakes in Corporate Clients*, 14 GEO. J. LEGAL ETHICS 1179, 1193 (2001).

44. *Id.* See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.7 cmt. 1 & 6 (emphasizing that "independent judgment [is] [an] essential element[] in the lawyer's relationship to a client;" noting that the "lawyer's own interests should not be permitted to have an adverse effect on representation of a client;" and warning that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult if not impossible for the lawyer to give the client detached advice").

45. See ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 186.

46. *Id.*

47. See *supra*, Part I.

but the lawyer can better assess the magnitude of the risk by thoroughly screening the client and matter beforehand.⁴⁸ If a lawyer accepts the risk and becomes his or her client's business partner, the lawyer's firm should take steps to protect itself. A firm should require an attorney who wants to engage in a business transaction with a client to discuss the situation with a partner in the firm.⁴⁹ Even in a sole-proprietorship situation, the lawyer should consult an independent attorney before entering into a business transaction with a client.⁵⁰ Firms should make sure that the business transaction between the attorney and the client is clearly and fully memorialized in writing, such as in the engagement letter or in a separate document. Additionally, a firm should not allow the attorney who is entering into a business transaction with a client to provide legal advice regarding the business transaction.⁵¹

Lawyers may become the subject of third-party claims when they become involved with the business activities of their clients. When clients' business activities fail, investors and others who have experienced financial loss may look to the lawyer for compensation.⁵² When a lawyer is involved in business transactions with the client, outsiders do not perceive the lawyer as independent from the client, but rather view the lawyer as having great power and influence over the client.⁵³ This perception has caused malpractice insurance carriers to exclude from professional-liability coverage those lawyers who are directors and officers of their clients' business enterprises.⁵⁴

Difficulties also arise when lawyers forego a cash fee and instead acquire an interest in clients' businesses.⁵⁵ The difficulties include speculation as to possible undue influence by the lawyer in obtaining stock or other interests

48. SMITH & MALLEEN, *supra* note 4, § 2.7, at 95.

49. *Id.*

50. *Id.*

51. *Id.* (recommending that if the lawyer in the transaction provides legal advice, it should be "reviewed and approved in advance by a disinterested partner in the firm").

52. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 189.

53. *Id.* at 180. *See also* Abdo & Sahl, *supra* note 18, at 3 (explaining that, due to the merging roles of lawyer, manager, and agent, entertainment lawyers "intentionally or inadvertently exercise a greater degree of control over the client than is customary in other law practices").

54. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 182; *see also* JAY G. FOONBERG, *HOW TO START & BUILD A LAW PRACTICE* 471-72 (2d ed. 1999).

55. *See generally* Brandenburg & Coher, *supra* note 43. In an effort to obtain higher profits, lawyers have begun investing in the initial public offerings of clients. *Id.* at 1179. Although receiving an equity stake in a client is not new, the vast amount of potential profits for lawyers is new. *Id.* at 1179-80; *see also* Abdo & Sahl, *supra* note 1, at 5 (noting that a lawyer may accept an ownership interest in literary property when representing a client in transactions related to the property).

instead of a fee, the reasonable amount the lawyer should pay for the interest, the lack of independence a lawyer has once the lawyer gains an equity interest in the client, and other conflict of interest concerns, such as whether the lawyer must withdraw from representation.⁵⁶ Generally, once the lawyer owns an interest in the client's business, it becomes increasingly difficult for the lawyer to maintain independent judgment because of the lawyer's financial interest.⁵⁷ This belief stems in part from the observation that "[t]he more ties you have, the more questions people may raise."⁵⁸

IV. SCOPE OF RETENTION

Lawyers can minimize the risk of a malpractice claim by ensuring that clients understand the scope of representation. Lawyers must orally explain the nature and terms of the professional relationship in a manner readily understood by their clients. Lawyers should also have a written engagement letter to help ensure that both the lawyer and the client clearly understand the purpose, nature, and scope of the lawyer's and client's responsibilities.⁵⁹ The engagement letter should clearly identify the client, including the client's proper legal name when the client is a business.⁶⁰ Lawyers should be sensitive to third-party liability when signing an engagement letter with a client.⁶¹

56. Brandenburg & Coher, *supra* note 43, at 1181 (citing Debra Baker, *Who Wants to be a Millionaire?*, 86 A.B.A. J. 36 (2000)).

57. *Id.* at 1189. The article suggests that although lawyers should instruct clients to seek outside counsel before issuing the stock to the lawyer, this suggestion is often unrealistic because a client offering an equity share in itself probably lacks the money to hire another lawyer to review the deal. *Id.* at 1183.

58. *Id.* at 1182 (quoting John F. Olson, chair of the ABA Business Law Section's Committee on Lawyer Business Ethics).

59. SMITH & MALLEEN, *supra* note 4, § 2.9, at 96. See Abdo & Sahl, *supra* note 1, at 3-4. Although it is beyond the scope of this article to discuss all of the contents of an engagement letter, a lawyer should include in any engagement letter a provision that describes the grounds and process for the lawyer's withdrawal from representation.

60. SMITH & MALLEEN, *supra* note 4, § 2.9, at 98.

61. See generally *Even Street Prods. v. Shkat Arrow Hafer & Weber, LLP*, No.643 F.Supp. 2d 317 (S.D.N.Y. 2008) (the spelling of the law firm's name in the case heading of the reported decision differs from the spelling in the text of the opinion). In 2000, New York Times Television and Diamond Time Ltd., produced a documentary about Sly Stone titled "Jimi and Sly: The Skin I'm In." *Id.* at 320. That same year Showtime Networks broadcasted the documentary. The production used Sly Stone's music without authorization of the copyright holders, Sony and Warner/Chappell (Warner). *Id.* Sony and Warner retained Shukat, Arrow, Hafer & Webber, LLP (Shukat) to prosecute a copyright infringement action. The Shukat firm entered into a written agreement with the New York Times Television attorneys to toll the statute of limitations in hope of reaching a settlement. *Id.* That agreement expired and Sony and Warner were barred from suing for copyright infringement. Sony and Warner assigned to the plaintiff, Even Street Productions (Even), all of the rights and

The engagement letter should state clearly the basis and amount of the lawyer's fee.⁶² The letter also should address other financial issues, including the advancement of expenses, the computation of interest on outstanding balances, special firm charges (e.g. copying and delivery of documents), and billing procedures.⁶³ The engagement letter also should identify the client's

interests of Sly Stone's musical career. *Id.* at 319-20. Even expected to benefit from a resolution of the copyright infringement claims, which Sony and Warner could no longer bring because they were barred by the statute of limitations. Even also had separate agreements with Sony and Warner that assigned and transferred any and all claims or causes of action Sony and Warner had against any third party. Even sued Shukat for legal malpractice. The court denied the law firm's motion to dismiss and held that Even could sue Shukat for legal malpractice. The court determined that Even's agreements with Sony and Warner could be reasonably construed as assigning not only copyright claims but also legal malpractice claims. *See also* Phillip M. Callesen & James W. May, *Potential Legal Opinion Liability for Ohio Business Lawyers*, 23 THE OHIO LAWYER 13, 15 (Jan./Feb. 2009) (discussing liability for lawyers who provide opinions to clients that are relied on by third parties, and reviewing *Dean Foods v. Arthur J. Pappathanasi*, 18 Mass. L. Rep. 598 (2004), a case that resulted in a \$7.2 million judgment against a seller's law firm for negligent misrepresentation in issuing a legal opinion for the sale of a business). *Id.*

62. *See generally* King v. Fox, 418 F.3d 121 (2d Cir. 2005), for a recent entertainment law case involving a dispute over a fee agreement. Edward King was a member of the Southern rock band, Lynyrd Skynyrd, from 1972 to 1975. *Id.* at 124. After MCA Records and the band refused to pay King his artist royalties, King hired attorney Lawrence Fox. *Id.* at 124-25. Due to King's limited resources, Fox—who specialized in personal injury cases—agreed to represent King on a contingency fee basis. *Id.* The brief, written agreement stated that Fox was entitled to one-third of “any money recovered from” MCA Records. *Id.* at 125. On King's behalf, Fox secured a settlement with MCA Records related only to King's artist royalties. Fox then relied on the written contingency fee agreement to obtain one-third of King's writer royalties as well as his artist royalties—even though Fox never represented King in writer royalty matters. *Id.* at 126. King sued Fox for malpractice, alleging in part that the terms of the contingency fee agreement were unconscionable. The federal district court granted summary judgment to Fox, finding that the terms were within a reasonable range, that Fox clearly explained the terms of the agreement to King, and that King ratified Fox's conduct. King v. Fox, No. 917 CIV 4134, 2004 U.S. Dist. LEXIS 462, at **12-13 (S.D.N.Y. Jan. 21, 2004). On appeal, the Second Circuit certified three questions to the New York Court of Appeals on the issue of whether King ratified Fox's potentially unconscionable conduct. King, 418 F.3d at 137. The New York Court of Appeals answered all three questions affirmatively but with significant qualifications. King v. Fox, 51 N.E.2d 1184, 1190 (2006). First, the court held that a ratification of an attorney's fee agreement can occur during a period of continuous representation “so long as the client has full knowledge of the relevant facts and has acquiesced.” *Id.* at 1191. Second, the court held that a ratification of an attorney's fee agreement can occur during a period of continuous representation even if attorney misconduct occurs during that period so long as the client's acquiescence is not obtained as a result of the misconduct. *Id.* Third, the court held that a ratification of an attorney's fee agreement that might otherwise be considered voidable as unconscionable can occur if the client is fully informed, has equal bargaining power, and knowingly and voluntarily affirms an existing fee arrangement with “both a full understanding of the facts that made the agreement voidable and knowledge of his or her rights as a client.” *Id.* at 1192.

63. SMITH & MALLEN, *supra* note 4, § 2.9, at 101-02; *see also* ABA CENTER FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF'L CONDUCT 61-75 (5th ed. 2003). *See generally* Rachel Abramowitz, *Birkhead Gets Tentative Ruling Against Ex-Attorney*, L.A. TIMES, July 13, 2007, at E2 (discussing, in part, the misunderstandings and fee dispute between Attorney Debra Opri and her former client, Larry Birkhead, who claimed to have fathered Anna Nicole Smith's

responsibilities, such as notifying the lawyer of any material changes that may affect the lawyer's work.⁶⁴ In multiple-client settings, lawyers should at a minimum inform all clients in writing about the effect of joint representation on the attorney-client privilege.⁶⁵ In addition to a written document outlining the rights and responsibilities of both the lawyer and the client, the lawyer should discuss these matters with the client to ensure that the client truly understands the representation agreement.⁶⁶

The engagement letter also should clearly state the scope of the lawyer's authority. Under Model Rule 1.2, the client has authority to settle a case.⁶⁷ The engagement letter should expressly identify to what extent, if any, the

daughter; Birkhead sued Opri for fraud, breach of fiduciary duty, and malpractice). The California Bar Association also investigated Opri's conduct. *Id.*

64. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 54.

65. SMITH & MALLIN, *supra* note 4, § 2.9, at 99. The representation of multiple clients also presents conflict of interest issues. See Abdo & Sahl, *supra* note 1, at 4 (noting that some commentators believe that lawyers should refuse to simultaneously represent an artist and a manager in negotiating their artist-management agreement because of conflict of interest concerns) (citing Jack P. Sahl, Professor of Law and Faculty Dir. of the Miller-Becker Ctr. for Prof'l Responsibility at the Univ. of Akron School of Law, Presentation at the 12th Annual International Folk Alliance Conference: Ethics for Entertainment Lawyers: Avoiding Conflicts of Interest (Feb. 11, 2000)). See Bolton v. Weil, Gotshal & Manges, 798 N.Y.S.2d 343 (N.Y. 2004), for an example of a client feeling betrayed in the context of multiple representation. The plaintiff, the singer Michael Bolton, sued his lawyers, Weil, Gotshal, & Manges (WGM) for breaching its fiduciary duties in representing him in a copyright action brought by Three Brothers Action. *Id.* Bolton contended that WGM failed (1) to advise him of conflicts of interests arising from WGM's joint representation of Bolton, his record company (Sony Music Entertainment, Inc.), and his publishing company (Warner-Chappell Ltd.), and (2) to advise him of settlement developments or follow his instructions regarding settlement. *Id.* at 345. Bolton argued that WGM did not discuss with him his indemnity obligations to his publishing and record companies and did not inform him of favorable settlement offers. *Id.* at 2-3; see generally Bolton v. Weil, Gotshal & Manges, LLP, 2005 N.Y. Misc. LEXIS 1899 (N.Y. Sup. Ct. 2005) (denying a motion by Bolton's former personal lawyers, Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, to dismiss a third-party complaint against them, and permitting a claim for contribution against them by WGM); Anthony Lin, *Singer Sues Weil, Gotshal & Manges Over Joint Representation*, 230 N.Y. L. J. 1, Dec. 22, 2003 (reporting that the U.S. Court of Appeals for the Ninth Circuit upheld a jury award of \$5.4 million against Bolton, his co-writer, music publisher and record company for copyright infringement, and noting that Bolton sued WGM for \$30 million in damages alleging that the firm "was conflicted" when it defended him and other parties).

66. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 54.

67. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.2. The Code counterpart to Rule 1.2 is EC 7-7 (emphasizing that the ultimate authority to accept a settlement rests with the client). See also MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at EC 7-8 (explaining that a lawyer should ensure that the client makes informed decisions, and should defer to the client when the client decides "to forego legally available objectives"). See generally *id.* at DR 7-101(A)(1) (providing that a lawyer must not intentionally fail to seek the client's lawful objectives); *Id.* at DR 7-101(A)(2) (stating that lawyers *must* "not fail to carry out a contract of employment entered into with a client for professional services," but noting that lawyers may withdraw pursuant to DR 2-110) (emphasis added).

client delegates settlement authority to the lawyer.⁶⁸ A lawyer should be aware that even if there is an agreement granting the lawyer authority to engage in settlement discussions with the other side, this does not mean that the lawyer has authority to actually accept or reject settlement offers.⁶⁹ If the lawyer wants specific settlement authority, the lawyer should discuss the matter with the client and obtain written authorization.⁷⁰ Even if the client grants specific settlement authority, it is generally wise to communicate the settlement offer to the client prior to the lawyer accepting or rejecting it.⁷¹

The engagement letter needs to describe the goals of representation—particularly in an entertainment law practice, where the lawyer often performs different roles.⁷² It is important that the entertainment lawyer listen to the client's wishes in establishing the goals of representation. If the representation involves litigation, the client may want to settle a case early or may want to explore alternatives to litigation, such as arbitration or mediation. The lawyer should have a clear understanding of the client's objectives at the beginning of representation so that he or she can devise and implement a plan to achieve them.⁷³ A clear understanding of the client's expectations at the start of the

68. SMITH & MALLIN, *supra* note 4, § 2.9, at 99. The lawyer's settlement authority must be specific. *Id.* Even if a client grants a lawyer settlement authority in an engagement letter, the lawyer should be mindful that subsequent client instructions can override this authority. *Id.* (citing *Lewis v. Uselton*, 416 S.E.2d 94, 97 (Ga. 1992) (holding that although an engagement letter granted the lawyer "full 'power and authority to settle,'" the lawyer's acceptance of a \$22,500 settlement offer was unauthorized when the clients told the attorney they did not want to settle for anything under \$50,000)).

69. *Auvil v. Grafton Homes, Inc.*, 92 F.3d 226, 230 (4th Cir. 1996) (stating that "[t]he authority to negotiate . . . is far different from the authority to agree to a specific settlement."); *Johnson v. Schmitz*, 237 F. Supp. 2d 183, 192 (Dist. Conn. 2002) (stating that authority to enter into negotiations is not the same as authority to agree to a settlement).

70. See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.4 cmt. 2. "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject an offer." See generally MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at DR 5-106. Although there is no direct counterpart in the Code to Rule 1.4, DR 5-106 suggests that a lawyer should not make an aggregate settlement on behalf of multiple clients unless each client has consented to the settlement after being fully advised of important details. *Id.*

71. "A lawyer should provide a client with a professional assessment of the advantages and disadvantages of a proposed settlement, so that the client can make a fully-informed decision about settlement. Any effort to assist the client in reaching a decision should avoid interference with the client's ultimate decision-making authority." ABA ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, 3.2.4 (2002).

72. See *supra* text accompanying notes 18-20.

73. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 54. The attorney must consult with his or her client to clearly determine "the client's desired results." See Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations*, 7 PEPP. DISP.

attorney-client relationship also permits the lawyer to address any unreasonable expectations.

A lawyer's representation of a client generally includes "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court."⁷⁴ However, the lawyer and client may agree to limit the representation by excluding some of the services that lawyers generally provide.⁷⁵ For example, a lawyer may agree to negotiate a publishing contract for an author but decline to shop the author's work to other publishing companies, review the work for possible defamation, or counsel the client regarding the tax consequences of forming a corporation. A client might prefer limited representation because the client has limited objectives or cannot afford all of the services generally included in full representation.⁷⁶

Before a lawyer agrees to limit the scope of the representation, the lawyer needs to confirm that limiting the scope is reasonable under the circumstances.⁷⁷ To determine whether limiting the scope is reasonable, the lawyer should evaluate: the complexity of the case, transaction, or other matter; the importance of the matter; the judge or jury's discretion in reviewing the matter; how the dispute will be resolved; and other resources the client might have to aid in representation.⁷⁸

Clients who agree to limited representation tend to be happy with the results, as evidenced in part by the low rate of malpractice claims against limited-assistance attorneys.⁷⁹ This may be because limited representation is

RESOL. L. J. 425, 445 (2007). In choosing which strategy to employ the attorney needs to consider what [his or] her client's hopes and fears are." *Id.* at 459. The attorney must conduct negotiations in the way that comports with the client's desired ends. *Id.* at 445.

74. MARK H. TOUHEY III ET AL., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 2 n.6 (2002) (quoting Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422-23 (1994)).

75. *Id.* at 2.

76. *Id.* at 2-7.

77. See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.2 cmt. 7.

78. TOUHEY III, *supra* note 73, at 59. "[T]he best candidates for limited scope assistance have a degree of emotional detachment, the willingness and ability to handle 'some paperwork,' some capacity to gather and analyze financial information, reasonable decisiveness, willingness and ability to handle details and follow through on obligations, and the necessary time to perform delegated tasks." *Id.* (citing M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES xiii (1997)). As the complexity of the issues increase, so does the need for lawyer support and advice. *Id.* at 59. For example, the lawyer would need to provide more legal services in the case of a divorce involving custody disputes and division of pension plans than in an uncontested divorce where no children or significant property is involved. *Id.*

79. See *id.* at 51. "[T]here are fewer rather than more malpractice claims when lawyers

more client-centered than full representation.⁸⁰ Limited representation often provides the client with a high degree of control over his or her legal affairs and offers a more affordable price than with full representation where the client is expected to surrender his money and control to the lawyer—giving him or her “all [of] the responsibility.”⁸¹ It is important to remember, however, that the decision to limit the scope of representation does not excuse the lawyer’s obligation to provide competent representation.⁸²

V. TIME LIMITATIONS AND CONFLICT OF INTERESTS

Lawyer codes of conduct provide different conflict of interest rules depending on whether the lawyer is representing a current client against another current client, or instead, a current client against a former client.⁸³ Thus, the point in time at which a person is no longer a current client has major consequences for the lawyer. Consequently, in both current and former client situations, lawyers need to understand the timing aspects of the attorney-client relationship.

Model Rule 1.7 addresses conflicts between current clients. As a general rule, a lawyer cannot represent a client if the representation will be “directly adverse to another client” or if the representation would “materially limit” the lawyer’s representation of another client.⁸⁴ However, under Model Rule 1.7

unbundled services.” *Id.* (quoting Leigh P. Perkins, *Unbundling Your Services Makes Some Clients Happy*, LAWS. WKLY USA, Dec. 18, 1995).

80. See NELSON, *supra* note 15, at 27-40. As purveyors of services, lawyers must be “client-centered as well as case-oriented” and also describing a “client-centered orientation” as one where the lawyers “gather as much information as [they] can about how [their] clients see their situations, and factoring that information into the solutions [they] design for them.” *Id.* at 27.

81. TOUHEY III, *supra* note 73, at 52 (citing MICHAEL A. CANE, WELCOME TO THE INFORMATION HIGHWAY, in THE CHANGING FACE OF LEGAL PRACTICE: A NATIONAL CONFERENCE ON “UNBUNDLED” LEGAL SERVICES 2 (Vol. 4 2000)).

82. MODEL RULES OF PROF’L CONDUCT, *supra* note 14, at R. 1.2 cmt. 7. See also Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO J. LEGAL ETHICS 915, 915-16 (1998) (noting that although clients may seek limited representation for various reasons, “legal ethics norms expect lawyers to maximize their clients’ positions, regardless of whether the clients pay them to do so”).

83. The Code’s conflict of interest provisions are found at DR 5-101 and DR 5-105. Unlike the Model Rules, the Code does not have a provision expressly dealing with conflicts involving former clients. Code jurisdictions nevertheless followed the “substantial relationship” test as first formulated by the courts for resolving conflicts involving former clients. See *infra* notes 90-93 and accompanying text (discussing the substantial relationship test).

84. MODEL RULES OF PROF’L CONDUCT, *supra* note 14, at R. 1.7(a) (1)-(2) *cf.* MODEL CODE OF PROF’L RESPONSIBILITY, *supra* note 14, at EC 5-15 (exhorting that “a lawyer should never represent in litigation multiple clients with differing interest” but noting that a lawyer may represent multiple clients in non-litigation matters only if their interests vary slightly); *Id.* at DR 5-105(B) (prohibiting a lawyer from “represent[ing] multiple clients if doing so will adversely affect the representation”). It

(b)(1)-(4), even if a conflict exists with another current client, the lawyer can still 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.⁸⁵

Even after following the steps in Model Rule 1.7 (b)(1)-(4), a lawyer should be wary about representing current clients with adverse interests. For example, even if the lawyer can show the representation was not prohibited by law, that it did not involve a claim brought by one client against another client in the same proceeding, and that each client gave informed consent in writing, the lawyer still has to prove that he reasonably believed he could provide

is worth noting that conflicts of interest are common in the entertainment industry. At least one well-know entertainment lawyer has gone so far as to suggest that, “[a]nyone that does not have conflicts is not a player in Hollywood.” Adam Sandler, *Legal Eagles Swoop Down on Hollywood Suit: Conflict of Interest: Latest Legal Scuffle*, VARIETY, Aug. 28, 1995. The New York Times reported that the prominent entertainment lawyer, Bert Fields, “has drawn some heat in Hollywood for simultaneously representing both talent and studios.” See Allison Hope Weiner, *Telling Hollywood It’s Out of Order*, N.Y. TIMES, May 15, 2005, at 17. Fields said that after he discloses the conflict to his clients, “[t]hey usually think it’s a great advantage.” See *id.*; see also Abdo & Sahl, *supra* note 1, at 3-4 (noting that sometimes the “package deal”—where a lawyer simultaneously represents a successful movie producer and a famous actor—may result in a lucrative production in which “[e]veryone wins”).

85. MODEL RULES OF PROF’L CONDUCT, *supra* note 14, at R. 1.7(b)(1)-(4) *cf.* CODE OF PROF’L RESPONSIBILITY, *supra* note 14, at DR 5-105(C) (stating that in situations covered in DR 5-105 (A) (a lawyer shall not accept proffered employment if his independent judgment is likely to be adversely affected) and (B) (a lawyer shall not continue multiple employment if his independent judgment on behalf of one client is adversely affected by representation of another client), a lawyer “may represent multiple clients if it is obvious that he can adequately represent the interest of each” and each consents after full disclosure to the representation). See *generally id.* at EC 5-17 (providing that before a lawyer represents multiple clients in a non-litigation matter, the lawyer “should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent”). The Model Rules make it clear now that the lawyer may not “represent both Client A and B in the case of A v. B.” RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 280-81 (2005). It is also clear “that Rule 1.7 does not absolutely prohibit a lawyer from representing adverse parties outside of the litigation context . . . if the lawyer secures an adequate waiver.” *Id.* at 282.

competent and diligent representation to each client. If lawyers are not careful, they may find themselves in the middle of a disqualification proceeding.⁸⁶ In many cases, the lawyer's belief that such competent and diligent representation was possible will not be reasonable by the very fact that the lawyer is representing one client against another.⁸⁷ When representing two clients against each other, there is a substantial risk that one or both will feel betrayed, in part, because of the fear that the lawyer failed to zealously pursue a client's interests.⁸⁸

When a current client no longer employs a lawyer, the client becomes a former client. The timing of when a current client becomes a former client is not always clear. Nevertheless, a lawyer owes former clients certain ethical duties. Model Rule 1.9 identifies these obligations and provides that a lawyer cannot represent a client against a former client in "the same or a substantially related matter" when the client's interests are "materially adverse to the interests of the former client," unless the former client gives informed written consent.⁸⁹ When a new matter is the same or substantially similar, it is generally assumed that the lawyer gained confidences relevant to the new

86. See Mary Flood, *Hardin Stays as Clemens' Attorney/Judge Says Issue of Representation Excludes McNamee*, HOUSTON CHRON., May 7, 2008 at 5. In the instant case, the judge ultimately allowed Attorney Rusty Hardin to continue to represent Roger Clemens in his defamation suit against Brian McNamee. *Id.* McNamee lacked standing to seek Hardin's disqualification because he had represented Andy Pettitte, not McNamee. Pettitte was Clemens' former teammate and a potential defense witness in the same defamation case. *Id.* "Richard Emery, one of McNamee's New York City-based lawyers, said . . . the judge acknowledged that Hardin [did] something unethical because the court implied that if Pettitte asks to have Hardin removed, the judge may do that." *Id.*

87. See MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.7(b)(1).

88. See *id.* at R. 1.7 cmt. 6 *cf.* CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at EC 5-16 (providing that a lawyer should advise multiple clients of any "circumstance that might cause multiple clients to question the undivided loyalty of the lawyer").

89. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.9(a) *cf.* CODE OF PROF'L CONDUCT EC 4-6 (requiring a lawyer to preserve the confidences of a client after the termination of employment). This obligation generally precludes a lawyer from representing an interest adverse to that of a former client in a substantially related matter. See *Spivey v. Bender*, 601 N.E.2d 56, 59 (Ohio Ct. App. 1991); see also *Abdo & Sahl*, *supra* note 1, at 5. In the case of *Fargnoli v. Ziffren, Brittenham & Branca*, Fargnoli, Case No BC068280 (1992 L.A. Sup. Ct.,—a former manager for Prince—was previously represented by the defendant law firm. Alex Citron & Robert W. Welkos, *Hollywood Firm Sued Again*, L.A. TIMES, Nov. 12, 1992, at D1. The law firm later represented Prince when Fargnoli sued the entertainer. *Id.* Fargnoli alleged that the firm had disclosed confidential communications to Prince. *Id.* The court granted summary judgment to the law firm, noting that a written release precluded Fargnoli's conflict of interest claims. See James Bates, *Judge Dismisses Suit by Prince's Ex-Manager*, L.A. TIMES, Apr. 20, 1993, at D2. For example, a sports agent representing two players on the same team in a sport where there are salary caps will have to sacrifice the interests of one client for the other in most cases, as players are "competing for a finite resource." Neiman *supra* note 6 at 15. Such conduct by sports lawyer-agents would violate Model Rule 1.7's conflict of interest standard.

matter.⁹⁰ Additionally, even if the lawyer is representing a client against a former client in a matter that is not substantially similar, the lawyer cannot use information gained during the former representation against the former client unless the client consents.⁹¹

Although Model Rule 1.9 limits a lawyer's ability to represent a current client against a former client, Model Rule 1.9 is not as restrictive as Model Rule 1.7. Model Rule 1.9's substantial relationship test reflects a concern for protecting clients' loyalties and confidences, but it also reflects other competing policy concerns. Those concerns include lawyer mobility and the desire for clients to hire the lawyer of their own choosing.⁹² In 2009, the

90. See Donald R. McMinn, Note: *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U.L. REV. 1231, 1250 (1990); see also Spivey, 601 N.E.2d at 59 (explaining that when the lawyer represents a client whose interests are adverse to that of a former client, there is a concern that the lawyer obtained confidential information during the representation (citing *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980)). Some courts take the position that where no confidential information was revealed during the former representation, there is no conflict of interest barring representation of a new client. See generally *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978).

The determination of whether there is a substantial relationship turns on the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule thus does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other.

Id. at 224. But see *Griffith v. Taylor*, 937 P.2d 297, 301 (Alaska 1997) (finding that the substantial relationship test should apply even if no confidential information is acquired during the course of representation). *Accord E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 397 (S.D. Tex. 1969).

The rule against representing conflicting interests disqualifies an attorney from appearing adversely to his former client in litigation growing out of the subject matter of the prior representation. The Court has held that the former client's failure to disclose confidential information to his attorney does not disable him from moving to disqualify.

Id.

91. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.9 (C)(1) *cf.* MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at EC 4-5 (barring a lawyer from "us[ing] information acquired during the representation of a client to the disadvantage of that client").

92. McMinn, *supra* note 87, at 1250. See generally *e.g.*, *Forbes v. NAMS International Inc.*, No. 3:07-CV-0039, Slip 2007 U.S. Dist. LEXIS 45161 (N.D.N.Y. 2007). The defendant, NAMS International, developed patented software for multimedia entertainment. Forbes and other plaintiffs invested in NAMS allegedly based on material misrepresentations concerning its capabilities and ability to obtain patent rights in new technologies in the field. *Id.* at 5. Attorney Ronald J. Benjamin represented the plaintiffs. He also represented the defendant, NAMS, in its earlier lawsuit against Spectra.Net Communications after a proposed merger of the two companies failed. During the merger negotiations, NAMS shared information concerning its current and future technology. The district court found that even though eight years had passed, there was a substantial relationship between the issues raised in both cases and a high probability that Benjamin had access to

ABA amended Model Rule 1.10 that provides for imputed disqualification to further promote lawyer mobility and client choice of counsel.⁹³ When a lawyer departs one firm for another, Model Rule 1.10 now permits the departing lawyer's new firm to avoid having the migratory lawyer's conflicts imputed to it by erecting a screen around the new lawyer.⁹⁴ The screen should be in place when the migratory lawyer joins the new firm to protect against the lawyer's involvement in the conflicted matter.⁹⁵

In deciding whether Model Rule 1.7 or 1.9 is applicable for analyzing a conflict of interest problem, the lawyer must ascertain whether the client is proceeding against another current or former client of the lawyer. Timing is important. At what point does a current client become a former client for purposes of a conflict of interest analysis?

Comment 4 to Model Rule 1.3 provides that, unless representation is terminated under Model Rule 1.16, a lawyer should "carry through to conclusion" all the matters undertaken for the client.⁹⁶ If the lawyer's representation has been limited to a specific matter, the attorney-client relationship ends when the attorney completes that specific matter.⁹⁷

confidential information about NAMS that would be harmful to it in the instant case. *Id.* at 13-15. The court granted NAMS' disqualification motion against Benjamin and stated that the need to preserve the integrity of and public confidence in the judicial process overrides the plaintiffs' choice of legal representation in this case. *Id.* at 15; *see generally Disqualification Motion*, 23 ENT. L. & FIN. 4 (Sept. 2007) (discussing the holding in *Forbes*, No. 3:07-CV-0039, 2007 U.S. Dist. LEXIS 45161).

93. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.10. *See* 25, NO. 16 ABA/BNA LAW. MAN. PROF. CONDUCT 420 (Aug. 5, 2009) (commenting that the "[r]ules for the first time provide that private law firms may screen incoming lawyers to avoid the imputation of the lawyer's former-client conflicts to the rest of the firm, even without getting consent from the affected former clients" and noting that if "certain procedural requirements are met, a screened lawyer's colleagues may represent clients in matters that the lawyer would be prohibited from handling under the rule on former client conflicts").

94. *See* 25, NO. 16. ABA/BNA LAW. MAN. PROF. CONDUCT 418 (Aug. 5, 2009) (recognizing that the ABA approved a modest "'housekeeping amendment' to Model Rule 1.10" that clarifies that the new non-consensual screening procedures in the rule may be used to prevent a firm's imputed disqualification only when a lawyer has moved from one firm to another" (citing 25 ABA/BNA LAW MAN. PROF. CONDUCT 420)).

95. *Cf. Kala v. Aluminum Smelting Co.*, 688 N.E.2d 258, 267 (Ohio 1998) (specifically noting that "all cases" require the screen to "be in place when the attorney joins the firm"—it is "too late" to screen after the filing of a disqualification motion) *with* MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.10 (a)(2)(i)-(iii) cmt. 10 (outlining screen requirements, including that there be a "timely implementation of a screen").

96. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.3 cmt. 4. *See also* CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at DR 7-101(A)(2) (reminding lawyers that they shall not intentionally fail to carry out a contract of employment with clients for professional services unless the lawyers withdraw under DR 2-110).

97. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.3 cmt. 4.

However, if the lawyer has worked for the client for a long time on assorted matters, the client may assume that the lawyer continues to serve his interests until the lawyer expressly notifies him of withdrawal.⁹⁸ As Comment 4 suggests, “doubt[s] about whether a client-lawyer relationship still exists should be clarified . . . in writing.”⁹⁹ Just as with engagement letters, good practice dictates that lawyers send clients a conclusion of services letter.¹⁰⁰

In *IBM Corp. v. Levin*,¹⁰¹ the Third Circuit discussed when a current client becomes a former client. In *IBM*, the court found that the law firm had an ongoing attorney-client relationship with both IBM and the party the firm was representing against IBM.¹⁰² Although the firm did not have a specific retainer agreement with IBM when it filed its complaint against IBM, the court found that “the pattern of repeat retainers, both before and after the filing of the complaint, support[ed] the finding of a continuous relationship.”¹⁰³

VI. IMPLEMENTING INTERNAL CONTROLS IN THE OFFICE

A law firm is often faced with a malpractice claim that it could have avoided by implementing internal controls in its office. Internal controls help ensure that common errors do not occur.¹⁰⁴ For example, although calendaring errors are a leading cause of malpractice, a firm should be able to avoid these errors by establishing an office-wide calendar with a well-defined procedure for its use.¹⁰⁵ A calendaring system needs to be user-friendly; it should be easy to learn, use, and maintain.¹⁰⁶ The calendaring system should also have an off-site backup in case of problems in the central system.¹⁰⁷ The

98. *Id.*

99. *Id.*

100. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 54.

101. *See generally* *IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978).

102. *Id.* at 281.

103. *Id.* *See* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 840 (1992) (discussing the difficult situation where the lawyer continuously represented a client, but was not presently involved in a specific matter for the client and stating that “continuing clientship is usually not a relationship ascertainable from the intentions and behavior of the parties, but rather a concept imposed with little evidentiary support by a court . . . in order to resolve one or another question”).

104. *See* SMITH & MALLIN, *supra* note 4, § 2.1-.2.4 at 44-58. Certain organizational controls and individual practice procedures can improve the overall competence of attorneys and the quality of the services they render. *Id.* at 50-51.

105. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 72.

106. *Id.* at 52.

107. *Id.*

system should be able to find discrepancies between the central and back-up calendar, and should have a tracking system to know who made changes and what changes were made.¹⁰⁸ Further, the calendaring system should give each open matter a review date so the firm can regularly review each file.¹⁰⁹

Law firms should consider an additional internal control by establishing committees to help prevent malpractice and to enhance the quality of work performed for clients.¹¹⁰ Just as firms benefit from a managing partner or a managing committee, firms also benefit from such "quality control committees."¹¹¹ The firm should determine the committee's responsibilities, who will serve on it, and the extent to which the committee's determinations are final.¹¹² Possible functions that the committee could perform include: considering possible ethical problems; developing a procedure for opening a new file; identifying criteria for evaluating clients and claims; establishing a billing procedure; maintaining form files; preventing document loss; developing a policy for referrals, scheduling projects, and events; and creating stress and alcohol awareness programs.¹¹³

An important internal control is one aimed at avoiding conflicts of interest. Relying solely on lawyers' memories to uncover conflicts is no longer sufficient.¹¹⁴ Instead, firms should have a "systemized procedure for documenting and analyzing potential conflicts for every new client and new matter accepted by the firm."¹¹⁵ Conflict-check systems must provide a method for matching names.¹¹⁶ If a firm has multiple offices, the names of the clients and matters of one office should be accessible by any other office in the firm.¹¹⁷ Additionally, when the firm accepts a new case, it should

108. *Id.*

109. *Id.*

110. SMITH & MALLEN, *supra* note 4, § 2.2, at 51-52.

111. *Id.* at 51-52. Smith and Mallen suggest several names for committees aimed at preventing malpractice, including: "(1) quality control; (2) quality assurance; (3) risk management; and (4) professional responsibility." *Id.* § 2.3, at 52. "Quality Control Committees" or "Quality Assurance Committees" are the preferred names because the focus is on increasing quality, as opposed to decreasing risk, and generally carry a more positive connotation. *Id.*

112. *Id.* § 2.3, at 52-53.

113. *Id.* § 2.4, at 55-58 (providing a more extensive list of possible committee functions).

114. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 57.

115. *Id.*

116. *See id.*

117. *Id.* Page 85 features a chart entitled "Types of Names to Track in Conflict System." This chart gives the list of important people to track depending on the type of representation. For example, for a probate case, the chart suggests tracking the decedent, personal representative, the "spouse/children/heirs/devisees" and the "trustee/guardian/conservator." *Id.*

circulate a “new matter memo” to lawyers and support staff within the firm.¹¹⁸ This memo should identify the parties and the intake attorney.¹¹⁹ The memo also should state what the case is about and what services the firm will provide.¹²⁰ By circulating the memo, other lawyers are warned about accepting prospective clients and matters that have conflicts with the new client.¹²¹

It also is essential that firms establish a system to ensure adequate documentation of work.¹²² For example, preferably more than one person should check the content and accuracy of all documents—such as letters, briefs, contracts, and motions—before the documents leave the firm.¹²³ Each client and matter should have its own file for all documents the lawyer prepares or receives.¹²⁴ Relevant documents should be filed daily.¹²⁵ This ensures that documents are not misplaced and that others will know that they are looking at an up-to-date file.¹²⁶

VII. IDENTIFYING ATTORNEY COMPETENCY ISSUES

Lawyers should provide their clients with competent representation; failure to do so can lead to a malpractice action,¹²⁷ Rule 11 sanctions,¹²⁸ and

118. *Id.* at 58. See SMITH & MALLIN, *supra* note 4, § 2.4, at 56 (evaluating a client or transaction should “require[] consultation between the originating attorney and another partner or committee”).

119. ABA STANDING COMMITTEE ON LAWYER’S PROFESSIONAL LIABILITY, *supra* note 26, at 58.

120. *Id.*

121. *Id.*

122. *Id.* at 59.

123. *Id.* See SMITH & MALLIN, *supra* note 4, § 2.4, at 51-52, 55-58. A law firm’s quality assurance committee should oversee “[w]ork control” issues. *Id.* at 56-57.

124. ABA STANDING COMMITTEE ON LAWYER’S PROFESSIONAL LIABILITY, *supra* note 26, at 59.

125. *Id.*

126. *Id.*

127. See generally *Battle v. Thornton*, 646 A.2d 315 (D.C. 1994) (stating that in a jurisdiction that does not certify specialists, the standard of care at issue in a malpractice action is that of an ordinary lawyer). Lawyers who communicate that their practice is “limited to” or that they “primarily handle” or “specialize in” entertainment law may be held to a higher standard of care than other lawyers. See *Wright v. Williams*, 121 Cal. Rptr. 194, 199 (Ct. App. 1975) (noting that “a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field”).

128. See e.g., *Atlantic Recording Corp. v. Heslep*, 2007 WL 1435395, *8 (N.D. Tex. 2007) (holding that Rule 11 sanctions against Heslep’s attorney were appropriate for filing a frivolous motion for sanctions against the plaintiffs’ attorney). In addition to Rule 11 sanctions, the court may

discipline.¹²⁹ Model Rule 1.1 helps define competency and states the basic principle that “[a] lawyer shall provide competent representation to a client.¹³⁰ Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹³¹

exercise broad inherent authority to discipline attorneys. *See generally* Muzikowski v. Paramount Pictures Corp., 477 F.3d 899 (7th Cir. 2007). In *Muzikowski*, the plaintiff sued Paramount Pictures claiming that its film, *Hardball*, about a little league coach, “was a thinly disguised biography of him” and that it was defamatory and placed Muzikowski in a false light. *Id.* at 903. The Seventh Circuit affirmed the district court’s grant of summary judgment to the defendant. It also upheld the court’s award of reasonable attorney fees as a sanction against the plaintiff’s lawyers under Rule 37(b)(2) for willfully disobeying a court order to identify the documents that the plaintiff intended to use at trial. *Id.* at 909 (holding that “[d]istrict courts possess wide latitude in fashioning appropriate sanctions and evaluating the reasonableness of the attorneys’ fees requested” (citing *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999)). “Rather than comply with the [trial court’s] order, [the plaintiff’s] lawyers identified 14,599 pages of documents that they characterized as ‘for possible use at trial.’” *Id.* at 909. When questioned about their failure to comply with the court’s order, the lawyers “mysterious[ly]” claimed the court had never issued such an order. *Id.*

129. *See generally e.g.*, *Att’y. Grievance Comm’n v. Midlen*, 911 A.2d 852 (2006). Jimmy Swaggart Ministries (JSM) hired attorney John Midlen Jr. to represent JSM for royalty distributions by the Librarian of Congress for cable TV broadcasts of JSM religious programs. *Id.* at 855. Initially, Midlen and JSM agreed that Midlen would deduct his fees from the distribution checks and remit the remaining balance to JSM. *Id.* JSM instructed Midlen that it no longer wanted Midlen to deduct his fees before submitting the royalties to JSM. *Id.* at 856. Midlen continued to deduct his fees and was fired. JSM claimed that Midlen took months to return its client files and failed to provide “understandable legal bills” and an accounting of funds collected on JSM’s behalf. *Id.* at 857-58. The District of Columbia Court of Appeals suspended him from practice for eighteen months. *Id.* at 853. Imposing reciprocal discipline, the Court of Appeals of Maryland suspended Midlen for eighteen months but found insufficient evidence to have the suspensions run concurrently. *Id.* at 867; *see also* *Rosenthal v. State Bar*, 738 P.2d 723, 725 (Cal. 1987) (disbarring attorney Rosenthal for his representation of actress Doris Day Melcher, her late husband, and her son because of egregious misconduct, such as conducting transactions with undisclosed conflicts of interest, taking positions adverse to former clients, overstating expenses and double-billing for legal fees, filing fraudulent claims, and giving false testimony).

130. MODEL RULES OF PROF’L CONDUCT, *supra* note 14, at R. 1.1. The Code counterpart to Rule 1.1 is DR 6-101. DR 6-101(A) (1) provides that a lawyer must not “[h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.” MODEL CODE OF PROF’L RESPONSIBILITY, *supra* note 14, at DR 6-101(A) (1). In addition, DR 6-101(A)(2) and (3) prohibit a lawyer from handling a legal matter without adequate preparation and from neglecting “a legal matter entrusted to him.” *Id.* at DR 6-101(A)(2), (3).

131. MODEL CODE OF PROF’L CONDUCT, *supra* note 14, at R. 1.1. *See Love v. Mail on Sunday*, 473 F. Supp. 2d 1052, 1059 (C.D. Cal. 2007), for an entertainment law case that was critical of a lawyer’s skill, preparation and candor. The plaintiff, Mike Love, and the defendant, Brian Wilson, were members of the musical group, The Beach Boys. *Id.* at 1053. Love alleged that the defendants recorded and distributed a CD of Beach Boys songs to millions of people without Love’s authorization. *Id.* The CD was distributed in the United Kingdom through the Sept. 4, 2004, edition of the newspaper, *Mail on Sunday*. *Id.* at 1053-54. Love sued for unfair competition under the Lanham Act “based on the CD’s use of the Beach Boys photos that included plaintiff’s image, and on the use of the phrase ‘The Beach Boys’ on the CD and related advertisements for the CD.” *Id.* at 1054. The district court held that the Lanham Act did not apply because the allegedly infringing

Determination of whether a lawyer is competent to undertake representation depends on the complexity of the matter, the lawyer's experience both in general and with the particular matter, the preparation the lawyer is able to undertake, and the possibility of receiving assistance from another lawyer on staff who is already competent in the matter.¹³²

Competent handling of a matter starts with the initial client and case screening. The entertainment lawyer needs to realistically evaluate his or her knowledge and skill concerning the subject matter of the proposed representation. The lawyer needs to determine whether he or she has sufficient experience to properly handle the matter.

Another important question that the lawyer must consider is whether he or she has sufficient time to undertake representation. Major litigation and complex issues generally demand more of a lawyer's time than simpler issues.¹³³ If an otherwise competent lawyer knows he or she cannot devote proper attention to a matter, the lawyer should not accept it.¹³⁴ Model Rule 1.1 allows a lawyer to undertake representation if he or she can become competent through proper study.¹³⁵ However, a lawyer should be wary of hastily undertaking representation in a matter that appears simple but falls outside his or her area of expertise or experience.¹³⁶ The lawyer may not

acts—the United Kingdom CD sales—occurred overseas and granted summary judgment for the defendants. *Id.* at 1058. The court sanctioned Love's attorney \$1,000 for misleading and deceiving the court and wasting time and resources. *Id.* at 1059-60. The court strongly admonished Love for his disingenuous claim of California residency and "submitting a sloppily-assembled opposition brief." *Id.* at 1059. Love's counsel also submitted a consumer's Declaration that he had purchased a CD in the United States on eBay in hope of demonstrating that the CDs had reached the United States market. *Id.* The purchaser was not an innocent and independent consumer but rather someone who had been represented by or a co-plaintiff with Love's counsel. *Id.* The court stated that at a minimum, Love's counsel should have disclosed his relationship with the consumer. *Id.* The rift between Love and Wilson resulted in another reported decision. *See Love v. Mail on Sunday*, 489 F. Supp. 2d 1100, 1104 (C.D. Cal. 2007) (granting summary judgment for the defendant, Brian Wilson, a member of the musical group the Beach Boys, and finding that he did not breach a fiduciary duty to another group member, Mike Love, based on an alleged partnership).

132. *See* ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 54-56; *see also* Abdo & Sahl, *supra* note 1, at 3 (recommending that lawyers attend continuing legal education programs discussing developments in the entertainment field).

133. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.1 cmt. 5.

134. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 55.

135. The Code counterpart to Rule 1.1 is EC 6-3 (permitting a lawyer to undertake representation "if in good faith he expects to become qualified through study and investigation" and providing it does not result in undue delay or cost to the client). MODEL RULES OF PROF'L RESPONSIBILITY, *supra* note 14, at EC 6-3.

136. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 55. *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 187 (1986). "Competence requires a fair modicum of knowledge and skill. A lawyer must know at least the basic elements of the law

initially appreciate the amount of work necessary to provide competent representation and may quickly find the case to be unduly burdensome.¹³⁷

Lawyers should avoid the client who brings the lawyer a case in the “eleventh hour.”¹³⁸ A lawyer who handles a case right before the statute of limitations expires risks having insufficient time to investigate the matter, increases the chance of overlooking claims or parties, and is more likely to miss the statute of limitations.¹³⁹ All of these errors constitute grounds for an attorney-malpractice claim. The attorney may ultimately pay for the client’s procrastination.¹⁴⁰

Lawyers should not automatically agree to represent a client because they are a family member or a friend.¹⁴¹ These persons are just as apt as other clients to have unrealistic expectations about the lawyer’s obligations, efforts, fees, and results.¹⁴² Although it may seem counterintuitive, effective communication with a friend or family member may be more difficult because of the personal history of the parties. Disgruntled clients who are friends or family members may even experience a special sense of disappointment or betrayal, which enhances the likelihood of the client filing a grievance or malpractice action against the lawyer.¹⁴³

Competency involves adequate research and investigation. Almost half of all malpractice claims stem from substantive errors.¹⁴⁴ For example, the lawyer may not know or correctly apply the law, or the lawyer may conduct insufficient discovery or investigation.¹⁴⁵ The lawyer may not know the

involved in representing a client.” *Id.*

137. ABA STANDING COMMITTEE ON LAWYER’S PROFESSIONAL LIABILITY, *supra* note 26, at 55. “Yes, you can develop the expertise given sufficient time, but keep in mind that sufficient time will be far more than meets the eye at first glance and the client will not be willing to pay for your education.” *Id.* The ABA opposes “dabbling” in complex areas of the law, and contends that “there is no such thing as a simple will or a cut-and-dried personal injury case.” *Id.*

138. *Id.*

139. *Id.*; see WOLFRAM, *supra* note 136, 186-87.

140. ABA STANDING COMMITTEE ON LAWYER’S PROFESSIONAL LIABILITY, *supra* note 26, at 55; see WOLFRAM, *supra* note 136, at 191-92.

141. ABA STANDING COMMITTEE ON LAWYER’S PROFESSIONAL LIABILITY, *supra* note 26, at 55.

142. *Id.*

143. *Id.*

144. See *id.* at 56 (noting that in 1999 the ABA reported that forty-six percent of all malpractice claims resulted from substantive errors).

145. *Id.* See *Dimensional Music Publishing, LLC v. Kersey*, 448 F. Supp. 2d 643 (E.D. Pa. 2006), for an entertainment law case involving allegations of improper investigation and due diligence. The plaintiff, Dimensional, a limited liability company engaged in music publishing, filed suit for a declaratory judgment to determine if it owned exclusively all the rights in the composition, “Disco Inferno,” written by Tyrone Kersey and Leroy Green. *Id.* at 646-47. If Dimensional cannot

applicable deadlines or may make planning and procedural choice errors.¹⁴⁶

Lawyers may avoid these substantive errors by carefully and thoroughly researching the law, by reviewing the work of subordinate lawyers and staff, and by consulting experts in the field.¹⁴⁷ Lawyers must keep abreast of legal developments in their field in hope of minimizing the risk of substantive error.¹⁴⁸ A firm-wide written policy encouraging and funding Continuing Legal Education (CLE) offers lawyers the opportunity to learn of recent developments and to fine tune existing knowledge and skills. Lawyers should also consider reviewing closed files and contacting clients when recent developments may affect their interests. For example, an estate planning lawyer may wish to contact a former client about tax code changes that affect the client's will or trust.

A. Competency Issues and Technology

Lawyer competence today is increasingly dependent upon the understanding and use of technology.¹⁴⁹ Technology facilitates greater and

be the owner, Dimensional alleges the result was a product of malpractice by Paul, Weiss, Rifkind, Wharton & Garrison (Paul Weiss) in failing "to discover and report to plaintiff the risk that there was never a valid transfer of Kersey's renewal rights in the [c]omposition." *Id.* at 654. Paul Weiss argued that it never represented the plaintiff, but the court found "there was at least a relationship of privity." *Id.* at 655.

146. *Id.*; see also WOLFRAM, *supra* note 136, at 185-88.

147. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 56; see also Abdo & Sahl, *supra* note 1, at 3 (noting that consultations with "more experienced entertainment lawyers are common and highly advisable").

148. ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY, *supra* note 26, at 56; see MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.1 cmt. 6 (stating that a "lawyer should keep abreast of changes") cf. MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 14, at EC 6-2 (noting that a lawyer maintains "his competence by keeping abreast of current legal literature and developments, [and] participating in continuing legal education programs"). The competent practice of law also requires lawyers to remain aware of business developments in the industries in which they practice that might affect their ability to provide competent representation. For example, lawyers in the music industry need to know about new business models, trends, and deal points concerning the digital distribution of music. See generally Robert Levine, *Buying Music From Anywhere and Selling It for Play on the Internet*, N.Y. TIMES, Jan. 9, 2006, at C1 (noting how "the economics of online stores is changing the financial calculations of the music business and making it profitable to sell a relatively small number of copies of a song," and reporting about various digital music distribution deals).

149. See DAVID I.C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* (2009). Understanding technology includes appreciating its impact on business models and deal points. For example, in the publishing industry there is a question about who owns the digital rights to "backlisted books"—older publications—and how much the rights are worth. See Motoko Rich, *Plot Twist for Familiar Works: Who Owns the E-Book Rights?*, N.Y. TIMES, Dec. 13, 2009, at A1. Authors contend that it costs publishers much less to publish and release digital versions of works. *Id.* Accordingly, authors want more than the traditional digital royalty rate of twenty-five percent of

faster communication between lawyers and clients as well as with third parties, such as witnesses and court personnel.¹⁵⁰ Technology also facilitates efficient and comprehensive research, the negotiating and drafting of documents, the presentation of a client's case in a courtroom or other proceeding, and the storage and retrieval of information.¹⁵¹ These technological benefits play an important role in helping lawyers to meet their ethical obligation to provide competent representation.¹⁵²

The inability to understand and to properly use technology may interfere with a lawyer's ability to provide competent representation. For example, a litigator "who produces electronic documents but [who] does not understand metadata is potentially committing malpractice."¹⁵³

Another common technology problem concerns the rapid pace and pervasiveness of electronic communication and its concomitant demands upon lawyers for immediate advice.¹⁵⁴ It is easy for a lawyer to make a misstatement or offer questionable advice under the pressure of high paced communications. In general, lawyers should resist knee-jerk replies to emails and instead carve out adequate time for reflection and the editing of replies.

net proceeds, which is generally less than they "typically receive on hardcover editions." *Id.* See generally Andrew Adam Newman, *A New Novel, Edited Down And Read in a Free Podcast*, N.Y. TIMES, Sept. 21, 2009, at B4 (reporting on an industry first where a publisher, Hachette Audio, released for free on iTunes an abridged and serialized audio version of "Transition" by Ian. M. Banks in hope of increasing full downloads (\$19.95) and hardcover sales (\$25.99)); Brain Stelter, *Web-TV Divide Is Back in Focus With NBC Sale*, N.Y. TIMES, Dec. 4, 2009, at A1 (highlighting that online consumption of videos and television streams is soaring and that the television industry's business model is changing to restrict streaming; quoting Stephen B. Burke, the chief operating officer of Comcast, "[streaming is] the biggest social movement I've ever seen").

150. The ease and speed of electronic communications may heighten concerns about ethical violations. See generally Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20 (Nov. 17, 2009); see also *In the Nation, Facebook Limit for Judges*, AKRON BEACON J., Dec. 12, 2009, at A2 (reporting that the Florida Judicial Ethics Advisory Committee opined that lawyers and judges should no longer "friend" each other because it might suggest "that lawyers are in a position to influence their judge friends").

151. See THOMSON, *supra* note 149, at 46. A 2006 ABA Survey found "that the percentage of firms that had never e-filed a court document dropped precipitously from 70 percent to 40 percent" and that one study showed two-thirds of survey respondents started their research with online sources. *Id.* at 48 (citing Sanford N. Greenberg, *Legal Research Training: Preparing Student for a Rapidly Changing Environment*, 13 J. LEGAL WRITING 241, 247 (2007)).

152. MODEL RULES OF PROF'L CONDUCT, *supra* note 14, at R. 1.1. These technological benefits also promote lawyer compliance with ethical precepts reflected in other rules. See, e.g., *id.* at R. 1.3 (addressing the lawyer's duty of diligence); *id.* at R.1.4 (requiring lawyers to communicate with clients).

153. THOMSON, *supra* note 149, at 52.

154. See generally *id.* at vii–viii (reporting that "[t]he Internet has achieved massive growth" and that "[a] generation of students has grown up with the sophisticated and pervasive use of technology in nearly every facet of their lives").

Technology has also presented new hurdles to lawyer competency in the discovery process. The “expanding use of electronic communication and the relatively low cost of storing electronic information” has prompted one expert to write, “[t]he discovery process today is . . . drowning in potential sources of information.”¹⁵⁵

Lawyers play a key role in the discovery process by identifying, collecting, and reviewing information. Lawyers, clients, and judges all have an interest in maximizing the quality of discovery, which often means “using automated tools to produce a reliable, reproducible and consistent product.”¹⁵⁶ Thus lawyers are well advised to consult with experts in the storage and retrieval of electronic communication in light of the potential for malpractice.¹⁵⁷ In *Qualcomm, Inc. v. Broadcom Corp.*, lawyers were held responsible for failing to disclose e-mails and other documents that were detrimental to their case.¹⁵⁸

Lawyers may obtain discovery regarding any matter that is not privileged and is relevant to a party’s claim or defense subject to some limitations.¹⁵⁹ Entertainment lawyers should inform clients as soon as possible about the potential large costs associated with the retrieval of information.¹⁶⁰ “[A]

155. *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 191, 197 (2007) [hereinafter *Sedona Conference*].

156. *Id.* at 199.

157. *United States v. Ganier*, 468 F.3d 920, 923, 926 (6th Cir. 2006) (recognizing that the categorization of computer-related evidence is a relatively new question,” in a case where the defendant was charged, in part, with obstruction of justice for deleting emails pursuant to an “email ‘retention’ policy”). The court held that the FBI agent’s testimony about forensic computer tests constituted expert testimony and not lay opinion. *Id.* at 926-27.

158. *See generally* *Qualcomm, Inc. v. Broadcom, Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part by* *Qualcomm, Inc. v. Broadcom, Corp.*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). *See* Paul Gupta, Dianna Szego & Jennifer Jacobs, *Determining When the Duty to Preserve Arises and Managing Compliance with the Legal and Ethical E-Discovery Obligations*, in PLI ELECTRONIC DISCOVERY GUIDANCE 2008: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW 217 (2008).

159. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (ordering a defendant in a gender discrimination suit to produce all relevant e-mails including those deleted that were on back up disks; providing an excellent discussion of the “proportionality test” under FRCP 26(b)(2)(i)(ii) and (iii) for shifting the costs of production to the requesting party).

160. There are several reported cases involving both the retrieval of electronic information and the entertainment industry. *See generally e.g.*, *Rowe Entm’t Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002). In *Rowe Entm’t Inc.*, the plaintiffs were African American concert promoters who claimed that certain booking agencies and promoters had engaged in discriminatory and anti-competitive practices. The plaintiffs made broad requests for e-mail correspondence. The defendants claimed that producing these e-mails was enormously expensive and they sought a protective order relieving them of the burden of production. The court ruled that the defendants had to produce the e-mails even if it involved a huge expense because it was likely that they would reveal

midsize case can generate up to 500 gigabytes of potentially relevant data [which] could cost as much as \$3.5 million to process and review . . . before production.”¹⁶¹ Both the substantial cost and time involved in producing all relevant information in discovery has caused firms to outsource the production of information or to depend on their clients to produce the information. Although lawyers may outsource their work for e-discovery or have their clients search all relevant documents, lawyers are ultimately responsible for the production of all relevant information.¹⁶²

VIII. CONCLUSION

Lawyers need to continually reassess how they practice law to ensure that their work conforms to good practice standards.¹⁶³ This is especially true for entertainment lawyers who work in a highly competitive and rapidly changing

relevant information. However, the court shifted the cost of production to the plaintiffs. *See generally* *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C. D. Ca. 2007); *Columbia Pictures Industries v. Fung*, 2007 U.S. Dist. LEXIS 97576 (Cent. D. Ca. June 8, 2007). Columbia pictures sued the owners of various websites for encouraging users to download copyrighted materials for free on their websites. *See generally* *Fung*, 2007 U.S. Dist. LEXIS 97576. Columbia Pictures requested that the defendants in both cases preserve and produce electronic data, including the IP addresses of the website users. *Id.* The court held in both *Columbia Pictures Industries v. Bunnell* and *Columbia Pictures Industries v. Fung* that the preservation and production of this data was relevant and proper. *See generally id.*; *Bunnell*, 2007 U.S. Dist. LEXIS 46364.

161. THOMSON, *supra* note 149, at 52. “[T]he costs of storage have plummeted from \$20,000 per gigabyte in 1990 to less than \$1 per gigabyte today.” *Sedona Conference, supra* note 152, at 198 (citing Michelle Kessler, *Days of Officially Drowning in Data Almost Upon Us*, USA TODAY, Mar. 5, 2007, available at http://www.usatoday.com/tech/news/2007-03-05-data_N.htm).

162. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No.08-451 (2008) (permitting “a lawyer to outsource legal and non-legal support services provided the lawyer remains ultimately responsible for providing competent legal services to the client under Model Rule 1.1”). A lawyer who outsources work must comply with Rules 5.1 and 5.3. *Id.* Thus, the outsourcing lawyer must undertake reasonable efforts to ensure that lawyers or non-lawyers who receive outsourced work act in accordance with the outsourcing lawyer’s professional obligations. *Id.* A lawyer should inform his or her client about the outsourcing of work and obtain client consent when the lawyers or non-lawyers performing outsourced work receive information protected by Rule 1.6. *Id.* *See generally* Eileen Libby, *A Qualified Yes*, 94 ABA J. 32 (Nov. 2008).

163. Abdo & Sahl, *supra* note 1, at 3 (recommending that entertainment lawyers conduct professional responsibility audits of their practices to ensure that they are complying with state ethical codes and noting that records of such audits may be “useful evidence of the lawyer’s efforts to comply with ethical standards if the lawyer becomes the subject of a grievance or a malpractice action”). The ABA is also engaged in a major reassessment of existing rules of lawyer conduct because of the increasing globalization of the practice of law and “rapid advances in technology.” Joan C. Rogers, *Agenda for Ethics 20/20 Project Examines Impact of Technology, Disappearing Borders*, in NO. 25 ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 694 (2009); *See also* Pamela Atkins, *ABA Launches New Initiative to Revamp Lawyer Ethics Rules*, in NO. 16 ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 418 (2009) (reporting about the creation of the ABA Commission on Ethics 20/20, and its task of taking a “fresh look at legal ethics and the regulation of the profession”).

business environment.¹⁶⁴ Lawyers must be flexible in adapting to this ever-changing business landscape, but they must also be resolute in their commitment to good practice standards.¹⁶⁵ The standards discussed in this article will hopefully protect entertainment and other lawyers from being the target of disciplinary and legal malpractice actions.

164. Tim Arango, *G.E. Makes It Official: NBC Will Go To Comcast*, N.Y. TIMES, Dec. 4, 2009 at B3 (recognizing that G.E.'s acquisition of NBC "reshapes the entertainment industry, giving a cable provider a huge portfolio of new content, even as it raises the sector's anxieties about the future"); Jeffrey R. Young, *Music Industry Changes Tune of New Program to Fight File Sharing*, CHRON. OF HIGHER EDUC., Nov. 13, 2009, at A12 (reporting about Choruss, a new experimental service led by Warner Music Group, that would allow students at six undisclosed colleges to pay a blanket license fee, "similar to what radio stations pay to air popular songs," to download music "to their own computers with no restrictions"); Brooks Barnes, *After Mickey's Makeover, Look for a Little Less Mr. Nice Guy*, N.Y. TIMES, Nov. 5, 2009 at A4 (discussing how Disney is "re-imaging" Mickey Mouse to induce "new generations of texting, tech-savvy children to embrace him"); Brooks Barnes & Michael Cieply, *Disney Swoops Into Action, Buying Marvel For \$4 Billion*, N.Y. TIMES, Aug. 31, 2009, at B7 (describing Disney's acquisition, and it possibly "herald[ing] a new wave of media consolidation"); Jenna Wortham, *iPhone Games Give Music Artists New Spotlight*, AKRON BEACON J., Dec. 26, 2008, at C8 (describing how a simple game for iPhone has become "an Internet-age mobile stage for musicians;" reporting that in October 2008, players of Tap Tap Revenge—an iPhone game—bought 50,000 copies of the featured track *Hot n Cold* by Katy Perry). "The gravy train of the old days of having CD sales buffer you as an artist are gone," as artists "tr[y] to be in more than one place at once." *Id.* at C9. See generally, Jack P. Sahl, *The New Era—Qua Vadis* 43 AKRON L. REV. 1 (2010) (discussing the fall 2009 Miller-Becker Institute for Professional Responsibility Inaugural Symposium titled "Lawyers Beyond Borders" and "Practicing Law in the Electronic Age" that examined the challenges confronting lawyers in an increasingly global and technological era).

165. See Rogers, *supra* note 163, at 696 (stating that "the ultimate goal is 'to help the legal profession respond to the opportunities and challenges' that advances in technology have created while preserving the core values of the profession" (quoting, in part, Ethics 20/20 Commission Co-chair Michael Traynor)).

