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WALKING THE ETHICS TIGHTROPE

1 New York CLE Credit in Ethics (Transitional and Nontransitional)

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Breakfast
The Princeton Club
15 West 43rd Street
New York, NY

Speakers:

David Rabinowitz, Partner, Moses & Singer Counsel for Jeffrey Koons

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Moderator:

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WALKING THE ETHICS TIGHTROPE
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David Rabinowitz is co-head of the Litigation Department and a member of the Intellectual Property Department at Moses & Singer, where he has been a partner since 1985. He is an experienced litigator and trial attorney for civil commercial cases involving contracts, copyright, trademark and unfair competition, employment and employment discrimination, real estate, and decedents' estates and trusts with emphasis on the entertainment, media, banking and business products industries. Mr. Rabinowitz is experienced with arbitration and other alternative dispute resolution procedures, and he has appeared in state and federal courts throughout the United States.

Mr. Rabinowitz has lectured and participated on panels before the Bar Association of the City of New York, the American Bar Association, The Practicing Law Institute, the Copyright Society of the United States, the Licensing International annual convention and the Massachusetts Software Council. He has taught Copyright Law at Seton Hall Law School. He is a member and former trustee of The Copyright Society. Mr. Rabinowitz has published numerous articles which have appeared in Advertising Age, Entertainment Law Reporter, The Entertainment Publishing and the Arts Handbook, The Bulletin of the Copyright Society of the United States and Practical Lawyer. He has written a series of articles on Internet Law entitled "Web Site Story," which appeared in The American Lawyer's Corporate Counsel Magazine.

Education

- Columbia University School of Law, J.D., 1976, Harlan Fiske Stone Scholar, 1973-1976
- Massachusetts Institute of Technology, S.B., 1972

Articles

- "Everything You Ever Wanted To Know About the Copyright Act Before 1909"
- "Web Site Story 6-Breakaway Employees Beware"
- "Web Site Story 5-Emerging Limits to Out-of-State Jurisdiction over Web Sites"
- "Web Site Story 4-Nationwide Internet Jurisdiction is not Ended by Blue Note".
- "Web Site Story 3-The Emerging Tort of Domain Name Infringement"
- "Web Site Story 2-Finding Yourself Subject to Jurisdiction Far, Far Away"
- "Web Site Story-A Legal Primer for Web Site Owners and Designers"
- "Copyright Preemption: New York State's Erroneous Interpretation"
- "Copyright and Trademark Infringement: Current Techniques for Plaintiffs and Defendants"

Presentations (last 10 years)

- 1997-2006 Practicing Law Institute program, "Understanding The Intellectual Property License"
- 2005 Practicing Law Institute program, "Know Your Boundaries! The Unauthorized Practice of Law"
- 2004-2006 Licensing International - "Winning Ethics in Licensing"
- 2003-2006 Practicing Law Institute program, "Internet Law Institute"
- 2000, 2002, 2005, 2006 Copyright Society of the U.S.A., "Basic Ethics for the Negotiating Lawyer"
- 2004 Bar Association of the City of New York, "Ethics for the Entertainment Lawyer"
- 2001-2004 Adjunct Professor, Copyright Law, Seton Hall Law School
- 2003 Bar Association of the City of New York, "Ethics for the IP Practitioner"
- 2000-2003 Bar Association of the City of New York, "Trademark Basics for Attorneys"
- 2000 Bar Association of the City of New York, "Get Wired 2000: Practicing Arts, Entertainment, Media & Sports Law in the Digital Age"
- 1997 Trademark Committee, New York City Bar Association, "Fair Use-Real, Virtual and Totally Virtual"
- 1997 American Association of Advertising Agencies, "Legal Issues in the Agency Business"

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Gary Sesser is Chair of the Ethics Committee for Carter Ledyard & Milburn LLP, where he has been a partner since 1997. Previously he was Ethics Partner for Haight, Gardner, Poor & Havens in New York. Mr. Sesser is an experienced litigator whose diverse practice involves Commercial Litigation, Antitrust, Art Law, Bankruptcy and Maritime Law. His bar affiliations include: American Bar Foundation (where he is a Fellow), The New York City Bar Association, the Federal Bar Council, the Maritime Law Association, and the American Bar Association.

Mr. Sesser has published numerous articles which have appeared in, among others, the Journal of Bankruptcy Law & Practice, The Practical Litigator, International Business Lawyer, and The Metropolitan Corporate Counsel, and he has lectured both in the US and abroad, including before the International Bar Association in Cannes, France. He has also participated on panels and webcasts on ethics and privilege issues sponsored by the Association of Corporate Counsel and LexisNexis®. In 2003 Mr. Sesser successfully argued before the U.S. Court of Appeals for the Third Circuit *en banc* in the *In re Cybergenics Corporation* case, involving the derivative right of a creditors committee to set aside fraudulent transfers on behalf of the bankruptcy estate, and he has defended multiple clients in civil and criminal antitrust investigations by the Justice Department. He has also represented estates, art galleries, collectors, and art dealers in litigated and non-litigated disputes relating to authenticity, value, and ownership of works of fine art. For the past fifteen years he has acted as court-appointed mediator in a variety of litigated matters in the U.S. District Court for the Eastern District of New York.

Education

B.A., 1972 Cornell University (*magna cum laude*)
J.D., 1975 The University of Michigan Law School (*cum laude*)

Admissions

1975 Massachusetts
1977 New York
1980 District of Columbia

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David Krell is a solo practitioner specializing in intellectual property law. David's career started at Villanova Law School where he was a staff writer on the Villanova Environmental Law Journal. After graduating in 1992, David worked in the Business and Legal Affairs division of Broadway Video, the production company for Saturday Night Live. Seeking to expand his media experience, David worked as a ratings analyst for Aaron Spelling's distribution company, Worldvision. In 1996, David joined the fledgling Fox News Channel as a researcher, later receiving promotions to news writer and producer. After eight years in television news at cable networks and New York stations, David returned to the law and entered the LLM in Intellectual Property program at Cardozo Law School. He graduated in 2005.

From 2001-2005, David produced and moderated a seminar series in New York City called PRIME-Professionals in Media and Entertainment. PRIME panelists included high-level representatives from HBO, NBC Sports, Madison Square Garden Networks, Latina magazine, New York Post, MSNBC, WCBS-TV, Major League Baseball International, Kate Spade, Coach, and WCBS 880AM. Topics included: Intellectual Property For Artists, Anti-Counterfeiting in the Fashion Industry, Hispanic Marketing, Politics and Media, and Protecting Brands in the Digital Age.

Recently, David developed a writing workshop for law firms, companies, and non-profit organizations. "Your Writing is Your Brand" uses pop culture, history, and literature to illustrate the lessons of effective writing.

David is also a television historian. He has a weekly commentary on the "Talking Television," a show that can be heard on www.ksav.org on Tuesday nights from 10:30pm to 12:00 midnight EST. David also served as a consultant on the 2006 Museum of TV & Radio exhibit entitled "The Gentleman Giant" which honored Leonard Goldenson, the founder of the ABC television network.

NON-CASH FEE ARRANGEMENTS

The 1999 New York amendments to DR 5-104 brought the New York rule into close conformity with the ABA Model Rule 1.8, which requires terms of agreements with clients to be fair and reasonable, and which requires that clients be warned to seek independent counsel on deals where the lawyer accepts, as a fee, an interest in the client's business or property. In addition, the new amendments forbid the lawyer to even negotiate with the client or the lawyer's own potential assigns or transferees concerning literary or media rights relating to the subject of the representation until the representation is over.

ABA MODEL CODE (pre-1990) – NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY

DR 2-106

B. A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee may include the following:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

2. The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

D. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing

stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination.

Canon 5 A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client

EC 5-1

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

EC 5-4

If, in the course of the representation of a client, a lawyer is permitted to receive from the client a beneficial ownership in literary or media rights relating to the subject matter of the employment, the lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though the employment has previously ended.

DR 5-101 Conflicts Of Interest – Lawyer's Own Interests

(a) A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

DR 5-104 Transactions Between Lawyer And Client

A. 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 professional judgment therein for the protection of the client, unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) The lawyer advises the client to seek the advice of independent counsel in the transaction; and

(3) The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

B. Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:

(1) With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.

(2) With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.

ABA MODEL RULES (1990)

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT

Literary Rights

... Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

MULTIPLE CLIENTS

A lawyer may not represent more than one client in a transaction unless all clients consent after a full explanation of the implications of using one lawyer. Even if they consent, the lawyer may violate ethical rules and even commit malpractice if the interests of the parties are in fact in conflict or if the lawyer's representation of one client may be adversely affected by the joint representation. The easiest case is when more than one party is on the same side of a deal. The most dangerous case is representing parties on both sides of a deal; even if the lawyer is not later accused of any wrongdoing by a disgruntled former client, the lawyer will be unable to continue representing the party that brought the lawyer into the deal when a dispute arises.

ABA MODEL CODE (pre-1990) – NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY

Canon 5 A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client

EC 5-1

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

Interests of Multiple Clients

EC 5-14

Maintaining the independence of professional judgment required of a lawyer precludes acceptance or continuation of employment that will adversely affect the lawyer's judgment on behalf of or dilute the lawyer's loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that the lawyer's judgment may impaired or loyalty divided if the lawyer accepts or continues the employment. The lawyer should resolve all doubts against the

propriety of the representation.... On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation....

EC 5-16

... [B]efore a lawyer may represent multiple clients, 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.

EC 5-19

A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, the lawyer should explain any circumstances that might cause a client to question the lawyer's undivided loyalty. Regardless of the belief of a lawyer that he or she may properly represent multiple clients, the lawyer must defer to a client who holds the contrary belief and withdraw from representation of that client.

DR 5-105 Conflict Of Interest; Simultaneous Representation

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

C. In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the

simultaneous representation and the advantages and risks involved.

D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105 (A), (B) or (C), DR 5-108, or DR 9-101 (B) except as otherwise provided therein.

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105 (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 (D).

ABA MODEL RULES (1990)

Preamble

[2] ... As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client.

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT

Loyalty to a Client

... The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation....

... [S]imultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

RULE 1.10 Imputed Disqualification; General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice....

RULE 2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

COMMENT

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients.... The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

... [A] lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

FORMER CLIENTS

Ethical obligations to former clients may preclude the lawyer from representing other clients adverse to the former client. If the lawyer represented more than one party in an earlier transaction, the lawyer will be prohibited from representing any of them against another in a dispute arising out of the transaction. In other circumstances, the lawyer's right to represent a party adverse to a former client turns on whether the lawyer has confidential information from the former client that would come into play in the new transaction. In all events, the lawyer may not disclose the former client's confidential information.

ABA MODEL CODE (pre-1990) – NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY

DR 5-108 Conflict Of Interest; Former Client.

A. Except as provided in DR 9-101 (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by DR 4-101 (B) that is material to the matter.

C. Notwithstanding the provisions of DR 5-105 (D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not

currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR 4-101 (B) that is material to the matter, unless the affected client consents after full disclosure.

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation -

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client consents after consultation.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-1
February 17, 2006

Topic: Multiple Representations; Informed Consent; Waiver of Conflicts

DIGEST: A law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients. *See* DR 5-105(C). "Blanket" or "open-ended" advance waivers, and advance waivers that permit the law firm to act adverse to the client on matters substantially related to the law firm's representation of the client should be limited to sophisticated clients, and the latter advance waiver also conditioned on meeting the tests articulated in ABCNY Formal Opinion 2001-2, including that (a) the waiver be limited to transactional matters that are not starkly disputed and (b) client confidences and secrets be safeguarded.

CODE: DR 4-101; EC 4-1; EC 4-2; EC 4-4; EC 4-5; EC 4-6; DR 5-105; DR 5-108; EC 5-1; EC 5-14; EC 5-15; EC 5-16

QUESTION

Under what circumstances may a law firm ethically request that a client prospectively waive objection to the law firm's subsequent representation of another client adversely to the first client?

OPINION

When a law firm agrees to represent a client in a particular matter, it may ethically request that the client waive future conflicts of interest, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, if (a) the law firm appropriately discloses the implications, advantages, and risks involved and if the client can make an informed decision whether to consent; and (b) a disinterested lawyer would believe that the lawyer can competently represent the interests of all affected clients. *See* DR 5-105(C).

At least for a sophisticated client,[1] blanket advance waivers and advance waivers that include substantially related matters (with adequate protection for client confidences and secrets) also are ethically permitted.

These conclusions are consistent with the opinions of other bar associations and with prior opinions of this Committee. For example, both the New York County Lawyers' Association Committee on Professional Ethics and the American Bar Association have recognized the permissibility of advance waivers. *See* NYCLA Ethics Opinion No. 724 (approving advance waiver if future representation gives rise to consentable conflict and if attorney makes adequate disclosure to client or prospective client); ABA Formal Opinion 05-436 (noting that comment to Model Rules supports "likely validity of an 'open-ended' informed consent if the client is an experienced user of legal services"); *see also* NYSBA Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct Rule 1.7, Comment 22A (Sept. 30, 2005) ("A client may agree in advance to waive potential conflicts that have not yet ripened into actual conflicts. The nature of the disclosure necessary to ensure that the client's advance consent is 'informed' will depend on various factors."); Restatement 3d of Law Governing Lawyers § 122, Comment d ("[T]he gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client."); ABCNY Formal Opinion

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2005-05

UNFORESEEABLE CONCURRENT CLIENT CONFLICTS

1. QUESTION

When unforeseeable conflicts develop between clients in the course of ongoing representation of both, without fault of the lawyer, and the clients refuse to consent to simultaneous representation, which, if any, client may the lawyer continue to represent? If the lawyer may continue to represent one but not both clients, how does the lawyer decide which client to continue representing?

2. INTRODUCTION

Conflicts that arise through no fault of the lawyer may develop in the course of representing two or more clients in unrelated matters as a result of corporate acquisitions or other unforeseeable circumstances. In those situations, lawyers typically seek conflict waivers from the affected clients, but in some instances a client may withhold consent to the multiple representation. This opinion examines the lawyer's ethical duties when confronted with such so-called "thrust upon" conflicts, which are illustrated by the following two scenarios.

Scenario 1 : A law firm represents Client A in a breach of contract suit against Company B. During the pendency of that suit, Client C, a longtime ongoing client of the law firm, acquires Company B in a stock sale, and Company B becomes a wholly owned subsidiary of Client C. The law firm (which does not represent Client C in the acquisition of B) informs Clients A and C that it wishes to continue to represent each of them in their respective matters. Client A consents to a conflict of interest waiver, but Client C does not. May the law firm continue to represent at least one client, and if so, may the law firm choose which client to represent?

Scenario 2 : A law firm has advised Client A for several years regarding various intellectual property licensing issues. The law firm has also advised Client B for several years on general corporate transactional matters not involving intellectual property licensing, including current negotiations with Company C to form a joint venture. During the course of those negotiations, Client A acquires Company C. Upon learning of the merger, the law firm seeks to obtain conflict of interest waivers from Clients A and B so that it may continue to represent both clients in their respective matters. Client A agrees to provide the necessary conflict of interest waiver, but Client B does not. May the law firm continue to represent at least one of the clients, and if so, may the law firm choose which client to represent?

As these scenarios suggest, "thrust upon" conflicts often, but do not always, arise as a result of changes in corporate ownership. Also, they may arise in both litigation and transactional practice. While in litigation a disqualification motion may as a practical matter resolve the question, in any case a lawyer's ethical duties exist independent of court disqualification jurisprudence and a lawyer will have to guide him or herself based on analysis of ethical obligations under the Code. A lawyer faced with an unforeseen conflict that arises through no fault of his or her own, the lawyer should be guided by the factors set forth in this opinion when deciding from which representation to withdraw.

3.DISCUSSION

Lawyers have a duty to consider potential conflicts at the outset of an engagement and to decline proffered employment when such conflicts are likely. DR 5-105(A). Even careful conflicting-checking, however, will not eliminate the risk of unforeseeable conflicts arising after the lawyer or firm has commenced multiple

HYPOTHETICAL 1

I. Hot Shot was making a name for himself and his band ("Band") in clubs around Los Angeles. Recording Executive ("Executive") from one of the big labels caught his performance and flew Hot Shot and Band to New York City for a meeting at Record Company. Executive was very excited about this new group and sent their demo to an entertainment lawyer ("Lawyer") and to a manager ("Manager"). Lawyer has specialized in entertainment law for the last 20 years, primarily in New York City. Lawyer had been with Record Company as a business affairs and legal executive before going into private practice. Executive has used Lawyer for the Record Company and also referred artists to him. Manager is well known in the music business and has done business with Executive and Lawyer.

Lawyer and Manager spoke about the Band's demo. Lawyer told Manager: "Look, if you get a chance to pitch the Band, keep me in mind as the attorney to represent the Band in the future. I know that they live in and perform in California, but I'm a natural for them, even if I'm a New York guy. And you and I can get along well, if you know what I mean." Manager agreed to promote Lawyer to the Band, and added, "I expect you in return to promote me to any new talent you are professionally exposed to." Lawyer agreed.

Upon hearing Band's demo Record Company's President authorized Executive to make an artist deal with Hot Shot and Band. A few days later, while Band was in New York, Record Company's form contract was sent over to Hot Shot. The contract was one which Lawyer had developed over time for Record Company and, as form contracts for new groups will be, it was very favorable to Record Company. Hot Shot read the contract and immediately called Manager and said, "I want you to be my manager". Manager said, "Let me bring Lawyer over to the hotel and we will discuss the the contract."

Lawyer talked to Hot Shot for an hour, reviewed the contract and made some minor changes. During his conversation with Hot Shot, Lawyer says: "Look, you should know that I have had professional relationships with everyone in 'the business' [referring to the recording business], and so you have got to understand that there is always the possibility of a conflict of interest — this is such an incestuous business you are getting into. Is that okay?" Hot Shot, who is delighted to be dealing with an industry insider, says: "Yeah, you're the man and I trust you. You are my lawyer and the Band's lawyer." Lawyer does not tell Hot Shot that Lawyer derives 40% of his income from clients referred to him directly or indirectly by Executive. Lawyer tells Hot Shot that the contract is a good one for Hot Shot and the Band. Hot Shot signs the contract on behalf of Band.

What are the issues/problems?

II. Hot Shot, in a separate agreement with the Band members drafted by Lawyer, retains control of the use of the name of the band and veto power over any

business decision by the band, including replacement of band members, use of the trademark, or choice of manager. In addition, Hot Shot's share of the publishing was equal to what all the other Band Members were entitled to. Years later, Hot Shot has a falling out with the other members of the Band and litigation erupts.

What are the issues/problems?

III. Five years after the recording contract is signed, Hot Shot is told by another lawyer that the original contract with Record Company completely favored the Record Company. Band is now huge, but a disproportionate (in Hot Shot's eyes) share of the profits from Band's records still go to Record Company, and Band had another 2 records to make for Record Company to satisfy its contractual obligation. Hot Shot sue Lawyer in a California state court.

What are the issues/problems?

IV. In a separate action the Band Members sue Lawyer in California.

What are the issues/problems?

Issues in this hypothetical concern attorney conflicts in the representation of multiple clients in a deal; unrepresented parties; fiduciary obligations of an attorney; the question of when an attorney client relationship exists and the issues involved in the multi-jurisdictional practice of law.

HYPOTHETICAL 2

I. Fledgling musician ("Musician") plays at an after hours bar. There he meets and Lawyer. Musician, who plays the heavy metal guitar as a soloist, tells Lawyer he wants help getting some "gigs" and a shot at a recording label contract. Lawyer tells Musician he can help him and points out that he is handling other heavy metal guitar soloists.

Musician, being little known and of meager resources, agrees with Lawyer that Lawyer shall be entitled to 15% of Musician's gross from any transactions that Lawyer negotiates on Musician's behalf. Lawyer spends many hours on behalf of Musician, by among other things, promoting him for live appearances, sending his demos to recording companies and negotiating contracts for the resulting transactions. In the two years, Lawyer expends $40,000 in legal time at his normal hourly rate, while receiving $1,500 under his arrangement with Musician. However, in year 3, Musician becomes successful, and the transactions that year generate $150,000 in income owed to Lawyer, while Lawyer expends only another $20,000 in legal time. Musician fires Lawyer and sends him a check for what Musician believes to be reasonable fees, e.g. $20,000 along with a letter disclaiming any further obligation to Lawyer.

What rights does Lawyer have?

Would the result be any different if the fees owed Lawyer for year 3 were $1,500,000 instead of $150,000?

Would the result be any different if the retainer agreement had been written?

II. Lawyer is retained to represent a start-up internet company ("Company"), receiving her regular hourly rates. Shortly after beginning her representation, Lawyer negotiates a manufacturing deal for Company, which Company needs in order to stay in business. Company, however, lacks the $250,000 needed to finance the project and is unsuccessful in obtaining bank loans. Lawyer advises Company that Lawyer knows of investors who might be willing to invest the money in Company. Company's principals tell Lawyer that if he can produce investors who will invest the $250,000, they will give Lawyer 3% of Company's stock. The investment is made, Company completes the project and never looks back. Ten years later, Company is worth $10,000,000. Lawyer, who has continued to represent Company on an hourly basis, then reminds Company of its promise of 3% of the stock.

If Company refuses to deliver the stock, can Lawyer compel it to do so? Would the result be any different if the Company were worth $1,000,000,000?