



# **Ethical Pitfalls in Representing Creative Collaborators (Organization as Client)**

**Bryan T. Kroes, Esq.**  
**[bkroes@hzattys.com](mailto:bkroes@hzattys.com) | (414) 727-6250**



## Organization as a Client

- Any group of individuals who come together to pursue a collective endeavor in the entertainment industry.
  - Musicians and bands
  - Film crews
  - Record labels
  - Teams (sports or entertainment)
- Not specific to entertainment industry.

## Wis. Stat. § 905.03 Lawyer-Client Privilege

- (1)(a) A “client” is a person, public officer, or **corporation, association, or other organization or entity**, either public or private, who has rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

## Wis. Stat. § 178.0202 Formation of Partnership

- (1) Except as otherwise provided for in sub. (2), the association of 2 or more persons to carry on, as co-owners, a business for profit forms a partnership, **whether or not the persons intended to form a partnership.**

## Wisconsin Ethical Rules

- SCR 20:1.6 – Confidentiality
  - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation...
  - (b) A lawyer **shall** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in the death or substantial bodily harm or substantial injury to the financial interest or property of another.

## Wisconsin Ethical Rules

- SCR 20:1.6 – Confidentiality
  - (c) A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    - (1) to prevent reasonably likely death or substantial bodily harm;
    - (2) to prevent, mitigate or rectify substantial injury to the financial interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
    - (3) to secure legal advice about the lawyer's conduct under these rules;
    - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client...;
    - (5) to comply with other law or a court order; or
    - (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.7 – Conflict of Interest: Current Clients
  - (a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest....
  - (b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:
    - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    - (2) the representation is not prohibited by law;
    - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
    - (4) each affected client gives informed consent, confirming in writing signed by the client.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.8 – Conflict of Interest: Prohibited Transactions
  - (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.
  - (g) A lawyer who represents two or more clients shall not participate in making an aggregated agreement of the claims of or against the clients, unless each client gives informed consent, in writing signed by the client.
  - (j)(2) When the client is an organization, a lawyer for the organization (whether inside counsel or outside counsel) shall not have sexual relations with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.



## Wisconsin Ethical Rules (cont.)

- SCR 20:1.9 – Duties to Former Clients
  - (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing by the client.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.13 – Organization as a Client
  - (a) A lawyer employed or retained by an organization represents the organization acting **through its duly authorized constituents**.
  - (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of the legal obligation of the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, **then the lawyer shall proceed as is reasonably necessary in the best interest of the organization**. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.13 – Organization as a Client
  - (c) Except as provided in par. (d), if,
    - (1) despite the lawyer’s efforts in accordance with par. (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and
    - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, **then the lawyer may reveal information relating to the representation whether or not SCR 20:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.**
  - (d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.13 – Organization as a Client
  - (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to pars. (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
  - (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer **shall** explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

## Wisconsin Ethical Rules (cont.)

- SCR 20:1.13 – Organization as a Client
  - (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7. If the organization's consent to the dual representation is required by SCR 20:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
  - (h) Notwithstanding other provisions of this rule, a lawyer shall comply with the disclosure requirements of SCR 20:1.6(b).

## Croce v. Kurnit 565 F.Supp. 884 (1982)

- Kurnit, an attorney for CBS, was introduced to Jim Croce as “the lawyer”.
- Even in absence of express attorney-client relationship, a lawyer may owe fiduciary obligations to persons with whom the lawyer deals.
- Fiduciary duty arises when a lawyer deals with persons who, although not his clients, has or should have reason to believe to rely upon the lawyer.
- Attorney’s introduction as “the lawyer,” his explanation to professional entertainer of legal ramifications of publishing and managerial contracts, his interest as principal in the transaction, his failure to advise entertainer to obtain outside counsel, and entertainer’s lack of independent representation, taken together, establish both fiduciary duty on the part of the attorney and breach of that duty.

## Joel v. Grubman

1992, Case No. 261-55-92, N.Y. Sup. Ct.

- Musician Billy Joel sued former lawyers for fraud, breach of fiduciary duty, malpractice and breach of contract arising out of business decisions made with the musician's former manager, in addition to conflicts alleged regarding former representation of musician's record label.
- Case settled before going to trial, however, industry insiders acknowledged that "every artist that goes to [the attorney] hires him precisely because he has relationships with all the label executives" and as such, "gets results."

## HCL Properties Limited, et al. v. The Superior Court of Los Angeles County

35 Cal.4<sup>th</sup> 54 (2005)

- Limited partnership managing property and businesses of deceased entertainer, sued record companies for unpaid royalties, and companies sought discovery related to royalty agreements.
- When entertainer died his privilege transferred to his personal representative, and only once the estate was finally distributed and the personal representative discharged, was the privilege terminated because there was on longer any privilege holder statutorily authorized to assert it.





## Fouts v. Breezy Point Condo. Ass'n

2014 WI App 77

- Former condo association director asserted that, as a director, he was entitled to review confidential communications between the association and its attorney, regardless of a claim of attorney-client privilege.
- The “entity rule” provides that when a lawyer represents an organization, the organization is the client, not the organization’s constituents.
  - Even though the organization acts through its constituents.
- Fiduciary duties of a condominium association to ensure the association was properly managed did not automatically entitle Fouts to access records of the association protected by attorney-client privilege.



## Lane v. Sharp Packaging Systems, Inc.,

2002 WI 28

- Employee's status as a former director of the corporation does not allow him to waive the attorney-client privilege for current employees, even when documents were created during his tenure.
- The clear purpose of the "entity rule" is to enhance the corporate lawyer's ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation's constituents.

## Jesse by Reinecke v. Danforth

169 Wis.2d 229, 485 N.W.2d 63 (1992)

- Group of physicians sought to create a corporate entity to purchase and operate an MRI machine.
- Where a person retains a lawyer for the purpose of organizing an entity and a lawyer's involvement with that person is directly related to that incorporation and such entity is eventually incorporated, "entity rule" applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.
- It is the corporate entity, not the person, who holds the attorney-client privilege.

## Identifying Potential Conflicts

- There could be an inherent conflict when representing any group of people.
- There could be a conflict when a lawyer already representing one party is introduced generally as “the lawyer”. (*Croce*)
- When the lawyer is sought for contacts to the industry insiders or for the lawyer’s relationships, it is the potential for conflicts that makes the lawyer attractive to clients.

## Hypotheticals

- Band hires lawyer. Band has a spokesperson member who is the only member the lawyer typically interacts with. A dispute arises between the spokesperson member and the remaining band members over funds. The spokesperson member comes to the lawyer to discuss the dispute without the other members present.

## Hypotheticals

- Same band. The spokesperson member has confided in the lawyer that the band has no assets upon which the dispute may be founded - because the spokesperson member has been moving all such funds into a different bank account to conceal it from the other members.

# Hypotheticals

- Same band. Several of the other musicians request the lawyer's assistance in their own matters.

## Solutions to Potential Conflicts

- Interview and screen clients.
- Identify the client early before representation commences.
- Set representation parameters and boundaries early in the relationship.
- Memorialize the representation in a legal representation agreement
- Appoint contact person for day-to-day contact
  - E-mail and correspondence to all decision-making members of organization.
- Explain the implications of joint representation.
  - Obtain a conflict of interest waiver if applicable.
- Keep meticulous notes and memorialize verbal directives in e-mail or letter.
- Adhere to the representation boundaries.
- Identify and address subsequent internal conflicts as they arise.
- Know when to abstain from or terminate representation.





## When in doubt...

**State Bar of Wisconsin Ethics Hotline**  
**(608) 229-2017 or (800) 254-9154,**  
**Monday through Friday, 9 a.m. to 5 p.m.**



# Questions?

**Bryan T. Kroes**  
**[bkroes@hzattys.com](mailto:bkroes@hzattys.com)**  
**414-727-6250**

