Conflicts of Interest in the Practice of Entertainment Law
Conflicts of Interest

1) Is there a difference in how conflict of interest rules apply to entertainment attorneys vs. other attorneys?

2) Do the rules impact entertainment attorneys differently?

3) Why?
Conflicts of Interest

Rules are complex and intertwined.

Today → Discussing ABA Model Rule 1.7 and 1.8 (a) and (i)

Not discussing:
  • Remainder of 1.8
  • ABA Model Rule 1.9 – Duties to former clients
  • ABA Model Rule 1.18 – Duties to prospective clients
Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
Rule 1.7 Conflict Of Interest: Current Clients

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

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.
SCR 20:1.7 Conflicts of interest current clients.

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(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, confirmed in a writing signed by the client.
Scenario #1(a)

You have been hired by a comic book writer to negotiate a contract with an artist to draw a comic book.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #1(b)

A comic book artist and a comic book writer ask you to negotiate a contract with a publisher to print a comic book.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #1(c)

You helped a comic book writer and an artist negotiate a set of contracts to create a comic book. Now, the artist wants to sue the writer for unpaid money.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #1(d)

Your current client, a comic book artist, and a comic book writer ask you to negotiate a contract with a publisher, a former client, to print a comic book.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #2(a)

A production company asks you to help them negotiate contracts with talent during the production of a film.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #2(b)

A writer and a director want your help setting up a production company.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #2(c)

A current client, a writer, and an actor want your help setting up a production company.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #2(d)

You helped set up a production company between your client and her friend. Now, your client wants to sue her partner in the company.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #3(a)

A writer and artist want your help negotiating a deal with a studio to develop their comic book into a TV show.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #3(b)

You helped a writer and an artist negotiate a TV deal with a studio. The artist feels she was taken advantage of in the deal and wants to sue.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #3(c)

Your current clients, a comic book publisher and a production studio, are negotiating a deal together.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #4(a)

An actor wants your help negotiating a deal with a manager.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #4(b)

Your client, an up-and-coming actor, wants your help landing the best manager in the business, another client of yours.

Who is your client?

Is there a conflict?

Can you proceed?
Scenario #4(c)

Your client, an actor, wants to sue his manager, a client of yours, for breach of contract.

Who is your client?

Is there a conflict?

Can you proceed?
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(i) 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 authorized 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.
SCR 20:1.8 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 in a manner that can be reasonably understood by the client;
2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
SCR 20:1.8 Conflict of interest: prohibited transactions.

(i) 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 authorized 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.
Scenario #5

• An attorney approaches the heirs of the creator of a famous literary character.

• Attorney proposes to represent heirs going forward if they agree to assign copyright to his film production company for future commercial exploitation of the literary character. Result would be joint venture between attorney and heirs.

Conflict of interest?
Scenario #5


Case: Involved question of waiver of attorney-client privilege regarding documents submitted to federal government.

Court: “The ethical and professional concerns raised by Toberoff’s actions will likely occur to many readers, but they are not before this court.”
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Questions?
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Dirk Vanover
Vanover Legal, LLC
www.vanoverlegal.com
www.comicslawyer.com
dirk@vanoverlegal.com

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