

# LIVING BY PERCENTAGES: A CANADIAN PERSPECTIVE ON THE ETHICAL IMPLICATIONS OF LAWYERS ACTING AS TALENT AGENTS AND MANAGERS

Bob Tarantino\*

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*Canadian entertainment lawyers who represent individual creators and performers (“talent”) often find themselves providing their clients with advice or services that are not strictly legal in nature. These services have more in common with the work of talent managers or agents. Such “non-legal” services must be provided in a manner that comports with the requirements of lawyers’ professional ethical obligations, but doing so can prove challenging for even experienced counsel. There are various sources of restriction on lawyers’ ability to act as managers and agents, including the fact that ethical obligations “travel” even when a lawyer is not providing legal services. Drawing on prior scholarship, which posits that lawyers have a duty to remain independent from their clients’ interests, this article examines how acting as a manager or agent interfaces with the duties of competence, integrity and loyalty. In addition, the ethical implications of conventional entertainment industry fee arrangements are canvassed.*

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*Les juristes canadiens spécialisés en droit du divertissement qui représentent des créateurs et des interprètes se retrouvent fréquemment à fournir à leurs clients des conseils ou des services qui ne sont pas de nature strictement juridique. Ces services se rapprochent du travail des agents artistiques et des impresarios. Ces services « non juridiques » doivent néanmoins être fournis dans le respect des normes déontologiques applicables aux juristes, mais cela peut être très difficile, même pour des juristes chevronnés. Il existe plusieurs sources de limitation de la capacité des juristes à agir en qualité d’agent artistique ou d’impresario, y compris le fait que les obligations déontologiques « demeurent présentes » même lorsqu’un juriste ne donne pas de service juridique. Suivant cette théorie, qui repose sur l’hypothèse que les juristes ont une obligation de demeurer indépendants par rapport aux intérêts de leurs clients, cet article examine le croisement entre le fait d’agir en qualité d’agent artistique ou d’impresario et les obligations de compétence, d’intégrité et de loyauté incombant aux juristes. En outre, l’auteur de l’article se penche sur les implications déontologiques des arrangements liés à la rémunération dans le secteur du divertissement.*

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\* LL.B., LL.M. (Osgoode Hall), B.C.L. (Oxon.). Counsel, Dentons Canada LLP. The author would like to thank the *Canadian Bar Review*’s editors and anonymous peer reviewers for their comments.

## 1. Introduction

The term “entertainment lawyer” usually describes a solicitor or transactional lawyer who advises clients operating in one or more facets of the entertainment industries (usually understood to consist of film, television, music, book publishing, live theatre, broadcasting and videogames).<sup>1</sup> The nature of the services provided by entertainment lawyers who represent “talent” (e.g. individual creators and performers) result in those lawyers—sometimes deliberately, sometimes inadvertently—carrying out activities that are not strictly “legal” in nature. Talent in the entertainment industries often rely on the services of a team of personal advisors, including lawyers, accountants, managers and agents.<sup>2</sup> One source of the ethical tensions described in this article is the presence of an unavoidable overlap between the services entertainment lawyers are called upon to provide and the services provided by non-professionals such as managers and talent agents.<sup>3</sup> The financial realities of the Canadian market cause those tensions to become more acute: by comparison with the markets in Los Angeles, New York, Nashville—and even other US cities such as Austin, Miami and Chicago—there is a relative dearth in Canada of managers and agents, and the talent has less income available to spend on retaining separate individuals to perform the different roles.

Canadian entertainment lawyers who represent talent may thus, intentionally or not, find themselves playing multiple roles or “wearing multiple hats”: not only are they providing legal advice to their clients, they are also called upon to provide advice or perform services that, in a different market, would be provided by a “manager” or “agent.” This article explores the ethical implications of Canadian entertainment lawyers carrying out

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<sup>1</sup> For detailed discussions about the roles played by entertainment lawyers, see Donna G Cole-Wallen, “Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations” (1985-1986) 8:3/4 *Hastings Comm & Ent LJ* 481 at 490 [Cole-Wallen]; James M O’Brien III, “Regulation of Attorneys Under California’s Talent Agencies Act: A Tautological Approach to Protecting Artists” (1992) 80:2 *Cal L Rev* 471 at 484 [O’Brien].

<sup>2</sup> Cole-Wallen, *supra* note 1 at 485. For a Canadian perspective on the roles played by different personal representatives in the music industry, see Paul Sanderson, *Musicians and the Law in Canada*, 4th ed (Toronto: Carswell, 2014) at 213–18 [Sanderson].

<sup>3</sup> Cole-Wallen, *supra* note 1 at 486. The role of “manager” is sometimes further bifurcated into the roles of “personal manager” and “business manager,” the latter being someone who, in conjunction with tax lawyers and accountants, is focused on the tax-advantaged management of income and investments; see Lloyd Zane Remick & David Spencer Eisen, “The Personal Manager in the Entertainment and Sports Industries” (1986) 3 *U Miami Ent & Sports L Rev* 57 at 62ff [Remick & Eisen]. Musicians who undertake extensive live touring may also have a “road manager,” though that role is usually played by someone who is paid a set salary for their services.

activities usually associated with managers or agents.<sup>4</sup> A lawyer's ethical obligations apply to the lawyer even when the lawyer is not providing legal services; in other words, a lawyer's ethical obligations continue to apply during that lawyer's rendering of managerial or agency services.<sup>5</sup> Given the intertwined nature of the advice provided by entertainment lawyers, those ethical obligations complicate their relationship with talent clients, and deserve careful attention.

While the Canadian entertainment law bar may appear miniscule to outsiders, it has a national presence—concentrated though it is in the larger cities of Toronto, Montreal and Vancouver, with sprinklings of practitioners in smaller markets such as Halifax, Ottawa and Calgary. Many of the largest firms in the country have entertainment practice groups and major Canadian broadcasting and content creation undertakings (e.g. the Canadian Broadcasting Corporation, Rogers, Vice Media) have significant in-house legal teams. In addition, a robust cross-country network of boutique firms and sole practitioners service entertainment clients.<sup>6</sup> Though the concerns of entertainment canvassed herein may seem idiosyncratic, they share common elements with some other lawyers facing ethical quandaries. The challenges presented by the intertwined legal and business arrangements in which entertainment lawyers may find themselves (e.g. charging percentage fees for their legal services, providing their clients with managerial advice) echo the challenges faced by corporate lawyers or organizational in-house counsel. These lawyers find themselves structurally embedded in the operations of their clients, making it difficult (if not impossible) to separate “legal” advice from “business” advice, or rendering them uniquely vulnerable to the financial performance and viability of their client. Lawyers and ethicists are accustomed to thinking about the need to cultivate an ethic of loyalty to clients and the concomitant need to maintain independence from the state—but echoing through much of the analysis in this article is an attempt to grapple with what Pascale Chapdelaine and Eleanor Myers

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<sup>4</sup> See generally Adam M Dodek & Jeffrey G Hoskins, QC, eds, *Canadian Legal Practice* (Toronto: LexisNexis Canada) (loose-leaf updated 12/2015 revision 40), §4.433-4.434 [Dodek & Hoskins]. The concerns raised in this article have been the subject of attention in the United States for nearly three decades, see e.g. the seminal articles: Cole-Wallen, *supra* note 1; Robert E Fraley & F Russell Harwell, “Ethics and the Sports Lawyer: A Comprehensive Approach” (1988) 13 J Leg Prof 9 [Fraley & Harwell, “Comprehensive Approach”]; See also Simon Chester & Eugene AG Cipparone, “Practising Entertainment Law—When It’s Not So Entertaining” (Paper delivered at the Law Society of Upper Canada Entertainment & Media Law Symposium, 26 April 2013) [unpublished].

<sup>5</sup> See discussion in Part III(B) below.

<sup>6</sup> The Canadian Bar Association and its Ontario branch both maintain Entertainment, Media and Communications Law Sections. At the time of writing, the Ontario Section has more than 250 members.

have termed the ethical obligation of lawyers to maintain “independence from the client.”<sup>7</sup>

This article proceeds as follows: Part II sets out in further detail the differing roles of entertainment lawyers, personal managers and agents and discusses the different “structures” through which entertainment lawyers can provide managerial or agency services. Part III explores the various legal constraints on Canadian lawyers providing managerial or agency services, beginning with British Columbia’s regulation of talent agencies, and continuing with the obligations imposed by rules of professional conduct that oblige lawyers to observe duties of competence, integrity, and loyalty. Those professional rules are supplemented by various common law sources of potential liability and restraint, such as liability in tort for negligence. Part III explores how those ethical obligations constrain the conduct of entertainment lawyers, including restrictions on when they can enter into business arrangements with clients and the fees they can charge. Concluding thoughts are offered in Part IV.

## 2. *Definitions and Structures*

The entertainment lawyer’s practice is a species of business law. While the entertainment lawyer has a comparatively greater need to focus on substantive areas such as copyright, trademark and personality rights, much of the practice is merely the application of conventional areas of law such as contract, tax, labour/employment and business associations to a collection of particular industries.<sup>8</sup> As suggested above, the role that an entertainment lawyer plays on the team of talent advisors is the source of some of the ethical tensions described in this article. At least part of the function performed by an entertainment lawyer is “protecting the artist’s interests [...] from profit-seeking companies and other representatives.”<sup>9</sup> The lawyer is called upon to be not only an “independent advisor”, but also a “watch dog” on behalf of talent with respect to all other parties, including the talent’s other personal advisors.<sup>10</sup> The intersection of legal and managerial functions is likely inevitable: “the managerial function of advising and counseling artists in their careers is inextricably bound with problems of law and contracts.”<sup>11</sup> There remains, however, a distinction (discussed further below) between a

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<sup>7</sup> Pascale Chapdelaine, “The Regulation of In-House Counsel: Opening the Pandora’s Box of Professional Independence” (2011) [unpublished, online: <[https://papers.ssrn.com/abstract\\_id=1714087](https://papers.ssrn.com/abstract_id=1714087)>] at 35 [emphasis in original] [Chapdelaine]. See also Eleanor W Myers, “Examining Independence and Loyalty” (1999) 72 Temp L Rev 857 [Myers]; see also *infra* notes 95ff and accompanying text.

<sup>8</sup> Cole-Wallen, *supra* note 1 at 490; see also O’Brien, *supra* note 1 at 484.

<sup>9</sup> Cole-Wallen, *supra* note 1 at 491 [emphasis added].

<sup>10</sup> *Ibid* at 492.

<sup>11</sup> *Ibid* at 493.

lawyer *incidentally* performing managerial functions as a consequence of performing legal activities (which is almost certainly unavoidable), and a lawyer deliberately and simultaneously (or “instrumentally”) performing the roles of both lawyer and manager or agent. By acting in such a dual capacity, some argue that the lawyer loses the ability to “police” deals on behalf of the client, because the lawyer has become an “active participant” in the deal-making process.<sup>12</sup>

To call a lawyer a “watch dog” for his or her client’s interests may seem trite, but it may also be a fair description of the role of a personal manager. However, there is at least one material distinction between managers and lawyers: lawyers labour under professional ethical obligations to act in certain ways. If a manager fails to protect his or her client’s interests, they might be a bad manager, but they are liable to no special sanction, apart from potential liability for a claim in civil court or, *in extremis*, criminal charges for fraud. However, if a lawyer fails to protect his or her client’s interests, they may, in addition to any liability imposed by the courts, be subject to sanction by their regulator and the courts for violating their ethical obligations.

Some of the ethical and practical challenges posed by entertainment lawyers performing managerial or agency functions originate, in part, with a basic epistemological puzzle: it is difficult to define with precision what a manager actually does for their client.<sup>13</sup> That difficulty is compounded by the observation that the “functions of agents, managers, and entrepreneurial entertainment lawyers often overlap [...] [and] are not easily distinguishable.”<sup>14</sup> In part, this is due to the fact that the distinction between manager and agent is “obscured and blurred.”<sup>15</sup> The imprecision of the categories being considered results in analytical difficulties when considering the regulation of lawyers who take on these roles.<sup>16</sup> The differing roles and functions of managers and agents will be considered in turn.

Managers are “career advisers” whose ambit extends from “daily management to strategic career development planning.”<sup>17</sup> The manager “advises, counsels and directs the entertainer in the development,

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<sup>12</sup> *Ibid* at 493–94.

<sup>13</sup> See generally Remick & Eisen, *supra* note 3.

<sup>14</sup> See Kenneth J Abdo and Jack P Sahl, “Entertainment Law Ethics Part 2: Agents, Managers and Lawyers” (2005) 22:4 *Ent & Sports Lawyer* 2 at 2 [Abdo & Sahl, “Ethics Part 2”].

<sup>15</sup> Remick & Eisen, *supra* note 3 at 74.

<sup>16</sup> O’Brien, *supra* note 1 at 478.

<sup>17</sup> Abdo & Sahl, “Ethics Part 2”, *supra* note 14 at 2.

advancements and enhancement of his artistic career.”<sup>18</sup> Managers focus on the provision of “day-to-day” personal advice and guidance, addressing matters such as the selection of projects (which are procured by agents), matters relating to publicity and advertising, and the selection and supervision of other personal representatives (including the agent, lawyer, accountant, financial advisor, etc).<sup>19</sup>

By comparison to managers, the role of agent has a deceptively simple “definition”: agents procure employment for talent.<sup>20</sup> Another formulation of the role is that the agent’s “primary function is to market the artist’s talent to buyers within the entertainment industry.”<sup>21</sup> The role of agent has two complementary functions: identifying employment opportunities and negotiating the terms of the engagement, often in conjunction with the manager and lawyer. Generally, only incidentally do agents provide career development advice,<sup>22</sup> and, by comparison with managers, talent agents usually have minimal involvement in the “day-to-day career demands and problems” of talent.<sup>23</sup>

Although the role of agent pivots around the notion of “procuring” employment, none of the legislative schemes regulating talent agents contain a definition of the term.<sup>24</sup> *Black’s Law Dictionary* offers a definition of “procure” that includes “to obtain [...] to achieve or bring about.”<sup>25</sup> Though California’s *Talent Agencies Act*<sup>26</sup> lacks a definition of procurement, the California Labor Commission, which administers and enforces the *Talent Agencies Act*, has held that the following activities constitute procurement: “introducing artists to producers or directors; initiating contacts with employers; furthering an offer for an artist-client; and negotiating employment contracts.”<sup>27</sup> In 2013, the California Labor Commission held that a lawyer who negotiated the terms of an employment agreement for a television host had engaged in unlicensed procurement activities.<sup>28</sup> Despite the concept of procuring being present in British

<sup>18</sup> Cole-Wallen, *supra* note 1 at 486–87; see also O’Brien, *supra* note 1 at 481–83.

<sup>19</sup> See generally Remick & Eisen, *supra* note 3.

<sup>20</sup> See Heath B Zarin, “The California Controversy Over Procuring Employment: A Case for the Personal Managers Act” (1997) 7:2 *Fordham IP Media & Ent LJ* 927 at 934; see also Cole-Wallen, *supra* note 1 at 489.

<sup>21</sup> O’Brien, *supra* note 1 at 478.

<sup>22</sup> *Ibid* at 479.

<sup>23</sup> Cole-Wallen, *supra* note 1 at 489.

<sup>24</sup> See discussion in Part III(A), below.

<sup>25</sup> *Black’s Law Dictionary*, 10th ed, *sub verbo* “procure”.

<sup>26</sup> Cal Lab Code §§ 1700–1706.5 (2016) [*Talent Agencies Act*].

<sup>27</sup> O’Brien, *supra* note 1 at 498 [footnotes omitted].

<sup>28</sup> *Solis v Blancarte*, Labor Commissioner of the State of California (2013) (Case No. TAC-27089).

Columbia's regulation of talent agents,<sup>29</sup> few relevant Canadian definitions of "procure" are available.<sup>30</sup>

Thus, there remains a zone of ambiguity where the actions and activities of a manager or agent seem, at minimum, to coincide: if an agent "procures" three competing offers of employment for an actor, is the agent acting as a manager when advising on the different pros and cons of the offers? If a manager hears from a contact that a production is seeking talent and advises her client of that opportunity, has the manager "procured" that employment, and thereby acted as an agent?<sup>31</sup> There are also material distinctions between the different entertainment industries in terms of the ways in which managers and agents function, and therefore different "hats" lawyers might wear in the context of those industries. For example, in the music industry, the booking agent is usually a highly specialized occupation and managers and lawyers would only rarely have the opportunity to carry out agency functions; however, music lawyers may often be called upon to provide managerial services.<sup>32</sup> By contrast, in the book publishing industry, the role of manager and agent is usually collapsed into a single representative (termed an agent) and an author retaining *both* a manager and an agent would be unusual. In the film and television industries, there exists a very structured ecosystem of agents (driven in part by the fact that talent agencies are regulated in California, New York and British Columbia), though there remain commonalities between the managerial and agency functions.

From a lawyer's perspective, while the role and function of a lawyer—to provide "legal" advice—may seem comparatively easy to ascertain,<sup>33</sup> aspects of a lawyer's services overlap with managerial or agency functions. That overlapping can be described as occurring in two different ways: incidental and instrumental. Incidental overlapping of legal and managerial or agency services occurs when advice of a managerial nature or agent-like procurement activity is embedded within or ancillary to the provision of legal services or other client-facing interactions (e.g. during the course of reviewing draft contracts, a lawyer advises on which of two competing contracts is "better", or at a social function introduces an actor client to a producer casting her next movie). In cases of incidental overlap, attempts to parse out whether a particular piece of advice given to a client, or a

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<sup>29</sup> See discussion in Part III(A), below.

<sup>30</sup> When Canadian courts have considered the concept of "procure," they have generally done so in the context of criminal prosecutions. The few times the term has been considered in non-criminal contexts, courts have generally cited *Black's Law Dictionary*; see e.g. *Ordex Developments Ltd v Sherwood Communications Group Ltd*, 1990 CarswellOnt 3306 (WL Can) at para 16, [1990] OJ No 1478 (QL) (Ont Dist Ct).

<sup>31</sup> See O'Brien, *supra* note 1 at 483–84.

<sup>32</sup> See Abdo & Sahl, "Ethics Part 2", *supra* note 14 at 4.

<sup>33</sup> But see *infra* note 34.

particular action taken on behalf of a client, is properly categorized as having been given or taken in the capacity of manager, agent or lawyer is likely an impossible task.<sup>34</sup>

The more analytically interesting and more ethically complex situation is one where an entertainment lawyer provides managerial or agency services in an instrumental manner. In an instrumental overlapping, a lawyer deliberately provides services as a manager or agent and identifies himself or herself to the client and to third parties as playing those roles. To schematize how a lawyer might render manager or agent services in an instrumental fashion, we can consider the following three structures:<sup>35</sup>

1. In an “integrated” structure, the lawyer acts as both lawyer and agent or manager to the same client through the same business vehicle, being a conventional law firm (whether a sole proprietorship, partnership, limited liability partnership or professional corporation). In this model, the lawyer provides legal services to the client through a law firm and, at the same time and through the same business entity (e.g. the law firm), acts as that client’s manager or agent. In this model, no separate accounts are maintained for the same client (e.g. the client receives one invoice from the law firm covering both sets of services and monies are maintained in one or more bank accounts operated by the law firm);

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<sup>34</sup> It should be noted that there are significant practical consequences to the characterization of a lawyer’s services as managerial or agent-like. Of critical importance is that professional liability insurance policies available to lawyers (such as that provided by LawPRO for lawyers practicing law in Ontario) only cover claims resulting from the performance of, or failure to perform, legal services. LawPRO’s policies, for example, somewhat tautologically define insured “Professional Services” to mean “the practice of law”, see LawPRO, *2016 Professional Liability Insurance for Lawyers*, Insurance Policy No. 2016-001, Part V, online: <[www.lawpro.ca/insurance/insurance\\_type/standard\\_policies.asp](http://www.lawpro.ca/insurance/insurance_type/standard_policies.asp)>. The full definition of “Professional Services” contained in the policy, at 12: “the practice of the Law of Canada, its provinces and territories, and specifically, those services performed, or which ought to have been performed, by or on behalf of an INSURED in such INSURED’s capacity as a LAWYER [...]” [emphasis in original]. Thus, whether LawPRO’s insurance policies will cover a lawyer sued for malpractice by a client will depend, among other factors, on whether the activity the client is suing in respect of was properly characterized as the practice of law. (Some US commentators have concluded that managerial and agency services are non-legal, though ultimately “law related” (see Cole-Wallen, *supra* note 1 at 495, 510). At a minimum, then, a lawyer who is providing managerial or agency services should consider obtaining additional insurance coverage from another provider that would address claims arising from the rendering of those services.

<sup>35</sup> Adapted from Bob Tarantino, “Living by Percentages—Lawyers Acting as Talent Agents and Other Ethical Dilemmas” (Paper delivered at the Law Society of Upper Canada Entertainment & Media Law Symposium, 1 May 2015) [unpublished].



2. In an “overlapping” structure, the lawyer creates separate business entities that provide legal and managerial or agency services to the same client. In this model, the lawyer provides legal services to the client in the conventional manner, through a law firm, and the lawyer creates a separate entity (such as a corporation) to provide manager or agent services under a separate retainer. In this model, separate accounts are maintained (e.g. the client receives different invoices from the lawyer for services rendered and money is held in different bank accounts—one operated by the law firm and one operated by the other business entity);
3. In a “separated” structure, the lawyer provides legal services to one client through a conventional law firm model and, via a separate business entity, provides managerial or agency services to a different client. For example, a lawyer could have a real estate practice and also be an agent rendering agency services to musicians, or could provide entertainment law services to film producers, but provide theatrical booking agent services to live theatre performers.

While there are numerous permutations of the foregoing structural elements, they provide a useful model as we consider the nature and application of a lawyer’s professional ethical obligations in carrying out managerial or agency services.

### *3. Constraints on Lawyers Wearing Multiple Hats*

In Canada, there are two sources of constraints on entertainment lawyers who act simultaneously as managers or agents. The first is specific to lawyers providing services in the province of British Columbia, whereas the second applies generally to all lawyers across the country. Two prefatory notes: British Columbia is the only Canadian jurisdiction that expressly regulates talent agents, and talent managers are not subject to licensure or specific regulation in any Canadian jurisdiction.

#### *A) British Columbia*

The province of British Columbia is the only jurisdiction in Canada that regulates the activities of talent agents, though it should be highlighted that the ambit of British Columbia’s regulation extends solely to talent agents in the film and television industries. The relevant provisions are set forth in the province’s *Employment Standards Act* (“BC ESA”)<sup>36</sup> and its accompanying Regulation.<sup>37</sup> The BC ESA requires that any person operating a talent agency

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<sup>36</sup> *Employment Standards Act*, RSBC 1996, c 113 [BC ESA].

<sup>37</sup> BC Reg 396/95 [BC Reg].

be licensed.<sup>38</sup> The BC *ESA* defines “talent agency” to mean “a person that, for a fee, engages in the occupation of offering to procure, promising to procure or procuring employment for actors, performers, extras or technical creative film persons.”<sup>39</sup> “Technical creative film person” is defined to include “a film director, director of photography, production designer, art director, person involved in writing or rewriting scripts, hair stylist, make-up artist, costume designer, or animal coordinator involved in the production of a film, video, television show or television commercial.”<sup>40</sup> Failure to comply with the licensing requirements constitutes an offence under the BC *ESA*, punishable by monetary penalties of up to \$10,000.<sup>41</sup> A lawyer who renders talent agency services in British Columbia must register as a talent agent—the regulatory scheme contains no carve-out or “safe harbour” for lawyers who provide agency services, whether through an integrated, overlapping or separated structure.<sup>42</sup>

### *B) Professional Ethical Obligations*

A lawyer who performs managerial or agency functions for their client runs the risk of breaching his or her professional ethical obligations as a result of having provided those services. As renowned Canadian music lawyer Paul Sanderson succinctly states, “a lawyer [...] should exercise extreme caution when acting in a secondary capacity,” such as taking on a managerial or agency role.<sup>43</sup> In addition to being subject to laws of general application, lawyers in Canada are subject to regulation by the law society of their province or territory by means of a code of conduct.<sup>44</sup> The discussion contained in this section refers to the Federation of Law Societies of Canada’s (“FLSC”) *Model Code of Professional Conduct*,<sup>45</sup> which has been adopted as a model by a number of law societies across Canada, including British Columbia and Ontario.<sup>46</sup>

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<sup>38</sup> BC *ESA*, *supra* note 36, s 12.

<sup>39</sup> *Ibid*, s 1.

<sup>40</sup> BC Reg, *supra* note 37, s 1.

<sup>41</sup> *Ibid*, s 29.

<sup>42</sup> California’s regulatory scheme for talent agents also does not have an exemption for lawyers, a fact that has been subject to sustained criticism; see O’Brien, *supra* note 1; Gary E Devlin, “The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California’s Entertainment Industry” (2001) 28:2 Pepp L Rev 381.

<sup>43</sup> Sanderson, *supra* note 2 at 215.

<sup>44</sup> See Dodek & Hoskins, *supra* note 4 at §3.16.

<sup>45</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 2014 [FLSC *Model Code*]. All references to “Rules” in this article are to the FLSC *Model Code* unless otherwise noted.

<sup>46</sup> Dodek & Hoskins, *supra* note 4 at §3.17.

The Rules and its accompanying commentary demonstrate a regulatory approach broadly consistent with that found in the United States, where entertainment lawyers carrying on secondary occupations must also comply with professional rules.<sup>47</sup> The Rules are a constraining factor on the conduct of entertainment lawyers who perform managerial or agency functions, but the force of that constraint varies depending on the structuring of the delivery of the managerial or agency services. The level of connection or overlap between legal services and non-legal services is critical: the greater the overlap, the more constraining the effect of the Rules will be.

The foundational professional ethical obligations of integrity, competence, and loyalty gird the legal and non-legal activities of lawyers. Scenarios in which entertainment lawyers provide managerial or agency services raise issues relating to those duties and the lawyer's obligations to avoid conflicts of interest.<sup>48</sup> Each of these will be assessed in turn: in order to understand how professional ethical obligations constrain lawyers' activities, this article will first demonstrate how lawyers remain subject to those obligations even when not providing legal services.

### 1) "Travelling" Obligations

Underpinning the discussion in this article is the fact that while lawyers are not prohibited from undertaking other business activities concurrently with their activities as lawyers,<sup>49</sup> a lawyer's professional ethical obligations continue to apply to the lawyer even when they are not acting as a lawyer.<sup>50</sup> The Rules expressly contemplate the interface between a lawyer's legal services and his or her provision of non-legal services. Rule 7.3-1 provides that "a lawyer who engages in another profession, business or occupation [...] must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence." Rule 7.3-2 states that "a lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client."

The commentary to the Rules clarifies that "the term 'outside interest' covers the widest possible range of activities and includes activities that may

<sup>47</sup> Cole-Wallen, *supra* note 1 at 504ff.

<sup>48</sup> See Sanderson, *supra* note 2 at 215.

<sup>49</sup> Various US legal regulators have given extensive consideration to the issue of lawyers engaging in "second occupations"; see e.g. Formal Ethics Opinion 82-F-36 of the Board of Professional Responsibility of the Supreme Court of Tennessee; see also Cole-Wallen, *supra* note 1 at 498ff.

<sup>50</sup> See *FLSC Model Code*, *supra* note 45, Rule 7.3-2, commentary [1]: "the question of whether and to what extent the lawyer may permitted to engage in [an] outside interest will be subject to any applicable law or rule of the [Law] Society."

overlap or be connected with the practice of law [...] as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts.”<sup>51</sup> Managerial and agency activities, however conceived, fall within the range of activities that “may overlap or be connected with the practice of law.”<sup>52</sup> Even if managerial or agency activities are conceived of as falling towards the “not so connected” end of the spectrum, the Rules still apply to the lawyer’s conduct. However, the *extent* to which the Rules apply to that non-legal conduct can become more attenuated depending on the characteristics of the mode in which the non-legal conduct is performed. The commentary to Rule 7.3-1 provides:

When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer’s conduct might bring the lawyer or the profession into disrepute or impair the lawyer’s competence, such as if the outside interest might occupy so much time that clients’ interests would suffer because of inattention or lack of preparation.<sup>53</sup>

As the text of Rule 7.3-1 indicates, the less “related” an entertainment lawyer’s managerial or agency services are to their legal services, the less they will be constrained by the lawyer’s professional ethical obligations. However, the lawyer can never be fully free of those obligations: when the lawyer’s conduct in even “unrelated” activities redounds to the detriment of the reputation of the lawyer or the profession, that conduct is potentially a violation of the Rules.

## 2) *Integrity and Competence*

The obligation of integrity informs a second Rule relevant to lawyers undertaking non-legal activities: Rule 2.1; it obliges a lawyer to conduct themselves with integrity, intended as a restraining notion that permits only those actions that further public respect for the profession and the administration of justice institutionally. The concept of “integrity” relates to characteristics of honesty, trustworthiness and honour.<sup>54</sup> Lawyers who provide managerial or agency services must not conduct themselves in a manner that negatively reflects on the lawyer in such a way as to bring the lawyer or the profession into disrepute. That being said, the commentary to Rule 2.1 states that the regulator “[g]enerally [...] will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer’s professional integrity.”<sup>55</sup> However, even in a separated structure for delivery of managerial or agency services,

<sup>51</sup> *Ibid.*

<sup>52</sup> See Cole-Wallen, *supra* note 1 at 495, 510.

<sup>53</sup> *FLSC Model Code*, *supra* note 45, Rule 7.3-2, commentary [2] [emphasis added].

<sup>54</sup> See Dodek & Hoskins, *supra* note 4 at §3.21ff.

<sup>55</sup> *FLSC Model Code*, *supra* note 45, Rule 2.1-1, commentary [4].

the lawyer's conduct must not be such as to taint the integrity or competence of the lawyer, whether by dishonest dealings or commitment to non-legal services so totally that it jeopardizes the lawyer's ability to provide competent legal services to the same or other clients.

The Rules evidence a focus on the protection of two different subjects that inform their interpretation in “multiple hats” scenarios—the client and the integrity of the profession and the administration of justice more broadly.<sup>56</sup> So, to protect clients, the commentary to Rule 7.3-1 states that “a lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction.”<sup>57</sup> Lawyers are therefore obliged to “clearly differentiate legal advice from non-legal advice,”<sup>58</sup> and should, “if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular [non-legal] field.”<sup>59</sup>

As the multiple-hat-wearing lawyer moves from carrying out legal and non-legal activities via the separated to the overlapping to the integrated structure, there is increasing risk to the lawyer's ability to comply with his or her professional ethical obligations. In all circumstances, as noted above, the lawyer's professional obligations will, to greater or lesser extent, “travel” and govern the conduct of the lawyer. However, an “integrated” structure—which features the most overlap between legal and non-legal services, and the least separation between both the delivery of the services and their incidentals (such as accounting)—would be most likely to give rise to an unmanageable risk of breach of the Rules. That risk is a result of the lack of clarity as to whether the lawyer providing the managerial or agency services is doing so in his or her professional capacity as a lawyer. When a lawyer is performing legal services along with managerial or agency functions for the same client, it becomes difficult to find shelter under the notion that the regulator should be less concerned with the lawyer's “purely private or extra-professional activities.”<sup>60</sup> For example, consider the situation of a lawyer who is reviewing the provisions of a contract for the engagement of a talent client to perform at a live concert festival—for which the lawyer introduced the client to the concert promoter—and the lawyer is simultaneously giving advice to that same client regarding the suitability of the engagement fee payable to the client and the advisability of performing at that particular concert as compared to other competing offers. The lawyer is providing a mixture of legal, managerial and agency services, thus it may be impossible

<sup>56</sup> *Ibid*, Rule 2.1-1, commentary [2].

<sup>57</sup> *Ibid*, Rule 7.3-1, commentary [1].

<sup>58</sup> Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters, 1993) (loose-leaf revision 2015, release 1) at 20-6 [MacKenzie].

<sup>59</sup> *FLSC Model Code*, *supra* note 45, Rule 3.1-2, commentary [10].

<sup>60</sup> See *supra* note 55 and accompanying text.

for the client to discern where the legal advice stops and the managerial or agency advice begins.<sup>61</sup> When providing managerial or agency services, the closer a lawyer gets to the “integrated” model—where the lawyer’s relationship to the client is simultaneously and undiscernibly one of lawyer and manager or agent—the greater the likelihood that there will be at least a skirmish between the lawyer’s managerial or agency activities and their professional ethical obligations. Furthermore, if there are multiple clients involved, that will compound the likelihood of problems. The contours of a lawyer’s professional ethical obligations are rarely, if ever, precise, which means that a lawyer who acts as a manager or agent should always be sensitive to the potential risks to his or her obligations as a lawyer of competence, integrity and loyalty. A lawyer providing such services in an integrated model should be especially watchful.

The entertainment lawyer who wishes to perform managerial or agency functions should also note that the ethical obligation of competence is bi-directional and can result in liability for both professional misconduct and negligence.<sup>62</sup> The Rules expressly concern themselves with the scenario where a lawyer’s commitments to non-legal activities impair the lawyer’s ability to practice law competently because of a lack of time to remain up-to-date on changes in the law.<sup>63</sup> In addition, a lawyer who provides “non-legal” advice while acting in a legal capacity can be held liable in tort for negligence, being held to the standard of a reasonably competent lawyer in the provision of that non-legal advice.<sup>64</sup> In other words, an entertainment lawyer would be held to the standard of “a reasonably competent lawyer” when providing managerial or agency services.<sup>65</sup> Competency is thus

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<sup>61</sup> Again, this is not unique to entertainment practice; see e.g. *Wong et al v 407527 Ontario Ltd* (1999), 179 DLR (4th) 38, 125 OAC 101 (“[a]lthough ordinarily clients retain lawyers for legal advice and not business advice, on some transactions the two are intermingled and no clear dividing line can be drawn” at para 46).

<sup>62</sup> For the principle that lawyers can be liable to clients in tort for negligence, see e.g. *Canada Trustco Mortgage Co v Barlet & Richardes* (1996) 28 OR (3d) 768, 91 OAC 33; *Coughlin v Comery*, 1996 CarswellOnt 686 (WL Can), 61 ACWS (3d) 702 (Gen Div), supp. reasons 1996 CarswellOnt 2816 (WL Can), 64 ACWS (3d) 30 (Gen Div), aff’d 1998 CarswellOnt 3958 (WL Can), 83 ACWS (3d) 506 (CA), leave to appeal to SCC dismissed, 242 NR 200, 125 OAC 399.

<sup>63</sup> *FLSC Model Code*, supra note 45, Rule 7.3-2, commentary [2]; see also Remick & Eisen, supra note 3 at 62; see also Fraley & Harwell, “Comprehensive Approach”, supra note 4 at 20.

<sup>64</sup> Beverly G Smith, *Professional Conduct for Lawyers and Judges*, 4th ed (Fredericton, NB: Maritime Law Book, 2001) at ch 3 at para 15, citing *Brumer v Gunn* (1982), 18 Man R (2d) 155, [1983] 1 WWR 424 (QB) [*Brumer*] (a lawyer was found liable for providing negligent investment advice); *Eckstein v Law Society of Manitoba*, 116 DLR (3d) 60, 6 Man R (2d) 161 (QB), rev’d on other grounds 121 DLR (3d) 677, 7 Man R (2d) 415 (CA).

<sup>65</sup> See MacKenzie, supra note 58 at 14-2.

measured not just in disciplinary liability in connection with legal advice, but in tort in connection with non-legal advice.<sup>66</sup>

### 3) *Loyalty and Conflicts of Interest*

The entertainment business is notorious for its cavalier attitude towards conflicts of interest.<sup>67</sup> Indeed, some participants view putative conflicts of interest as beneficial, a useful social lubricant for assembling and completing deals.<sup>68</sup> However, any such casual approach to the matter by lawyers must necessarily contend with Rule 3.4-1: “A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.” In addition, the commentary to Rule 7.3-1 states that a lawyer “must not carry on, manage or be involved in any outside interest in such a way [...] that would give rise to a conflict of interest or duty to a client.” In the context of a conflict of interest between a lawyer and a client, the courts have defined a conflicting interest as “an interest that gives rise to a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests.”<sup>69</sup>

The obligation to avoid conflicts of interest arises from the lawyer’s duty of loyalty to their client, which itself gives rise to a fiduciary obligation in favour of the client.<sup>70</sup> That obligation entails avoiding “a conflict between their personal or pecuniary interests and their [professional ethical] duties.”<sup>71</sup> As described by the Supreme Court of Canada, a client whose

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<sup>66</sup> *Ibid*, citing *Brumer*, *supra* note 64 and *Eckstein*, *supra* note 64; see also *Lockhart v MacDonald* (1980), 42 NSR (2d) 29, 118 DLR (3d) 397 (CA), varied on other grounds (1980), 44 NSR (2d) 261, 118 DLR (3d) 397 (SC), leave to appeal to SCC refused (1980), 118 DLR (3d) 397n, 35 NR 265n.

<sup>67</sup> See *Dodek & Hoskins*, *supra* note 4 at §4.433.

<sup>68</sup> Joseph Leone & Sujit Patel, “Music to My Lawyer’s Ears: Interpreting Model Rule 1.13 to Guide Entertainment Attorneys Through Conflicts of Interest” (2011) 24 *Geo J Leg Ethics* 643 at 656; see also Kenneth J Abdo and Jack P Sahl, “Entertainment Law Ethics: Part 1 The First of a Series on Ethics for Entertainment Lawyers” (2004) 22:3 *Ent & Sports Lawyer* 2 at 3.

<sup>69</sup> *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 56, [2007] 2 SCR 177 [*Strother*], citing *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631 [*Neil*].

<sup>70</sup> On the relationship between loyalty and conflicts of interest, see Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis, 2011) at 236–38 [Woolley].

<sup>71</sup> *Dodek & Hoskins*, *supra* note 4 at §4.161ff. See also *Davey v Woolley, Hames, Dale & Dingwall* (1982), 35 OR (2d) 599, 133 DLR (3d) 647 (CA), leave to appeal to SCC refused (1982), 37 OR (2d) 499n (“A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests [...] human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client’s interests and his own or his client’s interests and those of another client to whom he owes the self-same duty of loyalty, dedication

lawyer is in a conflict of interest may be prejudiced when the lawyer “soft peddles’ his representation of [the] client in order to serve his own interests, those of another client, or those of a third person.”<sup>72</sup> At a bare minimum, the Ontario courts have held that where potential or actual conflicts of interest arise, it is the duty of the lawyer to raise the matter with the client.<sup>73</sup> As the Supreme Court of Canada stated in *Neil*: “[I]oyalty includes putting the client’s business ahead of the lawyer’s business.”<sup>74</sup> The number of potential personal or pecuniary conflicts is so vast, and any analysis of them is necessarily so fact-dependent, that this article will provide only fairly general observations on this point. It should be noted that even the prohibition on acting where there is a conflict of interest is contingent; a lawyer can act even in the face of a conflict where the client has consented.<sup>75</sup> That accommodation is informed in part by some of the considerations at issue for the entertainment bar: in addition to a general desire to facilitate client autonomy, there may be issues such as the availability of lawyers with the requisite skills and experience.<sup>76</sup>

Where a lawyer acts *as a lawyer* for multiple clients who may have competing interests, the threats of formal conflicts may be obvious, perhaps even manageable. For example, a lawyer who represents multiple recording artists, each of whom is negotiating with the same record label, may be required to advance arguments or positions in the negotiations for Band A’s contract that are incompatible with the best interests of Band B in their own contract negotiations. Such a “positional” conflict likely does not give rise to a disqualifying conflict of interest.<sup>77</sup> However, where a lawyer acts as both lawyer *and in another representative capacity* for multiple clients who may have competing interests, the threat of formal conflicts can

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and good faith” at para 8). See also *FLSC Model Code*, *supra* note 45, Rule 3.4-1 and commentary [5]; see also Robert E Fraley and F Russell Harwell, “The Sports Lawyer’s Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation” (1988-1989) 11 *Hastings Comm & Ent LJ* 165 at 173 [Fraley & Harwell, “The Sports Lawyer’s Duty”].

<sup>72</sup> *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 23, [2013] 2 SCR 649 [McKercher].

<sup>73</sup> See *McCauley Music Co v Solomon*, 1982 CarswellOnt 3555 (WL Can), 16 ACWS (2d) 368 (Ont H Ct J) (the case involved a convoluted set of facts wherein an entertainment lawyer acted simultaneously for a music publisher, a songwriter and various other parties with interrelated interests; the lawyer was ultimately found liable for failing to advise the music publisher of the pending expiry of a publishing contract, which resulted in the publisher missing the opportunity to exercise an option to extend the term of the contract); see also *Dodek & Hoskins*, *supra* note 4 at §4.434.

<sup>74</sup> *Neil*, *supra* note 69 at para 24.

<sup>75</sup> *FLSC Model Code*, *supra* note 45, Rule 3.4-2.

<sup>76</sup> See generally MacKenzie, *supra* note 58 at 22-2; see also *FLSC Model Code*, *supra* note 45, Rule 3.4-2, commentary [3].

<sup>77</sup> See Woolley, *supra* note 70 at 234.



multiply to the point where it may become unmanageable.<sup>78</sup> In part, this is because of conflicts between the conventional role played by managers and agents and the lawyer's professional obligation of zealous advocacy on behalf of his or her clients. M. William Krasilovsky and Robert S. Meloni use the example of a lawyer who acts as a lawyer for multiple musical acts while also acting as a manager or agent for multiple acts: the manager's need to facilitate a sustained cooperative relationship with a record label, for example, may conflict with the lawyer's obligation to "deal zealously and impartially [...] in negotiating and policing the deal, without regard for future reprisal or lack of cooperation."<sup>79</sup> In short, the lawyer's ability to insist on strict compliance with the terms of his or her client's deal with a record label in his or her capacity as lawyer could be compromised by his or her simultaneous need to court favours from that same record label on behalf of the same or another client for whom the lawyer is acting as a manager.

Some US commentators take the position that it is flatly impermissible for a lawyer to negotiate an artist's contract while simultaneously serving as that artist's manager due to the inherent conflicts of interest.<sup>80</sup> Others take the position that a client benefits from a lawyer who acts as a manager or agent because of, among other factors, the educational requirements necessary to become licensed to practice law and the fiduciary duties imposed on the lawyer, such as, but not limited to, obligations of confidentiality.<sup>81</sup> Various arguments have been advanced against entertainment lawyers acting simultaneously as managers or agents for the same client. One argument, premised on a lawyer charging an hourly fee or flat periodic retainer (rather than a percentage fee), is that a lawyer acting solely as lawyer is better able to provide "independent, unbiased legal advice" on contracts because the lawyer's entitlement to a fee for the services will be absolute, unlike the agent or manager whose income (because it is calculated on commission) will be dependent on the contract being entered into and the dollar value of the contract.<sup>82</sup> A second, and related argument (which I will term the "guard dog" argument), is that the lawyer who acts solely as a lawyer can act as an independent advocate for the talent—effectively a counter-balance

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<sup>78</sup> M William Krasilovsky & Robert S Meloni, "Ethical Considerations for Music Industry Professionals" (1990-1991) 15 Colum-VLA JL & Arts 335 at 350-51 [Krasilovsky & Meloni].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* at 355.

<sup>81</sup> See Cole-Wallen, *supra* note 1 at 524; O'Brien, *supra* note 1 at 502. Note that while the nature of the lawyer's duty to his or her client is fiduciary in nature, it is also possible for a non-lawyer agent or manager to be subject to fiduciary or fiduciary-like obligations imposed through the laws of agency. See generally Fraley & Harwell, "The Sports Lawyer's Duty", *supra* note 71 at 179.

<sup>82</sup> Remick & Eisen, *supra* note 3 at 61.

between the talent and the manager or agent—whose pecuniary interests do not necessarily align with that of the talent.<sup>83</sup>

The persuasive value of the former argument will be a function of the extent to which one believes that there is a material difference between a lawyer having an interest in a percent of a client's income and a lawyer having an interest in a client getting more income in order that the client can pay the lawyer's hourly fees. (It should be recognized that alternative fee arrangements may give rise to opportunities for self-dealing: where a lawyer is acting as an agent for some clients and solely as a lawyer for others and if presented with an employment opportunity that would be suitable for multiple clients, the temptation may arise for the lawyer to steer the opportunity to the client whose fee structure will most richly reward the lawyer.)<sup>84</sup>

The “guard dog” argument has more purchase: the lawyer's professional duty of loyalty means that a lawyer is uniquely positioned to advocate for and defend a client, even against the client's other personal advisors. An entertainment lawyer who wears too many hats for one client may expose the client to risk in two senses: first, it leaves the client with fewer, rather than more, advisors when the complexity of the modern entertainment industries means that more advice may be better than less; and second, the lawyer's pecuniary interests may become so enmeshed with the business activities of the client that the lawyer functionally becomes a business partner of the client, which gives rise to its own set of ethical considerations. Becoming so enmeshed in the client's business concerns that one effectively becomes a partner (in the sense of sharing profits and losses) raises the spectre of the lawyer failing to respect the need for studied distance *from* the client, as discussed further below.

Representing clients in the entertainment industries almost inevitably gives rise to opportunities for a lawyer to have business dealings with clients.<sup>85</sup> Such dealings can take a number of forms: from providing money for expenditures on a film production, to providing start-up capital for a recording label, to jointly owning copyright in a music catalogue. The unavoidable risk in such situations is that the lawyer's pecuniary self-interest in the business will “undermine the lawyer's ability to exercise independent judgment on behalf of the client.”<sup>86</sup> The Rules provide that “[a] lawyer must not enter into a transaction with a client unless the

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<sup>83</sup> *Ibid* at 61–62; see also *supra* notes 7–8 and accompanying text.

<sup>84</sup> See O'Brien, *supra* note 1 at 503.

<sup>85</sup> See Jack P Sahl, “Entertainment Law – The Specter of Malpractice Claims and Disciplinary Actions” (2010) 20 Marq Sports L Rev 377 at 385.

<sup>86</sup> *Ibid* at 386.

transaction [...] is fair and reasonable to the client.”<sup>87</sup> As compared to the *FLSC Model Code*, the *Rules of Professional Conduct* of the Law Society of Upper Canada (“LSUC”) imposes a higher standard in such matters. The *LSUC Rules* require that the client obtain independent legal advice with respect to the transaction prior to the lawyer and client entering into the transaction,<sup>88</sup> whereas the *FLSC Model Code* requires only that the lawyer “consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction,” and even then, it is only if the transaction has specified characteristics.<sup>89</sup> The commentary to the *FLSC Model Code* also cautions that “[a] lawyer should not uncritically accept” a client’s decision to proceed with a transaction with the lawyer, and reiterates that “the lawyer’s first duty will be to the client”, stipulating that “[i]f the lawyer has any misgivings about being able to place the client’s interests first, the retainer should be declined.”<sup>90</sup> If a lawyer’s transaction with a client is challenged, the onus rests on the lawyer to demonstrate that the lawyer:

has made full disclosure of all material facts within his knowledge, that the transaction is a just and fair one insofar as the client is concerned, that the client received the advantage of the best professional assistance which if he had been involved in a transaction with a third party he could possibly have afforded, and that having regard to the facts of [the] case independent advice was not indispensable.<sup>91</sup>

There are some aspects of the conventional practice of entertainment law that give rise to special consideration of the conflicts of interest rules.<sup>92</sup> With respect to fee arrangements, when a client’s payment for legal services

<sup>87</sup> *FLSC Model Code*, *supra* note 45, Rule 3.4-28.

<sup>88</sup> The Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2014) Rule 3.4-28 [*LSUC Rules*].

<sup>89</sup> *FLSC Model Code*, *supra* note 45, Rule 3.4-29(b). The triggering characteristics are lending or borrowing money; buying or selling property or services having other than nominal value; giving or acquiring ownership, security or other pecuniary interest in a company or other entity; recommending an investment; or entering into a common business venture.

<sup>90</sup> *FLSC Model Code*, *supra* note 45, Rule 3.4-29, commentary [2].

<sup>91</sup> *Milligan v Gemini Mercury Sales Ltd*, 1 BLR 63 at para 48, 1977 CarswellOnt 32 (WL Can) (Ont H Ct J); see generally Mark Ellis, *Fiduciary Duties in Canada* (Carswell, 2004) (loose-leaf), ch 9 at 9-24.12ff.

<sup>92</sup> To illustrate the variety of conflict situations that can arise in the entertainment law context, it warrants noting that some of the highest-profile court decisions involving lawyers’ obligations of loyalty involved, at least tangentially, entertainment law or the entertainment industries. The Supreme Court of Canada’s decision in *Strother*, *supra* note 69, arose because a tax lawyer who advised clients on structuring tax sheltered investment vehicles for film and television productions eventually established a competing structure, which was held to be a breach of the lawyer’s duty of loyalty and the (now former) tax lawyer was required to disgorge a portion of the profits realized from this competing business.

consists of providing an ownership interest to the lawyer in property or a business enterprise (e.g. assigning to the lawyer partial ownership of copyrighted works), Rule 3.4-36 requires that the lawyer recommend the client obtain independent legal advice, though it does not require that the client actually obtain that advice. Another aspect that warrants consideration is the practice of “shopping” client material.<sup>93</sup> Many of the larger distributors of entertainment products (book publishers, record companies, film producers, etc.) will not consider “unsolicited” materials submitted directly by creators (such as manuscripts, sound recordings, film scripts, etc.) and instead will only review materials submitted by managers, agents or lawyers with whom they have a relationship. In performing this service, the lawyer is performing no legal services—rather the lawyer is leveraging his or her contacts (e.g. personal relationships) within the industry to provide access for a client who otherwise would have none. Charging fees for “shopping” material raises concern about the disclosure and reasonableness of fees that are discussed in further detail below in Part III(B)(4). However, a more subtle ethical concern relating to conflicts of interest lurks. By shopping material for new talent, a lawyer may find themselves in competition with a more established client: a client may have their own “label deal” with the record company whereby if the client brings new talent to the attention of the record company, the client is entitled to share in the revenue generated by that new talent; thus, if a lawyer “shops” an artist to the label, that lawyer may be depriving their client who has the label deal of the opportunity to present that same material to the record company.<sup>94</sup>

Lurking in the shadow of the foregoing discussion is a further ethical obligation that is only rarely expressly articulated in the Canadian context: the notion that the lawyer’s concept of “professional independence” requires independence *from* the client.<sup>95</sup> Such an obligation creates tension with the lawyer’s duty of loyalty to the client, which itself is made more difficult by the various other duties under which lawyers labour (e.g. duties to the courts and to the legal profession).<sup>96</sup> There are a number of vectors along which these conflicts can materialize: the lawyer *qua* manager or agent may lack the independence to give the client unpalatable advice when it conflicts with client desires (in part because managers often function as emotional or creative support for talent),<sup>97</sup> or the lawyer’s pecuniary interests may militate in favour of providing advice that an un-conflicted lawyer would not regard as optimal. However, there is a risk that shared pecuniary interests between

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<sup>93</sup> In the context of the music industry, see Krasilovsky & Meloni, *supra* note 78 at 358.

<sup>94</sup> *Ibid* at 359.

<sup>95</sup> See Chapdelaine, *supra* note 7; Myers, *supra* note 7. See also Robert Gordon, “The Independence of Lawyers” (1988) 68 BUL Rev 1 [Gordon].

<sup>96</sup> See Chapdelaine, *supra* note 7 at 38–39.

<sup>97</sup> See Myers, *supra* note 7 at 863.

a lawyer and their client can become so material that they compromise the lawyer's ability to fulfill their other duties of loyalty, candour and acting in the public interest.<sup>98</sup> These conflicts are not merely theoretical, nor should they be viewed as debilitating—lawyers in a variety of different practice contexts navigate them on a daily basis.<sup>99</sup>

All the foregoing being said, navigating the obligations imposed on lawyers by their professional ethical commitments when entering into business relationships with clients can be “fraught with difficulty and risk.”<sup>100</sup> Alice Woolley has articulated a straightforward formulation of the obligation:

unless the lawyer can show that a business relationship was advantageous to the client, that the client clearly understood the conflict and consented to it, and that the client had independent legal advice, the lawyer has a major problem and is at significant risk of civil liability and professional discipline.<sup>101</sup>

The greater the formal separation between the lawyer's professional activities and their managerial or agency activities, the easier it will be for the lawyer to advance an argument that they have discharged the duty as described by Woolley. The preferred structure for lawyers who provide managerial or agency services is therefore the “separated” structure, where there is no confluence of clients or entities, thereby doing as much as possible to avoid the occurrence of a conflict arising in the first instance. Employing a separated structure is not a panacea, and will not obviate all risk of ethical transgression: the lawyer's duty of loyalty is a fiduciary one,<sup>102</sup> and in assessing such matters courts and regulators are generally loathe to privilege form over substance.<sup>103</sup>

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<sup>98</sup> This concern is most often expressly considered in the context of corporate in-house counsel, see e.g. Milton C Regan, Jr, Zachary B Hutchison & Juliet R Aiken, “Lawyer Independence in Context: Lessons from Four Practice Settings” (2016) 29 *Geo J Leg Ethics* 153.

<sup>99</sup> A relatively rich body of US and European academic consideration of the matter has developed; see e.g. Bruce Green, “Lawyers’ Professional Independence: Overrated or Undervalued?” (2013) 46 *Akron L Rev* 599; Leslie C Levin & Lynn Mather, eds, *Lawyers in Practice: Ethical Decision Making in Context* (Chicago: University of Chicago Press, 2012).

<sup>100</sup> Woolley, *supra* note 70 at 274.

<sup>101</sup> *Ibid.*

<sup>102</sup> *McKercher, supra* note 72 at paras 25, 31.

<sup>103</sup> See e.g. *LSUC Rules, supra* note 88, Rule 3.4-28.2 (addresses business transactions between lawyers and clients): “A lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-28 to 3.4-36.”

#### 4) *Ethically-Compliant Fee Arrangements*

Charging talent a “percentage fee” is a conventional approach to legal fees in the entertainment industry, but it is one that gives rise to additional ethical concerns, derived in part from the same factors motivating concerns with conflicts of interest. When entertainment lawyers make use of percentage fee arrangements, whether as compensation for the provision of legal services or for the provision of managerial or agency services, the Rules become a constraining factor. Managers and agents in the entertainment industries are generally compensated via commission, with percentages customarily ranging from 10 to 25% of the client’s gross income.<sup>104</sup> In the United States, particularly in California, it is also often the case that entertainment lawyers will be paid on a commission basis, generally receiving 5 to 10% of gross income.<sup>105</sup> The amount of the percentage charged by managers and agents in the United States is determined through a patchwork of industry conventions,<sup>106</sup> legal regulations,<sup>107</sup> and collective agreements.<sup>108</sup> Entertainment lawyers use a variety of structures in their fee arrangements with their clients: hourly billing, flat fee (or “piece work”), percentage fee arrangements and monthly or annual retainers are most common.<sup>109</sup> This article will focus on percentage fees, as they pose the most obvious potential ethical issue. Canadian entertainment lawyers who enter into percentage fee arrangements are obliged to consider three related ethical dimensions: the substantive question of whether percentage fee arrangements are permitted at all, any limitations on percentage fee arrangements imposed by professional ethical obligations, and the obligation to disclose the particulars of the arrangement.

As a preliminary matter, a distinction must be drawn between “contingency” fees and “percentage” fees; though both make use of the mathematical function of percentages to determine the fee to which the

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<sup>104</sup> Cole-Wallen, *supra* note 1 at 520.

<sup>105</sup> Kenneth J Abdo and Jack P Sahl, “A Professional Responsibility Primer for Today’s Entertainment Lawyer” (2000-2001) 18 *Ent & Sports Lawyer* 3 at 7 [Abdo & Sahl, “Professional Responsibility Primer”]; see also Abdo & Sahl “Ethics Part 2”, *supra* note 14 at 5.

<sup>106</sup> Cole-Wallen, *supra* note 1 at 521.

<sup>107</sup> In New York, General Business Law § 185 caps the fees of theatrical agents at 20%; in California, while the *Talent Agencies Act*, *supra* note 26, contains no express cap on commissions, the Labor Commission has the authority to review contracts that contain “oppressive and unjust” terms, and the Commission has indicated that it views talent agent fees in excess of 25% to fall afoul of the permitted threshold (see Cole-Wallen, *supra* note 1 at 521, n 218 and accompanying text).

<sup>108</sup> For example, Article 16, Section 6(a) of the Bylaws of the American Federation of Musicians of the United States and Canada cap the percentage that members can pay talent agents for securing engagement.

<sup>109</sup> Cole-Wallen, *supra* note 1 at 522.

lawyer is entitled, they operate differently.<sup>110</sup> A contingency fee is a fee whose payment is conditional on “the outcome of the matter for which the lawyer’s services are to be provided.”<sup>111</sup> In other words, it is a fee tied to a specific mandate—usually a litigation matter—the result of which determines whether the fee is payable at all. A percentage fee arrangement, by contrast, is one where the lawyer’s fee entitlement is determined not with reference to the success or failure of a particular mandate, but rather solely with reference to some stream of income or revenue payable to the client.<sup>112</sup> Of the two models, percentage fee arrangements are more frequently used by entertainment lawyers than are contingency fee arrangements,<sup>113</sup> though a particular lawyer-client relationship can employ elements of both models.<sup>114</sup>

Most often the percentage fee will be calculated on all sources of income received by the client from activities in the entertainment industry, including contractual advances (e.g. under a record contract), fees for performing creative services (e.g. live performances), royalties or bonus entitlements (e.g. from sales of records or theatrical box office achievements) and fees for sponsorship or endorsement. The revenue base can be structured in a number of different ways: gross revenues or net revenues of some general stream of income (e.g. all entertainment-based activities or all gross income from any source) or of some more narrowly-defined stream (e.g. the compensation payable pursuant to a particular contract), and may be subject to broad exclusions (e.g. revenues from an acting career may not be covered in a retainer that pertains to advice for music industry activities) or narrow ones (e.g. excluding revenues derived from a particular contract entered into by the client prior to the commencement of the retainer).

Percentage fee arrangements are permissible in Canada: Canadian lawyers are not prohibited from entering into fee arrangements with their clients whereby the lawyer’s compensation is structured as a percentage of

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<sup>110</sup> See generally MacKenzie, *supra* note 58 at 12-1.

<sup>111</sup> *FLSC Model Code*, *supra* note 45, Rule 3.6-2.

<sup>112</sup> So, for example, an entertainment lawyer on a 5% percentage fee basis with a client may be entitled to receive 5% of the client’s entertainment-related income irrespective of whether the lawyer achieved a successful result for the client in a particular litigation matter or whether a particular contract that the lawyer drafted ever got signed.

<sup>113</sup> In the US, contingency and percentage fee arrangements have been expressly countenanced by the courts, see Cole-Wallen, *supra* note 1 at 509.

<sup>114</sup> For example, an entertainment lawyer using a percentage arrangement may offer discounts on the applicable percentage with respect to particular revenue streams, such as a lower percentage of fees from a particular contract that did not involve much work on the part of the lawyer, or a higher percentage of fees from a particular contract that involved a lot of effort. See generally Abdo & Sahl, “Ethics Part 2”, *supra* note 14 at 5-6.

some amount received by the client.<sup>115</sup> However, lawyers are prohibited from charging any fee that is not “fair and reasonable.”<sup>116</sup> An unreasonable and unfair percentage fee arrangement poses two different problems. First, and most importantly, it would constitute a breach of the rule prohibiting unfair and unreasonable fees and may lead to disciplinary action.<sup>117</sup> Second, it may result in a finding that the client is not obliged to make payment of some or all of the disputed fee. What constitutes a “fair and reasonable” fee is determined with reference to a number of factors, including the time and effort required and actually spent by the lawyer, whether the lawyer provided special skill in rendering services and the result obtained.<sup>118</sup> In some circumstances then, a percentage fee arrangement could be successfully challenged by a client on the basis that the arrangement has resulted in a windfall to the lawyer when compared to the amount of work actually provided by the lawyer.

Lawyers making use of percentage fee arrangements should also be cognizant of the fact that the “top line” or “face” amount of a contract may not be the appropriate dollar amount on which to apply the percentage—it may be that the percentage should be calculated with reference to the amount of “compensation” contained in the contract, not the total amount payable to the artist. Recording contracts, for example, sometimes contain allocations of funds that are intended to be expended solely on the costs of recording (e.g. studio rental costs, equipment purchases, hiring of session musicians, etc.); the “commissionable” amount in such circumstances may properly be the “net” amount received by the artist after deducting recording cost allocations.<sup>119</sup> The reasonable fee parameter thus operates along two axes: whether the percentage fee charged is reasonable *on its own terms* (e.g. a 40% fee might be adjudged *prima facie* unreasonable by reference to the standard agency commission of, in the film industry, 10%)

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<sup>115</sup> See generally Dodek & Hoskins, *supra* note 4 at §10.70; see also *Solicitors Act*, RSO 1990, c S.15, ss 15–33 [*Solicitors Act*]; see also *FLSC Model Code*, *supra* note 45 Rule 3.6-2.

<sup>116</sup> See *FLSC Model Code*, *supra* note 45 Rule 3.6-1.

<sup>117</sup> Note, however, that “[l]awyers are rarely disciplined for charging excessive fees” (MacKenzie, *supra* note 58 at 25–15).

<sup>118</sup> See *FLSC Model Code*, *supra* note 45, Rule 3.6-1 and accompanying commentary. For a flavour of how high the threshold can be when determining whether a fee is unfair and unreasonable, the Canadian Bar Association’s discontinued (and non-binding) *Code of Professional Conduct* stated in its commentary to the rule on fees that a fee “will not be fair and reasonable [...] if it is one that cannot be justified in the light of all pertinent circumstances, including [...] if it] is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit” (The Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, c XI).

<sup>119</sup> Krasilovksy & Meloni, *supra* note 78 at 345–46.



and whether the percentage fee charged is reasonable *with reference to the services performed*.

Contingency fee arrangements with clients must be in writing.<sup>120</sup> Although it is unclear whether percentage fee arrangements must also be in writing, the better interpretation—in light of a lawyer’s duty of candour and the fiduciary relationship that requires “full disclosure in all financial dealings” between a lawyer and client—is that percentage fee arrangements should also be in writing.<sup>121</sup> Such written disclosure should contain an explicit delineation of the percentage amount and the sources of revenue that are, and are not, subject to the percentage fee, and the duration of the entitlement (e.g. whether the lawyer’s entitlement to share in revenues will continue after the end of the lawyer’s engagement).<sup>122</sup>

There are cogent arguments that a percentage fee arrangement itself gives rise to a conflict of interest.<sup>123</sup> The conflict can be seen in the situation where a client is considering multiple endorsement contracts: a lawyer who is providing managerial or agency services and has a percentage fee arrangement will be incentivized to counsel the client to enter into the contract worth the most money, possibly overlooking negative factors such as a conflict between the talent’s desired public image and the nature of the product being endorsed. Where the lawyer wears only a single “hat”—that of lawyer—and relies on the manager or agent to counsel the talent about which endorsement deal to take, the lawyer’s duties are more easily discharged: the manager or agent decides (in conjunction with the talent) which deal to take, advises the lawyer of the deal terms, and the lawyer works to ensure that the contract reflects the agreed-upon terms and otherwise protects the interests of the client to the maximal extent possible in the circumstances.

Fee-related matters can become further complicated in two distinct ways when lawyers engage in instrumental overlapping of legal and managerial

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<sup>120</sup> See *FLSC Model Code*, *supra* note 45, Rule 3.6-2 and accompanying commentary, which states that a lawyer, subject to compliance with any applicable legislation, “may enter into a written agreement” that provides for a contingent fee. The Ontario *Solicitors Act*, *supra* note 115, s 28.1(4) requires “contingency fee agreements” to be in writing.

<sup>121</sup> *FLSC Model Code*, *supra* note 45, Rule 3.6-1, commentary [2]; see also *ibid*, Rule 3.6-1 and accompanying commentary. See also Dodek & Hoskins, *supra* note 4 §3.180.

<sup>122</sup> See Abdo & Sahl “Professional Responsibility Primer”, *supra* note 105 at 7–8. The retainer agreement should also, of course, address the treatment of disbursements. See also *In re Estate of Glenn Miller*, 447 A2d 549 (NJ Sup Ct 1982) (Glen Miller’s former lawyer was denied a perpetual royalty equal to a third of record sales due to a failure to adequately disclose the duration of the royalty entitlement).

<sup>123</sup> See Fraley & Harwell, “The Sports Lawyer’s Duty”, *supra* note 71 at 187, 189ff.

or agency activities. The lawyer could offer legal services at a discounted hourly or flat fee rate on the basis (whether explicitly described or not) that: (a) the lawyer is being compensated at a higher rate through services rendered using a different “hat” (e.g. the lawyer agrees to provide legal services for \$50 per hour, while also being compensated for managerial or agency services at a rate of 20% of gross revenues), or (b) the lawyer is receiving compensation through a completely different mechanism, such as the lawyer being granted a co-ownership interest in music publishing or master recording rights.<sup>124</sup> The former gives rise to concerns about the reasonableness and adequacy of disclosure of the “true” fee.<sup>125</sup> The latter gives rise to concerns about the lawyer functionally carrying on business together with the client as co-venturers.<sup>126</sup>

As a final note on the topic of fees, there may also be situations in which the fee chargeable by a lawyer in his or her capacity as an agent is affected by a client’s union or guild membership. Such a situation will apply only where the client is a member of the American Federation of Musicians of the United States and Canada (“AFM”) or the US talent unions (SAG/AFTRA for actors, the Directors Guild of America, and the Writers Guild of America); Canadian talent unions, other than the AFM, do not dictate agency or managerial fees to their members. The US unions regulate agent fees indirectly by obliging their members to only accept employment from registered or “franchised” agents or by capping the fees that their members can pay to their agents. Franchised SAG/AFTRA agents are restricted to charging a maximum of 10% commission.<sup>127</sup> Franchised AFM agents are restricted to commissions of between 15 and 25%.<sup>128</sup>

#### 4. Conclusion

Lawyers can “wear multiple hats” in the sense that they can carry out, and even hold themselves out as performing, multiple non-legal roles in addition to or contemporaneously with their legal activities. However, any lawyer who does so should be mindful of two related hazards. First, lawyers must be wary of any temptation to “ethically switch hats.”<sup>129</sup>

<sup>124</sup> Krasilovsky & Meloni, *supra* note 78 at 345.

<sup>125</sup> See *supra* note 119 and accompanying text.

<sup>126</sup> See *supra* notes 85–99 and accompanying text.

<sup>127</sup> See SAG-AFTRA, “Agency Representation FAQs”, online: <[www.sagaftra.org/professional-representatives/agency-representation-faqs](http://www.sagaftra.org/professional-representatives/agency-representation-faqs)>.

<sup>128</sup> See *supra* note 108. Agents are generally restricted to commissions between 15% and 20%, however an agent who also has a personal management relationship with an AFM member, and whose management contract has been filed with and approved by the union, can charge up to an additional 5% commission.

<sup>129</sup> O’Brien, *supra* note 1 at 507, quoting David Baskerville, *Music Business Handbook and Career Guide*, 3rd ed (Los Angeles: Sherwood, 1982) at 162–63.

Another way to articulate the point is to say that while lawyers can perform multiple talent advisory roles by changing their metaphorical hats, they cannot remove their ethical underclothes—a lawyer is obliged to abide by his or her professional ethical obligations irrespective of which function (legal, managerial, agency) he or she is performing. To adapt an adage: a lawyer is a lawyer is a lawyer.<sup>130</sup> Whether an entertainment lawyer provides managerial or agency services only incidentally, or does so explicitly and instrumentally, the lawyer’s ethical duties constrain his or her behaviour. Secondly, a lawyer who performs multiple personal advisory roles for the same client must be wary of becoming so closely involved with the client’s undertakings—so deeply enmeshed in the client’s activities and so intimately tied to their revenue-generating capacity—that the lawyer may lose the necessary “distance” from the client required to offer dispassionate advice.

There are multiple possible approaches to the problems faced by entertainment lawyers described in this article. One is to act solely and exclusively as a lawyer for clients.<sup>131</sup> While superficially attractive, there remains a latent concern that, for reasons described in this article, it is often difficult, if not impossible, to cleanly “silo” activities, particularly with respect to the managerial function.<sup>132</sup> Another alternative is to play only one role for any given artist—thus a lawyer may be legal counsel to Artist A, and manager to Artist B, but Artist B will be required to retain separate legal counsel.<sup>133</sup> The final option is to approach any performance of managerial or agency functions with respect to the same client only through overlapping or separated structures as described in Part II, above. Since the problem is, by its nature, complex and variegated, there are inevitably risks to a lawyer’s compliance with his or her professional ethical obligations in undertaking managerial or agency activities on behalf of a client. Those risks are amplified by the extent to which there is overlap between the clients and the structures through which such activities are carried out.

None of the discussion in this article should be taken to mean that entertainment lawyers *cannot* or even *should not* act as managers or agents, even for clients for whom they concurrently provide legal services. However, it behooves lawyers who are undertaking such activities to do so only following ample disclosure to—and consent from—their client, and only with the utmost caution and a vigilance that should be constantly maintained. It may be, in light of the attendant risks, that such “multiple hats” scenarios are best reserved for seasoned practitioners who have

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<sup>130</sup> Gertrude Stein, “Sacred Emily” (1913), collected in *Geography and Plays* (Boston: Four Seas Co, 1922) (“a rose is a rose is a rose”).

<sup>131</sup> Cole-Wallen, *supra* note 1 at 525–26.

<sup>132</sup> See discussion in Part II, *above*.

<sup>133</sup> See Cole-Wallen, *supra* note 1 at 526.

developed the practical and ethical sensitivities needed to identify looming ethical concerns and who have adequate support networks of colleagues, peers and mentors who can be called upon for counsel and advice when a conflict with professional ethical obligation(s) looms. Due to the nearly infinite variety of circumstances in which an entertainment lawyer can find themselves, which feature some of the ethical risks discussed in this article, “bright line” tests are impossible to formulate. Perhaps the best advice for entertainment lawyers who represent talent is to be sensitive to the risks, to cultivate an attitude of independence<sup>134</sup> and to constantly self-diagnose for situations of ethical compromise.

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<sup>134</sup> See Gordon, *supra* note 95 at 31 ff.