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Conflicts for Sports and Entertainment Attorneys: The Good News, the Bad News, and the Ugly Consequences

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I. INTRODUCTION

The good news for some sports and entertainment attorneys is that representing multiple clients in a single transaction or in several related transactions is not necessarily unethical, unsavory, unprofessional or impossible. The bad news is, it can be all of the above. The ugly consequences arise when attorneys fail to prepare themselves and their clients for multiple representations that carry potential conflicts of interest.

Attorneys are often unprepared for these representations because they assume that they are somehow immune from such conflicts or that they are protected by a simple conflict of interest waiver letter. It is true that multiple-client representations do not necessarily violate ethical rules. However, clearing the conflicts inherent in such representations with nothing more than a simple waiver letter may not satisfy ethical requirements if the representation is challenged. This article proposes that an attorney can obtain adequate protection not from a waiver letter, but rather from the process of explaining his role as a multiple-client representative and by obtaining the clients' informed consent. During that process, the attorney must meet with the clients to determine whether the clients and their interests present conflicts of interest which render multiple-client representation inappropriate. To that end, this article provides a brief review of the ethical rules governing attorney representation of multiple clients in a single or related

1. See Richard E. Flamm & Joseph B. Anderson, Conflict of Interest in Entertainment Law Practice, Revisited, 14 Ent. & Sports Law. 3 (1996) (noting erroneous perception among some entertainment attorneys that they do not need any waivers or only need conflict letter, and recounting several instances in which attorneys have been sued for engaging in conflicting representations without proper disclosure, waiver or consent).


3. See, e.g., Model Rules Rule 2.2 (1995) (requiring attorneys to consult each client about common representation and to assess feasibility of serving all client interests in such representation. For the text of Rule 2.2, see infra note 37 and accompanying text).
transactions and suggests a process for cautiously avoiding inherent conflicts.

Section II provides a brief review and discussion of the relevant rules and terminology pertinent to multiple-client representation. Section III discusses the preparation attorneys should make when considering representation of clients with potential or actual conflicts of interest. Section IV discusses the client consultation requirements and offers suggestions for informing the client about how his or her representation is affected when the attorney represents multiple clients. Section V provides suggestions about the actual conflict consent or waiver letter.

II. The Rules Related to Representing Multiple Parties

As of June 1997, forty-one jurisdictions base their ethical standards for attorney behavior regarding conflicts of interest and multiple-client representation on the Model Rules of Professional Conduct (Model Rules), drafted by the American Bar Association (ABA). The remaining jurisdictions base their rules regarding conflicts of interest on the ABA Model Code of Professional Responsibility (Model Code) or on ethical standards which track neither the Model Code nor the Model Rules. Whether based on the Model Rules or on the Model Code, individual jurisdictions

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4. For a discussion of the relevant rules and terminology pertinent to multiple-client representation, see infra notes 8-50 and accompanying text.

5. For a discussion of the preparation attorneys should undergo when considering representation of clients with potential or actual conflicts of interest, see infra notes 51-86 and accompanying text.

6. For a discussion of the client consultation requirements and for suggestions on informing the client about the changed nature of representation in multiple-client representations, see infra notes 87-143 and accompanying text.

7. For suggestions about the actual conflict consent or waiver letter, see infra notes 144-91 and accompanying text.


9. See Compendium 517, at 7-8 (1997) and inside back cover. Other states, like New York, base their ethics rules on the Model Code of Professional Responsibility, which was the predominant source for ABA standards of ethical conduct between 1969 and 1983. See id. at inside back cover. California has adopted ethical standards which do not track the Model Rules or Model Code. See id.
often modify the ABA language when their local ethics rules are enacted.10

Under the Model Rules, Rule 1.7 addresses conflicts of interest generally and describes the circumstances under which conflicting representations can be undertaken.11 Rule 1.8 limits an attorney's participation in business transactions which are adverse to a client's interests.12 Rule 1.9 addresses conflicts involving former clients and limits an attorney's ability to represent new clients in matters which directly conflict with former clients' interests.13 Rule 2.2 describes the circumstances under which an attorney may accept common representation of two or more clients in a single transaction or several related transactions.14 Rule 2.2 identifies an attorney's role in such representations as an intermediary between clients and, without specific definition, refers to this type of representation as "intermediation."15

10. See id. at 10. According to the Compendium:
The Model Rules are intended to serve as a national framework for implementation of standards of professional conduct . . . . Undoubtedly, there will be those who take issue with one or another of the Rules' provisions . . . . [T]he Model Rules, like all model legislation, [was expected to be] subject to modification at the level of local implementation.

Id. at 10.


12. See Model Rules Rule 1.8 (1995). Rule 1.8 provides in part:
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 interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; 
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and 
(3) the client consents in writing thereto.

Id.

13. See Annotated Model Rules Rule 1.9. Rule 1.9 provides in part:
Conflict of Interest: Former Client
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.


Unlike the Model Rules, the Model Code did not specifically address multiple-client representation. Sections DR 5-105(A), (B) and (C) of the Model Code govern conflicts encountered prior to, or in lieu of, a state's adoption of the Model Rules. Notwithstanding these Model Code provisions, Model Rules 1.7 and 2.2 have been identified as the most relevant for examination of multiple-client representations; therefore, they are the focus of this discussion.

Model Rule 1.7 directly applies to general conflicts of interest between current clients, when intermediation is not selected. In addition, Rule 1.7 supplements Rule 2.2 in guiding the attorney's decisions in determining which types of clients and transactions should not be considered for intermediation. Model Rule 2.2 was specifically drafted to address intermediation, referring to it as a special type or "special case" of multiple-client representation. The comments to Rule 2.2 describe the special nature of intermediation.

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16. See id. commentary at 275. The comments to Rule 2.2 indicate there was no MODEL CODE counterpart to Rule 2.2, but reference Ethical Consideration EC 5-20 and DR-105 of the MODEL CODE. See id.

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

COMPENDIUM 210 (footnotes omitted).

DR 5-105(C) states that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Id. In addition, DR 5-101(A) states, "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Id. at 208.

18. See John S. Dzienkowski, Lawyers As Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession, 1992 U. ILL. L. REV. 741, 763 (1993) (identifying Rules 1.7 and 2.2 as most relevant to multiple-client representation). As previously noted, California's ethics rules track neither the Model Rules nor the Model Code. See COMPENDIUM 7-8 and inside back cover. California does not have a rule specifically addressing lawyers as intermediaries. See id. However, California's Rules of Professional Conduct Rule 3-310 prescribes the consultation and consent process for attorneys representing two or more clients with potential or actual conflicts. See CAL. RULES OF PROF'L CONDUCT Rule 3-310 (1997).


ated representation as "common representation." The comments further note that the Rule's drafters might have used the term "common representation" to emphasize the commonality of interest that is required of clients in intermediated representation. Common interests among intermediation clients also distinguishes intermediation from other conflict situations.

According to Rules 1.7 and 2.2, an attorney may proceed with conflicting representations or intermediations only after obtaining the clients' consent and only if she "reasonably believes" that none of the clients' interests is likely to be compromised by the representation. However, this admonition in the Rules is misleadingly simply because it essentially ignores the possibility that the attorney's judgment may be clouded when evaluating the clients' conflicting interests. Moreover, it provides no hint of how complex the consent to conflict process can be.

Sports and entertainment attorneys frequently encounter representations where the conflicts associated with multiple-client representation are subtle and appear insignificant when the representation is first considered. In reality, sports and entertainment transactions are often complex and involve clients occupying disparate positions. For example, attorney Peter L. Haviland recently noted that multiple-client entertainment transactions are so complex that using a standard letter for clearing such conflicts is virtually useless.

These Rules fail to adequately distinguish intermediation from other, more traditional attorney-client relationships. Indeed, Rule 2.2 is mysteriously devoid of a definition of intermediation, which would assist practitioners in distinguishing intermediation from

22. See Model Rules Rule 2.2 cmt. 1 (1995). In acting as an intermediary, the lawyer seeks to "establish or adjust a relationship between clients on an amicable and mutually advantageous basis . . . ." Id. cmt. 3.


24. For a comprehensive history of the development of Rule 2.2, see generally Dzienkowski, supra note 18.


27. See Peter L. Haviland, Presentation at the Black Entertainment and Sports Lawyers Association (BESLA) 17th Annual Conference (Oct. 30, 1997). Mr. Haviland, a partner practicing entertainment law at the Los Angeles office of Kaye, Scholer, Fierman, Hays & Handler, was a featured speaker on BESLA's program entitled Unique Legal and Ethical Issues Facing Sports and Entertainment Attorneys. See id.
more traditional conflicts under Rule 1.7.\textsuperscript{28} The Rules also fail to provide sufficient guidelines in evaluating a potential multiple-client representation, consulting with the clients, and documenting the attorney-client agreements prior to accepting and commencing the work.

A better process for clearing conflicts requires the attorney to focus more attention on the characteristics of the transaction and the clients who will be involved in the intermediation if, after evaluating these characteristics, all agree that intermediation is appropriate. Both Rules 1.7 and 2.2 have been criticized for not providing enough assistance to the attorney during this evaluation process.\textsuperscript{29} Nonetheless, it is important to understand Model Rules 1.7 and 2.2 because courts rely on them, to varying extents, as the basis for evaluating the attorney’s performance if a dispute arises between an attorney and her clients.\textsuperscript{30} Therefore, a preliminary review of the Rules is appropriate.

A. Model Rule 1.7

Model Rule 1.7 provides a general standard for lawyers analyzing the propriety of representing multiple clients with adverse interests.\textsuperscript{31} Under Rule 1.7, lawyers can proceed with the representation

\textsuperscript{28} For discussion of a proposed definition of intermediation, see infra notes 59-60 and accompanying text.

\textsuperscript{29} See Dzienkowski, supra note 18, at 763-78 (noting that Rule 2.2 fails to address fundamental issues about multiple-client representation).

\textsuperscript{30} Compare Kizer v. Davis, 369 N.E.2d 439, 444 (Ind. 1977) (quoting Model Code’s preliminary statement distinguishing violation of Model Code’s Disciplinary Rules, which calls for liability, from violation of Ethical Considerations, which is merely aspirational in character) with Committee on Prof’l Ethics v. Behnke, 276 N.W.2d 838, 840 (Iowa 1979) (noting that lawyers should view Canons as professional obligations, not aspirations, and that violation of Ethical Consideration warrants liability). The Kizer court held that only a violation of a Disciplinary Rule, and not a violation of a Canon or Ethical Consideration, will lead to liability. See Kizer, 369 N.E.2d at 444. The Behnke court held that a violation of an Ethical Consideration will lead to liability. See Behnke, 276 N.W.2d at 840.

\textsuperscript{31} See Rule 1.7, which states:

Conflict of Interest: General rule

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

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

(2) each client consents after consultation.

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

(1) the lawyer reasonably believes the representation will not be adversely affected; and
of multiple clients if they "reasonably believe" the representations will not be adversely affected. Rule 1.7 is intended to provide the attorney with guidance as to which types of conflicting representations are appropriate to pursue. However, the comment to Rule 1.7 provides a difficult standard for an attorney to satisfy in determining whether it is appropriate to "reasonably believe" that he can accept the conflicting representation or request that the client consent to the conflict. Basically, it states that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of a client's consent." This standard presumes that any attorney with interests in multiple clients and a potential role in multiple representations can be completely impartial in evaluating whether it is proper to seek consent to the conflicting representations. Therefore, the attorney should be alert about issues which arise while obtaining the client's consent. Awareness of these issues will help the attorney and the clients make an informed decision as they proceed in the consent process.

B. Model Rule 2.2

Model Rule 2.2, which specifically contemplates dual or multiple representation, uses the same "reasonable belief" standard as Model Rule 1.7 for analyzing when multiple-client representation is appropriate. Model Rule 2.2 was drafted, however, to more specifically address conflict situations in which the clients' interests, though different, were not actually conflicting.

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


32. See id.; see also Kevin McMunigal, Rethinking Attorney Conflict of Interest Doctrine, 5 Geo. J. Legal Ethics 823, 851 (1992). McMunigal describes the "obvious" language of DR 5-105 and the "reasonably believes" language of Rule 1.7 as inadequate tests for determining the line between consentable and nonconsentable conflicts. See McMunigal, supra, at 871-72.

33. See Model Rules Rule 1.7 cmt. 5 (1995) (indicating that it is improper for lawyer to seek consent to proceed with representations that are directly adverse and those which materially limit lawyer's representation of other clients).

34. See id. cmt. 1.

35. Id. cmt. 5.

36. See id. Rule 2.2.

37. See Annotated Model Rules Rule 2.2 cmt. (1983). Rule 2.2 states:

(a) A lawyer may act as intermediary between clients if:
Rule 2.2 permits attorneys to accept representation of multiple clients where a potential conflict of interest exists by virtue of the multiple representations, provided the conditions set forth in the Rule, primarily consultation and consent, are satisfied. Model Rule 2.2 contains essentially the same precautions for representing conflicting interests as those stated in Model Rule 1.7. Rule 2.2, however, requires attorneys to perform a more detailed analysis of whether the clients' situation is appropriate for intermediation than does Rule 1.7.

For example, Model Rule 2.2 requires attorneys to inform clients about the implications of retaining the attorney as an intermediary. This Rule mandates that the attorney explain the advantages, risks and effects that the intermediation will have on privileged communications and confidentiality for all clients. The Rule's comments caution the attorney to explain his non-partisan

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

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

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

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

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


39. See Hazard & Hodes, supra note 38, at 201.


42. See id.
role between the clients and that the clients, as a result, will have more responsibility in making decisions.43

When assessing whether to act as intermediary between clients, the attorney is guided by Rule 2.2's prohibition on accepting intermediation in certain situations.44 However, those admonitions offer guidance only for situations in which intermediation is "plainly impossible."45 According to the Rule, those situations are limited to "contentious litigation," "contentious negotiation" and situations where "definite antagonism" already exists.46 Sports and entertainment attorneys are likely to encounter multiple-client representations where none of these noted situations exist but where, upon close examination, intermediation is clearly inappropriate. Indeed, in some transactions, the conflicts that make intermediation so impractical are viewed as a conduit for putting the deal together.47

Model Rule 2.2 also presents attorneys with a delicate balancing act with respect to confidentiality and privileged communications. The Comments to Model Rule 2.2 suggest that the attorney "keep each client adequately informed" and simultaneously "maintain confidentiality of information relating to the representation."48 One Comment admonishes, "if the balance cannot be maintained, the common representation is improper."49 The obvious problem with this admonition is that keeping one client informed may simultaneously jeopardize the attorney's duty of confidentiality to the other client. Absent detailed discussion, the attorney is not likely to know in advance that a proper balance cannot be maintained. The first indication of a balancing problem may not be seen until tensions arise between keeping one client informed and preserving the other client's confidence. Therefore, the attorney may become aware of the problem when it is too late to avoid it.

Finally, the Rule 2.2 Comment states that the intermediating lawyer should explain to each client that her representation will be non-partisan and not involve the type of advocacy which the client

43. See id. at cmt. 8.
44. See id. at cmt. 4.
45. See id. at cmt. 8.
47. See, e.g., Corie Brown, That's Entertainment, Cal. Law., June 1993, at 41 (noting opinion that clients seek out attorneys because of their conflicting connections); Barbara S. Wahl, Representation of Athletes, 11-SPG ENT. & SPORTS LAW. 18, 19 (1998) (indicating that young athletes sometimes pick agents based on contacts and clout in sport).
49. Id. Comment 6 also notes the predominant view that no attorney-client privilege attaches among clients in multiple-client representations. See id.
would "normally expect." A better practice when consulting with clients is to explain the nature of the representation that they will receive in intermediation, rather than to inform them what they should not expect.

Thus, like Rule 1.7, Model Rule 2.2 provides some basis for considering multiple-client representations or intermediation. However, neither Rule provides much assistance for actually clearing the conflicts and establishing an appropriate relationship between the attorney and the multiple clients which complies with the Rules. Moreover, a waiver letter is of little value if a dispute arises between a client and attorney in these circumstances because Rules 1.7 and 2.2 state that some conflicts cannot be waived, even with client consent. Therefore, the first goal of the waiver process should be to identify where consent is deemed appropriate. The second goal should be to obtain informed consent from clients regarding intermediated representation which is not otherwise inappropriate or prohibited. The following sections address the preparation of the attorney, the clients and the documents for multiple-client representations.

III. ATTORNEY PREPARATION FOR MULTIPLE REPRESENTATIONS

Adequate thought and preparation for a new case or representation should not be a foreign concept for any attorney. However, multiple-client representation raises a number of unique issues that warrant special consideration. Unlike the typical attorney-client relationship, multiple-client representations remain controversial when compared to traditional representations, even though they are recognized in the Model Rules. The ability of clients to truly understand the implications of multiple-client representation when potential conflicts of interest exist has also been debated.

An important part of appropriately handling conflicting representations is to develop the proper attitude toward conflicts. Even attorneys who feel confident in their ability to handle multiple rep-

50. Id. at cmt. 8.
51. For a discussion of these issues, see infra notes 58-86 and accompanying text.
52. See Developments in the Law, supra note 8, at 1247 (noting debate over propriety of lawyers representing clients with conflicting interests has been raging since inception of rules prescribing ethical attorney conduct).
53. See id. at 1247 n.3 (noting longstanding debate about whether client can meaningfully consent to representation by lawyer with conflicting interests); see also Report of the 16th Annual Meeting of the Pennsylvania Bar Association 156, 165 (1910) (suggesting elimination of option for clients to consent to conflicts).

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resentations should exercise extreme caution before doing so.\textsuperscript{54} In engaging in multiple-client representations, an attorney’s subjective belief that she can represent multiple clients is not enough to support her decision to proceed.\textsuperscript{55} The unique nature of the representation warrants reflection and caution.\textsuperscript{56} Caution is also warranted by the fact that some courts disfavor multiple-client representations.\textsuperscript{57} Therefore, even if multiple-client representations are an attorney’s daily fare, each representation should be treated and regarded as unique. The following subsections highlight some of the unique features that need consideration.

A. Defining the Relationship

As previously noted, Model Rule 2.2 describes when an attorney may act as an intermediary, but contains no definition of intermediation.\textsuperscript{58} For purposes of this article, intermediation is “a special type of attorney-client relationship in which one lawyer seeks to adjust the rights and responsibilities or resolve a dispute between or among two or more clients with potential conflicts of

\textsuperscript{54} See Robert H. Aronson, \textit{Conflict of Interest}, 52 Wash. L. Rev. 807, 826-27 (1977). In describing the degree of caution that should be used, Mr. Aronson explained,

It is of the utmost importance that the attorney representing both parties to a transaction reflect upon the rationales behind conflict of interest proscriptions. It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or helpful to the other, and the possibility that a court will subsequently disagree with the attorney’s decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

\textit{Id.} (footnotes omitted).

Even after undertaking multiple-client representations, the attorney should continue to exercise extreme caution.

The lawyer may see his role as counselor or negotiator for all concerned. At a minimum, the attorney must ensure that each understands the potential conflicts and their consequences, particularly the potential necessity for him to withdraw from representation of one or both and his inability to use confidences received from any of the parties in a subsequent suit between them. . . . If the parties have not clearly understood the lawyer’s ethical responsibilities ab initio, the ensuing rancor may be directed toward him.

\textit{Id.} (footnotes omitted).

\textsuperscript{55} See \textit{id}.

\textsuperscript{56} See \textit{id}.

\textsuperscript{57} See, e.g., In Re Conduct of Jans, 666 P.2d 830, 833 (Or. 1983) (stating that no amount of disclosure could make representation of conflicting interests proper).

\textsuperscript{58} See \textit{Model Rules} Rule 2.2 (1995).
interest where the clients mutually agree to forego partisan representation by separate attorneys.\textsuperscript{59} The lawyer, as intermediary, is not an arbitrator or mediator but is a mutual advocate of the clients as long as they agree to pursue mutual or consistent goals.\textsuperscript{60} This definition is not a part of the Rules nor any court's precedent. It is important, however, in identifying several issues which distinguish intermediation as a special type of attorney-client relationship.

Under this interpretation of intermediation, the clients mutually agree to forego partisan representation by separate attorneys. This is noteworthy when consulting with the clients and drafting the agreement to proceed with intermediated representation. A second idea introduced by this definition is that the attorney serves as a mutual advocate of the clients' consistent goals. Thus, an attorney involved in multiple-client representations should be aware of indications that the clients' goals may be diverging. If the clients become antagonistic in their desired outcomes, the attorney may have to withdraw.\textsuperscript{61}

In defining intermediation and distinguishing it from traditional representation, attorneys should also consider whether the situation is appropriate for intermediation. By considering whether or not the situation is appropriate for intermediation, the attorney may be alerted to issues which need to be considered before the consultation and consent process with the client is initiated. This analysis may also reveal impermissible conflicts which would preclude intermediation.

B. Defining the Client

In addition to defining intermediation, multiple-client representations should be further distinguished from traditional attorney-client relationships by defining the intermediation client. Justice Brandeis first characterized the difference between single versus multiple-client representations as a difference in the client


\textsuperscript{60} See id.

\textsuperscript{61} See Model Rules Rule 2.2 (1995). The Rule states in paragraph (c):

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

\textit{Id.}
when he coined the phrase "lawyer for the situation."62 In doing so, he recognized that a lawyer representing multiple clients in a single transaction does not merely represent the individual clients.63 Rather, the attorney's representation encompasses the clients and their unified goals or "situation."64 Therefore, the intermediation client is comprised of the individual clients who pursue mutual or compatible goals.65 Such a definition acknowledges that the attorney is representing individual clients. Simultaneously, it signals that the representation is appropriate only as long as the clients' goals and interests are consistent. As a result, the attorney must explain that he could be forced to withdraw from representation if conflicting interests emerge during the intermediation.66

C. Analyzing the Transaction

Professor Geoffrey Hazard identified four factors of a transaction, which he referred to as a "bargaining relationship," which could be evaluated during consideration of a multiple-client representation.67 These factors are: 1) the amount of money involved in the transaction; 2) whether open-ended bargaining was involved in the negotiations; 3) the bargaining style of the parties to the transaction; and 4) whether significant changes in the circumstances were likely to occur during the execution of the final agreement.68 Specifically, Professor Hazard analyzed these factors to distinguish "bargaining relationships" that are appropriate for multiple-client representation from those which are not.69 Thus, for an attorney contemplating intermediation, the intermediated representation may be further distinguished from traditional lawyering by considering the analysis of Professor Hazard, who contemplated the multi-

62. See Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 58-68 (1978) (noting "that a lawyer serving more than one client in a single transaction represents 'the situation'").
63. See id.
64. See id.
65. See Walton, supra note 59, at 863 ("The lawyer, as intermediary, is not an arbitrator or mediator but is a mutual advocate of the clients as long as they agree to pursue mutual or consistent goals.").
66. See Model Rules Rule 2.2(c) (1995). For the text of Rule 2.2, see supra note 37.
67. See Hazard, supra note 62, at 74-76.
68. See id.
69. See id. at 74. "[S]ome bargaining relationships involve irrepressible conflicts of interest between the parties involved . . . . The propriety of a lawyer's conduct in representing 'the situation' turns on distinguishing one kind of bargaining relationship from the other, but the distinction is often not very clear." Id. These four factors help the attorney make the distinction. See id. at 74-76.
ple-client representation long before Model Rule 2.2 on intermediation was drafted.70

It is not clear whether Professor Hazard specifically intended these factors to serve as guideposts for an attorney evaluating a potential representation.71 However, these factors would provide beneficial guidance during the preliminary stages of a prospective intermediation if the attorney used them as a backdrop for evaluating the characteristics and information received during the disclosure and consent procedure. Unlike the Model Rules and Model Code which focus on the ultimate result or impact of the conflicts on the clients’ representation, these factors emphasize the characteristics of the transaction that the parties will pursue.

1. The Amount of Money Involved in the Transaction

Professor Hazard noted that parties to a transaction can more easily justify hiring separate counsel when large amounts of money are involved in the transaction. However, reduced attorneys’ fees is not the primary reason parties choose multiple-client representation in many sports and entertainment transactions.72 The primary motivation for most multiple-client representations is a perception that the attorney has a special relationship with one or both parties that will facilitate the transaction between the intermediating clients.73 Nonetheless, for purposes of evaluating the representation, attorneys should be aware that transactions involving large sums of

70. See Hazard, supra note 62, at 58-86.
71. Professor Hazard was the Reporter to the ABA Commission on Evaluation of Professional Standards (Kutak Commission), that drafted Rule 2.2. See Dziekonski, supra note 18, at 763 (noting that Hazard was influential in drafting Rule 2.2). The four factors, or their implications, are not apparent in the Rule’s text. See Model Rules Rule 2.2 (1995). The comments contain a discussion of “contentious negotiations” which are similar to Hazard’s discussion of bargaining style, but this similarity may be coincidental. See id. at cmt. 4.
72. See Flamm & Anderson, supra note 1, at 3 (indicating that many artists and entertainers choose their attorney based on who attorney knows); see also Brown, supra note 47, (quoting Georgetown University Law Center Professor Carrie Menkel-Meadow: “Clients want these lawyers precisely for these conflicts . . . .”); Edwin F. McPherson, Conflicts in the Entertainment Industry? . . . Not!, ENT. & SPORTS Law., Winter 1992, at 5 (quoting unidentified attorney who stated, “the only reason for which many potential clients come to the more established entertainment firms is because of the firm’s inherent conflicts (and therefore connections), not in spite of them.”); Michael D. Harris, Conflicts: A Boutique Problem?, L.A. DAILY J., Jan. 11, 1993, at 15 (quoting Michael S. Sherman, attorney at Century City-based Jeffer, Mangels, Butler & Marmaro as saying, “[T]here’s a general idea in the entertainment industry that one goes to a boutique because of the clients they represent, in the hope that the lawyers will introduce one client to another client and create something as a result.”).
73. See Flamm & Anderson, supra note 1, at 3.
money may be more complex, have longer anticipated durations and may result in changing circumstances between the intermediating parties. Professor Hazard noted all of these as factors which can make a transaction involving large sums of money ill-suited for common representation.\textsuperscript{74}

2. \textit{Whether Open-Ended Bargaining Is Part of the Transaction}

Professor Hazard also noted that when clients expect that their final agreement will be the result of open-ended bargaining, the transaction may be inappropriate for what we now call intermediation.\textsuperscript{75} Open-ended bargaining refers to a transaction in which the final terms of the agreement will be negotiated at arms-length by the parties.\textsuperscript{76} Hazard noted that one characteristic of this arms-length bargaining process is the element of bluffing, which he defined as "a pretense of intractability masking an undisclosed degree of willingness to make a concession."\textsuperscript{77} Hazard observed that a lawyer representing both parties to a transaction could not represent them during such an arms-length negotiation because he would know each party’s presumably undisclosed final position, which would make bluffing impossible.\textsuperscript{78} It is conceivable that a lawyer who knows each party’s willingness to compromise could thereby more easily find their common ground. In a process or transaction involving bluffing, however, neither client would normally expect that his opponent’s attorney would be in a position to know that a stated position was only a bluff.\textsuperscript{79}

Here again, there is an issue as to whether the attorney can represent all parties in such an open-ended bargaining transaction and, if such a representation is undertaken, what level and type of disclosure is necessary before the clients can agree that one attorney can represent all concerns. This problem may be self-correcting because disclosing the impact of intermediated representation on the prospect of open-ended bargaining may result in one or both clients deciding that separate representation is necessary.\textsuperscript{80}

\textsuperscript{74} See Hazard, supra note 62, at 76.
\textsuperscript{75} See id. at 73-76.
\textsuperscript{76} Id. at 75.
\textsuperscript{77} Id.
\textsuperscript{78} See id.
\textsuperscript{79} See Hazard, supra note 62, at 75 (noting that it is obvious that one attorney cannot represent both parties when bluffing is involved).
\textsuperscript{80} See id. (noting that parties who "engage in a contentious struggle characterized by posturing" are less likely to accommodate conflicting representation); see also Model Rules Rule 1.7 (1995) (stating that lawyer must disclose impact of
Another option for resolving this issue is for neither party to disclose its ultimate bargaining position to the intermediating attorney.\textsuperscript{81} However, the parties' unwillingness to fully disclose terms and issues related to the transaction to each other or the attorney has been considered by some commentators to raise a situation in which intermediation should be approached with caution, if at all.\textsuperscript{82} Other commentators, in contrast, suggest that clients should have the option of making less than full disclosure during the intermediation.\textsuperscript{83} An intermediation involving limited disclosure would require that all parties fully understand that they reserve the right to withhold information for the purpose of negotiation from the common attorney and to disclose only that negotiating information as they see fit.\textsuperscript{84} 

3. \textit{The Bargaining Style of the Parties}

Professor Hazard discussed bargaining style from the perspective of the clients during the representation.\textsuperscript{85} From the perspective of evaluating the clients and the situation, it may be beneficial to consider the respective clients' level of sophistication. A client who is new to the sports or entertainment business, particularly the athlete or performer, may know little about the issues and negotiating points in the transaction.

Pairing such a client with an experienced insider for an intermediation creates a problem for both clients. Providing more information for the uninformed client should help that client understand the value of key negotiating points. For example, a musician would benefit from knowing not to freely sign away the copyrights in her music. That information arguably has the inverse effect on the established insider. The attorney, therein would be promoting one client's interest to the detriment of the other client's interest. This type of conflict is specifically proscribed under conflict on representation of each client). For the text of Rule 1.7, see supra note 31.

\textsuperscript{81} See, e.g., Dzienkowski, supra note 18, at 811 (discussing various agreements to keep certain information confidential during intermediation).

\textsuperscript{82} See id. at 813 (noting that lawyers should be cautious about agreeing to confidentiality agreements in intermediation); see also I GEOFFREY C. HAZARD, JR. & W. WILLIAM HODGES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 2.2 515 & n.1 (2d ed. Supp. 1992) (noting that any party balking at sharing confidences is an indication that multiple representation should not be attempted).

\textsuperscript{83} See Pennell, supra note 40, at 742; see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 729 (1986).

\textsuperscript{84} See Pennell, supra note 40, at 742; see also Wolfram, supra note 84.

\textsuperscript{85} HAZARD & HODGES, supra note 62, at 75.
Rule 1.7(b). Yet, if the seasoned client is willing to forego the information advantage, the result could be a less one-sided transaction which may promote a better long-term relationship between the parties. The real issue is confirming that both parties understand the conflict and consent to the attorney sharing the information with the novice client.

4. The Possibility That Circumstances Will Change

In an industry where overnight sensations are frequently here today and gone tomorrow, the potential for conflicts resulting from changing circumstances is great. Committing an unknown talent to a long-term deal could be disastrous for the performer if the deal does not account for the possibility that the unknown talent may become a sensation in short order. Conversely, the budding superstar may never quite bloom. This can be a problem for an owner committed to an expensive, long-term contract. Therefore, the clients must be fully informed of the risk and consent.

By considering these factors and understanding that intermediation is fundamentally different from other representations, the attorney can be better prepared from the outset. Thus, when first consulting with the clients prior to beginning the intermediation, the attorney will be ready for the issues and processes that are likely to occur or are expected by the clients during the intermediation. These considerations do not replace an attorney’s professional judgment. Rather, they provide the analytical foundation upon which to base “reasonable beliefs” that the representation can proceed without sacrificing any client’s interest. By distinguishing intermediation from traditional partisan representation and providing perimeters for evaluating prospective intermediation clients and transactions, attorneys can better counsel their clients when seeking their consent for a potential intermediated representation.

86. See Model Rules Rule 1.7(b) (1995).
87. See Flamm & Anderson, supra note 1, at 5 (noting that changes in circumstances may obviate client’s prior consent to anticipated or existing conflict, if change in circumstances alters prior conflict or raises new issues not subject to first waiver); see also Model Rules Rule 2.2(b) (1995) (indicating that while acting as intermediary, attorney has continuing duty to consult with clients so they will understand implications of their decisions during intermediation).
IV. Client Consultation, Disclosure, and Consent to Conflicts

Whether the Model Rules, the Model Code or another variant applies, the ethics rules uniformly dictate that multiple party representations proceed only after the attorney consults with the clients and obtains consent to the conflicting representation.88 It should be noted, however, that while the Rules suggest a qualified tolerance of conflicting representations, client consent to conflicting representations is a source of tension for commentators and drafters of ethics rules.89 The difficulty lies in balancing the client’s right to select counsel against the legal institution’s interests in maintaining high ethical standards, to avoid the appearance of impropriety inherent in multiple-client representations.90

Historically, the primary obstacle to resolving this issue has been “the lack of a meaningful standard for limiting client attempts to waive a conflict of interest.”91 The onus for limiting client consent to conflicts has typically fallen on the individual attorney, who must decide whether to solicit consent or reject the business when presented with a conflicting representation.92 The ethics rules have been criticized as ambiguous in defining when attorneys may seek consent to conflicting representations.93 These rules, however, are consistent in their prescription that representation proceed only after consultation and client consent.94

88. See, e.g., COMPENDIUM 208-10 (discussing lawyer’s obligations in conflicting representations under DR 5-105); MODEL RULES Rules 1.7-1.9, 2.2 (1995).
89. See Developments in the Law, supra note 9, at 1247 n.3.
92. See MODEL RULES Rule 2.2(a), (c) (1995).
93. See generally Dzienkowski, supra note 19.
94. For further discussion of the consultation and consent requirement, see infra notes 97-109 and accompanying text. See also MODEL RULES Rule 2.2 cmt. 8. Comment 8 states that,

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances.

Id.
A. Consultation and Consent — Generally

Under the Model Rules, when an attorney "reasonably believe[s] that the client will not be adversely affected,"95 he may proceed with a conflicting representation only if the client "consents after consultation."96 Consultation is defined in the Model Rules as the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."97 Courts have held that consultation shall also include "explanation of the implications of the common representation and the advantages and risks involved."98 Merely informing a client that a conflict exists is not sufficient to establish consultation.99 Likewise, oral consultation without a written consent is considered unsatisfactory.100 Moreover, absent adequate consultation there can be no consent.101

The significance of securing adequate consent after fully disclosing all of the implications of a conflicting representation was underscored in In re Shannon.102 In Shannon, the court held that it need not consider whether the attorney was reasonable in accepting the representation, because the consent was improper as a result of insufficient disclosure.103 What constitutes full and complete disclosure will necessarily be determined by the circumstances and tailored to the level of sophistication and experience of the

98. In Re Shannon, 876 P.2d 548, 556 (Ariz. 1994) (adopting wording of Ethical Rule 1.7(B)).
99. See, e.g., In Re Shannon, 876 P.2d at 558. The Shannon court stated that, "[a] mere mention of the possibility of a conflict of interest, without more, is not sufficient to meet the requirements of the ethical rules." Id.
101. See Conrad v. Rood, 862 S.W.2d 312, 314 (Ky. 1993). The court held, "[t]here was no consent after consultation, because there was no consultation, nor could there be under the circumstances here presented. There could be no consent because McKinstry had an obligation under the rule to withdraw from representing both." Id.
102. See In Re Shannon, 876 P.2d at 558. In Shannon, the attorney informed client A of the possibility of a conflict of interest arising, and that in such event he could no longer provide representation. See id. The court noted that the attorney failed to explain the concept of a conflict of interest, the type of conflict that might arise, or the benefit or detriment of such dual representation. See id. The court also stressed that this type of dual representation could possibly constrain the attorney from raising certain defenses on the part of client A. See id.
103. See id.
particular client.104 In Financial General Bankshares Inc. v Metzger,105 the federal district court noted, "[f]ull disclosure means just [the] affirmative revelation by the attorney of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation."106 The fact that a client has "knowledge of the existence of his attorney's other representation does not alone constitute full disclosure."107

Conflict waiver may also be attacked as an abuse of the fiduciary relationship between attorney and client. Waivers are contracts, and are thus governed by the law and principles of contracts. Generally, a waiver is the voluntary and intentional relinquishment of a known privilege or right.108 However, the very fact that some sports and entertainment attorneys are marketing their conflicts as the way to get the deal done suggests that the conflict waivers are not wholly voluntary.109 The conflict waiver may thus be invalidated, because if using a particular attorney is the only method for getting the "deal" done, then the waiver may have been procured through undue influence. In such situations, the validity of the waiver may be questioned because of the fiduciary relationship that exists between attorney and client.110

What is required for consultation or full disclosure will, of course, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client's familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues involved and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived.

Id.

106. 523 F. Supp. at 771; see also Rogers v. Robson, Masters, Ryan, Brumund & Belom, 392 N.E.2d 1365, 1371 (Ill. App. Ct. 1979). The court stated:
What facts must be revealed depends on the circumstances. When an attorney represents two clients with divergent or conflicting interests in the same subject matter, the attorney must disclose all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make a free and intelligent decision regarding the representation.

Id.

108. See Johnson v. Zerbst, 304 U.S. 458, 469 (1938) (remanding criminal conviction to determine if defendant competently and intelligently waived his Sixth Amendment right to counsel).
109. See Brown, supra note 47, at 42 (noting that some clients do not understand waiver issues arising in conflicting representation).
110. See Croce v. Kurnit, 565 F. Supp. 884, 890 (S.D.N.Y. 1982) (holding that attorney who was officer in subject managerial and publishing company breached fiduciary duty to singer in failing to advise singer to seek outside counsel with respect to recording, publishing and managerial contracts).
Some entertainment and sports attorneys have characterized themselves as “access providers,” acting more like agents than attorneys.\textsuperscript{111} However, the fact that an attorney acts as an agent for the client does not relieve the attorney of an ethical obligation of utmost loyalty to the client.\textsuperscript{112} Rather, the ethical obligation is just as great.\textsuperscript{113} While entertainment attorneys are permitted to undertake conflicting representations once the disclosure requirement is met, the stringent ethical obligations of disclosure, consultation and consent may be exactly what is lacking for much of the industry.\textsuperscript{114} A mere conflict of interest waiver letter, which fails to show disclosure and informed consent to the actual and potential conflicts, may not be sufficient to establish informed, voluntary waiver of conflicts of interest.\textsuperscript{115}

\textsuperscript{111} See Flamm & Anderson, \textit{supra} note 1, at 3 (noting entertainment attorneys’ self perception as “power brokers” and “access providers,” as opposed to providers of legal services).

\textsuperscript{112} See, e.g., Croce, 565 F. Supp. at 890-91 (holding that attorney who claimed he was more of conduit for plaintiff, but not his attorney, still had disclosure obligations as to attorney’s role in transaction); see also Michael A. Weiss, \textit{The Regulation of Sports Agents: Fact or Fiction?}, 1 \textit{Sports Law. J.} 329, 349 (1994) (noting that some attorney/sports agents completely abandon their law practices to avoid ethical restrictions placed on practicing attorneys).

\textsuperscript{113} See Croce, 565 F. Supp. at 890-91.

\textsuperscript{114} See Flamm & Anderson, \textit{supra} note 1, at 5 (noting ambiguity as to whether conflict waiver would satisfy requirements of informed consent).

Attorneys should be aware, however, that the relevant conflict rules do not say that in situations of multiple representations an attorney may satisfy his or her ethical duties by obtaining a conflict waiver from the concerned clients. What they say is that, in some situations where a potential for conflict exists, the attorney may nevertheless be ethically permitted to proceed with the representation as long as he or she obtains the client’s “informed consent.”

\textit{Id.}

\textsuperscript{115} See Brown, \textit{supra} note 47, at 98 (quoting Los Angeles County Bar President, Richard Chernick, who noted that attorneys cannot obtain voluntary waivers without full disclosure of all possible conflicts); see also Flamm & Anderson, \textit{supra} note 1, at 5. The relevant conflict rules do not dismiss an attorney’s ethical duties simply by obtaining a conflict waiver in a case of multiple representation. \textit{See id.} The rules simply state that in some situations, where a potential conflict of interest is present, the attorney must obtain a client’s informed consent in order to ethically proceed with the multiple representation. \textit{See id.} But because this informed consent is usually executed at the outset of the representation, prior to the existence of any conflict, they may not actually satisfy the informed consent requirement. \textit{See id.}
B. Disclosing the Impact of Intermediation on Traditional Attorney Duties

The nature of intermediation requires modification of several traditional duties between the attorney and the client. The impact of intermediation on these duties should be discussed during a consultation with the clients, which ideally occurs before committing to or beginning the representation. The Model Rules and commentators who have analyzed the Rules have identified several areas where traditional attorney-client duties are likely to be affected.

1. The Duty of Loyalty

The duty of loyalty is not specifically defined in the Model Rules, but they do state that loyalty is essential and fundamental to the attorney-client relationship. Model Rule 1.7 indicates that, as a general rule, the loyalty duty prohibits the representation of interests which are directly adverse to a client without the client's consent. Though not specifically discussed in Model Rule 2.2, the Comments to Rule 2.2 suggest that lawyers owe a duty of impartiality, rather than absolute loyalty, to intermediating clients and thus the lawyer should not favor either client's position.

The fact that sports and entertainment attorneys often deal with multiple athletes and entertainers for short periods of time, while their employers are long-term clients, creates a potential problem in an attorney's effort to fulfill their duty of loyalty/impartiality. The Comment to Model Rule 2.2 cautions that a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been intro-

116. See Flamm & Anderson, supra note 1, at 5 (noting some modifications that should be considered in traditional relationship between attorney and client); see also Model Rules Rule 2.2 cmt. 7 (1995) (noting that intermediation alters ordinary partisanship that is normally present in attorney representation).
117. See infra notes 124-43 for a discussion of these modifications.
118. See Model Rules Rule 1.7 cmt. 1 (1995); see also Annotated Model Rules Rule 1.8 commentary at 131 (1983).
120. See Model Rules Rule 2.2 cmt. 7 (1995).
121. Telephone Interview with Reginald Brown (Dec. 26, 1997). Mr. Brown is a Los Angeles entertainment attorney representing R&B, rap artists and producers. See id. He noted that particularly in the entertainment industry, long-term clients often have a history of paying for legal services. See id. New clients are often true starving artists. See id. Therefore, the attorney must guard against any inclination to favor the more established, lucrative client. See id.
duced." This is one of the few areas in which Model Rule 2.2 provides a concrete statement that the intermediation is improper. The representation of a long-term client and a new client in intermediation clearly presents an issue that must be discussed and resolved. Moreover, it may present obstacles to the representation that affect other issues, beyond impartiality.

A difference in the duration of the attorney’s representation of each client may raise problems with respect to the attorney’s duties of confidentiality and zealous representation. For example, an attorney may have a greater amount of confidential information about a long-term client than a new client. This could severely impact a representation involving proprietary information where, according to Model Rule 2.2, the prevailing position is that no attorney-client privilege attaches among commonly represented clients. Though these are not the only complications, the goal from the perspective of the Model Rules is to alert attorneys to consider all of the client factors as interrelated, rather than focusing on the few that support what may be an incorrect conclusion, that multiple representation is appropriate. The critical issues for the attorney to consider are whether the attorney can explain to the clients that the attorney’s duty of loyalty in the intermediation is owed to all clients and their mutual goal, whether the attorney can obtain client consent to a different type of loyalty and whether the attorney can fulfill the duty of loyalty during the representation.

2. The Duties of Zealous Representation

With respect to the duty of zealous representation, Professor Dzienkowski advocated that “a lawyer as intermediary must represent actively the interests of all the parties, treating those interests as part of the objective of the representation . . . ." This view is

123. See id.
124. See Model Rules Rule 2.2 cmt. 6 (1995). In a situation of dual representation, the attorney is still required to keep each client adequately informed and to maintain a level of confidentiality of information exchanged in both representations. See id. This requires a delicate balance by the attorney and if the attorney cannot maintain this balance, the dual representation is deemed improper. See id.
125. See Annotated Model Rules Rule 2.2 commentary at 274 (1983) (noting that if litigation were to arise between clients, privilege would not protect any such communication, and clients should be advised of this accordingly).
126. Dzienkowski, supra note 18, at 791. The attorney as an intermediary must consider the needs of all its clients and treat these objectives as part of his goal in representation. See id. This requires identifying a client’s interests at the beginning of representation, then exploring possible alternatives to the client during the representation, and communicating these alternatives to the client. See id.
consistent with the Comment to Model Rule 2.2, which indicates that the attorney in intermediation has a duty of impartiality with respect to the intermediating clients.\(^{127}\) Dzienkowski also stated that the lawyer must inquire into the intermediating parties' "understanding of which avenues they have forgone and the consequences of their actions."\(^{128}\) An example previously noted is the opportunity to bluff, which may be sacrificed in intermediated representations.\(^{129}\) Similarly, clients who prefer their attorneys to take aggressive, hard ball positions could not reasonably expect such representation during intermediation.\(^{130}\)

By inquiring into the clients' sophistication and understanding of these issues, as well as their comprehension of the impact of multiple-client representation on those issues, the attorney is able to evaluate the propriety of intermediation. The attorney is also able to assess the extent and nature of explanation needed during the consultation and consent process, in the event intermediation is elected.

3. *The Duty to Keep Clients Informed*

Thorough communication of information through client consultation is the basis for initiating and proceeding with intermediation.\(^{131}\) Model Rule 2.2(a)(1) and (b) direct the attorney to consult with the clients regarding the implications of the intermediation before proceeding with the representation, and to continue consulting with the clients regarding the decisions and conclusions they make throughout the process.\(^{132}\) On the other hand, sharing information received from one client with the other violates the

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Upon obtaining an agreement from clients, the attorney must explore possible reasons for such agreement and be satisfied that the clients have fully considered the alternatives and consequences of the pact. *See id.*

127. See *id.* at 791 n.279 (quoting language of *Model Rules* Rule 2.2(b) stating that attorney must "consult with each client concerning decisions to be made and considerations relevant in making them, so that each client can make adequately informed decisions.").


129. See *Hazard*, *supra* note 62, at 75. Bluffing is a critical element of the bargaining process. *See id.*

130. *See id.* (noting that "when a lawyer is called on to bargain for a party, he shares the party's mask and the party's secret real intentions. He obviously cannot do that simultaneously for both parties.").

131. See *Model Rules* Rule 2.2(a)(1),(b) (1995); see also *Annotated Model Rules* Rule 2.2 commentary at 299 (1983) (noting that Rule 2.2 elaborates on point that "caution, consultation, and consent" are required before lawyer may act as intermediary).


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traditional construct of the duties of loyalty and confidentiality.\textsuperscript{133} The attorney should consider a position with the clients wherein information revealed is information shared.\textsuperscript{134} The clients should be informed that the attorney is obligated to keep all clients informed of all matters affecting the intermediation.\textsuperscript{135} They should also be informed that the disclosure is part of the attorney’s representation of all the clients and any belated demands for individual representation may result in the attorney’s withdrawal from the representation.\textsuperscript{136} Client reluctance to agree to such disclosure may be a sign that intermediation is not appropriate.\textsuperscript{137}

4. \textit{The Duty of Confidentiality}

The duty of confidentiality, like the duty to inform, presents a problem during both the consultation and performance phases of intermediation. When representing multiple clients with divergent or conflicting interests, disclosing confidential information about Client A to Client B violates the attorney’s duty of confidentiality to A.\textsuperscript{138} Simultaneously, failing to disclose the information violates the attorney’s duty to inform Client B.\textsuperscript{139} The obvious solution to this problem is to have the clients agree to full disclosure at the outset of the representation. Professor Pennell notes one problem that may arise if the clients initially agree to a full disclosure and sharing rule, but decide subsequent to intermediation to withhold their confidential information, rather than have it disclosed to the other clients.\textsuperscript{140} An existing client who is considering a new intermediation that is similar to a prior representation will require careful counseling about the impact of previously disclosed information on the new matter.\textsuperscript{141} If the prior information is relevant to the current intermediation and the existing client directs the attorney to keep the information confidential, intermediation may be inap-

\textsuperscript{133} See ANNOTATED MODEL RULES Rule 1.7 commentary at 85, 105 (1983).
\textsuperscript{134} See Dzienkowski, supra note 18, at 810 (suggesting default position in intermediation that, absent specific agreement, information received by attorney during representation belongs to all clients).
\textsuperscript{135} See id. at 811.
\textsuperscript{136} See id.
\textsuperscript{137} See ANNOTATED MODEL RULES Rule 2.2, supra note 37, commentary at 279 (1983).
\textsuperscript{138} See ANNOTATED MODEL RULES Rule 1.6 commentary at 85 (1983).
\textsuperscript{139} See ANNOTATED MODEL RULES Rule 1.4 commentary at 37 (1983) (noting that lawyer is not permitted to withhold information that concerns matter for which attorney represents client, if matter is of importance to client).
\textsuperscript{140} See Pennell, supra note 40, at 742.
\textsuperscript{141} Dzienkowski, supra note 18, at 806-07.
appropriate. Such conflicts are inevitable in an entertainment practice where, for example, the lawyer represents recording artists and a recording or production company. The attorney will represent different artist clients, but the same company client. Over time, the attorney may learn the full spectrum of negotiable points with the company client, but that company client will expect to cut different deals with different artists based on the value the company places on the artist. The company will, therefore, expect the attorney to maintain its confidence about the negotiability of certain points. This problem might be exacerbated if artists are selecting the attorney because she has the record company connection. Detailed consultation and consent procedures are necessary if multiple-client representation is even considered under these types of circumstances.

V. THE PROPER CONTENT FOR THE INFORMED CONSENT LETTER

Authors such as Joseph B. Anderson and Darryl D. Miller stress the need for entertainment attorneys to obtain conflict waivers before undertaking the representation of multiple clients. Within the entertainment bar, conflict waivers are being used more frequently than in the past. Merely obtaining a written waiver by itself, however, may not be sufficient to shield the practitioner from liability. In situations where the conflict is actual and apparent, fully informed written waivers may nevertheless be insufficient to continue the representation. Indeed, some courts have totally

142. See id.

143. See Flamm & Anderson, supra note 1, at 3 (noting that "many entertainers and artists tend to choose counsel not on the basis of their legal track record but on who their other clients are and who they know.").

144. See Joseph B. Anderson & Darryl D. Miller, Professional Responsibility 101: A Response to "Conflicts in the Entertainment Industry? . . . Not!," 11 ENT. & SPORTS LAW. 8, 10 (1993). Anderson and Miller attack the position taken by Edwin McPherson, in his refusal to acknowledge the need to obtain informed, written waivers of conflicts and potential conflicts of interests. See id. at 10. They note that obtaining conflict waivers is the minimum professional duty of the attorney, stating "[i]t is one of our highest ethical duties to inform clients of their full panoply of options and provide them with the ability to make fully informed decisions regarding the exercise of those options." Id. at 10. For a discussion of the position taken by Edwin McPherson, see McPherson, supra note 72.

145. See Brown, supra note 47, at 40 (noting statement by Kenneth Ziffren that "everybody" is obtaining conflict waivers).

146. For an example of where a waiver in itself is not enough, as a result of insufficient consultation, see supra notes 106-07 and accompanying text.

147. See Brown, supra note 47 at 40 (citing Los Angeles County Bar Association Formal Op. No. 471).
forbade waiving actual conflicts. The situation likely to present itself to practitioners is a waiver that would usually be valid, but is invalid because of insufficient disclosure and because of the nature of the relationship between attorney and client. To address this problem, the attorney should follow detailed consultation procedures similar to those outlined above, keeping in mind that the Rules call for informed consent. The attorney can then follow up the consultation and disclosure with a consent letter, that reflects the detailed consideration the attorney and the clients have given to the multiple-client representation.

The Practicing Law Institute (PLI) has outlined ten types of information which should be included in a general conflict of interest waiver letter. According to the PLI, the letter should cover the following areas of information:

1. The matter(s) in which you represent the other party. This representation must be thoroughly described.
2. Whether this representation [described in number 1] is on a regular basis.
3. Whether you expect to continue to represent the other party in the future.
4. Describe the relationship of the other party to the present matter.
5. Whether any matter that you have worked on for the other party is substantially related to the present matter.
6. Whether you have received any confidential information from this client that is related to work for the other party.
7. Whether you have received any confidential information from the other party that is related to the present matter.
8. Whether you believe that the representation of the other party by you (or your firm) would adversely affect your ability to represent you [this client] in this matter.

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148. See In Re Conduct of Jans, 666 P.2d 830, 833 (1983). As the Oregon Supreme Court noted, "It is never proper for a lawyer to represent clients with conflicting interests no matter how carefully and thoroughly the lawyer discloses the possible effect and obtains consent." Id.; see also In Re Conduct of Jordan, 712 P.2d 97, 100 (1985) (noting that there could be no consent where actual conflict existed in representing creditor and debtor at same time).


9. That, with the client's permission, you have discussed the matter with the other party and they have given their consent to the representation.
10. That the client has indicated their consent to the representation notwithstanding the conflict of interest.\textsuperscript{151}

In light of what has been said thus far, these ten types of information are necessary for a multiple representation conflict waiver. This article, however, suggests that additional matters need to be covered by attorneys seeking waiver and consent to multiple-client representation or intermediation involving sports or entertainment clients.

To some extent, the different nature of an intermediated representation would be discussed and disclosed with all concerned clients during the consultation phase of the anticipated representation.\textsuperscript{152} Having had the in-depth consultation, which many courts have ruled is necessary for proper consent to an intermediated representation, it is also critical to document that the consultation has occurred.\textsuperscript{153} The absence of documentation creates a serious problem of proving adequate consultation if a dispute arises during the representation. Therefore, the position taken in this article is that the waiver letter should summarize the issues covered during the consultation with the clients, indicate their understanding of such consultation and confirm that it indeed occurred. Moreover, an informed consent letter should confirm the client's understanding of the following issues, in addition to those suggested by PLI:

1. \textit{Non-partisan representation}

As indicated in Model Rule 2.2, the client should be made to understand that intermediation is not the type of representation a client would "normally expect" from an attorney.\textsuperscript{154} To satisfy this requirement, the letter should indicate that the clients understand that the representation that they will receive is not the partisan representation that is generally rendered by individual attorneys.

\begin{itemize}
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} See Model Rules Rule 2.2(a)(1) (1995).
  \item \textsuperscript{153} See Harry H. Scheider, Jr., \textit{An Invitation to Malpractice}, A.B.A. J., Jan. 1993, at 100.
  \item \textsuperscript{154} See Model Rules Rule 2.2 cmt. 7 (1995) (stating that when consulting client when attorney is acting as intermediary between clients, attorney should make clear that attorney's role is not of partisanship normally expected in other circumstances).
\end{itemize}
2. Mutual goals

In relation to the requirements set forth by the PLI, describing the impact of intermediation on partisan representation, the attorney should disclose his or her role as a non-antagonistic "lawyer for the situation."155 In other words, the lawyer should state that the lawyer represents the clients and their mutual goal of reaching an agreement in the transaction, but cannot represent either client if a serious dispute arises regarding the formation or performance of the agreement.

3. Open-ended bargaining

As discussed above, the attorney should disclose and confirm that the clients understand that traditional open-ended bargaining could be compromised by the intermediated representation.156 In the alternative, the attorney may wish to draft an addendum to the conflict waiver letter which specifies the type and extent of information which will be mutually disclosed to the intermediating attorney and the type of information which each party is at liberty to keep to themselves. As previously noted, some commentators have suggested that a desire by the clients to restrict disclosure is a warning sign that intermediation is not appropriate.157

4. Confidentiality

As discussed in the PLI materials and related to the disclosure of information with respect to open-ended bargaining, the attorney should include a detailed explanation of the impact of the intermediated representation on matters which either client considers confidential.158 Here again, planning for a separate agreement with regard to disclosure may be necessary.

155. See Hazard, supra note 62, at 58-68. See also Model Code Rule 2.2 cmt. 4 (1995) (noting that attorney cannot undertake common representation if parties are antagonistic toward each other in that they contemplate contentious negotiations or contentious litigation is imminent).

156. For a discussion of how intermediary representation by an attorney may differ from the normal expectation of partisan representation, see infra notes 159-60 and accompanying text.

157. For a discussion of the problems with a client's unwillingness to disclose information in an intermediation situation, see supra notes 134-37 and accompanying text.

158. See Kupperman, supra note 150, at 142 (noting that waiver letter should include any confidential information from other party in relation to matter of representation).
5. **Impartiality**

As noted, the Comments to Model Rule 2.2 indicate that the intermediating attorney owes the clients a duty of impartiality. This duty differs from the traditional duty of loyalty that accompanies partisan representation by separate attorneys. This difference should also be noted in the conflict letter which has been signed and understood by the client.

6. **Summary**

Finally, the waiver letter should summarize and confirm any specific issues discussed by the clients and the attorney during the disclosure process, inform or shape the clients' understanding of the nature of the representation and the respective roles of all parties involved.

With these factors in mind, it might be appropriate to examine a sample waiver letter and consider what would be required to make it an informed consent to multiple-client representation. The following letter addresses a specific, and very limited, type of entertainment-related conflict situation.

[Date]
[Address]
Re: *Waiver of Potential Conflict of Interest*

Dear [Jack]:

[Jill Band] has asked us to obtain the necessary licensing and copyrights in connection with its "Up a Hill" compact disc. This requires obtaining for Jill Band a compulsory mechanical license from you, and advising you regarding registering copyrights, in connection with your original works and arrangements that appear on the "Up a Hill" compact disc. We feel that this situation may present a potential conflict of interest if a dispute arises between Jill Band and you regarding the license or ownership of the copyrights. We do not believe that advising you in these matters will adversely affect the interests of Jill Band. However, we have explained to you that in the event that a dispute arises regarding these matters,

159. For a discussion of the duties of impartiality, see supra notes 120-23 and accompanying text.

160. For a discussion of an attorney's duty to consult his client on this variation from traditional representation, see supra note 155 and accompanying text.
[Law Firm] cannot represent you in this matter (the dispute).

[Law Firm] cannot represent you in this matter until Jill Band and you waive any possible conflicts of interest that may arise from [Law Firm]'s representation of both parties. We also are hereby advising you that you have the right to retain independent counsel to review this consent letter before consenting to [Law Firm]'s advising you in the matters described above.

[Law Firm] can advise you if you consent to the waiver of this conflict of interest. You may waive such conflict by signing the original copy of this letter and returning it to me at the above address. We also have enclosed an extra copy for you to keep.

If you have any questions or concerns, please feel free to call.

Very truly yours,

[Name]

[Law Firm]

Having read this letter and understanding that I am waiving any conflicts of interest that may arise by [Law Firm]'s representation of both myself and Jill Band, I waive such conflicts of interest so that [Law Firm], [Names of individual attorneys working on matter] or any other member or associate of [Law Firm] may assist __me__ in executing a license for, and obtaining copyright registrations for, his original works and arrangements that appear on ___Jill Band's "Up a Hill" compact disc with respect to future work and arrangements. I understand that I have a right to retain independent counsel to review this consent agreement.

__________________________________________

[Name]

Date: ________________________________ 161

In evaluating this sample letter, a preliminary and perhaps obvious observation is that in multiple representations, all of the clients involved in the transaction must waive their concomitant conflicts with each other.162 Therefore, each client will receive a similar, but not necessarily identical, waiver letter. The differences

161. Kupperman, supra note 150 (names added).
in the letters would reflect the differences in each clients' initial position and the various rights which might be affected.\textsuperscript{163}

Using the criteria set out by the PLI, one of the first areas of information an attorney should address in a conflict of interest waiver letter to a client is the matter in which the attorney represents the other party.\textsuperscript{164} In this sample letter, the first sentence explains that the other party has asked the attorney to obtain the necessary licensing and copyrights. Although this gives the client a general idea of the nature of the matter in which the attorney is representing the other party, attempts should be made to discuss the matter more thoroughly.\textsuperscript{165} For example, the attorney should thoroughly describe both the nature of her representation with all involved clients, and explain the reason the other party needs the licensing and copyrights for its compact disc.\textsuperscript{166}

The second piece of information discussed in the PLI guidelines, whether the representation described above is on a regular basis, is omitted from the sample letter.\textsuperscript{167} The letter should include an explanation stating when the representation of the other party will conclude, or whether representation will continue indefinitely.\textsuperscript{168}

Likewise, the third area of information, whether the attorney expects to continue to represent the other party in the future, is absent as well.\textsuperscript{169} The attorney should give each client involved in the intermediation an explanation of whether she expects the representation to be continuous for one or more of the intermediating clients, or limited to the specific transaction at hand.

The fourth area of information which should be included in a waiver letter is the relationship of the other party to the present matter.\textsuperscript{170} This information is not adequately presented in the sample letter. In the letter, the attorney should explain the outcome or consequences of obtaining the necessary licensing and copyrights for the compact disc. In other words, the attorney should briefly

\textsuperscript{163} For example, in the sample letter Jack, as the owner of certain rights, should have a letter which differs from Jill Band's letter as the acquiring party.

\textsuperscript{164} For a discussion of the ten steps set forth by the PLI in order to obtain client consent, see supra note 151 and accompanying text.

\textsuperscript{165} See Kupperman, supra note 150, at 141 (noting that representation must be thoroughly described).

\textsuperscript{166} For a discussion of the areas that should be discussed in a client consent letter regarding a conflict of interest, see id. and accompanying text.

\textsuperscript{167} See id.

\textsuperscript{168} See id.

\textsuperscript{169} See id.

\textsuperscript{170} See Kupperman, supra note 150, at 142.
address what position the Jill Band will be in once the licenses and copyrights are obtained and where the Jill Band would be without those licenses and copyrights. Moreover, the letter should explain what impact granting the license may have on Jack's rights in the composition. For example, if Jill Band's arrangement of Jack's song is copyrightable, Jack may be limited in his right to perform that particular arrangement.

The sample letter also fails to meet the fifth requirement of disclosure, whether any matter that the attorney has previously worked on for the other party is substantially related to the present matter. If the attorney has never worked on a matter substantially related to the one at hand for the other party, this should be stated in the letter. If a prior matter the attorney worked on for either party is substantially related to the present matter, an explanation of the relationship should be included.

The sixth and seventh areas of information are closely related. The sixth requirement of disclosure relates to whether the attorney has received any confidential information from this client that is related to the work for the other party. Similarly, the seventh area of information addresses whether the attorney has received any confidential information from the other party that is related to the present matter. Although the letter explains that in order to perform the Jill Band's work, the attorney needs to obtain a compulsory mechanical license from Jack, the letter should also state whether the attorney already has confidential information provided by Jack that pertains to the work the attorney will perform for the Jill Band. Similarly, the letter should state whether the attorney currently has confidential information provided by the Jill Band that is relevant to Jack in the present matter.

The eighth area of information relates to whether the attorney believes that her representation of the Jill Band would adversely affect her ability to represent Jack in this matter. This area is also insufficiently addressed in the sample letter. The letter states that "we do not believe that advising you [Jack] in these matters will adversely affect the interests of Jill Band." The letter, however, does not explicitly state whether the attorney believes her representation of the Jill Band will adversely affect Jack's interests.

171. See id. at 141-42.
172. See id. at 142.
173. See id.
174. See id.
175. See Kupperman, supra note 150, at 142.
The ninth area of information is that, with the client's permission, the attorney has discussed the matter with the other party and they have given their consent to the representation. The letter does not clarify that the attorney has discussed the matter with the other party or obtained that party's consent to representation. The letter simply states that both clients must waive any possible conflicts of interest that arise before the attorney will represent them.

The tenth and final area of information articulated by the PLI that should be addressed in a waiver letter is that the client has indicated his consent to the representation, notwithstanding the conflict of interest. This is addressed in the last paragraph of the letter, which states that the law firm is able to advise the client as long as the client consents by waiving any conflict of interest. Furthermore, the letter instructs the client that he may waive the conflict of interest by signing the original copy of the letter. The sample letter would be strengthened by indicating that, by signing the letter, the client is waiving the conflict. Such a statement more clearly informs the client of the consequences of signing the letter.

In addition to the ten suggested factors set out by the PLI, there are the five other areas of information which this article has suggested the attorney should include in such a letter, in order to facilitate the client's understanding of the role that the attorney has in the representation. First, the letter should indicate that when the attorney is representing at least two clients, the client will not receive the typical partisan representation that might be expected. In the sample letter, this issue is addressed only briefly by stating that “we have explained to you that in the event that a dispute arises regarding these matters, [Law Firm] cannot represent you in this matter.” The letter should include a brief explanation of what a client can expect from the attorney representing both parties, and what alternatives he has in the event a dispute arises.

176. See id.
177. See id.
178. See id.
179. See id.
180. For a discussion of the five factors set forth in this article, see supra notes 154-60 and accompanying text.
181. See supra note 154.
182. This statement is also confusing in its use of the terms “these matters,” which implies disputes, and “this matter,” which implies the multiple representation. More accurately, the letter should indicate that if a dispute arises from the intermediated matter, all clients will need separate representation for the dispute.
Second, the letter should explain that the role you will play is one of a "lawyer for the situation."183 This issue is closely related to the first one discussed above. The sample letter clearly states that if a dispute does arise, the attorney will be unable to represent the addressed client in the matter. The letter should also explain to the client that the attorney's role in that particular matter is to represent both clients, to help them reach an agreement in the transaction.

Third, the letter should explain to the client that there is a possibility that open-ended bargaining may not occur if you represent both parties.184 The sample letter fails to address this point at all. The letter should address this issue or an alternative: draft an addendum to the letter, which specifies the nature of the information each party will disclose to the intermediating attorney, as well as the information each party may keep to himself.

Fourth, the letter should disclose to the client the impact mediated representation will have on matters either party considers confidential.185 Fifth, similar to the second factor above, the letter should explain that as the intermediating attorney, there is an expectation of impartiality.186 The attorney should clarify this in the letter because, without an explanation, clients may expect traditional duties of loyalty between attorney and client to apply. Finally, the letter should end by summarizing specific issues which the clients have raised and discussed with the attorney throughout the disclosure process, which shape the clients' understandings of the representation and the role each party has in the process.

Including these disclosures in addition to those suggested by the PLI may solve the problem of adequate disclosure, but they simultaneously result in a conflicts letter which is so long and complex that it may require the representation of an attorney to be understood and explained. Indeed, there are some commentators who suggest that clients entering into such a conflicting representation should be advised to seek independent counsel, with respect to the advisability of accepting such a representation.187 The sample

183. See Hazard supra note 62 and accompanying text.
184. Id.
185. See Annotated Model Rules Rule 2.2 supra note 2 commentary at 274 (1983).
186. See id.
187. See Harry H. Schneider, Jr., An Invitation to Malpractice (Part II), A.B.A. J., Jan. 1993, at 100 (discussing suggested procedures to obtain informed consent); see also Leonard M. Marks & Robert P. Mulvey, Ethical Aspects of Entertainment Law Practice, 359 PLI/PAT 605, 609 (1993) (stating that it is recommended that entertainer obtain independent legal advice).
letter requires the client to acknowledge the right to seek independent counsel, but is silent as to whether the client obtained independent advice. The letter should indicate whether separate counsel was consulted, and if not, that the client chose to forgo that right notwithstanding advice of the intermediating attorney. While such a practice may appear to be overkill, there are clearly sports and entertainment contracts which involve sufficient sums of money and complex terms which warrant review by independent counsel where intermediation is pursued for all or part of the transaction. Another possibility is to simply include the waiver letter and review of the letter as part of the consultation process. Here, the parties and the attorney would review the letter and approve its terms as a group immediately prior to accepting the intermediated representation.

VI. CONCLUSION

This discussion begs the question of whether executing a well drafted letter or giving the clients notice of their right to seek the advice of independent counsel will offer the intermediating attorney protection if a dispute arises. As discussed above, the mere fact that an attorney obtains a waiver from the client waiving the conflict of interest does not necessarily mean the conflict is validly waived. The bar has generally recognized strict professional standards, requiring that in order for a client to waive a conflict of interest, the attorney must consult with the client and fully and adequately explain "the implications of the common representation and the advantages and risks involved." While some attorneys exult the advantages of multiple representation, without full and complete disclosure of the conflict and its implications, a knowing and voluntary waiver may not be obtained. Consequently, in order to minimize such a risk, the conflict letter must reflect that this thorough consultation and consent process was completed.

188. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 372 (1993) ("The client's consent alone is not sufficient to waive present conflicts. A lawyer must also 'reasonably believe the representation will not adversely affect the relationship with the other client.'").

189. Model Rules Rule 1.7(b)(2) (1995). For the full text of Rule 1.7, see supra note 31 and accompanying text.

190. See McPherson, supra note 72, at 5 ("the only reason for which many potential clients come to the more established entertainment firms is because of the firms' inherent conflicts, not in spite of them.").

191. See Brown, supra note 47, at 42 (noting that deal makers within entertainment industry are not fulfilling this ethical obligation) (citing Carrie Menkel-Meadow, Professor of Law at U.C.L.A., stating that "[t]he clients' understanding of how deals are put together is exactly what seems to be missing.").