

ENTERTAINMENT AND SPORTS LAWYER

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Chair's Column

*"Nobody told me there'd be days like these.
Strange days indeed."
—John Lennon*

John Lennon's couplet, written 40 years ago, succinctly summarizes our challenging times.

In times of stress and strife, we often turn to the arts—music, theater, television, film, fine arts, poetry, literature—for comfort, community, strength, guidance, or just much needed distraction. I believe we are fortunate to serve the entertainment and sports industries that have been essential to managing the shelter-at-home directives. Those directives have deemed our legal services essential. As representatives of artists, talent, creatives, performers, entertainers, and producers, we know that our clients' services and works are essential. We marvel and celebrate how our clients have been able to adapt and adjust to find new ways to continue to create, perform, produce, and collaborate.



Peter J. Strand

Attorneys have also had to adapt and adjust to serve our clients. To serve our members and our mission, the Forum has also had to adapt. We have retooled the Forum's Annual three day CLE Conference to be virtual in 2020. We are still exploring formats and platforms but we will announce the details of our virtual conference very soon and expect to deliver the usual and anticipated timely and in-depth CLE programming and networking opportunities that the Forum strives to provide.

I hope you find this edition of the *Entertainment and Sports Lawyer* engaging, entertaining, and instructive. Thank you to all of the contributors, student reporters and

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Law Student Assistant Editors

Applications Being Accepted
Contact: Brosenblatt@bdlfirm.com

Forum Information

Forum on the Entertainment &
Sports Industries
American Bar Association
321 N. Clark St.
Chicago, IL 60654
Phone: 312-988-5658
Fax: 312-988-5677



AMERICAN BAR ASSOCIATION

Forum on the Entertainment
& Sports Industries

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Esports

The Differences Between Entertainment and Sports Dealmaking

By Jeremy M. Evans

Turner “Tfue” Tenney is a popular esports gamer who was represented by Faze Clan, an esports organization and digital, social, and streaming content network. Faze Clan would take a percentage of Tenney’s endorsement deals and winnings from tournaments on Twitch (owned by Amazon/AMZN). The relationship does not seem much different from a sports agency model for an athlete or an entertainment agency like WME/Endeavor or CAA for entertainment, media, and sports talent.

The question is what rules apply to Tenney and Faze Clan. Is Tenney an athlete, entertainer, or an influencer in the media space? Is Tenney all three designations in one under the law?

For this article, the focus will be on California since the Golden State is where this author is licensed to practice law, but also because California like New York state have robust laws and regulations for the broad-based field and term of talent representation, which includes varying legislative acts for entertainment, media, and sports individuals and business firms (agencies and attorneys, etc.) in the space.

Where we begin in a lawsuit¹ filed by Tunney against his former representation firm that argues unfair business practices and Talent Agencies Act violations in California, which raises questions about differences between sports and entertainment dealmaking. The purpose of this article will be to address those distinctions.

Previously, this author has written on the topic of talent representation. In 2018, in this publication, “Lawyers, Agents, and the Blurred Lines Regulating Talent Representation,” appeared in the Winter 2018, Volume 34, Issue 2 Edition of *Entertainment and Sports Lawyer*.² In 2016, “Ethical and Practical Implications and differences between Sports Agents and Attorneys,” appeared in the Summer 2016, Volume 23, Issue 3 Edition of what is now *the PRACTITIONER* with the Solo and Small Firm Section of the California Lawyers Association.³ Although not required, those aforementioned articles would be a good primer or reference to this article.

To assist the reader through this article, the author has labeled five sections of importance as to how esports gamer’s might be defined and agencies and attorneys regulated in terms of the talent space, with discussion how each of those labeling exercises causes both excitement and concern.

START A UNION, BUT WHAT ABOUT THE WGA-AGENCY DISPUTE?⁴

Unions have done some great things for labor, especially in the sports and entertainment industries where there is constantly a battle for leverage between management/ownership and the talent. That leverage space is where dealmaking is at its very best where each party is always trying to move the

needle in their direction. However, unions are not the answer to everything and of course individual athlete sports do not have unions and it is likely that many in that space would not complain since talent teams are allowed to secure deals according to their own understanding. Furthermore, it is not certain that a union would help a NASCAR, Formula 1, tennis, or golf athlete make more money or be better for the industry.

Esports, however, have somewhat of a hybrid role, somewhat like team sports, where the gamers have their own brands, endorsement deals, and sometimes distribution channels, but those same gamers are also members of teams like Faze Clan. The Writers Guild of America (WGA) is an example of the battle between labor and management and sometimes more importantly the agents and agencies who represent talent and what deals are good for the talent versus what is good for the agent/agencies, and management. Conflicts arise in those situations and any move to unionize would (1) require consolidation of the esports teams into selected leagues, which may constrict the available leagues, teams, and opportunities and relegate teams and gamers to lower levels (think triple A and double A minor league baseball), and (2) buy-in from all parties that may cause some gamers to want to go it alone and not join a team with an entrepreneurial spirit and not be limited to percentage deals coming on multiple ends (an agent and team taking a percentage for example, or worse, a company working as both a manager and agent, which is illegal in California and New York).⁵

Esports industry organization as a whole might be better for marketing purposes, and for laymen to understand what is what, but whether gamers should unionize and have an individual set of rules in an already convoluted space would be unwise without further understanding of the implications.

ESPORTS ARE A SPORT AND GAMERS ARE ATHLETES, THE MILLER-AYALA ACT⁶ APPLIES

Normally in California, if you want to represent a professional athlete, you have to file a simple Athlete Agent Disclosure Statement⁷ and pay a small fee. If you represent an athlete that plays in a league that has a union (NBAPA, NFLPA, NHLPA, MLBPA, or MLSPA)⁸ then you will have to generally take a test, fill out an application, and pay a fee. The Miller-Ayala Act governs the rules and regulations for agents in California.⁹ Attorneys fall somewhere in legislative purgatory because they are licensed to practice law, but must also get an agency license and separate business if they want to represent talent for doing legal things like negotiating contracts, term sheets, drafting contracts, and, you know, dealmaking.

If we assume gamers are athletes, then their representation should fall under the aforementioned established rules. However, it is not certain that gamers are athletes under the typical definition of or model. If anything, gamers are a mixture of three industries, entertainment, media, and sports. On the other hand, the sports industry does allow attorneys attorney's to negotiate and participate in dealmaking without an over-arching law with their law licenses.

ESPORTS ARE MEDIA AND ENTERTAINMENT, THE TALENT AGENCIES ACT¹⁰ APPLIES

Years ago, this nifty little legislative carve out, some would refer to it as a monopoly and restraint on trade,¹¹ and possibly worse the unauthorized practice of law, the *Talent Agencies Act* (TAA) was signed into law at the push of some in Hollywood who wanted more control and less competition in the industry. Now, however, there are some terrific agents and leaders in industry who have been trusted and delivered on major deals for their clients. It is also true that many agents graduated from law school and either decided not to practice law or practice law on a limited basis.

That being said, the concern arises when, for example, in the *Tenney v. Faze Clan* case and the WGA-ATA dispute where conflicts of interest between clients and businesses, percentage deals, packaging, and the like are not covered as clients protections or enforced strongly enough. Attorneys are not without fault in the legal industry, but there is always the threat of discipline and disbarment especially with the State Bar of California focusing solely on licensing and discipline since January 2019, which split with the now newly formed *California Lawyers Association*.¹² The TAA something that has fallen under scrutiny before, whether anything changes going forward is likely to begin in Sacramento and Washington, D.C. Until and if that time comes, attorneys and all others will need to be registered under the TAA to "procure" employment. At the end of the day, agents are practicing law and this needs to be addressed legislatively where a non-attorney is a licensed agent.

ESPORTS ARE SOMETHING COMPLETELY NEW, AND "INFLUENCERS" NEED A NEW REGULATION

What would an influencer law look it and who would it cover? One argument is that influencers are entertainers and that the *Talent Agencies Act* applies especially where deals are procured for the gamer. An argument that the sports agency rules apply would be a stretch at best unless the influencer was an athlete in some sport, but then the influencer would be an athlete who also does influencer promotions.

There is a combining of industries, audiences and fans are just as likely to see a gamer win a competition as they are to see their performances streamed on Twitch or YouTube, and with hundreds of teams and gamers without any real organization the teams represent something more like the studios

in entertainment as well. Gamers are also like influencers in that they utilize social media, like athletes and entertainers to promote products and ideals. A gamer is also like an athlete in team sports with individual branding opportunities.

Where is an attorney, or agent, to turn for answers? A new or revised law covering esports and influencers might be helpful to navigate the space, but basing any new legislation on the current landscape would be a mistake based on difficulties that currently exist. On the one hand, gamers, influencers, athletes, entertainment, and media clientele (e.g., talent) need protection. On the other hand, the representation who represent the talent needs to be able to, well, represent. To be clear, limitations on who represents talent should be based on qualifications and those who represent talent must be guided by clear and strong rules on ethics.

ESPORTS AND THE ENTIRE INDUSTRY NEEDS A REVAMP

The truth is the industry is changing. The entertainment, media, and sports industries still have their industry channels and established content, but it is likely that a new model is needed. The *Tenney v. Faze Clan* case is an example of the issues in entertainment and sports dealmaking in general: a lack of regulation and/or confusing and outdated regulation that favors the few.

This author would argue that, first, the best and possibly easiest path forward is to require that all legal work being done for talent should be completed by attorneys where the ethical rules¹³ as applied to attorneys currently covers all clientele. Legal work includes and should include drafting and negotiating of contracts and dealmaking in that space, which could and has always been interpreted broadly. If new legislation is drafted, it could be specific to talent in putting caps on percentage deals and defining more specifically conflict of interest and how it applies to talent and their representatives. The one downfall of new legislation is that more regulation on the legal industry is not necessarily the best thing where private deals between clients and their attorneys are best guided by the ethical rules and what the parties negotiate as a fair deal.

In the meantime, attorneys, agents, and all talent clientele are in limbo when it comes to gamers and influencers. Gamers are probably more akin to the sports industry and most practitioners are registering or acting as attorneys in that space. Influencers have taken the path of attorneys and talent agents through the TAA because there seems to be an entertainment feel to the work. Either way, it would be much easier to have one clear law for all. ■

Jeremy M. Evans is the Managing Attorney at California Sports Lawyer®, representing sports and entertainment professionals in contract drafting, negotiations, licensing, and career growth. Evans is the Director of the Center for Sports Law & Policy (CSLP) at Thomas Jefferson School of Law in San Diego, California, where he resides. He may be reached at Jeremy@CSLlegal.com, (619) 886-8587, www.CSLlegal.com, or @JeremyMEvansESQ.

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