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Letter From The Editor

"The Future is unwritten."—Joe Strummer

Dear Forum Members,

Welcome to Issue 34:2 of the *Entertainment and Sports Lawyer!* This is the first issue for 2018, and in case anyone has not noticed… it's cold! Florida has snow! The East Coast has been buried in sub-zero temperatures and feet of snow! Of course…here in Chicago, we merely call that "Thursday."

It is with a heavy heart that this column is written. The entertainment industry recently lost a dear friend. Our long-time colleague and cherished member of the Forum's Governing Committee, Richard Rappaport, passed away in Miami on December 16, 2017 after a brief illness. Richard, one of the founders and driving forces behind our annual Entertainment and Sports Law Symposium in Miami, was truly a distinguished gentleman and a credit to our profession. Not merely an outstanding attorney beloved by his clients, he was respected by his colleagues. Richard's kindness, grace, and warmth will be sorely missed by all who had the pleasure of knowing him. We invite you to join us and members of Richard's family at the annual conference in Miami where the initial Richard Warren Rappaport Memorial Lecture will be given by John Capouya, Associate Professor of Journalism at The University of Tampa.

2018 marks the 20th Anniversary of the Entertainment Law Initiative and its national legal writing contest co-sponsored by the American Bar Association. The ELI invites law students to write a 3000 word essay about an issue the music industry currently faces. All essays must propose a solution. Winners of the competition have gone on to successful careers in music, entertainment media, and beyond. Prizes include tickets to the 60th Annual GRAMMY Awards Telecast and other selected GRAMMY Week events, a ticket to the Annual MusiCares Person of the Year Tribute Gala, and more. For more information visit www.entertainmentlawinitiative.com or email ELI@GRAMMY.com . Our next issue will feature the winning essay.

In this issue, we feature Robert C. Walsh's look at the music publisher's legal battle with Spotify, Jeremy Evans guide to drafting enforceable arbitration clauses in online entertainment contracts, and K. Eli Akhavan's primer on asset protection for professional athletes. Jeremy Evans also takes another look at the blurred lines regulating talent representation. Michelle Wahl and her team of Law Student Authors and Young Lawyers provide us with yet another stellar

IN THIS ISSUE

Litigation Update which should be kept on every practitioner's shelf.

We are proud to present poignant recaps of our Annual Meeting in our series: A Law Student's Perspective. Newly admitted attorney, Amanda Alasauskas tackles both "How 'Bigly' is the Future of the Music Industry" and "Trademarks, Counterfeits, and Piracy! Oh My!" Kate Drass presents her take on the panel that addressed "Sports and Entertainment General Counsels" and "Hot Trademark and Advertising Issues in the Entertainment and Sports Industries." D'Bria Bradshaw reports on "Ethics & The Addict: Legal Issues Related to the Attorney Practice of Law and to Representation of Celebrity Clients" and "ADR in Sports: It Fits Like A Glove." First time law student authors Brett Greenberg and Andrew Winegar share their perspectives on "Negotiating Contracts in Entertainment and Sports" and Harry Reid's Keynote Address, respectively.

And finally, we close with Shelly Rosenfeld's parody of Tom Petty's Free Fallin'—"Cold Callin".

We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf. The pending deadlines for article submissions are:

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Spring 2018 *(anticipated April Publishing)*	February 15, 2018
Summer 2018 *(anticipated July Publishing)*	May 15, 2018
Fall 2017 *(anticipated October Publishing)*	August 15, 2018
Winter 2018/2019 (*anticipated January Publishing*)	November 15, 2018

Please, come speak with me at the Annual Meeting in Las Vegas, and share with me your ideas for the Journal.

Best Wishes for a Happy, Health, and Successful New (ABA) Year!

Brian A. Rosenblatt
Bryce Downey & Lenkov LLC
Editor-in-Chief, Entertainment and Sports Lawyer

without even discussing it."
536 F.3d. at 128 (emphasis in original). Whether the Second Circuit's reading of MAI Systems is correct remains in doubt. Recently, in Disney Enterprises, Inc. v. VidAngel, Inc., 2017 WL 3623286 (9th Cir. August 24, 2017), the Ninth Circuit again found infringing copying on the basis of its MAI Systems holding without any discussion of the duration requirement, much less whether it was requiring that all infringing copying involve the creation of "copies" that satisfy the duration requirement. Id. at *13 – 14.

[3] The quoted language is from the Magistrate Judge's discovery report, whose recommendations were adopted in full by the district court. Id. at *1.

Finding The Needle In The Haystack: Drafting Enforceable Arbitration Clauses In Online Entertainment Contracts

by Jeremy M. Evans, LL.M

I. INTRODUCTION[1]

One of the larger issues in contracts today is how they fit into an online world through accepting terms and conditions on websites. In this article, we will tackle the issue of drafting enforceable arbitration clauses in the terms and conditions of websites. Digging deeper, we will look at the entertainment industry and how entertainment-type businesses have utilized terms and conditions on their websites when streaming movies, television shows, and music. We will close by looking at the best practices of drafting online arbitration clauses in the terms and conditions as being recognizable by consumers, enforceable by law, and approved by courts of law.

II. WHAT IS AN ARBITRATION CLAUSE?

An arbitration clause prevents the publicity of disputes, decreases discovery, litigation costs, exposure to class actions, with the ability to obtain a business-friendly adjudicator. In a world of social media and video recording at nearly everyone's fingertips, discretion is appreciation. In the entertainment industry, even more so today, arbitration clauses are utilized because the only thing gaining publicity and traction should be the marketing of the film, album, single, or television show, not personal and business disputes that become public. Increasingly with the ability to become instantly

infamous, arbitration clauses are very useful and appreciated when dealing with legal disputes.

An arbitration provision is something you will generally see as a clause inside a contract. Generally, it is placed towards the front of the agreement to increase exposure of the clause. It typically will include when arbitration is triggered (by some act or breach of the agreement), where the matter will be heard, who will be the arbitrator or arbitration entity, and who will bear the costs of the arbitrator to start and at the end where a decision is rendered.

Practically, an arbitrator is a neutral party, sometimes a judge or someone with relative dispute-resolution experience that can render a competent decision in a matter presented by the disputing parties. Arbitration is private and not public (unlike a court of law). Courts will not overturn arbitration decisions unless due to fraud, corruption, or misconduct by the arbitrator unrelated to the facts and circumstances of the underlying decision[2] (Code Civ. Proc., § 1285 et seq.). Furthermore, the parties can sign a non-disclosure and confidentiality agreement(s) to protect the filing, process, settlement, and/or award.

Per the Association of Corporate Counsel, a sample arbitration clause would look like this:

> "Any controversy or claim arising out of or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules [including the Optional Rules for Emergency Measures of Protection]. The arbitration hearing shall take place in _____, _____ before a single arbitrator. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."[3]

Per the Association of Corporate Counsel, a more complex arbitration provision would look like this:

> "Any controversy or claim arising from or relating to this contract or the breach, or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its applicable Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall take place before a panel of three arbitrators in _____, _____."[4]

A sample Judicial Mediation and Arbitration Services ("JAMS")[5] arbitration clause for a standard domestic contract would look like this:

> "Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of he scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction."[6]

A sample American Arbitration Association[7] arbitration clause for a domestic contract would look like this:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."[8]

Lastly, per California Lawyers for the Arts,[9] a sample clause calling for arbitration would look like this:

> "All disputes arising out of this agreement shall be submitted to final and binding arbitration. The arbitrator shall be selected in accordance with the rules of Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts. If such services are not available, the dispute shall be submitted to arbitration in accordance with the laws of the State of California. The arbitrator's award shall be final, and judgment may be entered upon it by any court having jurisdiction thereof."[10]

The Independent Film and Television Alliance have similar sample arbitration provisions.[11] Now that we have a flavor for what arbitration clauses look like, let us turn to how consumers generally view arbitration clauses to better understand how they might be drafted and interpreted by courts of law.

III. HOW DO CONSUMERS VIEW ARBITRATION CLAUSES?

Prior to becoming a lawyer, and specifically a practitioner who uses arbitration in their practice for their clients or as a retired judge or lawyer, understanding let alone knowing what an arbitration clause is a difficult proposition. This would be akin to asking this author how to solve a quantum physics problem or for a non-mechanic to tune a 1956 Bel Air Chevrolet correctly. With specific reference to mandatory arbitration clauses found in many online contracts, arbitration is just not common enough to come across in everyday life, to understand it or to recognize it.[12]

Furthermore, in taking a self-experiment, think about the last time you actually read the terms and conditions when you made a purchase or signed up for a social media account. How about the last time you made a purchase via Amazon.com Prime®. Did you purchase a new iPhone 8 or X recently, did you actually read the terms and conditions for the contract? You did not, unless, of course, you were an attorney litigating a case or found yourself subject to an arbitration clause which you did not know that you agreed to in the first place.[13]

What's more, since you did not review the terms and conditions, it is unlikely that you saw one clause or provision in the terms and conditions of the online contract. The specific provision being a mandatory arbitration clause hauling you before an arbitrator. This is important for consumers because when agreeing to online contracts you are subjecting yourself to terms and conditions you might not be familiar. In this light, arbitration clauses take away certain remedies available to consumers, like injunctions or litigation before a civil court. Remedies that might be available to consumers, but harmful to businesses. Where remedies are taken away, the law and courts in California have attempted to protect consumers,[14] but they have been restricted due to the Federal Arbitration Act ("FAA") and the United States Supreme Court's interpretation of FAA preemption.[15/16]

IV. WHAT MAKES AN ONLINE ARBITRATION CLAUSE ENFORCEABLE BY LAW?

Formation is the all-important term in drafting enforcement written and online contracts. Formation of a contract in the online setting requires the "reasonably conspicuous notice of the existence of the contract terms" by the business and the "unambiguous manifestation of assent to those terms" by the consumer.[17] (Specht v. Netscape Communications Corp., 306 F.3 17 (2d Cir. 2002).) In the context of arbitration provisions in online contracts, a business would have to noticeably post the terms and conditions that included an arbitration clause on their website and the consumer would have to agree to those terms and conditions prior to the online purchase/registration.

In the online context, posting of terms and conditions is commonly seen in two formats, "Clickwrap/Clickthrough"[18] and "Browsewrap"[19] type agreements. From attorneys Alison Brehm and Cathy Lee with Kelley Drye & Warren LLP[20], describing the differences of each:

> "Clickwrap and browsewrap agreements differ in presentation and functionality. Clickwrap agreements require a user to affirmatively click a box on the website acknowledging agreement to the terms of service,[21] which are often available in a scrolling text box, before the user is allowed to proceed.[22] Browsewrap agreements have hyperlinked terms of use that are typically found on a separate webpage, which the user does not have to visit to continue using the website or its services[23]...
>
> Generally, courts have declined to enforce browsewrap agreements because the fundamental element of assent is lacking.[24] As an initial matter, because no affirmative action is required by the user to agree to the terms other than use of the website, the validity of a browsewrap turns on whether a user has actual or constructive knowledge of a site's terms."[25]

Restatement § 69 of Contracts (Acceptance By Silence Or Exercise Of Dominion) also provides that:

> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.[26]

The seminal case using Restatement § 69 of Contracts is Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004). The court held that because the consumer took the benefit of the offer (even without an "unambiguous manifestation of assent" through a "browsewrap" type agreement), the consumer (a business) accepted the terms and conditions of the offer (and the arbitration clause) where there were multiple transactions between the parties.[27] The court reasoned that the familiarity, occurrence, and knowledge of the consumer (a business-to-business online contract) played a role in the court's decision distinguishing Verio from the Specht decision requiring the "unambiguous manifestation to assent" to the "reasonably conspicuous notice" of terms.

Therefore, in online contracting, when considering a consumer (non-business to business relationship), an arbitration clause is enforceable where there has been a "reasonably conspicuous notice of the existence of the contract terms" by the business and the "unambiguous manifestation of assent to those terms" by the consumer.[28]

V. APPLICATION AND ENFORCEMENT: SELECT ONLINE ENTERTAINMENT INDUSTRY ARBITRATION CLAUSES

When considering online entertainment contracts, we are specifically referring to the terms and conditions (and arbitration clauses) contained on an entertainment-type company's website. For example, a music streaming company like Pandora or a television, film, and original content streaming service like Netflix. Pandora's online arbitration provision provides as follows:

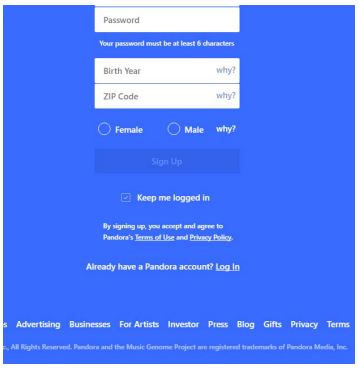
> "[25. Governing Law and Disputes.] (d) Arbitration Agreement. Any claims by Pandora, or claims by you that are not resolved by the Informal Resolution procedure described in section 25(c) above, arising out of, relating to, or connected with this Agreement must be asserted individually in binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and Supplementary Procedures for Consumer-Related Disputes (including utilizing desk, phone, or video conference proceedings where appropriate and permitted to mitigate costs of travel). This Agreement and each of its parts evidence a transaction involving interstate commerce, and the Federal Arbitration Act (9 U.S.C. Â§ 1 et seq.) will apply in all cases and govern the interpretation and enforcement of the arbitration rules and arbitration proceedings. Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. In addition to and notwithstanding the terms stated above, the following will apply to your disputes: (1) the arbitrator, and not any federal,

state, or local court or agency, will have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement including any claim that all or any part of this Agreement is void or voidable; (2) the arbitrator will not have the power to conduct any form of class or collective arbitration, nor join or consolidate claims by or for individuals; and (3) you hereby irrevocably waive any right you may have to a court trial (other than small claims court as provided above) or to serve as a representative, as a private attorney general, or in any other representative capacity, or to participate as a member of a class of claimants, in any lawsuit, arbitration, or other proceeding against us or related third parties arising out of, relating to, or connected with this Agreement.

The arbitration proceeding and the results thereof will be kept confidential by each party and not used for any purpose other than a party exercising its rights and fulfilling its obligations with respect to the other party; provided, however hat either party may disclose the existence and results of the proceeding: (1) as required by law, rule, or regulation; (2) to its accountants, attorneys, and other fiduciaries; and (3) to an arbitrator or third party who has exercised its rights under this section 25 for use as persuasive authority in other proceedings brought pursuant to this section 25.

(e) Limitation of Actions. Regardless of any statute or law to the contrary, any claim or cause of action you may have arising out of, relating to, or connected with your use of the Services, must be filed within twelve (12) months of the date the facts giving rise to the suit were known by you, or forever be barred."[29]

Pandora's "Terms" are a "browsewrap" agreement located on their homepage, as seen below:[30]



Would Pandora's arbitration clause be enforceable under *Specht* where there is no unambiguous manifestation of assent or conspicuous notice? Possibly, if the transaction was a business-to-business relationship with multiple transactions (like *Verio*), but not where Pandora has failed to have a check box or pop-up specific to the terms and conditions to a non-business entity consumer trying to listen to streamed music.

Netflix's arbitration clause in the "Terms of Use" link and provides as follows:

"[15.] Arbitration Agreement

If you are a Netflix member in the United States (including its possessions and territories), you and Netflix agree that any dispute, claim or controversy arising out of or relating in any way to the Netflix service, these Terms of Use and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the the same damages and relief that a court can award. You agree that, by agreeing to these Terms of Use, the U.S. Federal Arbitration Act governs the interpretation and enforcement of this provision, and that you and Netflix are each waiving the right to a trial by jury or to participate in a class action. This arbitration provision shall survive termination of this Agreement and the termination of your Netflix

membership.

If you elect to seek arbitration or file a small claim court action, you must first send to Netflix, by certified mail, a written Notice of your claim ("Notice"). The Notice to Netflix must be addressed to: General Counsel, Netflix, Inc., 100 Winchester Circle, Los Gatos, CA 95032-1815 ("Notice Address"). If Netflix initiates arbitration, it will send a written Notice to the email address used for your membership account. A Notice, whether sent by you or by Netflix, must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If Netflix and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or Netflix may commence an arbitration proceeding or file a claim in small claims court.

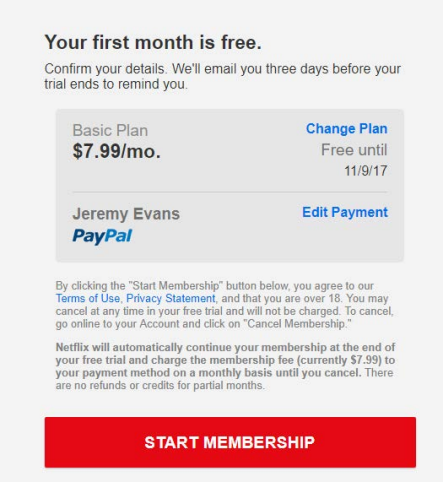
You may download or copy a form Notice and a form to initiate arbitration at www.adr.org. If you are required to pay a filing fee, after Netflix receives notice at the Notice Address that you have commenced arbitration, Netflix will reimburse you for your payment of the filing fee, unless your claim is for greater than US$10,000, in which event you will be responsible for filing fees.

The arbitration will be governed by the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules and Forms are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. The arbitrator is bound by the terms of this Agreement. All issues are for the arbitrator to decide, including issues relating to the scope and enforceability of this arbitration agreement. Unless Netflix and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your residence.

If your claim is for US$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds US$10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision explaining the essential findings and conclusions on which the award is based. If the arbitrator issues you an award that is greater than the value of Netflix's last written settlement offer made before an arbitrator was selected (or if Netflix did not make a settlement offer before an arbitrator was selected), then Netflix will pay you the amount of the award or US$5,000, whichever is greater. Except as expressly set forth herein, the payment of all filing, administration and arbitrator fees will be governed by the AAA Rules.

YOU AND NETFLIX AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and Netflix agree otherwise, the arbitrator may not consolidate more than one person's claims with your claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void. The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim."[31]

Netflix, like Pandora, also has its "Terms of Use" as a "browsewrap" agreement located on their "Sign up/Register page as seen below:[32]



At first glance, we can see that Netflix's arbitration clause is more detailed than Pandora's, and it also exempts class action lawsuits (sixth paragraph of section 15)[33] if a consumer wanted to bring such a claim with similarly situated consumers. Would Netflix's arbitration clause be enforceable under *Specht?* Like Pandora, possibly, if it was a business-to-business relationship with multiple transactions like in *Verio.* However, with a consumer just wanting to stream their favorite television show or movie, the arbitration clause is likely to be unenforceable where there is a lack of notice and assent to the terms and conditions absent a check box or pop up requiring the act of assenting before proceeding to signing-up/registering for the service.

Are arbitration clauses for entertainment companies and their online contracts different from other businesses? The obvious answer might be "yes" where each business's arbitration clause is likely, and hopefully, drafted differently and specific to the business's needs. In the entertainment industry, we might see more protection against the consumer's use of the business's license of other's intellectual property in music, television, and film because content and other's rights are at the heart of the industry. This makes sense because the intellectual property is the underlying value of the service being provided (e.g., streaming of music/television/film content). An entertainment company would, therefore, want to protect itself and content owners (via a license) from harm by reducing the available consumer remedies (e.g., requiring mandatory arbitration in the terms and conditions). We can see these differences between the arbitration clauses in the sample ACC, JAMS, AAA provisions for business contracts and those with Pandora and Netflix.

Where an entertainment company might be more protective of their business model/license, how might an in-house or outside counsel attorney draft the best arbitration clause to make sure it is understandable, recognizable, and enforceable as a matter of law in the courts. That is what we will discuss last.

VI. CLOSING: BEST PRACTICES IN DRAFTING ENFORCEABLE ONLINE ARBITRATION CLAUSES

Enforceable contracts, whether written or online, turns on the formation. Formation of a contract in the online setting requires the "reasonably conspicuous notice of the existence of the contract terms" by the business and the "unambiguous manifestation of assent to those terms" by the consumer.[34] (*Specht v. Netscape Communications Corp.*, 306 F.3 17 (2d Cir. 2002).) In the context of arbitration provisions in online contracts, a business would have to noticeably post the terms and conditions that included an arbitration clause on their website and the consumer would have to agree to those terms and conditions prior to the online purchase/registration for the consumer to be subject to the terms and conditions.

According to *Specht,* the arbitration clause would need to be a part of a "clickwrap/clickthrough" agreement to be enforceable. The user/consumer would be forced to physically do something to assent to the terms. Think of the "check-box" before purchasing something or some service online as a digital signature to an agreement right before payment/registration is made. It is currently the best-known way to make terms and conditions, and specifically arbitration clauses, enforceable. It also puts the consumer on notice by having the consumer forced to click something before a purchase/use.

Per attorneys Brehm and Lee, mentioned earlier

in this article in "Click Here to Accept the Terms of Service,"[35] they provide the following practical advice in drafting:

"Best Practices for Ensuring Enforceability"

A review of the decisions addressing online agreements—whether clickwraps, browsewraps, or a combination of both—reveals that there are a variety of ways to increase the likelihood that the agreements will be enforced, and these can be easily followed by website owners:

• There is a check-box that users must click adjacent to an affirmation similar to, "By clicking on the box, you are indicating that you have read and agree to the Terms of Use";
• The webpage is designed so that if the user does not check the box manifesting assent to the terms, the user cannot proceed in the transaction;
• In addition to a check-box that users must click, the terms of use are available either in a nearby scrolling text box or a nearby hyperlink;
• Any hyperlink of the terms is obvious, e.g., "Terms of Use" is underlined and has decent size lettering and visible coloring (not small lettering and not obfuscatory coloring);
• Any hyperlink of the terms has a central or obvious location on the webpage, e.g., the hyperlink is directly below the "I Agree" button (not relegated to the bottom of the webpage, which would require the user to scroll down to a submerged portion of the webpage);
• Any hyperlink of the terms immediately displays the terms (instead of requiring the user to click on a series of hyperlinks to view the terms);
• The terms of use are evident in every webpage on the website (rather than visible on only one webpage), in addition to requiring users to attest that they have read the terms of use;
• The terms are in readable font (at least 12 point); and
• The agreement contains all requisite elements of an enforceable contract (e.g., consideration, sufficiently definite material terms, etc.).[36]

Both website owners and users stand to benefit from such clear presentation of the terms. The owners have more certainty in knowing that the agreements will be upheld, and the users have a greater understanding of the terms dictating their use of the website or any commercial transaction. Ultimately, the more that an agreement looks like a clickwrap (i.e., requiring users to check the box next to the statement, "I have read and agree to the Terms of Use"), the more willing courts will be to find the notice necessary to give rise to constructive assent and enforce the agreement.[37]"

Brehm and Lee's advice has a consistent theme: be clear, be up front, and be consistent. With online agreements, the tendency may be to hide the terms and conditions, but the opposite is true. Drafters should be making it easier for consumers to consume not only the product being sold, but also to consume the entire benefit and consequences of their assent to the agreement.

In this light, some companies with quirky personalities have turned their terms and conditions into funny and entertaining scenarios where you could imagine the wording being something like "Our Lawyers Made Us Do This" or "READ THIS BECAUSE WE MIGHT OWN YOU AFTERWARDS."[38/39/40] It is not advisable, but it is an interesting note because it shows some companies understand what consumers are actually agreeing to, so companies should make it clear for them to understand and assent so they can get on to enjoying the very product they are trying to purchase/enjoy.

Professor Eric Goldman of Santa Clara University School of Law has some similar, but more specific advice when drafting online agreements (and making sure online arbitration clauses are enforceable). Goldman suggests that when advising tech, entertainment, or business clients, or any business doing business online that the attorney draft a "mandatory non-leaky clickthrough agreement."[41] This means that the process for assent to the agreement is a single process

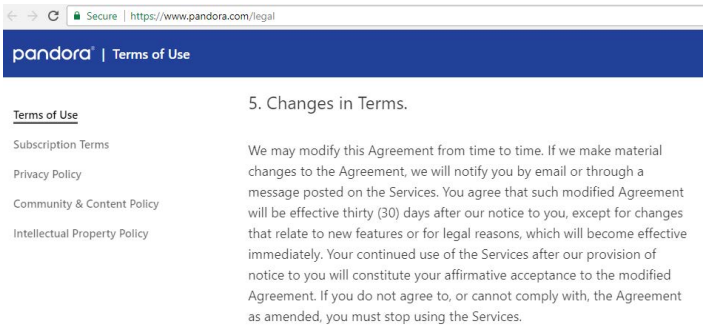
and is mandatory before the consumer can move forward/enjoy the thing that they are purchasing. Non-leaky means that a person cannot bypass the "accept" button of the terms and conditions. Clickthrough means the consumer has to scroll through the agreement's terms and conditions before clicking the accept button.[42] In some sense, Goldman's three-point way is to ensure everyone is on the same page when conducting business online. In the Pandora and Netflix examples, their browsewrap agreements lacked the both the check box/pop up and the clickthrough, thus likely making them unenforceable with a non-business consumer.

It is also essential that an attorney does not just copy and paste what other companies have done with their online agreements. In this way, Zachary Briers of Pepperdine University School of Law proposes three rules when drafting online agreements. First, ensure that your contract is not illusory. If the contract reserves to one party the unilateral right to revise the agreement, provide that any future revisions are prospective only, provide notice and opportunity to opt-out, or provide a new contract. Second, maintain evidentiary support, meaning proof showing what the website looked like at all stages with screen-shots or a history, when changes were made and why, and evidence of individual assent and to what terms. For example, a consumer who agreed to the terms and conditions thirty times in a month period showing continuous access and assent to the terms. Third, avoid the "every-one is doing it meme." Meaning, just because a large company is doing it does not make it the best way of doing things.[43]

Let us break down Briers's advice a bit further. First, for illusoriness, one seminal case is *Harris v. Blockbuster, Inc.,* 622 F.Supp.2d 396 (N.D. Tex. Apr. 15, 2009). In *Harris,* the court established precedent that when a contract has a clause that authorizes one party to make changes to the "contract" without notification the term is illusory and hence the entire "contract" is void.[44] The practical advice here is to draft agreements with clauses and provisions that stick. Meaning, do not leave open to change the contract or its terms unless it is purposeful and needed. Once you make the terms changeable, *unilaterally,* it takes away from the bargain agreed to between the parties, thus, making it illusory, misleading, and deceptive, even if your intention was the opposite.

If a client wants to change the agreement, send a notice. We are all used to seeing these. Sometimes we receive letters in the mail, emails, or pop-ups while browsing that notify the user that the terms and conditions for the company and those who use its services have changed. We often do not read them, but then again, we hardly read contracts as consumers unless something goes wrong. The point here is (1) as a business, to send a notice when the terms change and (2) as a consumer, to pay attention when it happens.

As an example, Pandora has a notice of change to the agreement in their terms of service, but they also provided wording that if a change were to occur, the user would be notified and have a thirty-day opportunity to opt-out. We can see the Pandora.com example below[45]:



Pandora has drafted well because the term is not illusory by offering notice and opt-out opportunities, but also by giving itself some leeway as laws and its business model change. As an aside, another way to enhance Pandora's "change in terms" provision would be to make clear that any revisions to the arbitration provision would only apply to disputes that arise prospectively, after the implementation of the revision, and not to previously accrued disputes.

As far as evidentiary support, this makes

sense and is likeable to our elementary mathematics teacher telling us to show our work. Businesses need to keep evidence handy showing what they did and did not do. Furthermore, businesses, with all of the technology and search programs, need to reasonably keep track of who is visiting their site and why. This is good for advertising and consumer use, behavior, and sale projections, but is also important for litigation and proving that something did or did not happen.

Lastly, as our mother's would tell us growing up, be the leader, do not follow Johnny jumping off the cliff. In business, the same principle applies. The worse thing a new or existing business can do is copy something from another business. Without a mandatory non-leaky clickthrough agreement, the Netflix and Pandora examples provided above are completely unenforceable in most states because they lack conspicuous notice to the terms. The difference here between browsewrap and a clickthrough agreement being an unenforceable contract and the attorney drafter possibly losing his job or worse.

In closing, the pop-up or check box and mandatory clickthrough requiring the consumer's signature and review places the terms and conditions before the consumers eyes so that they have the option to review the agreement and its terms and conditions/terms/terms of use. With the above, you can have the consumer "unambiguous[ly express their] manifestation of assent to those terms" (including an arbitration clause) by having the business place its terms (including an arbitration clause) on its website prior to purchase/use with a notice providing "check-box" accept button that is a "reasonably conspicuous notice of the existence of the contract terms." In this manner, the consumer can find the needle in the haystack and the business will have drafted an enforceable online arbitration clause.

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[1] 1 A great deal of gratitude goes to Pepperdine University School of Law Professors Zach Briers and William Nix for their insight into the subject matter

[2] Code Civ. Proc., § 1285 et seq.)

[3] Association of Corporate Counsel, "Sample Arbitration Clauses with Comments" (http://www.acc.com/_cs_upload/vl/membersonly/SampleFormPolicy/409703_1.pdf) (Last accessed on 9/21/2017)choice and access to more customized, often commercial-free, digital services.

[4] Id.

[5] Judicial Arbitration and Mediation Services ("JAMS") (https://www.jamsadr.com/): "JAMS is the largest private alternative dispute resolution provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial." (Last accessed on 9/21/2017)

[6] "JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts" (https://www.jamsadr.com/clauses/) (Last accessed on 9/21/2017)

[7] American Arbitration Association ("AAA") website (https://www.adr.org/Arbitration): "AAA panels comprise distinguished judges as well as leaders in the legal and business communities with industry-specific knowledge and expertise. Arbitrators are required to adhere to Codes of Ethics developed by the AAA and the American Bar Association (ABA). Select Expert Panels include Aerospace, Aviation, and National Security; Construction, Cybersecurity, Employment, Energy, Healthcare, Intellectual Property, Judicial, Labor, and Large and Complex Cases.") (Last accessed on 9/21/2017)

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[9] California Lawyers for the Arts (http://www.

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[16] Julie Werner, Ed Zimmerman, "US Supreme Court to Determine Whether Workers Waive Class Action," Forbes.com, October 1, 2017 (https://www.forbes.com/sites/edwardzimmerman/2017/10/01/us-supreme-court-to-determine-whether-workers-waive-class-action/#6611ff982267) (Last accessed on 10/10/2017)

[17] Specht v. Netscape Communications Corp., 306 F.3 17 (2d Cir. 2002)

[18] Technopedia.com, "Clickwrap Agreement" (https://www.techopedia.com/definition/4243/clickwrap-agreement): "A clickwrap agreement is a type of contract that is widely used with software licenses and online transactions in which a user must agree to terms and conditions prior to using the product or service.The format and content of clickwrap agreements vary by vendor. However, most of clickwrap agreements require the consent of end users by clicking an "OK," "I Accept" or "I Agree" button on a pop-up window or a dialog box. The user may reject the agreement by clicking the Cancel button or closing the window. Once rejected, the user us unable to use the service or product. A clickwrap agreement is also known as a clickwrap license or clickthrough agreement." (Last accessed on 9/21/2017)

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[20] Alison S. Brehm, Cathy D. Lee, "Click Here to Accept the Terms of Service," Communications Lawyer, Vol. 31, No. 1, American Bar Association, January 2015

[21] The phrases "terms of use" and "terms of service" are often used interchangeably. See Be In, Inc. v. Google Inc., No. 12-CV-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013)

[22] Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012)

[23] Be In, 2013 WL 5568706, at *6

[24] Tompkins v. 23andMe, Inc., No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *7 (N.D. Cal. June 25, 2014)

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[27] Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004)
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[32] Netflix.com (https://www.netflix.com/) (Last accessed on 10/10/2017)
[33] Id. at Sec. 15, 6th paragraph
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[37] See Be In, Inc. v. Google Inc., No. 12-CV-03373-LHK, 2013 WL 5568706, at *7 (N.D. Cal. Oct. 9, 2013)
[38] RJ, "Who said Terms of Service Agreements can't be funny?" DailyConversations.com, January 23, 2012 (http://www.dailyconversions.com/internet-marketing/who-said-terms-of-service-agreements-cant-be-funny/) (Last accessed on 10/10/2017)
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The Best Offense is a Good Defense

Lawyers, Agents, and the Blurred Lines Regulating Talent Representation

by Jeremy M. Evans, LL M

I. THE HOLLYWOOD DILEMMA

Professionals who serve as talent agents, sports agents, and/or lawyers all must meet specific regulatory and licensing requirements. Regulations are specific by state, and California is no different. This article focuses on regulations governing agents and lawyers who represent talent in the sports and entertainment industries in California. Part I of this article introduces the issues of navigating the talent representation industry, which includes agents, lawyers, managers, and clientele and presents the "Hollywood Dilemma" where lawyers cannot represent talent without a secondary license and/or registration. Part II describes the major registration requirements for talent agents, sports agents, and lawyers, with a discussion on the somewhat ironic similarities between agents and lawyers. Part III discusses the ethical and practical dilemmas in representing talent. Part IV sets forth the debate regarding the constitutionality of limits placed on lawyers through the Talent Agencies Act ("TAA"),[1/2] state registration requirements, and judicial decisions involving challenges to the TAA. Part V discusses who is best trained to service sports and entertainment clients. Part VI concludes this article by wrapping up and providing solutions to the matter of lawyers representing talent.

The registration requirements for talent agents, sports agents, and lawyers are clearly delineated on the respective forms, in the application processes, and in checking off the requirements to become licensed for each. The problem is that the work involved in servicing clients in each licensed area often overlaps and encompasses quasi, if not, legal practice crossovers. For example, agents may negotiate contracts and procure employment for their clients, while lawyers procure employment for their clients by negotiating contracts. This article aims to provide a clearer picture of the regulatory scheme and limits on what agents and lawyers can and cannot do, and why, for their clients. Finding reasoning in all of this will help all better serve clients and the artistic and athletic communities.

The California Labor Commissioner licenses and regulates talent agents and those who procure employment for talent in California through the TAA.[3] The California Secretary of State licenses and regulates sports agents through its powers and the Miller-Ayala Act.[4] The State Bar of California along with the California Supreme Court licenses and regulates lawyers.[5] The question of whether lawyers can be excluded from or regulated under the TAA and other California agent requirements from representing or working with talent or sports clients when lawyers are duly licensed by the State Bar of California and the California Supreme Court to do so has been hotly debated.[6/7/8]

The history of the TAA begins with Hollywood and the talent agent community that lobbied the California State Legislature to pass legislation excluding lawyers and everyone one except licensed talent agents from working with Hollywood's best. [9] Nonetheless, how and why a licensed attorney cannot represent talent without the fear of being left holding the proverbial bag *(with no money in it)*, but a licensed talent agent can practice law without a license is an important question because it raises the issue of fairness.[10/11]

This article explores the foregoing questions, with the following parameters. First, lawyers face a variety of interesting ethical dilemmas when representing talent. Second, this article will apply to both sports agents representing athletes and talent agents in the entertainment industry representing actors. Third, although the registration requirements are different in terms of representing entertainment talent versus sports clients, the barriers to entry are similar. The focus in this article will be on the two camps

that must be licensed to work in one form or another, lawyers and agents, since managers do not require any formal registration requirements when not procuring employment for clients.[12]

II. AGENT AND LAWYER LICENSE AND REGISTRATION REQUIREMENTS

Below are the various registration requirements when a person wants to represent talent.[13]

A. Sports Agents

Sports agents in California are licensed and regulated by the California Secretary of State through the power of the office and the Miller-Ayala Act.[14] The statutory scheme is as follows:

> [I]n California, a player agent must register with the California Secretary of State as an agent, while making mandatory declarations and disclosures, paying a small fee, and obtaining a bond.[15] If the agent wants to advise and work with student-athletes, he or she must register at the school that the student is attending.[16] Failure to comply may result in the agent/advisor being fined, suspended, or being disabled from representing athletes in one form or another.[17] Further, certain acts by agents (or others) could affect the eligibility of the student-athlete—and could therefore result in liability on the part of the agent. There is no formal education requirement to become an agent in California.[18] However, one must demonstrate relevant experience.[19]
>
> Athlete advisors are like agents in that they are generally the same person with a different registration requirement completed. Athlete advisors work with high school and college athletes who are entering the draft or thinking about entering the draft for a team or entering as an individual in a professional sports league. Registration generally requires payment of a fee and paperwork. Advisors are generally ***non-lawyers*** and may ***not*** practice law unless they are licensed to do so.
>
> Lastly, for an agent to represent a professional athlete in an American professional sports league (such as for the National Football League[20] draft or in free agency, or a Major League Baseball[21] player's (athlete's) arbitration, free-agency contract, or related matter), the agent must register with the Player's Association of the respective league where the athlete plays or will play. As an example, the National Football League (NFL) and Major League Baseball (MLB) both require a fairly large application fee, annual fees, passing a knowledge-based test, a background check, have a player on a professional team's roster, and in some leagues must have a four-year degree and a graduate-level degree. MLB does not require a formal education, but if one has a formal education, he or she have the opportunity to be designated as an "Expert Agent" [22] by applying and going through the approval process. Professional league agents are generally referred to as "Certified Agents" or simply "Certified." Certified Agents are generally not lawyers and may not practice law unless they are licensed to do so.[23]

Sports agents are often represented by lawyers and agents. Agents typically handle the negotiations with the professional sports league and the lawyer handles the contract review and the personal and business matters off the field. Sometimes the lawyer will wear two hats, acting as an agent and a lawyer where properly licensed/registered to do handle both.

B. Talent Agents

In California, the TAA is the regulatory scheme governing talent agents. The TAA provides, in general, that one must apply for a license, pay a fee, go through a background check, and obtain a bond.[25] No formal education is required, but applicants must provide and demonstrate experience in the industry. The TAA[24] was created out of protection for the talent industry in Hollywood to protect itself from unscrupulous individuals who might not have the client's best interest in mind.[26] The California Labor Commissioner has jurisdiction under the authority of the TAA over talent agents and those who

procure employment for talent.[27]

C. Lawyers

Lawyers have the highest bar to reach their profession and have the highest ethical standards imposed compared to talent agents and sports agents.[28] In California, to graduate from an American Bar Association accredited law school, prospective lawyers must enter law school with 15 years of school (a bachelor's degree), take the Law School Admission Test (LSAT), have a good grade point average, take and pass three years of law school, pass the Moral Character (background check), take and pass the Multistate Professional Responsibility Exam (MPRE), take and pass the California Bar Examination, maintain continuing legal education requirements, and obtain legal malpractice insurance or disclose to clients otherwise that the lawyer does not carry malpractice insurance.[29] Once the above requirements are fulfilled and adhered to with the highest ethical standards, a lawyer may then practice law.

D. Similarities Between Agents and Lawyers

The work that lawyers and agents engage in representing talent are eerily close, and one could make the argument that the agent industry was based on the qualifications of becoming a lawyer. For example, one of the interesting questions that have crossed the minds of many lawyers is whether malpractice insurance can serve as the bond required by the TAA[30] and state sport agent regulations in California. A bond serves as guard against some error by the agent that the talent can recover to compensate talent financially for the loss. Similarly, malpractice insurance serves as a guard against some error by the lawyer that the client can recover to compensate financially for the loss. Arguably, these forms of insurance coverage mirror each other and are interchangeable minus the higher threshold[31] to prove malpractice has occurred versus recovering on a bond.

In the instance where bonds and malpractice insurance are interchangeable makes for an argument that lawyers could just as easily be covered in representing talent as talent can recover from lawyers. Of course, in California, pursuant to Rule of Professional Conduct 3-410-Disclosure of Professional Liability Insurance, malpractice insurance is not required for lawyers, but lawyers must disclose the absence of malpractice insurance in writing to the client at the time of retention.[32] If lawyers were allowed to represent talent without registering as a talent or sports agent, there is room for cooperation to make it so that lawyers must carry malpractice insurance when working with talent to cover the TAA's bond requirement.

Interestingly, personal experience has shown that malpractice insurance rates for sports and entertainment lawyers are higher than other practice areas. Moreover, only certain insurance companies will insure lawyers working in the sports and entertainment industries.[33] The higher rates also show that the insurance industry is behind the ball on servicing lawyers as clients because talent clients are not more likely to file suit against their lawyers because they work in the sports and entertainment industry. There is actually an argument that it is less likely for a lawyer to be sued by a client or vice-versa because celebrities and athletes get enough attention and suing someone is not the type of attention talent would want. It also shows that there is a general misunderstanding and distrust where the rules and regulations are murky and hard to comply.

Another similarity can be found in the requirements to become a licensed talent agent, sports agent, and lawyer. In California, as in most states, a law student graduate who wants to practice law must take and pass both the bar exam and the moral character evaluation, pay the necessary fees, and keep up with their continuing legal education requirements, while purchasing malpractice insurance or disclosing to the client [or prospective client] that he does not carry malpractice insurance in writing.[34] A lawyer in California may also become specialized in a field by taking and passing a test after a certain number of years in practice.[35]

In California under the TAA,[36] a prospective

talent agent must pay a fee, post a bond, pass a background check, and demonstrate their experience.[37] Likewise, a sports agent in California must pay a fee, post a bond, pass a background check, and demonstrate their experience. Furthermore, a sports agent must also register with the respective players association where the agent will/is representing talent by paying a fee and/or passing a collective bargaining agreement exam, among other requirements like having an undergraduate and a post graduate degree demonstrating knowledge and experience (ex: National Football League Players Association). [38] The players' association registration requirement currently only applies to the five major unionized team sports in the United States: the National Basketball Association, Major League Baseball, Major League Soccer, the National Hockey League, and the National Football League.

In looking at the qualifications and requirements for each, there are four common denominators: (1) paying a fee, (2) being ethically and morally responsible/passing a background check, (3) taking a test and/or showing background and experience/continuing education, and (4) posting a bond/having malpractice insurance. The only differences here are that it is ironically cheaper in yearly fees to become/stay a licensed lawyer compared to both sports and talent agents, but it is harder to become and stay a lawyer by way of the legal education, bar exam, moral character test, background check, continuing legal education, paying for costly malpractice insurance, and abiding by the ethical and client confidentiality obligations and requirements.

The comparisons between the agent and legal industries reiterate the point that where lawyers historically existed before agents, the agent model was based upon the lawyer model, both in fact and in practice. However, agents can do lawyerly activities without being licensed lawyers, like negotiate contracts and represent talent clients, but lawyers cannot do the same activities without being subject to discipline, disbarment, fines/fees/litigation, and/or loss of earned legal fees by way of the TAA. Until the current system changes, the question of why the barriers of entry have been lowered to work closely with the most high profile talent groups is left unanswered.

III. ETHICAL DILEMMAS AND PRACTICAL REALITIES IN REPRESENTING TALENT

Practically speaking, the two most common responses to the dilemma that lawyers have to register as talent agents by agents or otherwise are (1) quit complaining, just register and pay the fee, or (2) get a law passed to exclude/include lawyers from the TAA. Both responses are related because the consequence for each is the same. For one, if a lawyer registers as a talent agent under the TAA, the lawyer is still subject to the ethical rules as a lawyer unlike that of the agent competition/counterpart. Second, this creates an unfair advantage for agents over lawyers. Third, it also ignores the fact that lawyers, who have the most stringent educational and testing requirements (especially in California), would be best served to service high profile clientele.[39] Fourth, assuming the lawyer lobby were to convince the California State Legislature to pass a bill to exclude or include lawyers in the TAA or the Miller-Ayala Act, lawyers would be still be subject to the high ethical standards set by the State Bar of California and the Professional Rules of Conduct.[40] Lastly, a lawyer obtaining an agent license ignores that lawyers are actually licensed to practice law, which is the thing agents are practicing unlicensed when negotiating contracts and the like.

Ethically speaking, there are four leading ethical dilemmas faced by lawyers when representing talent. The first ethical dilemma has to do with recruiting clients/talent, the second with practicing law in multiple states, while the third and fourth surround issues of conflicts of interest and attorney communication with a represented party. As partially quoted from "Ethical and Practical Implications and differences between Sports Agents and Attorneys:"[41]

IN-PERSON CONTACT WITH PROSPECTIVE CLIENTS

American Bar Association (ABA) *Model Rule of Professional Conduct 7.3(a)(2), Direct Contact with Prospective Clients, Solicitation of Clients:*

> A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: … (2) has a family, close personal, or prior professional relationship with the lawyer."[42]

California Rule of Professional Conduct 1-400, Advertising and Solicitation, provides:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following: … (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.
(B) Any unsolicited correspondence from a member or law firm directed to any person or entity.
(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship . . .[43]

THE MULTIJURISDICTIONAL PRACTICE OF LAW

ABA Model Rule of Professional Conduct 5.5(a), Unauthorized Practice of Law—Multijurisdictional Practice of Law, provides:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.[44]

California Rule of Professional Conduct 1-300(a)(b), Unauthorized Practice of Law, provides:

> (A) A member shall not aid any person or entity in the unauthorized practice of law.
> (B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.[45]

[CONFLICTS OF INTEREST EXPLAINED BELOW]

LAWYER COMMUNICATION WITH A REPRESENTATED PARTY

California Rule of Professional Conduct 2-100, Communication With a Represented Party[46] *, and ABA Model Rule 4.2, Communication with Person Represented by Counsel,*[47] prevent Lawyers from communicating with represented parties without the represented party's Lawyer approval and/or a court order . . . The Talent Agenc[ies] Act[48], the *Miller-Ayala Act*[49] and MLB/NFL Player Association rules[50] regulate agent changes/designations, but are mostly quiet when it comes to solicitation and communication as long as the agent(s) are registered [or licensed] properly.[51]

First, recruiting is essential in both the sports and entertainment industries. There is a dilemma of how lawyers can comply with being talent or sports agents in any form where the underlying job and roles of an agent place the lawyer in a compromising position(s) by (1) having to recruit clientele without prior relationships and (2) to work out of state (i.e., outside the jurisdiction where the lawyer is licensed to practice law). Therefore, the lawyer would be violating the first two rules of conduct mentioned above if the lawyer recruited a talent athlete or actor in another state.

Moreover, California Rule of Professional Conduct 3-310-Avoiding the Representation of Adverse Interests[52] presents another principal issue with lawyers representing talent as the current system is devised. Imagine a lawyer that represents Los Angeles Dodgers starting second baseman as well as the top rookie in baseball who is in the Dodgers farm system, who also happens to play second base. The Dodgers organization wants to trade or not renew the

veteran client's contract at the end of season, while simultaneously calling up the young prospect client. Even with written disclosures by each party notifying of the actual (not perceived conflict of interest), the lawyer would be conflicted out of the representation.

In providing an entertainment-based industry example, paraphrasing a story the book "Power House: CAA The Untold Story of Hollywood's Creative Artists Agency" by James Andrew Miller will be illustrative.[53] Actor Nicole Kidman wants a top part in the next hot summer movie. Actor Julia Roberts, her peer and also a highly talented actor, wants the part too. A lawyer represents both. As an agent, the common phraseology would be that the director or the producer makes the final decision and therefore if there is a conflict of interest it is out of the agents hands. Similarly, the general manager of the baseball team or the front office and ownership makes team decisions when signing their next second baseman, not the agent, therefore a conflict of interest does not exist with the agent.

However, the issue in conflicts of interest is not in who makes the decision, i.e., the judge or jury, general manager, director or producer, it is how well the lawyer zealously advocates for the client within the bounds of the law. [54] A lawyer could not conceivably represent both interests of the clients equally where the two are fighting for the same role or field position. Someone will have to compromise and the lawyer will have been compromised by being the position to represent conflicting parties in the same transaction.[55]

Lastly, with regard to attorney communication with a represented party,[56] using the Kidman and Dodgers examples above. Again paraphrasing from the *Power House* book by Miller,[57] imagine Lawyer "A" represents actor Kidman, but not actor Roberts who is represented by Lawyer "B." Lawyer A wants to represent Roberts to add to his book of clientele. However, by approaching actor Roberts without Lawyer B's written consent Lawyer A would violate both the in-person contact rules[58] and the attorney-client communication rule[59] because Roberts is already represented by Lawyer B. On the sports side, replace the actors with the second basemen and the same result follows.

And therein lies the Hollywood Dilemma. Lawyer ethics require one permissible act, while the practicalities of the entertainment and sports industries provide for another. It is not a judgment on one or the other, it is a reality that lawyers and agents face on a day-to-day basis. It is also why Hollywood and the sports industries rely heavily on talent agents to navigate difficult waters and why lawyers have been excluded, by rule or self-preservation, maybe both, from representing talent.

IV. CONSTITUTIONALITY AND DISRUPTION OF THE TALENT AGENCIES ACT

The foregoing parts of this article discussed how state legislation, specifically the TAA and the Miller-Ayala Act, imposes barriers on lawyers representing talent in the entertainment and sports industries. This section examines the constitutionality and fairness of all the rules and regulations on lawyers in representing talent through case law.

In applying the TAA to an actual case, the *Solis v. Blancarte,* TAC-27089 (2013)[60] matter that was heard before the California Labor Commissioner (who has jurisdiction over the TAA matters).[61] The case is instructional because it highlights that a lawyer, although duly licensed to practice law in California, cannot represent talent (including reviewing contracts) without being a licensed talent agent. A lawyer cannot review or negotiate a contract for talent because that act is seen as "procuring" employment, which is in violation of the TAA. As a result of the case, lawyer Blancarte lost his negotiated percentage fee from the agreed upon retainer agreement. The case demonstrates a few lessons that will be discussed later in this article, but for now know that not being licensed/registered as a talent agent in California has serious consequences and implications.[62]

A. Case law: Constitutional Challenges

In 2008, the National Conference of Personal Managers brought a lawsuit against the Governor of California (*National Conference of Personal Managers v. Edmund G. Brown*, 9th Cir. No. 15-56388, April 25, 2017) claiming that the TAA was unconstitutional for vagueness, a violation of the commerce clause, a violation of the first amendment, and void as involuntary servitude.[63] The case was dismissed, but the matter arose out of a 9th Circuit Court of Appeal case, *Marathon Entertainment, Inc. v. Blasi,* 9th Cir. No. B179819, June 23, 2006, where the manager for the talent sought to recover unpaid fees, but the court found for the talent because the manager procured employed while not being licensed under the TAA.[64] The *Brown* court held in dismissing the case that:

> "[C]ourts have already have sufficiently established what "procuring" means, noting that it is contained in 'numerous California statutes' that have not been challenged [and that personal managers were subject to the Talent Agencies Act according to the *Blasi* case] . . . [The court] said 'Not being compensated for work performed does not inevitably make that work involuntary servitude. Plaintiff's members [managers] have choices' . . . [The Court] also rejected claims that the Talent Agencies Act violated the Commerce Clause . . . and the First Amendment. Of the latter, [the court] wrote that the state statute 'protects conduct, not speech. It does not limit the speech of a personal manager; it limits the personal manager's ability to enforce contractual obligations when that person engages in the conduct of procuring employment.'[65]

The problem with the above decision is that is does not attack the Hollywood Dilemma head on with regard to what the rule of law is "supposed to do" and how it applies to lawyers, who are licensed to practice law. The American rule of law is based in fairness and the treatment of people equally.[66] In that sense, the law should bring people and their activities to the light, not into the dark. What the current system does is to force lawyers into small exceptions to work with talent or otherwise be subject to fines, loss of license, and possibly reputation. However, lawyers have been assisting the entertainment and sports industries for years and their efforts should applauded and rewarded, not discarded and dismissed through the TAA and similar laws and regulations. The TAA has also become a tool for talent to use when not wanting to pay attorney's fees,[67] and bad behavior should not be encouraged.

B. Case Law: Disruption in the Talent Agencies Act Power of Arbitrating Claims

There has been some crack in the armor of the TAA though and the California Labor Commissioner who hears matters under the TAA's jurisdiction. Again, in 2008, the United States Supreme Court in *Preston v. Ferrer,* 552 U.S. 346 (2008)[68] held that an arbitration clause in a lawyers contract with talent, even though the lawyer was unlicensed as a talent agent under the TAA, the talent would still be forced to submit to mandatory arbitration as opposed to a hearing before the California Labor Commissioner.[69] The court reasoned that "when parties agree to arbitrate all questions arising under a contract, state laws [the TAA] lodging primary jurisdiction in another forum [the California Labor Commissioner], whether judicial or administrative, are superseded by the FAA [Federal Arbitration Act]." [70] An overhauling of the TAA is not a complete win for Lawyers because an arbitrator would still have to apply the TAA and the law to a dispute, but it is a break in a series of victories for the TAA's authority.

C. Potential First Amendment Challenges to the Talent Agencies Act

The above decision highlights the remaining constitutional question. In this light, the 14th Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[71]

The law should be fair to all and apply equally according to the 14th Amendment. Certain classes of people, especially lawyers who are duly licensed, should not be excluded from representing talent-based clients. Furthermore, all prospective clients, including talent, should have access to legal services as they wish.

According to another legal theory, an argument could be made that restricting lawyers to not representing talent without a talent license is a restraint on trade and intra/interstate commerce. There are three sources of law for commerce. The Commerce Clause describes an enumerated power listed in the United States Constitution (Article I, Section 8, Clause 3).[72] It is one of Congresses' most recognized powers as a listed duty in the Constitution to regulate commerce.

The "Dormant Commerce Clause ultimately means that because Congress has been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity."[73] The Dormant Commerce Clause is not a specifically enumerated power listed in the Constitution, but has been developed through case law. Lastly, there is intrastate commerce that is generally regulated by the states unless preempted by federal law. Intrastate commerce is business that occurs within one states border only.

The major prevention from applying any form of the commerce clause to the lawyer-agent dilemma, specifically the TAA and the Miller-Ayala Act, is that lawyers are limited to practice law in the states where they are licensed. Specifically, when a lawyer practices outside the licensed jurisdiction (i.e., California), the lawyer, minus specific exceptions, would be subject to discipline, fines, civil litigation, malpractice claims, and possibly loss of license to practice law. Therefore, the focus is really on intrastate commerce.

Intrastate commerce is regulated by the states. Even for a lawyer who has licenses in two or more states, the representation would be limited to one state and in one court at a time. Lastly, there is no preemption yet by federal law, but the National Collegiate Athletic Association's proposed Uniform Athlete Agents Act[74] and the existing Uniform Bar Examination[75] could be precursors of what is to come to help regulate the crossover between the entertainment, legal, and sports industries to allow lawyers to work with talent in a more seamless, efficient, and ethical manner. Currently, however, despite the unfairness and lack of clarity, lawyers will have to continue to avoid representing talent or find a narrow exception to do so without being subject to discipline and/or losing earned legal fees.

V. WHO IS BEST TRAINED TO SERVICE TALENT?

This article has discussed the needs of talent representation and the roles, often overlapping, of agents and lawyers in that process. This article also discussed that lawyers must be registered as agents under the TAA, even though lawyers are licensed by the State Bar of California to practice law. This article then turned to the ethical and practical dilemmas in representing talent. Now this article closes with a discussion on perhaps the most important aspect of all in representing clientele (which may include talent), i.e., relationships, while providing some solutions to Hollywood dilemma.

The lawyer-client relationship is one of the most closely held and respected according to the letter-of-the-law and practice. It is equal to the doctor-patient and clergy–penitent privileges. However, the TAA and the various sport agent registrations restrict talent and sports clients from utilizing their counsel of choice without some registration, exception, or third party relationship, which as discussed above

presents its own lawyer-client privilege and fiduciary duty challenges.

For contexts sake, it takes a lawyer nineteen years of schooling after taking a bar examination and passing the moral character test before being able to practice law. A lawyer also has further continuing legal education and ethical duty requirements while practicing law. In addition, without disregarding the many talented talent and sports agents in America and around the world, the question becomes why lawyers are limited from being able to work with talent directly without an additional license. The situation should really be turned on its head. It is agents who should be seeking to become lawyers to represent clients to avoid the unauthorized practice of law, not lawyers losing earned fees and relationships because of a specialized license requirement.

Talent and sports clientele should be free to seek legal counsel from those who have obtained the highest ethical and education standards. The rhetorical question is why the entertainment and sports industries have allowed lower standards where agency work is not subject to conflicts of interest and other important and necessary rules and requirements as lawyers. Turning the dilemma on its head, the question becomes should the California State Legislature make it harder for agents to represent talent by raising the requirements (i.e., to become licensed lawyers before representing talent in the sports and entertainment industries). Currently, the TAA and case law that has created the Hollywood Dilemma has dealt with the matter unfortunately by asking who is *better situated* with the current rules to represent talent, not by asking who is *better qualified/trained* to represent talent.

VI. CONCLUSION: SOLUTIONS TO THE HOLLYWOOD DILEMMA

Over the years, many authors before have written on the Hollywood Dilemma. In 2001, Gary Devlin at Pepperdine University School of Law wrote on many of the same topics in "The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry."[76] Some courts and administrative bodies have jumped into the discussion since that time, including the *Solis, Blasi, Ferrer, and the National Conference of Personal Managers* cases in 2006, 2008, 2013, and 2017.

The *Ferrer* case is good law and a U.S. Supreme Court case, but that dealt with arbitrations in private contracts with talent where the lawyer is not licensed as a talent agent (thus highlighting the power of severability in contracts). It did push back against the TAA and California Labor Commissioner's jurisdiction, which cannot be understated considering the case history, but according to *Blasi* and *National Conference of Personal Managers,* it is the act of procuring employment that places individuals under the auspice of the TAA, not the job title of the individual (lawyer or otherwise). The *Solis* case is dispositive as to lawyers, but it is not authoritative law as a California Labor Commissioner decision.

The difficulty of navigating the lawyer vs. agent arena in representing and working with talent as dealmakers is a Hollywood Dilemma. The topic is interesting from a policy perspective because it seems backwards that the most educated and sometimes the most experienced people in the room (lawyers) cannot "procure" work for talent without a talent agent or sports agent license where "procure" could mean something as customary for a lawyer as reviewing a contract. Conversely, a talent agent who is unlicensed as a lawyer can act as a lawyer when reviewing and negotiating contracts. Therefore, any solution should require (1) exclusion from getting licensed as an agent if one is a licensed lawyer, or (2) inclusion in the TAA or new law as an agent if one is a licensed lawyer, and (3) coming to terms/a compromise on how to deal with the ethical dilemmas when practicing law as a talent agent or as an exception because one is acting as an agent.[77]

One solution revolves around not being licensed as a lawyer at all. This may seem like an attractive solution at first, but not when law school is arguably the legal education one needs to be a successful agent, specifically in contract drafting and negotiations, and yet costs significant time, preparation, six figures, and three-years to obtain. It is therefore not a practical one or financially sound one to ignore the law license all together.

On the other hand, Ari Emanuel with WME | IMG,[78] one of the top talent agents and executives in Hollywood, along with many others, have never attended law school, proving that law school is not a guaranteed path to success in the talent representation business. However, ignoring the issue by forgoing law school or forgoing a license to practice law does not seem to be the best path forward since there are very talented lawyers in the talent representation business. Back to the dilemma at hand, how do lawyers to work with talent without being subject to the TAA?

One observable, but problematic solution may be to ignore legal ethics and the TAA all together. There is some evidence that this occurs on the recruiting side in general and where lawyers are wearing two hats, one as a lawyer and one as agent. The dilemma here is navigating the waters between those two hats. Moreover, the result of being caught is that lawyers are subject to discipline and a loss of license by the State Bar of California and/or losing an earned fee via the California Labor Commissioner when acting as a talent agent.

A third and possibly more practical and ethical solution is to utilize the TAA and the various sport agent registration requirements to the lawyer's advantage by working within the Rules of Professional Conduct. First, this is practical because maybe as a lawyer one may not want to do as much handholding as an agent. Maybe a lawyer wants to focus on the broader concepts and ten-thousand foot view in representing the client as there something very powerful, rewarding, and nostalgic in the lawyer-client relationship.

The above solution works by having the lawyer work with a licensed talent agent. Working with talent directly or with a talent agent is possible because 1700.4(a) and 1700.44(d) of the TAA provides for exceptions to those who are working (1) on music contracts[79] or (2) at the written request of and with a registered talent agent.[80] However, the issue with the music contract exception is that this is a small exception in comparison to the larger body of work being done in film, television, and sports (there is currently no exception for lawyers to work with sports agents in Miller-Ayala Act or other registration requirements). It is, in other words, a start, but not the finish. For one, too many clients are left without service by lawyers in the music exception model where the industry has also been seriously disrupted with the advent of over-top-media and direct to consumer distribution.[81] On the second exception, this is a start because, as will be discussed later, additional issues arise when a lawyer acts in concert with an agent.

For one, California Rule of Professional Conduct 1-320-Financial Arrangements With Non-Lawyers,[82] requires that the lawyer's role in the matter be limited to (1) reviewing contracts and advising generally on business matters, and (2) to be paid by the company as general or outside counsel or directly by the client. The lawyer would not be able to exchange legal fees with a non-lawyer (the agent), thus somewhat preventing percentage fees, or on working with the client to procure employment (e.g., for sports agents read "recruit" or "negotiate a deal") with a studio or professional sports team. Essentially, the lawyer would be acting as a lawyer not a talent agent, however, the issue here is to determine whether lawyers can work with talent without being licensed as a talent or sports agent not whether regulations can box lawyers in to one specific activity. It seems, at least according to Rule 1-320 and the TAA that lawyers would be limited to working with talent in conjunction with a licensed talent agent in a non-music deal where the other parameters apply. Seems onerous and it is.

Second, keeping in mind the above requirements, California Rule of Professional Conduct 1-310-Forming a Partnership With a Non-Lawyer[83] also forbids lawyers from entering into a partnership with non-lawyers (e.g., agents) where the underlying work is legally related (e.g., where legal advice is being provided). Therefore, a lawyer could work with a licensed talent agent as outside or general counsel in a non-music deal where the lawyer is paid by the company or talent directly and does not share the legal fee, but the lawyer could not be a partner in the company or take any profit sharing.

The above is both impractical and unrealistic. This is similar to putting limits on making a living for lawyers like the National Football League does with its rookie player contracts.[84] One can see with the convoluted application of such rules, lawyers forgo becoming licensed lawyers and having to take the feared California Bar Exam to become licensed talent or sports agents. It also begs the question of whether the TAA has lowered the barriers of entry in working with the most high profile and wealthy populations in the world, entertainment, and sports clientele. Lastly, in working in conjunction with a licensed talent agent in a non-music deal where the pay structure and relationship is legal and ethical, a lawyer could advise one client, but not necessarily, the other in the same transaction because there would be a conflict of interest and disclosures could not cure that conflict.

However, there are two solutions to solve the Hollywood Dilemma as mentioned at the beginning of this section. First, the California Legislature needs to exclude lawyers from the TAA because lawyers are licensed, carry malpractice insurance, and are trained in art that talent need the most (contracts, intellectual property, dispute resolution, and negotiations) when protecting clientele's business and careers. Second, the United States Congress needs to pass legislation that covers both entertainment and sports agents so that a lawyer working in California may represent an athlete or actor working in Georgia, for example.

The second solution is really two parts because (1) it covers "agency" work that is legal in nature, and (2) covers legal work in a state where a lawyer is unlicensed. In some sense, the second solution is a "National Agency and Licensure Act" for lawyers. The business-side of this is that it is more inclusive in including lawyers, while still permitting current agents to keep current and future clients.

Professor Devlin agrees that a single legislative bill would be the best step forward, not one specific to managers, agents, or lawyers.[85] Since he wrote on the subject in 2001, the issue of lawyers being exempt from the TAA has not occurred. The current legislation is the same, the TAA abides. Other than *Solis,* lawyers have not attempted to directly challenge the TAA through litigation. Unfortunately, where the California Labor Commission has jurisdiction over the TAA, Courts have not ruled on the matter as to lawyers, and thus the process is cyclical. However, the court in *Ferrer* showed a willingness to treat the lawyer-client relationship with deference by respecting a contractual matter in a retainer agreement, or maybe it was just specific to a federal question by way of the Federal Arbitration Act preemption.

The question of whether talent is better served by restricting lawyers from working with talent where lawyers are the best trained to service talent is an important one. The dilemma is similar the sports agency industry where the National Collegiate Athletic Association limits when and where agents can work with athletes. Arguably, the law should be allowing open communication, not restricting it. It seems both constitutional and simple business savvy to allow communication versus restricting it. With a "National Agency and Licensure Act," the sports and entertainment industries can have a much clearer system that is understandable and fair to both lawyers and clientele.

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Litigation Update

by Michelle M. Wahl; Patrick Ouellette; Kathryn S. Yoches; Katie R. Day; Kyle E. Simmons; Bernetta Hardy

A Landmark Win for YouTube Users

The U.S. Copyright Act affords a "fair use" defense for alleged infringement in some instances. However, successfully arguing such a defense is not always a simple task. Without any bright-line rule or definitive standard, courts find themselves rendering decisions on a case-by-case basis. Granted, courts are required to consider a number of non-exhaustive factors, including (1) the purpose and character of the work, (2) the nature of the copyrighted work, (3) the quality, amount and substantiality of the portion of the copyrighted work used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

This defense became crucial in 2016 when Matt Hosseinzadeh ("Hosseinzadeh") a YouTuber, sued the creators of YouTube channel H3H3, Ethan and Hila Klein, alleging they had misused fair use and were infringing Hosseinzadeh's copyright when H3H3 posted a video featuring clips of Hosseinzadeh's video and then criticizing the same. Besides copyright infringement claims (and a defamation claim), Hosseinzadeh alleged that the Kleins had violated the Digital Millennium Copyright Act by asserting misrepresentations in a counter-takedown notice.

In its fair use examination, the Court held that criticism and comment, such as that exhibited by the Klein's video at issue, were classic fair use examples and were one of the key factors favoring the Kleins. However, because the Hosseinzadeh video was considered a creative work protected by copyright law, factor (2) favored Hosseinzadeh. Factor (3) was a flush given that the use of Hosseinzadeh's video in Klein's video was a necessary element for its critique and criticism. Finally, in light of the differing nature of the two videos, the Court held that the Klein's video was not a substitute for the Hosseinzadeh video. Considering