47th ANNUAL
ENTERTAINMENT SYMPOSIUM

2023 HYBRID SERIES

THE DISRUPTERS, THE DISRUPTED, AND THE DISRUPTED DISRUPTERS

DAY 2 SYLLABUS

June 7, 2023

UCLA School of Law
Ziffren Institute for Media, Entertainment, Technology & Sports Law

The Disrupters, the Disrupted, and the Disrupted Disrupters

47th Annual Entertainment Symposium

Wednesday May 31 | Wednesday June 7 | Friday June 9

Keynote Speaker

Bela Bajaria, *Chief Content Officer*, Netflix

For a decade or more, one of the dominant narratives in the entertainment industry has been the disruption of the legacy players and their businesses by the arrival of deep-pocketed, norm-breaking tech companies. But in the last few years, even these giants have weathered stock price plunges, endured labor conflict as the sequel to a global pandemic and faced the transformative potential of artificial intelligence. This year's Entertainment Symposium will explore how these disruptions have led to an ongoing transformation in traditional business models, production methods, and labor markets, while also highlighting key areas of law. Over the course of the program, an array of distinguished executives, entrepreneurs, attorneys and academics will examine how the entertainment industry's major players have adapted (or failed to adapt) to this challenging and rapidly changing business environment and consider what upstarts will thrive – and what legacy players will survive – in the industry's next phase.

Wednesday, May 31, 2023

5:00 - 5:05 pm (PDT)

Dean's Remarks

PRESENTER:

Dean Russell Korobkin

Interim Dean and Richard C. Maxwell Distinguished Professor of Law, UCLA School of Law

5:05 - 5:50 pm (PDT)

After Covid: The Industry Resets

Three and a half years after Covid's arrival, the industry works to find its footing again. This year's opening session sets the stage with the Symposium's annual status report exploring box office recovery, streaming, and digitally driven advertising. This presentation will explore how streaming maturity and higher interest rates are leading to an end of the "golden age of production," previously fueled by capital and emphasis on growth over profits. It will consider the evolving role theatricals can play in support of streaming, along with a study of the increased divergence between box office success and best picture honorees. It will also explore the many varied definitions of new...and not so new...FAST services. And it will consider these as factors contributing to today's extremely difficult labor environment.

PRESENTER:

Tom Wolzien

Chairman, Wolzien LLC

6:00 - 7:00 pm (PDT)

Dearly Departed: A Review of the Legal and Industry Implications of the Entertainment Job Market

With the widely publicized entertainment layoffs and changing job market, attorneys and executives are faced navigating issues including severance, high level employment agreements and compliance with labor laws. The navigation of these issues within the entertainment industry – from recruitment to termination – also requires a nuanced understanding of industry norms. This panel of experts will help deconstruct the legal and market realities of the dearly departed while also considering how bias can impact the process of hiring, firing and retaining a diverse pool of employees.

MODERATOR

Azi Amirteymoori

Owner/Employment Attorney/Senior HR Consultant, 403 Ops Consulting

PANELISTS:

Connie L. Chen

Principal, Jackson Lewis P.C.

Amanda N. Luftman
Managing Partner, Boren, Osher & Luftman, LLP

Joanna Sucherman
Owner, JLS Media

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Wednesday, June 7, 2023

5:00 - 6:00 pm (PDT)

Representing Everyone, Everywhere, All at Once: Entertainment Industry Conflicts and How to Navigate Them

The John H. Mitchell Panel on Ethics and Entertainment

Attorneys that practice in entertainment can be a relatively small and insular group, negotiating with the same people and companies deal after deal. Attorneys may represent multiple parties on the same side of a transaction including the writer, director, showrunner; and/or cast members on a particular film or television project. These types of repeated and intertwined representations often raise ethical issues. This panel will focus on providing guidance to attorneys in the entertainment industry on complying with their obligations pursuant to the California Rules of Professional Conduct, including advice when an attorney is faced with representing two or more clients on a deal, when clients' interests are ostensibly aligned but become adverse, and the pitfalls of representing various clients in repeated transactions with the same party. It will offer advice on how to avoid stepping over the line and when it may be time to withdraw. Finally, it will look at what happens and explore what to do if faced with a malpractice suit or disciplinary proceedings in this area.

MODERATOR:

Scott L. Cummings
Professor of Law and Robert Henigson Professor of Legal Ethics, UCLA School of Law

PANELISTS:

Amy L. Bomse
Shareholder, Rogers Joseph O'Donnell

Jeffrey M. Davidson
Partner, Covington & Burling LLP

Sally C. James
Partner, Greenberg Glusker LLP

6:10 - 7:10 pm (PDT)

New Frontiers: How Artificial Intelligence Presents New Opportunities (and Risks) for the Entertainment Industry

Artificial Intelligence and machine learning has had a swift impact on society and more particularly, the entertainment industry. Increasingly powerful and sophisticated generative AI presents new opportunities for creators, talent, and studios but also numerous risks for these stakeholders. From copyright questions to labor rights, from virtual production spaces to posthumous deepfakes, it is a time of excitement and trepidation. This panel will discuss these issues from a variety of perspectives, staying abreast of the most recent technological and legal developments in this fast-moving space.

MODERATOR:

Nathaniel Bach
Partner, Manatt, Phelps & Phillips, LLP

PANELISTS:

Travis Cloyd
CEO, WorldwideXR, *Global Futurist*, Thunderbird School of Global Management

Ted Schilowitz
Futurist-in-Residence, Paramount

P.J. Shapiro
Founding Partner, Johnson Shapiro Slewett & Kole LLP

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Friday, June 9, 2023

2:00 - 2:05 pm (PDT)

Welcome

2:05 - 2:20 pm (PDT)

Chairpersons Emeriti Recognition: Matthew C. Thompson & Lawrence Ulman

PRESENTERS:

Elsa Ramo
Co-Chair, UCLA Entertainment Symposium Advisory Committee; Managing Partner & Founder, Ramo Law PC

Craig Wagner
Co-Chair, UCLA Entertainment Symposium Advisory Committee; Executive Vice President, Business Affairs & General Counsel, Paradigm Talent Agency

Christa Zofcin Workman
Co-Chair, UCLA Entertainment Symposium Advisory Committee; Co-President & COO, River Road Entertainment

2:20 - 3:10 pm (PDT)

The Price of a Name: Navigating the World of Fictionalized True Stories and Celebrity Endorsements

Film and television are so often based on the stories of actual people and real-life events. A few recent examples include the fi lms TILL and AIR and the limited series DOPESICK, PAM & TOMMY and THE DROPOUT. Studios and production companies frequently go out of their way to acquire an individual's "life rights" or partner with celebrities to tell their stories. What is the price of a celebrity's name, likeness and life rights? Are life rights necessary to tell someone's story? This panel will explore financial and other issues surrounding the production of fictionalized true stories and content inspired by true events. The panel will also examine the world of celebrity endorsements, the inherent risks in talent lending their names to promote products or services, and how to avoid costly mistakes that can damage a celebrity's reputation or brand in the market.

MODERATOR:

Diana Palacios
Partner, Davis Wright Tremaine LLP

PANELISTS:

Lisa Callif
Founding Partner, Donaldson Callif Perez, LLP

Ann Brigid Clark
Shareholder, Greenberg Traurig

Kevin Vick
Partner, Jassy Vick Carolan LLP

3:10 - 3:30 pm (PDT)

Networking Break

3:30 - 4:20 pm (PDT)

Whose IP Is It Anyway? Source Material and Underlying Rights in Film and TV

So many fi lm and television shows today are based on underlying material. Whether a novel, blog, videogame or television format, literary and underlying rights deals are common in nearly every aspect of fi lmmaking and television production. This panel will examine issues surrounding source material agreements including granting and reserving rights, reversions when things don't go as planned, copyright termination and the management of a deceased author's estate that controls valuable copyright libraries.

MODERATOR:

Matt Belloni
Founding Partner, Puck

PANELISTS:

Michael Grizzi
Executive Vice President, Motion Picture Legal, Paramount Pictures

Michael Sherman
Partner, Reed Smith

Michelle Weiner
Co-Head of Books Department, Creative Artists Agency

4:20 - 4:30 pm (PDT)

On Popcorn and Purpose: When We Do More Than Entertain

PRESENTER:

Douglas Lichtman
Professor of Law and Faculty Director, Ziffren Institute for Media, Entertainment, Technology & Sports Law, UCLA School of Law

4:30 - 4:50 pm (PDT)

Networking Break

4:50 – 5:45 pm (PDT)

Keynote

Bela Bajaria
Chief Content Officer, Netflix

Ken Ziffren
Partner & Co-Founder, Ziffren Brittenham LLP

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UCLA School of Law is a State Bar of California approved MCLE provider. By attending all three (3) sessions, you may earn Minimum Continuing Legal Education credit in the amount of up to 6.25 total credits (4.25 hours of general credit, 1 hour of elimination of bias credit, and 1 hour of legal ethics credit).

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IN MEMORIAM

MICHAEL ADLER

May 10, 1969 – November 9, 2022

Thank you for your 45 years of service on the Entertainment Symposium Advisory Committee.

You were truly one of a kind and will be greatly missed.

ACKNOWLEDGEMENTS

THE SYMPOSIUM ADVISORY COMMITTEE AND EDITORS WOULD LIKE TO THANK THE FOLLOWING VOLUNTEERS FOR THEIR ASSISTANCE IN THE PREPARATION OF THIS SYLLABUS: LINDEN BIERMAN-LYTLE, DERRICK DAVIS, MATTHEW DRESDEN, STEFAN MALKOUN, MICHAEL MOSKOWITZ, NICOLAS JAMPOL AND SAM TURNER. AS WELL AS THE UCLA SCHOOL OF LAW STUDENT VOLUNTEERS. THE SYMPOSIUM ADVISORY COMMITTEE AND THE EDITORS ALSO WOULD LIKE TO EXPRESS THEIR GRATITUDE FOR THE ASSISTANCE AND SUPPORT GIVEN BY THE UCLA SCHOOL OF LAW AND ITS STAFF, AND ESPECIALLY DEAN RUSSELL KOROBKIN, DOUG LICHTMAN (FACULTY DIRECTOR, ZIFFREN INSTITUTE), CINDY X. LIN (EXECUTIVE DIRECTOR, ZIFFREN INSTITUTE), ANNABEL ADAMS (ASSISTANT DEAN OF COMMUNICATIONS), PATRICIA BIGGI (SENIOR DIRECTOR OF DEVELOPMENT, EXTERNAL AFFAIRS), CALLIE BRAZIL (DIRECTOR OF DIGITAL MARKETING & STORYTELLING, COMMUNICATIONS), TRINH BUI (EVENT MANAGER), DAVID CAPPOLI (DIRECTOR OF WEB OPERATIONS), ADAM CROWLEY (SENIOR DIRECTOR OF EXTERNAL RELATIONS, EXTERNAL AFFAIRS), ZACH DAI (STUDENT WORKER, ZIFFREN INSTITUTE), HARLISHA HAMM (SENIOR DIRECTOR, EXTERNAL AFFAIRS, EVENTS & PROGRAMMING), TOBI KAUFMAN (MAJOR GIFT ANALYST), LAUREN KIM (ASSISTANT DEAN OF ADMINISTRATIVE SERVICES & SPECIAL PROJECTS), FRANCISCO LOPEZ (MANAGER OF PUBLICATIONS AND GRAPHICS DESIGN), VINCE MALLARI (ASSISTANT DIRECTOR OF ALUMNI AND DONOR ENGAGEMENT, EXTERNAL AFFAIRS), ANTHONY SKULICK (DIRECTOR OF ANNUAL GIVING, EXTERNAL AFFAIRS), NENA SOSA (DEVELOPMENT ASSISTANT & EXECUTIVE BOARD LIAISON), GEOFFREY WONG (DIRECTOR OF EVENTS), KRISTEN WONG (PROGRAM COORDINATOR, ZIFFREN INSTITUTE) AND EDEN YEH (STUDENT WORKER, ZIFFREN INSTITUTE).

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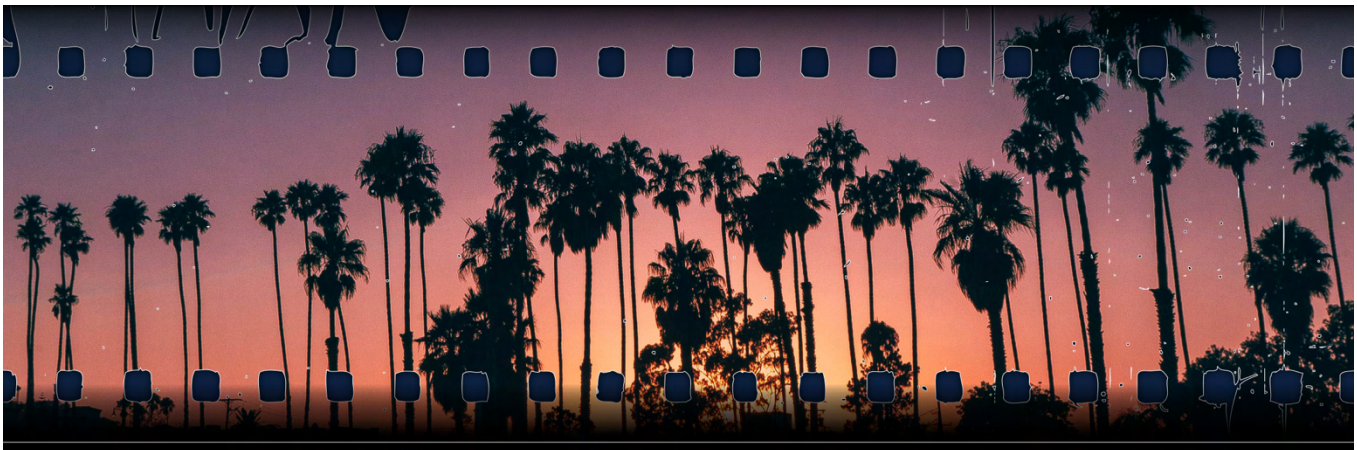

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JMBM's lawyers understand both the law and the business of the entertainment industry, and we leverage our personal familiarity with the industry, its artists, executives, and investors to provide our clients with top-quality service. Our clients include leading multinational entertainment and media companies, as well as actors, directors, producers, writers, recording artists, and investors.

We help our clients thrive in a world of shifting change to the media landscape, and represent their interests in financings and transactions, production agreement negotiations, intellectual property and other litigation, tax and estate planning, and a range of personal services.

JMBM can handle all of your legal needs.

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47th Annual Entertainment Symposium

The Disrupters, the Disrupted, and the Disrupted Disrupters

May 31 | June 7 | June 9

For a decade or more, one of the dominant narratives in the entertainment industry has been the disruption of the legacy players and their businesses by the arrival of deep-pocketed, norm-breaking tech companies. But in the last few years, even these giants have weathered stock price plunges, endured labor conflict as the sequel to a global pandemic and faced the transformative potential of artificial intelligence. This year's Entertainment Symposium will explore how these disruptions have led to an ongoing transformation in traditional business models, production methods, and labor markets, while also highlighting key areas of law. Over the course of the program, an array of distinguished executives, entrepreneurs, attorneys and academics will examine how the entertainment industry's major players have adapted (or failed to adapt) to this challenging and rapidly changing business environment and consider what upstarts will thrive – and what legacy players will survive – in the industry's next phase.

KEYNOTE

BELA BAJARIA

Chief Content Officer, Netflix

Bela Bajaria was named Chief Content Officer in 2023. Bela was named Head of Global TV in 2020, overseeing English language and local language scripted and unscripted series around the world. Previously, she oversaw local language originals, original series across Europe, the Middle East, Türkiye, Africa, India, Asia, and Latin America. In this role, she managed the teams behind shows such as La Casa de Papel (Spain), The Witcher (Poland), Sacred Games (India), Squid Game (Korea), Blood & Water (South Africa), and Sintonia (Brazil). Bela joined Netflix in 2016 to lead Netflix's push into unscripted programming including the critically acclaimed Queer Eye, Nailed It! and Tidying Up with Marie Kondo. She was previously President of Universal Television. Bajaria has been honored by THR's Women in Entertainment list, Variety's LA Women's Impact Report, named one of TIME's 100 Most Influential People of 2022, and named one of Fortune's Most Powerful Women in 2020, 2021 and 2022. She currently serves on the LA Board of Governors for the Paley Center, the Board of LA's Saban Community Clinic and the Board of Trustees for Meridian International Center.

AZI AMIRTEYMOORI

Owner/Employment Attorney/Senior HR Consultant, 403 Ops Consulting

Graduating from Western Michigan University, Cooley Law School, with a Juris Doctor, Azi was initiated to the HR field in both the legal and insurance industries handling primarily workers compensation cases. She then started her professional career in the public sector with the Los Angeles County Fire Department (LACoFD), Employee Relations Division as a Departmental Civil Service Representative. There she appeared before the Los Angeles County Civil Service Commission Board and represented the Department in all employment matters.

Azi expanded her career in the employee and labor relations field by joining the health care industry, where she was an employee relations manager at UCLA Health and later for the City of Hope (COH), advising and consulting her clients on various employment law matters which included investigations, EEO claims and providing training & development to leadership, all while consulting on business and organizational development.

Experienced in both union and non-union environments, Azi's legal background awarded her the opportunity to successfully negotiate numerous labor-management agreements, and represented her clients in a number of EEO matters.

Owner of 403 Ops Consulting, Azi can help any company, of any size remain in compliance with employment law, and provide the legal & HR expertise needed to keep her clients safe.

Azi is an active member of the California Bar Association and is bilingual in English and Farsi.

NATHANIEL BACH

Partner, Manatt, Phelps & Phillips, LLP

A Los Angeles-based Manatt partner, Nathaniel Bach represents prominent clients in the media, entertainment and technology industries, including film and television studios and networks, artists, brands, retailers, music publishers, producers, entrepreneurs and journalists.

Nat's broad practice spans copyright, trademark, right of publicity, First Amendment, contract, fashion, brand-protection, telecommunications, class action, intellectual property, and cutting-edge artificial intelligence, metaverse, digital assets, cryptocurrency and blockchain matters. In addition to his trial work, he maintains an active counseling practice, working with clients in pre-litigation and other risk-management matters. He has also represented clients in the financial industry in global regulatory and governmental investigations, and has played key roles in various other high-profile transactions and disputes.

Nat maintains an active pro bono practice. He successfully represented Dreamers to obtain a first-in-the-nation injunction blocking the Trump administration's unlawful revocation of the DACA program. Nat also represented one of the first Dreamers unlawfully targeted by the Trump administration, obtaining (after arguing) an unprecedented preliminary injunction that barred ICE and USCIS from falsely calling his client a gang member. He has partnered with diverse legal services organizations including the ACLU of Southern California, Public Counsel, Bet Tzedek, Lawyers Without Borders and the Equal Justice Initiative.

MATT BELLONI

Founding Partner, Puck

Matthew Belloni is an experienced content executive and entrepreneur who has successfully managed large teams of creators, serving as the top editor of a leading entertainment publication and appearing frequently as an analyst on television, as well as practicing law as an attorney in the entertainment industry.

Belloni is currently Founding Partner of Puck, a next-generation digital media company covering the power centers of Hollywood, Silicon Valley, Washington and New York. He joined Puck in May 2021 and writes a twice-weekly newsletter called What I'm Hearing about the entertainment industry.

As editorial director of *The Hollywood Reporter* from 2016 to 2020, Belloni was responsible for editorial content and initiatives at the iconic entertainment media outlet. Belloni oversaw all of *THR*'s editorial properties, including its weekly print magazine; THR.com and its digital verticals; on- and off-platform video content, podcasts and live events.

Over the course of 14 years with *THR*, Belloni served in a number of senior editorial positions, managing a staff of 100 journalists and playing a significant role in the outlet's heralded transformation from a trade newspaper into the entertainment industry's flagship media brand. During this time, THR took home many of publishing's most prestigious honors, including a National Magazine Award for General Excellence by the American Society of Magazine Editors and more than 100 National Arts and Entertainment Journalism awards.

Belloni spearheaded *THR*'s move into audio and video with its roundtable series, Close Up With *The Hollywood Reporter*, which was nominated for a Daytime Emmy Award, and Angelyne, a scripted adaptation of a *THR* article. Belloni also appears regularly as an analyst on NBC Nightly News, CBS This Morning, CNN, CNBC, NPR's The Business and The Bill Simmons Podcast.

Before joining *THR*, Belloni was an attorney at an entertainment law firm in Los Angeles, representing actors, filmmakers and media companies in disputes and litigation. He is an expert on the inner workings of the entertainment industry, and taught a course on Entertainment Journalism at the USC Annenberg School.

Belloni graduated from the University of California, Berkeley with a bachelor's degree in political science and obtained a law degree from the University of Southern California School of Law, where he was a member of the *USC Law Review*.

AMY L. BOMSE

Shareholder, Rogers Joseph O'Donnell PC

Ms. Bomse is co-chair of the Attorney Liability and Conduct Practice Group, and a member of the Complex Commercial Litigation Practice Group. She is also adjunct faculty at the Berkeley School of Law where she teaches legal ethics and the law of lawyering. Her practice focuses on the law of lawyering. She represents lawyer, law firms and clients in a wide variety of disputes involving professional negligence, fiduciary duties, breach of contract. She also counsels and advises lawyer and law firms concerning risk management and legal ethics.

LISA CALLIF

Partner, Donaldson Callif Perez, LLP

As a Founding Partner of Donaldson Callif Perez, Lisa Callif is the go-to attorney for all things clearance. Lisa specializes in representing independent producers and production companies in all aspects of content creation, including equity financing, production and distribution with extensive experience in fair use, copyright and personal rights issues. Lisa is the recipient of numerous prestigious awards – among her many accolades are recognition as a *Hollywood Reporter* Power Lawyer and a *Daily Journal* Top Entertainment Lawyer, as well as her recognition by Variety on the Women's Impact Report and the Best and the Brightest list. Lisa cuts through red tape for her clients and works tirelessly to preserve artists' voices so that they can shine a light on stories that otherwise might not be told.

Along with Partner Michael Donaldson, Lisa has co-written three books: *The American Bar Association's Legal Guide to Independent Filmmaking, Clearance and Copyright*, 4th Edition, and *Clearance and Copyright*, 5th Edition. She regularly publishes articles about emerging issues in entertainment and copyright law, and is often quoted in publications such as the *Wall Street Journal*, *Variety*, *Intellectual Property Magazine* and more. Lisa and Michael were featured on the cover of *LA Lawyer Magazine*, for which they co-authored an article about fair use and its application in documentary films.

CONNIE L. CHEN

Principal, Jackson Lewis P.C.

Connie L. Chen is a principal in the Los Angeles, California, office of Jackson Lewis P.C. Connie's practice focuses on representing employers in all types of employment-related litigation in state and federal courts and in arbitration.

Connie has broad experience litigating single plaintiff and class/representative action cases involving wage and hour, discrimination, harassment, retaliation, wrongful termination, and related claims. She assists employers in a variety of industries, including restaurant, hospitality, retail, logistics, manufacturing, construction, and entertainment.

In addition, Connie defends employers against wage and hour claims before the Division of Labor Standards Enforcement (DLSE), and charges of discrimination before the Workers' Compensation Appeals Board (WCAB), the Department of Fair Employment and Housing (DFEH), and the Equal Employment Opportunity Commission (EEOC). She also routinely provides preventative counseling to employers on policies and practices governing day-to-day workplace issues, including wage and hour compliance, employee handbooks, requests for leave, disability accommodation, employee discipline, layoffs, and terminations.

Connie is admitted in California and New York state and federal courts. While attending law school, she served as production editor of the Cardozo Arts and Entertainment Law Journal.

ANN BRIGID CLARK

Shareholder, Greenberg Traurig

Ann Brigid Clark focuses her practice on transactional entertainment, media and intellectual property matters, including the representation of independent motion picture and scripted and unscripted television production companies, digital media companies, financiers, independent producers, showrunners, writers, directors, artists, musicians and on-screen talent in connection with all aspects of development, production, distribution, promotion and exploitation of motion picture, television, new media, print and music projects.

Ann brings a unique and comprehensive perspective to her practice, having begun her career as an entertainment litigator, and, later, as production counsel for motion picture studios. She often acts in the capacity of an outside business affairs advisor for her clients, structuring and negotiating motion picture finance agreements, the acquisition of rights, first look agreements, merchandising, music licensing, and book publishing agreements.

Ann counsels clients on union and guild matters, licensing, intellectual property rights, and clearance issues. She also counsels sports and entertainment clients with respect to Internet, new media and other promotional, marketing and branding activities. In addition, she has deep experience as production counsel for numerous independent motion pictures with budgets ranging from $2 million to $200 million, and for scripted and unscripted television projects including game shows, competition-based shows and dramatic series, having drafted and negotiated hundreds of agreements with above and below-the-line talent, financiers, bond companies, unions and guilds.

TRAVIS CLOYD

CEO, WorldwideXR, *Global Futurist*, Thunderbird School of Global Management

Travis Cloyd is a seasoned leader and CEO of WorldwideXR (WXR), a cutting-edge technology company based in Beverly Hills. He is also the VP and CTO of CMG (Celebrity Management Group) which for the last 42 years has represented hundreds of historical iconic estates such as UCLA legends Jackie Robinson and James Dean.

He has a proven track record of innovation, entrepreneurship, and strategic management, with a focus on creating and financing immersive state-of-the-art technology companies. As an award-winning producer, XR visionary, and Metaverse educator, he has operated a portfolio of trendsetting businesses, positioning himself as a leading expert in the field. Recently recognized by Forbes as a top 'Next Entrepreneur,' he has also served as the Arts, Music, and Entertainment Ambassador to the GBBC (Global Blockchain Business Council). Plus, a member of the PGA (Producers Guild of America) and the new media council, serving on the education and international committees.

Cloyd is also the Global Futurist at Thunderbird School of Global Business Management, the #1 Masters in Management program in the world, and Senior Advisor to the Dean and Professor of Practice on Global Creative Industries. He was recently awarded the FIU Medallion, the highest honor at Florida International University, for his outstanding contributions to the institution.

Cloyd has produced next-level digital content for government agencies, professional sports leagues, major international studios, iconic brands, legendary actors, global musicians, top athletes, and historical figures throughout his career. He has produced feature films, virtual reality experiences, augmented reality content, and NFT collection drops, and continues to break new ground within the entertainment industry, creating and protecting virtual human IP content based on historical figures for all facets of the diverse XR, Metaverse, and AI ecosystem.

SCOTT L. CUMMINGS

Professor of Law and Robert Henigson Professor of Legal Ethics, UCLA School of Law

Scott L. Cummings is Robert Henigson Professor of Legal Ethics at the UCLA School of Law, where he teaches and writes about the legal profession, legal ethics, access to justice, and local government law. A recipient of the UCLA Distinguished Teaching Award, Professor Cummings is the founding faculty director of the UCLA Program on Legal Ethics and the Profession, which promotes empirical research and innovative programming on the challenges facing lawyers in the twenty-first century, and a long-time member of the UCLA David J. Epstein Program in Public Interest Law and Policy. In 2021, Professor Cummings was selected as the Fulbright Distinguished Chair at the European University Institute and a fellow at the Stanford Center for the Advanced Study in the Behavioral Sciences to study the role of lawyers in strengthening the rule of law. He was awarded a 2023 Guggenheim Fellowship to study the role of lawyers in democratic backsliding.

JEFFREY M. DAVIDSON

Partner, Covington & Burling

Jeffrey Davidson is a trial and appellate lawyer focusing on high-stakes commercial matters. Clients have called on him to deliver results in some of their most important disputes. Jeff also serves as a general counsel to Covington and advises on professional responsibility issues

In a recent trade secret arbitration with $1.8 billion at stake, he obtained a complete defense win on behalf of a major pharmaceutical company. In a recent insurance coverage matter on behalf of a leading corporation, he obtained a $25 million recovery after a contested arbitration hearing. In a third recent matter, he obtained summary adjudication against four insurance companies in a $100-million coverage dispute. Jeff also litigated one of the foundational cases on the foreign application of U.S. antitrust law, obtaining a ruling eliminating a $3.5 billion claim shortly before trial.

Jeff also led a cross-office Covington team representing the University of California in its landmark challenge to the government's rescission of the Deferred Action for Childhood Arrivals (DACA) program, obtained a nationwide injunction reinstating DACA, and successfully defended the injunction on appeal. In Regents of the University of California v. Department of Homeland Security, the Supreme Court agreed that the rescission was improper and set it aside.

MICHAEL GRIZZI

Executive Vice President, Motion Picture Legal, Paramount Pictures

Michael Grizzi is Executive Vice President, Motion Picture Legal, Paramount Pictures, where he leads the team of attorneys in the negotiation and documentation of high-level talent employment, rights acquisition, term deal and related agreements for Paramount's live action and animated features, a role he has held since 2015. Michael received a Bachelor of Science in Speech from Northwestern University, and is an alum of the UCLA School of Law, where he was an editor of the *UCLA Law Review* and graduated Order of the Coif. Following law school, he practiced with Irell and Manella in Los Angeles, where he handled corporate legal matters for a number of public companies. He also served as Vice President of Business and Legal Affairs for New Line Cinema.

Prior to his law career, Michael worked in television production, including on the series "Cheers". He is a lecturer in law at the USC Gould School of Law, where he has taught various Entertainment Law classes since 2008. His professional highlight as an attorney working in features would have to be a toss-up between handling the legal work for the film "Snakes On A Plane" and for the "Jackass" film franchise.

SALLY C. JAMES

Partner, Greenberg Glusker

Sally James, a partner in Greenberg Glusker's Entertainment and Corporate Departments, handles high-level corporate financing transactions alongside deals for A-list talent.

She represents actors, writers, and producers, as well as production companies, talent managers, business managers, and investors. She handles film finance and M&A transactions for established brands and also negotiates deals for entertainment start-ups.

Among her other deals, Sally has represented Chris Hemsworth (HighPost Capital's acquisition of Centr); The Russo Brothers ("The Electric State"); Scriber (launch and talent deals); Ubisoft Entertainment (Netflix's "Assassin's Creed" and "Beyond Good and Evil"); Alice Braga ("Hypnotic," "Dark Matter"); Adewale Akinnuoye-Agbaje ("His Dark Materials," "Our Man From Jersey"); and Silent House Productions ("Carol Burnett: 90 Years of Laughter + Love").

Sally has been recognized in *Variety*'s annual "Dealmakers Impact Report" and "Legal Impact Report," National Law Journal's "Sports and Entertainment Trailblazers list, *Los Angeles Business Journal*'s "Women of Influence: Attorneys" list, The Best Lawyers in America in the practice area of Entertainment Law – Motion Pictures and Television, and Southern California Super Lawyers Rising Stars.

She received her J.D. fromUniversity of California, Los Angeles School of Law, Order of the Coif, and her B.A., *summa cum laude*, from the University of Richmond with a major in Theatre Arts.

RUSSELL KOROBKIN

Interim Dean and Richard C. Maxwell Distinguished Professor of Law, UCLA School of Law

Russell Korobkin is the Interim Dean and Richard C. Maxwell Distinguished Professor of Law at the UCLA School of Law. He has been a member of the UCLA Law faculty since 2001, and he served as Vice Dean for Academic and Institutional Affairs from 2015-2019 and Vice Dean for Graduate and Professional Education from 2019-2022. He is the author *The Five Tool Negotiator: The Complete Guide to Bargaining Success* (Liveright, 2021), *Stem Cell Century: Law and Policy for a Breakthrough Technology* (Yale, 2008), two textbooks -- *Negotiation Theory and Strategy* (Aspen, 3d ed., 2014) and *K: A Common Law Approach to Contracts* (Aspen 3d. ed., 2022) -- and more than 50 journal articles on behavioral law and economics, negotiation, contracts, and health care law. A former San Francisco management consultant and Washington D.C. lawyer, Professor Korobkin earned his undergraduate and law degrees from Stanford University. In addition to UCLA, he has taught full time at the University of Illinois, University of Texas, and Harvard University Law Schools, and he has taught intensive negotiation courses to undergraduates, MBA students and law students at 10 universities on four continents.

DOUGLAS LICHTMAN

Professor of Law and Faculty Director of Ziffren Institute for Media, Entertainment, Technology & Sports Law, UCLA School of Law

Doug Lichtman focuses his teaching and research on topics relating to law and technology. His areas of specialty include patent and copyright law, telecommunications regulation, and information strategy and economics.

Professor Lichtman joined the faculty at UCLA School of Law in 2007 after a tenured teaching career at the University of Chicago. His work has been featured in numerous journals including the *Journal of Law & Economics*, the *Journal of Legal Studies*, the *Yale Law Journal*, and the *Harvard Business Review*. He co-authored *Telecommunications Law and Policy*, a textbook that investigates the federal regulatory regime applicable to broadcast television, cable television, radio, telephony, and the Internet. He also regularly writes in the popular press, with recent pieces appearing in the Los Angeles Times and the policy magazine Regulation.

AMANDA N. LUFTMAN

Partner, Boren, Osher & Luftman, LLP

Amanda N. Luftman represents both employers and employees on a wide range of labor and employment issues. Because Amanda is familiar with and continuously argues opposing perspectives of the same issues, she brings unique value to her clients, whether they are prosecuting or defending employment-related claims.

Amanda's philosophy is "knowledge is power". She routinely educates and counsels employers regarding best practices to comply with California's ever-changing landscape of labor and employment law. She is passionate about providing the most practical business solutions for her clients to achieve compliance with current laws – because Amanda believes in, and actually likes, compliance. Amanda, together with the BOL Employment Team, also drafts and negotiates employment agreements, company policies, and employee handbooks for employers.

When companies fail to "get it right", Amanda represents former employees in their efforts to achieve more favorable separation terms and current employees to assist in the resolution of their differences with their employers. Amanda strives to achieve a speedy and amicable resolution for her clients but will not hesitate to file a lawsuit when necessary. Amanda also assists employees in their negotiations for new employment; reviews and revises employment agreements; and negotiates best employment terms.

Following the first few years of her legal career with Robins, Kaplan, Miller & Ciresi, LLP in Los Angeles, Amanda accepted a position as a Senior Human Resources Consultant with The Walt Disney Company. She thoroughly enjoyed serving in a Human Resources role, as it gave her a very different perspective than her usual viewpoint as the attorney. Ultimately, she returned to her first love, the practice of law. At BOL, Amanda practices what she preaches, as the Managing Partner of the firm.

Ms. Luftman is a committed foodie who loves to stay abreast of the latest additions to the Los Angeles restaurant scene: good food and good live theater makes for a perfect outing. She also enjoys traveling and spending time with family, friends, and yes, her clients, too.

DIANA PALACIOS

Partner, Davis Wright Tremaine LLP

Diana Palacios focuses her practice on media, First Amendment, and intellectual property litigation and counseling. In her practice, she works on a range of matters, including defamation, records and courtroom access, privacy, right-of-publicity, false advertising, copyright, and trademark issues. She also provides pre-publication and pre-broadcast counseling in both English and Spanish for studios, television networks, production companies, and newspapers.

In her litigation practice, Diana defends intellectual property and content-tort claims in state and federal courts, and has experience resolving cases through mediation and arbitration.

TED SCHILOWITZ

Futurist-in-Residence, Paramount

Ted works across leadership and tech teams at Paramount Global, including CBS, CBS Sports, Paramount Pictures, Paramount Plus, MTV, Nickelodeon, BET, PlutoTV and Comedy Central, exploring emerging tech for new forms of entertainment.

Prior to joining Paramount, Ted was the Futurist at 20th Century Fox, where he worked on the evolving art, science and technology of advanced interactive visual storytelling.

Ted was part of the founding product development team at Red Digital Cinema as the company's first employee. Red cameras have won both scientific/technical Oscar and Emmy. Many of the world's biggest movies and TV shows are shot with these ultra high resolution digital movie cameras.

Ted is co-founder of the G-Tech product line of advanced hard drive storage products, the leading brand in that industry. They are implemented worldwide at the highest levels on cinema, television, sports and news production.

Ted has been featured in publications such as *Wired*, *Fast Company*, *The New York Times*, *Variety*, *Hollywood Reporter* and *The Wall Street Journal*. In 2019, Ted was honored at the Variety Hall of Fame event with the Variety Innovation Award.

P.J. SHAPIRO

Partner, Johnson Shapiro Slewett & Kole LLP

P.J. Shapiro is a Founding Partner of Johnson Shapiro Slewett & Kole LLP. He has an extensive film and television practice, representing some of today's most successful on-camera talent as well as many acclaimed film and television producers, directors, writers and content creators. He also represents some of the most celebrated artists in the world of music through a myriad of ventures and business transactions.

P.J. has structured and negotiated groundbreaking transactions in the media and entertainment industries – resulting in both lucrative financial benefits and unprecedented creative control for his clients. He has worked with clients to identify and exploit important and novel ancillary revenue sources, generating lucrative publishing, endorsement, licensing and merchandising deals. P.J. has also helped his clients establish significant commercial ventures across the beauty, apparel, fragrance, automotive, technology and wellness industries. P.J. supports his clients' civic and philanthropic passions by assisting in the creation and execution of foundations devoted to causes including domestic violence education and prevention, mental health advocacy and cancer awareness and treatment.

MICHAEL S. SHERMAN

Partner, Reed Smith LLP

Michael is a partner in Reed Smith's Entertainment and Media Industry Group and leads the firm's motion picture, television and publishing industry group. His practice emphasizes high level transactions focused on these segments of the entertainment and media industries including representation of a diverse group of individual and institutional clients across the motion picture, television, publishing, digital, music, theatre, sports and other related industries.

JOANNA SUCHERMAN

Owner, JLS Media

As a highly visible and seasoned media executive with diverse experience, Joanna Sucherman has simultaneously excelled in both the creative and business ends of the entertainment world. She has spent her career analyzing consumer and industry trends and is respected by clients as both a strategic and innovative thinker.

Sucherman is the Owner of JLS Media, a full-service media consulting agency, where she specializes in high-end executive placement and executive coaching. Through the explosive growth of JLS Media, Joanna has placed senior executives in multiple sectors, specifically focusing on entertainment. Her clients have included global media companies, including Disney, FOX, A&E, Lionsgate, Starz, Blumhouse, NBC, Fremantle, BBC Studios, MarVista Entertainment, 72andSunny, ITV Studios, HRTS, and River Road Entertainment.

Prior to launching her own company, Joanna was an SVP at Sucherman Group, a leading adviser for media organizations. While there, Joanna worked closely with companies on organizational design and development of programming functions within broadcast and cable news organizations.

Prior to joining SG, Joanna spent over a decade in the television broadcast and cable industry, producing a variety of cable television shows. Most notably, Joanna served as Executive Producer on several series at E! Entertainment.

Joanna launched JLS Media in 2015 with the goal of creating a synergistic company that offers both executive placement and executive coaching. She feels that coaching allows her to work closely with her clients, utilizing experience from her previous roles, thus helping clients to shape their careers and focus on long term goals.

Sucherman and her husband Scott Saltzburg live in Los Angeles.

KEVIN VICK

Partner, Jassy Vick Carolan LLP

Kevin Vick is a litigator with more than two decades' experience representing clients in the entertainment, media, technology, sports fashion and other industries. His trial and arbitration experience includes successfully defending motion picture companies and talent agencies in jury and bench trials. Kevin also has represented Broadway producers and sports agencies in arbitration on both the plaintiff's and defense sides. His appellate experience includes successful representations of major internet, media and entertainment clients, as well as individuals. He litigates defamation, copyright, trademark, Section 230, publicity rights, idea submission, invasion of privacy, and anti-SLAPP matters, as well as business disputes involving breach of contract, trade secrets and partnerships. Kevin graduated with honors from Stanford University and Harvard Law School, and clerked for the Honorable Florence-Marie Cooper of the United States District Court for the Central District of California. He has been named a Super Lawyer in Intellectual Property Litigation by *Super Lawyers* magazine since 2015. Kevin speaks Spanish, having lived and worked in Barcelona, Spain for three years between college and law school, and has represented Spanish-language media clients in litigation.

MICHELLE WEINER

Co-Head of Books Department, Creative Artists Agency

Michelle Weiner is Co-Head of the Books Department at leading entertainment and sports agency Creative Artists Agency (CAA). Weiner is based in the Los Angeles office and represents many of the world's leading authors, writers, journalists, bloggers, and podcast creators, including Jenny Han (TO ALL THE BOYS I'VE LOVED), Hillary Jordan (MUDBOUND), Nathan Hill (THE NIX), Garrard Conley (BOY ERASED), Stephanie Danler (SWEETBITTER), Matthew Desmond (EVICTED), Jeffrey Eugenides (MIDDLESEX, VIRGIN SUICIDES, THE MARRIAGE PLOT), Ken Armstrong and T. Christian Miller (ProPublica's AN UNBELIEVEABLE STORY OF RAPE), Maggie Shipstead (SEATING ARRANGEMENTS, ASTONISH ME, GREAT CIRCLE), Jennifer Weiner, Nana Kwame Adjei-Brenyah (FRIDAY BLACK), Flynn Berry (NORTHERN SPY), Ann Napolitano (DEAR EDWARD), and Kathleen Barber (TRUTH BE TOLD), among others.

Weiner began her career as an attorney at Hamrick and Evans. She joined CAA in 2006.

Weiner graduated from Colgate University with a Bachelor of Arts in English and Political Science, and the USC Gould School of Law with a J.D.

TOM WOLZIEN

Chairman, Wolzien LLC

Tom Wolzien is an inventor, analyst, and media executive. He created Wolzien LLC In 2005, after 14 years as a high profile sell-side analyst covering large publicly traded media and cable companies for the Wall Street research firm of Sanford C. Bernstein & Co, more than 15 years at NBC, and early years at local television stations and running an Army combat photography operation in Vietnam.

Since 2005 Wolzien has served as a consultant to senior managers at the largest media and technical organizations, including Warner Bros./Discovery (separately and together), Microsoft, CBS, Sony, and The Directors Guild of America (DGA). At the DGA Wolzien provided industrial research for the Guild's "Forecast Project", setting research groundwork used in four negotiating cycles.

Wolzien holds more than two dozen patents in 16 countries, initially for methods linking mass media and the web ("go" or click to buy button on many cable remotes), and more recently covering management systems to put large numbers of IP video (smartphone) callers on television, and for caller management use in other industries. The global patent portfolio is managed by wholly owned Video River Group LLC.

During 14 years at Bernstein, Wolzien was internationally recognized for ground breaking research on the impact of industrial trends on media and communications companies. In 1995 he was the first on Wall Street to identify the potential of the cable modem and, later, cable telephony. In 2004 he was first to identify the potential what he then called the "internet bypass" or streaming delivery of entertainment video to consumers via broadband connection--the basis of all streaming video content today.

From 1976 to 1991 Wolzien was at NBC in news production and executive management. His positions ranged from White House field producer to an executive producer of scheduled and prime time programs. Beyond presidential campaigns, he led coverage of the nuclear incident at Three Mile Island and historic Began-Sadat Mideast visits. He helped start CNBC as Senior Vice President of Cable and Business Development.

KEN ZIFFREN

Partner & Co-Founder, Ziffren Brittenham LLP

Ken Ziffren is Co-Founder and Partner of Ziffren Brittenham LLP (1979-present), and was a partner at the predecessor law firm of Ziffren & Ziffren from 1966 to 1978.

As part of an extensive transactional practice in the entertainment and media industries, Ziffren served as a neutral mediator in resolving the Writer's Guild strike in 1988, acted on behalf of Starz in establishing a premium pay television service in 1994, and served as special outside counsel to the NFL in negotiating contracts with the networks. He also provided counsel to Microsoft in forming MSNBC in 1996, and negotiated for DirecTV with studios on domestic and international pay-per-view agreements. In 2003, 2011 and 2018, Ziffren represented the TV Academy in negotiating the deals for the Emmys to be telecast over the four Networks, and in 2016 he represented the Motion Picture Academy (AMPAS) in implementing a long term extension deal with ABC.

Ziffren is a lecturer and writer on media and entertainment law. He is an Adjunct Professor at UCLA School of Law, teaching seminar courses in Network Television (1998-2004), Motion Picture Distribution (1998-present), and Special Television Issues SVOD/AVOD (2018-present). He also gives an annual presentation to Beverly Hills Bar Association, speaking every year since 2008.

Since 2014, Ziffren has been the "Film Czar" (Senior Advisor to the L.A. Mayor's Office of Motion Picture and TV Production) for the Mayor of Los Angeles, previously serving in this role with Mayor Eric Garcetti and currently serving in this role with Mayor Karen Bass. He is the Founder of the Ziffren Institute for Media, Entertainment, Technology & Sports Law at UCLA School of Law (established in 2016), and is a member of UCLA School of Law's Advisory Board, of which he formerly served as Chairman. He is also a member of the UCLA Campaign Cabinet.

Ziffren obtained his B.A. from Northwestern University, and J.D. from UCLA School of Law (Order of the Coif), where he was editor in chief of the *UCLA Law Review*. After graduation, he clerked for U.S. Supreme Court Chief Justice Earl Warren.

WEDNESDAY, JUNE 7, 2023

5:00 - 6:00pm PDT

Representing Everyone, Everywhere, All at Once: Entertainment Industry Conflicts and How to Navigate Them

The John H. Mitchell Panel on Ethics and Entertainment

Moderator:

Scott L. Cummings

Professor of Law and Robert Henigson Professor of Legal Ethics, UCLA School of Law

Panelists:

Amy L. Bomse

Shareholder, Rogers Joseph O'Donnell PC

Jeffrey M. Davidson

Partner, Covington & Burling LLP

Sally C. James

Partner, Greenberg Glusker LLP

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REPRESENTING EVERYONE, EVERYWHERE, ALL AT ONCE: ENTERTAINMENT INDUSTRY CONFLICTS AND HOW TO NAVIGATE THEM

THE JOHN H. MITCHELL PANEL ON ETHICS AND ENTERTAINMENT

OUTLINE OF TOPICS/ISSUES

ATTORNEYS THAT PRACTICE IN THE AREA OF ENTERTAINMENT IS A RELATIVELY SMALL GROUP OF LAWYERS AND CAN BE VERY INSULAR. WE ARE OFTEN NEGOTIATING WITH THE SAME PEOPLE AND COMPANIES ACROSS THE TABLE DEAL AFTER DEAL. IN THE PRIVATE PRACTICE SETTING, ATTORNEYS MAY BE REPRESENTING MULTIPLE PARTIES ON THE SAME SIDE OF A TRANSACTION INCLUDING THE WRITER, DIRECTOR, SHOWRUNNER AND PERHAPS EVEN CAST MEMBERS ON A PARTICULAR FILM OR TELEVISION PROJECT. CLIENTS OFTEN SEEK OUT ATTORNEYS THAT HAVE EXPERIENCE NEGOTIATING DEALS WITH THE SAME ADVERSE PARTY AND WANT TO BE REPRESENTED BY SOMEONE THAT KNOWS WHAT THE OTHER SIDE IS WILLING TO GIVE, AND HAS GIVEN, IN PRIOR NEGOTIATIONS. THESE TYPES OF REPEATED AND INTERTWINED REPRESENTATIONS OFTEN RAISE ETHICAL ISSUES THAT ARE MORE COMMON IN THE ENTERTAINMENT AND MEDIA BUSINESS. THIS PANEL WILL FOCUS ON PROVIDING GUIDANCE TO ATTORNEYS IN OUR INDUSTRY FOR COMPLYING WITH THEIR OBLIGATIONS PURSUANT TO THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT, INCLUDING ADVICE WHEN AN ATTORNEY IS FACED WITH REPRESENTING TWO OR MORE CLIENTS ON A DEAL, WHEN CLIENTS' INTERESTS ARE OSTENSIBLY ALIGNED BUT BECOME ADVERSE, AND THE PITFALLS OF REPRESENTING VARIOUS CLIENTS IN REPEATED TRANSACTIONS WITH THE SAME ADVERSE PARTY. OUR DISCUSSION WILL OFFER ADVICE TO AVOID STEPPING OVER THE LINE AND WHEN IT MAY BE TIME TO WITHDRAW. FINALLY, WE WILL LOOK AT WHAT HAPPENS AND WHAT TO DO IF ATTORNEYS ARE FACED WITH A MALPRACTICE SUIT OR DISCIPLINARY PROCEEDINGS IN THIS AREA.

198 Cal.Rptr.3d 253
Review Granted
Previously published at: 244 Cal.App.4th 590
(Cal.Const. art. 6, s 12; Cal. Rules of
Court, Rules 8.500, 8.1105 and 8.1110,
8.1115, 8.1120 and 8.1125)
Court of Appeal, Second District, Division 4, California.

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP, Plaintiff and Respondent,
v.
J–M MANUFACTURING CO.,
INC., Defendant and Appellant.

B256314
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Filed January 29, 2016
|
As Modified on Denial of Rehearing February 26, 2016

Synopsis

Background: Attorneys filed action against former client for specific performance, breach of contract, account stated, services rendered, and quantum meruit, seeking recovery of attorney fees under engagement agreement relating to prior litigation from which attorneys were disqualified for simultaneous representation of adverse clients. Client cross-complained for breach of contract, an accounting, breach of fiduciary duty, and fraudulent inducement, and sought disgorgement of fees previously paid. The Superior Court, Los Angeles County, No. YC067332, Stuart Rice, J., granted attorneys' motion to compel arbitration, and following arbitration, confirmed award in favor of attorneys. Client appealed.

Holdings: The Court of Appeal, Collins, J., held that:

question of enforceability of parties' agreement was for the court, rather than arbitrator, to decide;

attorneys violated rules of professional conduct by representing client while also representing adverse party in prior litigation in unrelated matters;

attorneys' violation of rules of professional conduct rendered parties' agreement unenforceable; and

attorneys' violation of rules of professional conduct precluded attorneys from collecting attorney fees from client for work done while actual conflict existed.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration; Motion for Attorney's Fees.

***255** APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart Rice, Judge. Reversed and remanded. (Los Angeles County Super. Ct. No. YC067332)

Attorneys and Law Firms

***256** Greines, Martin, Stein & Richland, Kent L. Richardson, Barbara W. Ravitz, and Jeffrey E. Raskin, Los Angeles, for Defendant and Appellant.

Gibson, Dunn & Crutcher, Kevin S. Rosen, Theane Evangelis, and Heather L. Richardson, Los Angeles, for Plaintiff and Respondent.

COLLINS, J.

INTRODUCTION

Appellant J–M Manufacturing Company, Inc. (J–M) appeals from a judgment in favor of its former attorneys, Sheppard, Mullin, Richter & Hampton, LLP (Sheppard Mullin). Sheppard Mullin sought recovery of attorney fees relating to litigation in which Sheppard Mullin represented J–M. Sheppard Mullin was disqualified from that litigation because, without obtaining informed consent from either client, Sheppard Mullin represented J–M, the defendant in the litigation, while simultaneously representing an adverse party in that case, South Tahoe Public Utility District (South Tahoe), in unrelated matters. J–M argued that its engagement agreement with Sheppard Mullin was unenforceable because it was illegal and it violated the public policy embodied in the California Rules of Professional Conduct Rule 3–310 (Rule 3–310), [1] which bars simultaneous representation of adverse clients. J–M argued that as a result of Sheppard Mullin's

violation, J–M did not owe Sheppard Mullin outstanding attorney fees and Sheppard Mullin should return to J–M all attorney fees paid pursuant to the agreement.

The trial court ordered the case to arbitration based on the parties' written engagement agreement. A panel of three arbitrators found that the agreement was not illegal, denied J–M's request for disgorgement of fees paid, and ordered J–M to pay Sheppard Mullin's outstanding fees. The trial court confirmed the award and J–M appealed, arguing that the trial court enforced an illegal contract in violation of public policy.

Under California law, because J–M challenged the legality of the entire agreement, the issue of illegality was for the trial court, rather than the arbitrators, to decide. The undisputed facts establish that Sheppard Mullin violated the requirements of Rule 3–310 by simultaneously representing J–M and South Tahoe. Sheppard Mullin failed to disclose the conflict to either J–M or South Tahoe, and it failed to obtain the informed written consent of either client to the conflict. The representation of both parties without informed written consent is contrary to California law and contravenes the public policy embodied in Rule 3–310. Because Sheppard Mullin's representation of J–M violated Rule 3–310 and public policy, the trial court erred by enforcing the contract between the parties and entering judgment on the arbitration award based on that contract. We therefore reverse the judgment.

J–M also seeks disgorgement of all fees paid to Sheppard Mullin. Sheppard Mullin, on the other hand, argues that under principles of quantum meruit, it is entitled to attorney fees despite its violation of the Rules of Professional Conduct. We follow established California law and find that Sheppard Mullin is not entitled to fees for the work it did while violating Rule 3–310, which exemplifies the inviolate duty of loyalty an attorney owes a client. Because the point at which the actual conflict arose ***257** is unclear from the record, however, we remand for a factual finding on that issue.

FACTUAL AND PROCEDURAL BACKGROUND

We take portions of our factual history from the declarations submitted to the arbitration panel, which are in the record on appeal.

A. The underlying litigation: the Qui Tam Action

In 2006, a qui tam action was initiated against J–M and Formosa Plastics Corporation U.S.A. on behalf of approximately 200 real parties in interest, including the United States, seven states, and other state and local government entities. (*United States ex rel. Hendrix v. J–M Manufacturing Company, Inc.,* United States District Court for the Central District of California, case No. 5:06–cv–00055–GW–PJW (Qui Tam Action).) J–M manufactures polyvinyl chloride (PVC) pipe. The Qui Tam Action alleged that J–M falsely represented to its customers that the PVC pipe products it sold conformed to applicable industry standards for water works parts. It also alleged that, contrary to this representation, J–M was aware of numerous tests proving that its PVC pipe regularly failed to meet the minimum longitudinal tensile-strength requirements. The complaint demanded over $1 billion in damages.

Another law firm represented J–M in the initial phases of the Qui Tam Action. By February 2010, the complaint was unsealed, and numerous governmental entities were filing notices of intervention. Camilla Eng, J–M's general counsel, invited Sheppard Mullin attorneys Bryan Daly and Charles Kreindler to meet with her and J–M chief executive officer Walter Wang to discuss replacing J–M's current counsel. They discussed the experience of the Sheppard Mullin attorneys in qui tam actions and their proposed defense strategy. J–M retained Sheppard Mullin shortly thereafter.

Sheppard Mullin represented J–M in the Qui Tam Action for sixteen months, litigating motions, conducting discovery, reviewing documents, and conducting an extensive internal investigation at J–M. It billed J–M nearly $3.8 million for approximately 10,000 hours of work.

B. Conflict waiver provision

In March 2010, before J–M retained Sheppard Mullin, Daly and Kreindler ran a conflicts check to determine whether Sheppard Mullin had represented any of the real parties in interest identified in the Qui Tam Action. They discovered that Jeffrey Dinkin, a Sheppard Mullin labor-and-employment partner, had done work for South Tahoe, one of the municipal intervenors in the Qui Tam Action. Dinkin stated in a declaration that he began working with South

Tahoe early in his career when he worked at a different firm. When he moved to Sheppard Mullin in 2002, he brought South Tahoe with him as a client. South Tahoe signed an engagement agreement with Sheppard Mullin in 2002, and it renewed that agreement in 2006. The agreement had a broad advance conflict waiver provision similar to the one in the J–M agreement, discussed below. Dinkin did occasional, as-needed labor and employment work for South Tahoe between 2006 and November 2009.

When Sheppard Mullin's conflict check for J–M revealed that South Tahoe was a client, Daly and Kreindler consulted with an assistant general counsel to Sheppard Mullin. That unidentified attorney informed them that South Tahoe had "agreed to an advance conflict waiver and that Sheppard Mullin had done no work for [South Tahoe] for the previous five ***258** months (since November 2009)." In addition, Daly and Kreindler discussed the issue with Ronald Ryland, Sheppard Mullin's general counsel, "who analyzed [South Tahoe's] conflict waiver and informed us that it allowed us to represent J–M in the Qui Tam Action."

Daly met with Eng for two hours on March 4, 2010, to discuss a draft engagement agreement. The draft contained the advance conflict waiver provision that ultimately was included in the final engagement agreement. It stated, "*Conflicts with Other Clients.* Sheppard, Mullin, Richter & Hampton LLP has many attorneys and multiple offices. We may *currently or in the future represent one or more other clients* (*including current, former, and future clients*) *in matters involving* [*J–M*]. We undertake this engagement on the condition that we may represent another client in a matter in which *we do not represent* [J–M], even if the interests of the other client are adverse to [J–M] (including appearance on behalf of another client adverse to [J–M] in litigation or arbitration) and can also, if necessary, examine or cross-examine [J–M] personnel on behalf of that other client in such proceedings or in other proceedings to which [J–M] is not a party *provided* the other matter is not substantially related to our representation of [J–M] and in the course of representing [J–M] we have not obtained confidential information of [J–M] material to representation of the other client. *By consenting to this arrangement, [J–M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations*. We seek this consent to allow our Firm to meet the needs of existing and future clients, to remain available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter." (Italics added except for word "provided.") We refer to this as the "conflict waiver provision."

According to Daly, Eng carefully reviewed the entire draft agreement with him, and she "did not ask me any questions or express any concern about the advance conflict waiver." Eng declared that Sheppard Mullin attorneys never discussed the conflict waiver provision with her, nor did they explain it. Eng also said the Sheppard Mullin attorneys assured her there were no conflicts in representing J–M in the Qui Tam Action. J–M's practice was to ensure that its outside attorneys had neither potential nor actual conflicts of interest. Although Eng made a number of handwritten edits related to the fee provisions, and also edited the paragraph preceding the conflict waiver provision, she did not edit the conflict waiver provision. She ultimately executed the engagement agreement (the Agreement) on March 8, 2010, and sent it to Daly by email.

C. South Tahoe raises the conflict of interest in the Qui Tam Action

Dinkin began actively working for South Tahoe again on March 29, 2010. Between March 2010 and May 2011, Sheppard Mullin billed South Tahoe for 12 hours of work, including telephone conversations and work on employment matters.

In March 2011, Day Pitney, counsel for South Tahoe in the Qui Tam Action, wrote a letter to Sheppard Mullin asserting that Sheppard Mullin had a conflict as a result of its simultaneous representation of J–M and South Tahoe. In response to the Day Pitney letter, Sheppard Mullin took the position that South Tahoe had agreed to an advance conflict waiver in its engagement ***259** agreement with Sheppard Mullin and therefore no conflict existed. Day Pitney's position was that there was an actual conflict. In April 2011, Day Pitney informed Sheppard Mullin that South Tahoe planned to bring a motion to disqualify Sheppard Mullin from the Qui Tam Action.

According to Eng's declaration submitted in the arbitration proceedings, she first heard about the conflict with South Tahoe on April 20, 2011, which she asserts was about 50 days after Day Pitney first contacted Sheppard Mullin about the conflict. Eng stated that Sheppard Mullin did not inform J–M that counsel for South Tahoe had contacted Sheppard Mullin about a potential disqualification motion because of the conflict until after the disqualification motion was filed.

Eng also stated that she first learned about the results of the March 2010 conflicts check on June 22, 2011, when she read in Sheppard Mullin attorneys' declarations that the conflicts check had revealed South Tahoe as a client. She declared that Sheppard Mullin never requested a conflict waiver from J–M in light of the South Tahoe conflict, and had Sheppard Mullin requested it, J–M would have declined.

D. Sheppard Mullin is disqualified as counsel in the Qui Tam Action

South Tahoe's disqualification motion in the Qui Tam Action was heard on June 6, 2011. The district court tentatively ruled that the advance waiver in South Tahoe's engagement agreement with Sheppard Mullin was invalid. In its tentative ruling, the court cited Rule 3–310(C)(3), which bars an attorney from representing clients in adverse positions without the informed written consent of each client.[2] The court referred to the engagement agreement letters between Sheppard Mullin and South Tahoe, and said that "the prospective waivers contained within the 2002 and 2006 letters were ineffective to indicate South Tahoe's informed consent to the conflict at issue here." The court added, "The Court cannot conclude that South Tahoe was in any way close to 'fully informed' " about the conflict with J–M.

The court rejected Sheppard Mullin's suggestion that it could drop South Tahoe as a client and remain counsel for J–M in the Qui Tam Action, citing *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1037, 117 Cal.Rptr.2d 685 (*American Airlines v. Sheppard Mullin*): "A lawyer may not avoid the automatic disqualification rule applicable to concurrent representation of conflicting interests by unilaterally converting a present client into a former client." The parties suggested bifurcating South Tahoe from the Qui Tam Action, with separate counsel for J–M working on that portion of the case. The hearing was continued to give the parties an opportunity to determine if that was a viable solution.

On June 9, 2011, Sheppard Mullin sent a letter to South Tahoe that began, "We write to address the long-standing relationship between the [South Tahoe Public Utility] District and our Firm. We have been pleased to provide labor advice to you for the last 9 years." Sheppard Mullin offered to "promptly pay to the District the sum of $100,000" and to "provide up to 40 hours of free labor and employment legal advice and services." In return, Sheppard Mullin asked that South Tahoe ***260** "consent to the Firm's continued representation of J–M in the pending federal district court action and any other state or federal action that the District and J–M may be involved in." South Tahoe declined on June 16, 2011. On July 1, Sheppard Mullin increased its offer to $250,000 and 40 hours of employment work in exchange for a conflict waiver. South Tahoe's response is not in the record, but it appears that the offer was rejected. Meanwhile, J–M rejected the proposal to bifurcate South Tahoe from the Qui Tam Action with separate counsel defending that portion of the case.

On July 14, 2011, the district court granted South Tahoe's motion to disqualify Sheppard Mullin.

E. The present action

After Sheppard Mullin was disqualified, J–M took the position that J–M was not required to pay Sheppard Mullin any fees that were outstanding at the time of the disqualification. J–M also demanded that Sheppard Mullin return all fees relating to the Qui Tam Action that J–M had already paid.

In June 2012, Sheppard Mullin filed an action against J–M for specific performance, breach of contract, account stated, services rendered, and quantum meruit. It sought approximately $1.3 million as payment for services rendered to J–M in the Qui Tam Action and related matters. It also sought specific performance of the arbitration provision in the Agreement. J–M cross-complained for breach of contract, an accounting, breach of fiduciary duty, and fraudulent inducement. It also sought disgorgement of fees previously paid to Sheppard Mullin.

Sheppard Mullin petitioned for an order compelling arbitration. J–M opposed arbitration, partly on the basis that the entire Agreement containing the arbitration provision was illegal and void as against public policy because Sheppard Mullin's conflict of interest between J–M and South Tahoe violated Rule 3–310(C)(3). J–M argued that the court was required to determine whether the contract was enforceable before sending the case to arbitration, because "the Court has an *independent duty* to ensure that it does not use its power to enforce an illegal contract."

The trial court granted Sheppard Mullin's motion to compel arbitration. The court noted that the parties "contract[ed] out of the procedural requirements of the Federal Arbitration Act (FAA) ... by providing that California law applies to disputes arising out of the subject retainer agreement." The court rejected J–M's argument that the contract was unenforceable based on illegality, instead interpreting J–M's arguments as arising under the doctrine of fraudulent inducement: "[J–M] argues that *circumstances unbeknown to it* at the time of signing the agreement, i.e. [Sheppard Mullin's] alleged conflict of interest, caused the *entire* retainer agreement to be unenforceable. Thus, [J–M] *knew what it* was signing, but [Sheppard Mullin] allegedly induced such consent by fraudulent means...." The court found that J–M had alleged fraud in the inducement, and the issue should be presented to the arbitrator. J–M's petition for writ of mandate challenging this ruling was denied.

F. Arbitration

Pursuant to the terms of the arbitration provision, the arbitration was conducted before a panel of three arbitrators. The parties stipulated that J–M waived any challenge to the value or quality of Sheppard Mullin's work in the Qui Tam Action and any claim for costs (fees included) associated with replacing Sheppard Mullin in the Qui Tam Action.

***261** The arbitrators' final award considered the claimed ethical violation and "fraudulent concealment of the conflict." The arbitrators found "that the better practice would have been [for Sheppard Mullin] to disclose the full South Tahoe situation to J–M, and seek J–M's waiver of it." But the arbitrators concluded that they need not decide whether Sheppard Mullin's failure to seek such a waiver constituted an ethical violation, and for purposes of their analysis assumed that the ethical violation occurred. The arbitrators rejected J–M's claim for fraudulent concealment, based on their finding that Sheppard Mullin honestly and in good faith believed that no conflict existed when it undertook J–M's representation in the Qui Tam Action.

The arbitrators found the assumed ethical violation did not require automatic fee disgorgement or forfeiture. Instead, they engaged in an equitable weighing of whether the ethical violation was serious or egregious. The arbitrators concluded that Sheppard Mullin's conduct was not so serious or egregious as to make disgorgement or forfeiture of fees appropriate. They also found that Sheppard Mullin's representation of South Tahoe involved a matter that was unrelated to the subject of the J–M representation, and therefore the conflict did not pervade the whole relationship with J–M or go to the heart of Sheppard Mullin's representation of J–M.

The arbitrators awarded Sheppard Mullin $1,118,147 in unpaid fees, pre-award interest of $251,471, and interest of $302 per day from January 8, 2014 until the date of the award against J–M. They awarded no recovery to J–M from Sheppard Mullin.

G. Petitions to confirm or vacate the award

Sheppard Mullin petitioned the trial court to confirm the arbitration award; J–M petitioned the court to vacate the award, again arguing that Sheppard Mullin violated Rule 3–310(C)(3), and sought an order requiring Sheppard Mullin to disgorge the fees it received from J–M. The trial court confirmed the award. It found the arbitrators did not exceed their powers in that the Agreement was not illegal or void and the arbitration award did not violate public policy or a statutory right. The court concluded that a violation of Rule 3–310 did not render the entire retainer agreement illegal, void, or unenforceable. It reasoned that whether an attorney should be entitled to attorney fees despite the existence of an ethical violation was at the heart of the determination made by the arbitrators, and that the court could not disrupt the legal and factual findings of the arbitrators.

The court entered judgment confirming the arbitration award on March 18, 2014. This timely appeal by J–M followed.

DISCUSSION

A. Standard of review

"On appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard." (*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892 fn. 7, 64 Cal.Rptr.2d 484 (*Lindenstadt*).) This is "the standard of review that governs a trial court's review of an arbitrator's decision where one of the parties claims that the entire contract or transaction underlying the award is illegal." (*Ibid.*) This is such a case.

B. Where a party challenges an entire contract as illegal or in violation of public policy, the question of enforceability is for the court

A central issue in this case is the court's role where a party has alleged that ***262** an entire contract, rather than a portion of a contract, is unenforceable because it violates public policy. Here, J–M has challenged the entire Agreement—rather than just a portion—as unenforceable. [3] J–M argues that the trial court should not have confirmed the arbitration award, because by doing so the court enforced a contract that violates California's public policy as articulated in the Rules of Professional Conduct for attorneys.

Sheppard Mullin, on the other hand, argues that the arbitration award was properly confirmed because a court's role in reviewing arbitration awards is extremely limited. Following arbitration, review is typically limited to the grounds set forth in Code of Civil Procedure section 1286.2 (section 1286.2), which provides that an arbitration award may be vacated only if the trial court makes particular findings, such as determining that the award was procured by fraud or corruption, the rights of the parties were substantially prejudiced by the actions of the arbitrators, or "the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon which the controversy submitted." (§ 1286.2.)

Determining whether federal or state law governs the Agreement is crucial to whether the court or the arbitrators should have decided if the Agreement was enforceable, and therefore how we review that decision. The trial court held that this question was properly presented to the arbitrators, noting that *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 147 Cal.Rptr.3d 274 (*Phillips*) holds that a "challenge ... that contests the validity of the agreement as a whole, is decided by the arbitrator." (*Id.* at p. 774, 147 Cal.Rptr.3d 274.) *Phillips,* however, and the U.S. Supreme Court case upon which it relied, *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (*Buckeye*), were governed by the Federal Arbitration Act (FAA; 9 U.S.C. § 1, et seq.), not California law. (See *Phillips, supra,* 209 Cal.App.4th at p. 764, 147 Cal.Rptr.3d 274 [noting that under the terms of the contract at issue, "the Federal Arbitration Act (FAA), not California law, 'govern[s] all questions of whether a claim is subject to arbitration.' "]; *Buckeye, supra,* 546 U.S. at pp. 445–446, 126 S.Ct. 1204 [as a matter of "substantive federal arbitration law," "the issue of the contract's validity is considered by the arbitrator in the first instance"].)

However, the Agreement states that J–M "agrees that this agreement will be governed by the laws of California without regard to its conflict rules." Where the parties agree that California law governs the contract, the FAA does not apply. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1264, 147 Cal.Rptr.3d 717 (*Mastick*); see also *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 470, 109 S.Ct. 1248, 103 L.Ed.2d 488 [California arbitration law is not preempted by the FAA where the parties have agreed that their arbitration agreement will be governed by California ***263** law].) Cases applying the FAA, therefore, are not controlling here.

Under California law, a challenge to the legality of an entire contract that contains an arbitration provision must be determined by the trial court, not the arbitrator. "The power of the arbitrator to determine rights under a contract is *dependent upon the existence of a valid contract* under which this right might arise, and the question of the validity of the basic contract is essentially a *judicial question,* which cannot be finally determined by an arbitrator." (1 Witkin, Summary 10th (2005) Contracts, § 450, p. 490, citing *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 610, 204 P.2d 23 (*Loving*).) And if a party challenges the enforceability of a contract after arbitration in a motion to vacate the arbitration award, the court should "review[ ] the evidence de novo to determine whether the arbitration award was based on illegal agreements or transactions." (*Lindenstadt, supra,* 55 Cal.App.4th at pp. 888–889, 64 Cal.Rptr.2d 484.)

"[A]ny preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." (*Loving, supra,* 33 Cal.2d at p. 609, 204 P.2d 23.)

Sheppard Mullin, arguing that limited judicial review applies, relies on *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 Cal.Rptr.2d 183, 832 P.2d 899 (*Moncharsh*) and *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 33, 152 Cal.Rptr.3d 199 (*Ahdout*). These cases are not controlling, however, because they address judicial review when a party has alleged that only a portion of an otherwise enforceable contract—rather than the contract as a whole—is illegal or unenforceable.

The Supreme Court explored this distinction in *Loving, supra,* 33 Cal.2d 603, 204 P.2d 23. In that case, the Court held it was error to confirm an arbitration award in favor of unlicensed contractors. The Court stated that "ordinarily with respect to arbitration proceedings 'the merits of the controversy between the parties are not subject to judicial review,' [citations]. But ... the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award." (*Id.* at p. 609, 204 P.2d 23.) The Court went on to say that deference to the findings of the arbitrators was not warranted in such circumstances: "When so raised, the issue [of illegality] is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." (*Ibid.*; see also *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 737, 259 Cal.Rptr. 780.)

The Supreme Court again emphasized this distinction in *Moncharsh,* which involved a challenge to only the fee-splitting clause of the relevant agreement, rather than the entire agreement. (*Moncharsh, supra,* 3 Cal.4th at p. 32, 10 Cal.Rptr.2d 183, 832 P.2d 899 ["Moncharsh challenges but a single provision of the overall employment contract"].) Since only a claim of *partial* illegality was raised, the Court ruled that the issue of illegality was for the arbitrator to resolve. (*Id.* at p. 30, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Indeed, the *Moncharsh* Court said that if the parties had established that the entire contract was illegal, the arbitration clause would not be enforceable: "[I]f an otherwise ***264** enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether." (*Id.* at 29, 10 Cal.Rptr.2d 183, 832 P.2d 899; see also *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 917, 182 Cal.Rptr.3d 644, 341 P.3d 438 ["*Moncharsh* noted that judicial review may be warranted when a party claims that an arbitrator has enforced an entire contract or transaction that is illegal."].)

Lindenstadt, supra, 55 Cal.App.4th 882, 64 Cal.Rptr.2d 484 also held that the trial court, not the arbitrator, must determine the legality of an entire contract. There, the court recognized the general rule that courts should not interfere with arbitration awards, but noted that in *Loving* "the Supreme Court recognized a narrow exception to the general rule" when a party challenged the legality of the entire contract. (*Lindenstadt, supra,* 55 Cal.App.4th at p. 889, 64 Cal.Rptr.2d 484.) In that case, plaintiff Lindenstadt assisted defendant Staff Builders in locating home health care businesses to acquire. Lindenstadt brought an action against Staff Builders seeking finder's fees for locating several businesses; Staff Builders asserted that Lindenstadt was statutorily barred from seeking fees because he acted as an unlicensed real estate broker. (*Id.* at pp. 885–886, 64 Cal.Rptr.2d 484.) The case went to arbitration based on the parties' contract, and the arbitrator concluded Lindenstadt was entitled to fees. (*Id.* p. 887, 64 Cal.Rptr.2d 484.) In its opposition to Lindenstadt's motion to confirm the arbitration award, Staff Builders argued that the trial court was obligated to undertake a de novo review of the evidence to determine whether the arbitration award was based on illegal contracts or transactions. (*Id.* p. 888, 64 Cal.Rptr.2d 484.) The Court of Appeal agreed, saying that Lindenstadt " 'cannot be permitted to rely upon the arbitrator's conclusion of legality' ([*Loving, supra,* 33 Cal.2d] at p. 614, 204 P.2d 23) since '... it would violate public policy to allow a party to do through arbitration what it cannot do through litigation' (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 316, fn. 2, 197 Cal.Rptr. 581, 673 P.2d 251, [*Ericksen*])." (*Lindenstadt, supra,* 55 Cal.App.4th at pp. 892–893, 64 Cal.Rptr.2d 484.) The Court of Appeal remanded the case to allow the trial court to determine whether Lindenstadt acted as an unlicensed real estate broker in each transaction at issue.

Ahdout, supra, 213 Cal.App.4th 21, 152 Cal.Rptr.3d 199, also discussed the different standards of review of an arbitration award depending on whether a party challenges an entire contract, or only a portion of a contract, as illegal or unenforceable. *Ahdout* contrasted *Loving,* where the entire agreement was challenged, with *Moncharsh,* where only a portion of the contract was challenged: "Whereas the building contract in *Loving* was rendered void in its entirety by the contractor's lack of a license, the illegality alleged in *Moncharsh* affected only one provision of an employment contract...." (*Ahdout, supra,* at p. 36, 152 Cal.Rptr.3d 199.) *Ahdout* recognized that the enforceability of the entire contract was also challenged in *Lindenstadt,* and added, "Indeed, the court in *Lindenstadt* noted the language in *Moncharsh* limiting the scope of *Loving* to cases where the entire contract or transaction was illegal." (*Ibid.*) By comparison, *Ahdout* noted that "the alleged illegality in the instant case does not infect the entire contract." (*Ibid.*) As a result, *Ahdout* found, review of the arbitrator's decision on the narrow grounds articulated in section 1286.2 was appropriate in that case, and "the exception enunciated in *Loving* and *Lindenstadt,* as considered ***265** by *Moncharsh,* is not applicable." (*Ibid.*) Here, judicial determination is required because, as in *Loving* and *Lindenstadt,* J–M has challenged the legality of the contract as a whole. [4]

J–M argued that the entire Agreement was unenforceable because Sheppard Mullin had a conflict of interest when it simultaneously represented J–M in the Qui Tam Action and adverse party South Tahoe in other matters. As stated in *Loving, Moncharsh, Lindenstadt,* and *Ahdout,* a challenge to the enforceability of a contract as a whole, rather than a portion of an otherwise enforceable contract, must be decided by the court rather than the arbitrator. [5] The trial court therefore erred by deferring to the arbitrators in determining the enforceability of the Agreement.

C. Sheppard Mullin violated Rule 3–310

Turning to the substance of the case, we determine whether Sheppard Mullin's simultaneous representation of J–M and South Tahoe violated Rule 3–310 of the California Rules of Professional Conduct. As noted above, we consider this question de novo.

Rule 3–310(C)(3) provides that an attorney "shall not, *without the informed written consent of each client* ... [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." (Italics added.) " 'Informed written consent' means the client's ... written agreement to the representation ***266** following written disclosure." (Rule 3–310(A)(2).)

J–M argues that the Agreement violated "the fundamental public policy embodied in rule 3–310(C) of the Rules of Professional Conduct, which required J–M's informed written consent to any conflicting representation by Sheppard." Sheppard Mullin, on the other hand, argues that the "Engagement Agreement's conflict waiver was plainly legal." "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349–350, 258 Cal.Rptr. 454; see also *Brisbane Lodging, L.P. v. Webcor Builders, Inc.* (2013) 216 Cal.App.4th 1249, 1256–1257, 157 Cal.Rptr.3d 467; *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838, 247 Cal.Rptr. 340.)

Sheppard Mullin argues that J–M's "illegality argument rests entirely on disputed factual issues that are not reviewable." Sheppard Mullin cites *Loving* to argue that illegality must be proved by "uncontradicted evidence." (See *Loving, supra,* 33 Cal.2d at p. 610, 204 P.2d 23 [if "it appears to the court from the uncontradicted evidence that the contract is illegal," the court should deny a petition to compel arbitration or enforce an arbitration award].) Courts have rejected this interpretation of *Loving*. "[A] reading of *Loving & Evans* to require uncontradicted evidence of illegality is too formalistic. The court did not explicitly condition its holding on the existence of uncontroverted evidence. Rather, the case merely stands for the proposition that the legality of the underlying agreement should first be judicially determined." (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 74, 254 Cal.Rptr. 689.)

Nonetheless, the essential facts are not in dispute. Sheppard Mullin partner Jeffery Dinkin did work for South Tahoe before the parties entered into the Agreement. Sheppard Mullin's conflicts check revealed Dinkin's work for South Tahoe before Sheppard Mullin gave the Agreement to J–M, but Sheppard Mullin concluded that there was no reason to

disclose this relationship to J–M. J–M signed the Agreement without knowing that Sheppard Mullin represented South Tahoe in unrelated matters. The parties disagree about whether South Tahoe was a "former" client or a "current" client at the time the Agreement was signed. However, it is undisputed that three weeks after J–M signed the Agreement, Dinkin began working for South Tahoe again, so there is no question that there was an actual conflict at that point. Sheppard Mullin was disqualified from the Qui Tam Action as a result.

Sheppard Mullin argues that it proceeded as required by Rule 3–310(C)(3): "The conflict waiver in the Engagement Agreement waives both current *and* future conflicts. Waivers of current and future conflicts are commonplace and enforced by California and other courts." The conflict waiver provision in the Agreement stated that Sheppard Mullin "may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J–M]." The Agreement allowed Sheppard Mullin to engage in conflicting representations "*provided* the other matter is not substantially related to our representation of [J–M] and in the course of representing [J–M] we have not obtained confidential information of [J–M] material to representation of the other client." It continued, "By consenting to this arrangement, [J–M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations."

***267** What Sheppard Mullin ignores, however, is that Rule 3–310(C)(3) requires *informed* written consent. "Where ... a fully informed consent is not obtained, the duty of loyalty to different clients renders it impossible for an attorney, consistent with ethics and the fidelity owed to clients, to advise one client as to a disputed claim against the other." (*Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898, 142 Cal.Rptr. 509.)

Here, the undisputed facts demonstrate that Sheppard Mullin did not disclose *any* information to J–M about a conflict with South Tahoe. The Agreement includes a boilerplate waiver that included no information about any specific potential or actual conflicts. Dinkin was working for South Tahoe while Sheppard Mullin was defending J–M against South Tahoe in the Qui Tam Action. It strains credulity to suggest that the Agreement constituted "*informed* written consent" of actual conflicts to J–M, when in fact Sheppard Mullin was silent about any conflict.

Even assuming Sheppard Mullin was not representing South Tahoe at the time it entered into the agreement with J–M, Sheppard Mullin nonetheless began performing additional work for South Tahoe three weeks later. It did not inform either client of this actual conflict. Because "waiver must be informed, a second waiver may be required if the original waiver insufficiently disclosed the nature of a subsequent conflict." (*Concat LP v. Unilever, PLC* (N.D. Cal. 2004) 350 F.Supp.2d 796, 820 (*Concat*), citing *Visa U.S.A. Inc. v. First Data Corp.* (N.D. Cal. 2003) 241 F.Supp.2d 1100, 1106 (*Visa*); see also Rule 3–310(C)(3) [an attorney may not "accept" new representation creating an actual conflict with an existing client without obtaining informed, written consent]; *Western Sugar Coop. v. Archer–Daniels–Midland Co.* (C.D. Cal. 2015) 98 F.Supp.3d 1074, 1082 (*Western Sugar*).)

In asserting its position that the waiver in the Agreement was sufficient, Sheppard Mullin relies on *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754 (*Zador*) and *Visa, supra,* 241 F.Supp.2d 1100 to argue that its broadly worded future waiver was sufficient. These cases, however, demonstrate the appropriate steps an attorney should take to obtain a client's informed written consent to a conflict pursuant to Rule 3–310—and thus highlight Sheppard Mullin's failure to do so.

Zador, supra, 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754 addressed informed waivers of potential future conflicts. In that case, Zador Corporation purchased a parcel of property through its agent, C.K. Kwan. A subsequent conveyance of the property gave rise to a claim by another party that he was entitled to an interest in the property, and he sued Zador, Kwan, and another entity. Zador asked the law firm Heller, Ehrman, White & McAuliffe (Heller), which had represented Zador's ownership for ten years, to handle the lawsuit.

Kwan asked Heller to represent him as well. Heller made clear to Kwan that it was also representing Zador, and presented Kwan with an agreement waiving and consenting to potential conflicts of interest. The agreement explained that while there was no present, actual conflict between Zador and Kwan, actual conflicts could arise if the interests of Zador became inconsistent with Kwan's interests. The agreement explained

possible risks if an actual conflict arose, including "shared attorney-client loyalties" and possible erosion of attorney-client privilege, and stated that Heller would continue to represent Zador if its interests became adverse to Kwan. The agreement encouraged Kwan ***268** to seek independent counsel regarding the "import of this consent" and asked him to agree not to seek disqualification of Heller if an actual conflict arose. (*Zador, supra,* 31 Cal.App.4th at pp. 1289–1290, 37 Cal.Rptr.2d 754.) Kwan took twenty minutes to study the agreement and then signed it. (*Id.* at p. 1290, 37 Cal.Rptr.2d 754.)

Two months later, Heller learned of a possible conflict between Kwan and Zador. Heller informed Kwan of the possible conflict and recommended he retain independent counsel. Kwan reaffirmed his consent to Heller's continued representation of Zador. In a confirming letter to Kwan, Heller memorialized this consent. Eventually, however, Zador (through Heller) named Kwan as a cross-defendant. (*Zador, supra,* 31 Cal.App.4th at pp. 1291–1292, 37 Cal.Rptr.2d 754.) Kwan then moved to disqualify Heller and the trial court granted the motion. (*Id.* at p. 1292, 37 Cal.Rptr.2d 754.)

The Court of Appeal held that disqualification of Heller was not required because Kwan had provided informed consent to Heller's continued representation of Zador in the event of a conflict. (*Zador, supra,* 31 Cal.App.4th at p. 1295, 37 Cal.Rptr.2d 754.) The court noted with approval that "The waiver and consent form was detailed." (*Id.* at p. 1299, 37 Cal.Rptr.2d 754, repeated at p. 1301, 37 Cal.Rptr.2d 754.) The court pointed out that when adversity arose between Kwan and Zador, Kwan obtained separate legal counsel but initially "reaffirmed his agreement to the consent form and to Heller's continued representation of Zador." (*Id.* at p. 1301, 37 Cal.Rptr.2d 754.) The order disqualifying Heller was therefore reversed. (*Id.* at p. 1303, 37 Cal.Rptr.2d 754.)

The second case Sheppard Mullin cites, *Visa, supra,* 241 F.Supp.2d 1100, also involved a motion to disqualify Heller in a case involving a potential future conflict. First Data, which was developing a system to processes credit card transactions, asked Heller to represent it in a patent infringement action pending in Delaware. The parties recognized a possible future conflict with Visa, with whom Heller had a longstanding relationship. Heller informed First Data that although it saw no current conflict in representing First Data in the Delaware action, it would only agree to represent First Data if First Data agreed to permit Heller to represent Visa in any future disputes, including litigation, that might arise between First Data and Visa. First Data agreed, and signed an engagement letter that clearly stated these terms. (*Visa,* at p. 1102,.)

About a year later, Visa sued First Data in California for trademark infringement and other claims. First Data moved to disqualify Heller as counsel for Visa in the California case, arguing that Heller's violation of Rule 3–310(C) required automatic disqualification. (*Visa, supra,* 241 F.Supp.2d at p. 1104.)

The district court observed that an advance waiver of potential future conflicts, such as the one executed by First Data and Heller, is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict. (*Visa, supra,* 241 F.Supp.2d at p. 1105.) Citing *Zador,* the *Visa* court emphasized that the "only inquiry that need be made is whether the waiver was fully informed," and noted that "[a] second waiver by First Data in a non-related litigation would only be required if the waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between Visa and First Data." (*Id.* at p. 1106,.)

Citing *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (*SpeeDee Oil*), ***269** *Zador, supra,* 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754, and other authority, the *Visa* court identified factors to be taken into account in evaluating whether full disclosure was made and the client made an informed waiver, such as the breadth of the waiver, the temporal scope of the waiver, the quality of the conflicts discussion between the attorney and the client, and the nature of the actual conflict. (*Visa, supra,* 241 F.Supp.2d at p. 1106.) Applying these factors, the *Visa* court found that the waiver was sufficient because Heller had identified the adverse client and disclosed as fully as possible the nature of any potential conflict. Heller had also explained that in the event of an actual conflict, it would represent Visa in any matters against First Data, including litigation. (*Id.* at p. 1107.) The court found that First Data signed the waiver with fully informed consent to any conflict with Visa. (*Id.* at pp. 1108–1109.)

Zador and *Visa* stand in sharp contrast to the facts here. Unlike Heller in *Zador* and *Visa,* Sheppard Mullin did not disclose the circumstances regarding a potential or actual conflict with

South Tahoe to either J–M or South Tahoe. The Sheppard Mullin attorneys on the Qui Tam Action were aware the firm had a relationship with South Tahoe, and even sought advice from firm counsel as to whether it had to be disclosed before J–M signed the Agreement. The conflict waiver provision in the Agreement did not mention South Tahoe. Instead, it broadly waived all current and future conflicts with any client: "*Conflicts with Other Clients.* Sheppard, Mullin Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J–M].... By consenting to this arrangement, [J–M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations."

The facts here therefore are not analogous to *Zador* and *Visa,* because Sheppard Mullin (1) failed to inform J–M about any potential or actual conflict with South Tahoe, and (2) did not obtain J–M's informed, written consent to continued representation despite the actual conflict that occurred while Sheppard Mullin was working for J–M and South Tahoe at the same time. Written consent to all potential and actual conflicts in the absence of any knowledge about the existence of such conflicts cannot comply with the requirement of "informed written consent" in Rule 3–310(C). Because Sheppard Mullin failed to secure informed written consent to the conflict before or during its representation of J–M, the Agreement violated Rule 3–310. [6]

D. Rule 3–310 is an expression of public policy central to the attorney-client relationship, the violation of which warrants finding the Agreement unenforceable

Having found that Sheppard Mullin violated Rule 3–310, the next question ***270** is whether the violation renders the parties' Agreement unenforceable. We find that it does.

A contract must have a lawful object or the contract is void. (Civ. Code, §§ 1550, subd. (3), 1596, 1598.) An unlawful contract is not valid. (Civ. Code, §§ 1607, 1667.) A contract is unlawful if it is "1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals." (Civ. Code, § 1667; see also Civ. Code, §§ 1441 ["A condition in a contract, the fulfillment of which is ... unlawful ... is void"], 1608 ["If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void"].) Therefore, courts have long held that "[a] contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity [citation], and the parties will be left, therefore, where they are found when they come to a court for relief." (*Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453–454, 296 P.2d 554; see also *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 541, 13 Cal.Rptr.3d 174.)

At issue in this case are the public policies embodied in the California Rules of Professional Conduct, which "are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public." (*Altschul v. Sayble* (1978) 83 Cal.App.3d 153, 163, 147 Cal.Rptr. 716 (*Altschul*).) "The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. (*Flatt [v. Superior Court* (1994) 9 Cal.4th 275,] 282, 285, 36 Cal.Rptr.2d 537, 885 P.2d 950 [*Flatt*].) The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. (*Ibid.*)" (*SpeeDee Oil, supra,* 20 Cal.4th at pp. 1146–1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Sheppard Mullin breached this essential basis for trust and security as to both J–M and South Tahoe.

A contract in violation of Rule 3–310(C) is against the public interest. "Rule 3–310 and conflict of interest rules are designed to 'assure the attorney's absolute and *undivided loyalty* and commitment to the client and the *protection of client confidences.*' (1 Vapnek et al., Cal. Practice Guide: Professional Responsibility) (The Rutter Group 2007 ¶ 4:4, p. 4–3.)" (*Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 427, 78 Cal.Rptr.3d 37.) "It is well established that an attorney's duties to his client are governed by the Rules of Professional Conduct, and that those rules, together with statutes and general principles relating to other fiduciary relationships, 'help define the duty component of the fiduciary duty which an attorney owes his client.' [Citation.]" (*American Airlines v. Sheppard Mullin, supra,* 96 Cal.App.4th at p. 1032, 117 Cal.Rptr.2d 685.)

"The primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of loyalty, rather than

confidentiality." (*Flatt, supra,* 9 Cal.4th at p. 284, 36 Cal.Rptr.2d 537, 885 P.2d 950.) The Supreme Court explained the underlying public policy: "A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship." ***271** (*Id.* at p. 285, 36 Cal.Rptr.2d 537, 885 P.2d 950.) Thus, "[t]he courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. (*Ibid.*)" (*SpeeDee Oil, supra,* 20 Cal.4th at pp. 1146–1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.) " 'The paramount concern ... [is] to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' " (*Fiduciary Trust International of California v. Superior Court* (2013) 218 Cal.App.4th 465, 485–486, 160 Cal.Rptr.3d 216 (*Fiduciary Trust*), quoting *SpeeDee Oil, supra,* 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.)

At oral argument, Sheppard Mullin cited *Ahdout* to argue that courts may consider only public policy as expressly declared by the Legislature. As a result, Sheppard Mullin argued, the Rules of Professional Conduct—adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California (Rule 1–100)—do not represent a statement of California public policy sufficient to render a contract unenforceable. (See *Ahdout, supra,* 213 Cal.App.4th at pp. 38–39, 152 Cal.Rptr.3d 199 ["The fact that [Bus. & Prof. Code] section 7031 reflects an explicit expression by the *Legislature* of its public policy objectives sets this case apart from *Moncharsh,* which concerned alleged violations of the Rules of Professional Conduct that are approved by the Supreme Court, not the Legislature."].) This is an incorrect reading of *Ahdout,* which distinguished cases such as *Moncharsh* that discuss the Rules of Professional Conduct but did not hold that such rules cannot serve as a valid expression of public policy.

Instead, "[t]here is no requirement that a contract violate an express mandate of a statute before it may be declared void as contrary to public policy." (*Altschul, supra,* 83 Cal.App.3d at p. 162, 147 Cal.Rptr. 716; see also *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 901, 102 Cal.Rptr.2d 502 ["Both legislative enactments and administrative regulations can be utilized to further this state's public policy of protecting consumers in the marketplace of goods and services."].) When determining whether a contract is unenforceable because it violates public policy, courts may look to a variety of sources. "The public policy in question may sometimes be based on statute (see, e.g., *Wildman v. Government Employees' Ins. Co.* (1957) 48 Cal.2d 31, 307 P.2d 359[ ]) but does not necessarily have to be—it can be based on other policies perceived to be contrary to the public welfare. (See *Altschul* [, *supra,*] 83 Cal.App.3d 153, 162, 147 Cal.Rptr. 716 [court refuses to enforce fee-for-referral agreements among attorneys as contrary to public policy].)" (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1081, 135 Cal.Rptr.2d 361, 70 P.3d 351, Moreno, J., concurring; see also *Cariveau v. Halferty* (2000) 83 Cal.App.4th 126, 132, 99 Cal.Rptr.2d 417 ["Public policy, in the context of a court's refusal to enforce a contract term, may be based on the policy expressed in a statute or the rules of a voluntary regulatory entity, or may be implied from the language of such statute or rule."].) Thus, in the context of determining whether a contract as a whole is illegal or against public policy and therefore unenforceable, a determination of relevant public policy is not limited to an explicit expression of public policy by the Legislature.

Moreover, Sheppard Mullin's argument ignores the long line of cases relying on the Rules of Professional Conduct to find contracts unenforceable. (See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142, 161, 126 Cal.Rptr.2d 536, 56 P.3d 645) ["[B]ecause ***272** this court approved rule 2–200 under legislative authorization (see Bus. & Prof. Code, § 6076), and because the rule binds all members of the State Bar (rule 1–100(A), 1st par.), it would be absurd for this or any other court to aid Chambers in accomplishing a fee division that would violate the rule's explicit requirement of written client consent and would subject Chambers to professional discipline."]; *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1417, 114 Cal.Rptr.3d 781 ["Fee agreements that violate the Rules of Professional Conduct may be deemed unenforceable on public policy grounds."]; *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 431, 130 Cal.Rptr.2d 782 [A fee agreement that violates Rule 4–200 is not valid and enforceable]; *McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 346, 17 Cal.Rptr.3d 66 ["In light of these public interest concerns, and because there is no dispute here that the agreement at issue between McIntosh and Mills clearly violates CPRC, rule 1–320(A), we conclude that

the doctrine of illegality applies facially to their fee-sharing agreement."]

As discussed in *Flatt, SpeeDee Oil, American Airlines v. Sheppard Mullin,* and *Fiduciary Trust,* the attorney's duty of undivided loyalty that forms the basis of Rule 3–310 constitutes the very foundation of an attorney-client relationship. The Agreement, which violated Rule 3–310(C), therefore violated an expression of public policy. The trial court erred in holding that the Agreement was valid and enforceable.

E. As a result of Sheppard Mullin's violation of 3–310, it is not entitled to attorney fees

Sheppard Mullin argues that despite its violation of Rule 3–310, it is nonetheless entitled to its attorney fees for its representation of J–M in the Qui Tam Action. However, when a conflict of interest is asserted as a "[d]efense in the attorney's action to recover fees or the reasonable value of services[, a] violation of the fiduciary obligation will defeat recovery." (1 Witkin, Cal. Proc. 5th (2008) Attys, § 104, p. 142.) Sheppard Mullin's violation of Rule 3–310 precludes it from receiving compensation for services provided to J–M in the Qui Tam Action.

"A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." (Rest.3d of the Law Governing Lawyers, § 37.)

California cases have drawn a line between cases involving serious ethical violations such as conflicts of interest, in which compensation is prohibited, and technical violations or potential conflicts, in which compensation may be allowed. Two seminal cases set out the governing principles. The first is *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 120 Cal.Rptr. 253 (*Goldstein*), a case in which a law firm sought to recover fees for legal services rendered. In the underlying case, a former corporate counsel represented a minority shareholder and director in a proxy fight against the same corporation. Focusing on the fact that the attorney knew confidential information about the corporation, the Court of Appeal held that former Rule 5 barred recovery of attorney fees for the underlying ***273** action.[7] (*Id*. at pp. 620, 623–624, 120 Cal.Rptr. 253.) The court reasoned, "It is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility." (*Id*. at p. 618, 120 Cal.Rptr. 253, citing *Clark v. Millsap* (1926) 197 Cal. 765, 785, 242 P. 918 ["acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties" will prevent an attorney from recovering for services rendered.].)

The second seminal case is *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 136 Cal.Rptr. 373 (*Jeffry*). In that case, a law firm represented a husband in a personal injury action, but also agreed to represent his wife in a dissolution of marriage action she brought against him. The Court of Appeal found that the law firm had breached former Rule 5–102(B),[8] which precluded an attorney from representing conflicting interests unless all parties concerned provided informed written consent. The attorney did not obtain written consent of both parties. (*Id*. at p. 11, 136 Cal.Rptr. 373.) The *Jeffry* court denied any fees to the firm for work performed after the conflict arose. (*Id*. at p. 12, 136 Cal.Rptr. 373.) The court emphasized that this conclusion was not based on an improper intent on the part of the firm: "We do not charge [the firm] with dishonest purpose or deliberately unethical conduct." (*Id*. at p. 11, 136 Cal.Rptr. 373.)

A number of cases have followed *Goldstein* and *Jeffry*. (See, e.g., *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 16, 60 Cal.Rptr.2d 207 [attorney not entitled to fees after he offered to dismiss a class action in return for a personal payment to him of millions of dollars]; *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 6 Cal.Rptr.3d 813 [law firm not entitled to fees after it helped a new client enforce a judgment against a former client by assisting the new client in locating and pursuing the former client's assets].) Another case, *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 125 Cal.Rptr.3d 765 (*Fair*), noted that attorneys are not entitled to fees where the ethical violation is "one that pervades the whole relationship." (*Id*. at p. 1150, 125 Cal.Rptr.3d 765.) *Fair* affirmed the trial court's denial of quantum meruit recovery where an attorney's conduct "constituted not merely

a technical rule violation, but the breach of *Fair* 's fiduciary duty to" his clients. (*Id*. at p. 1151, 125 Cal.Rptr.3d 765.)

As in *Fair,* the conflict here pervaded the entire relationship between Sheppard Mullin and J–M. Even if, as Sheppard Mullin argues, it was not working for South Tahoe at the time the Agreement was signed, it nonetheless began working for South Tahoe three weeks later, thereby representing adverse clients without telling either client about the actual conflict. The violation caused Sheppard Mullin to be disqualified from representing J–M in the Qui Tam Action—the very purpose for which J–M had hired it. It is clear, therefore, that Sheppard Mullin's ethical breach went to the very heart of its relationship with J–M.

Sheppard Mullin cites *Mardirossian & Associates v. Ersoff* (2007) 153 Cal.App.4th 257, 62 Cal.Rptr.3d 665, *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 49 Cal.Rptr.3d 60, and ***274** *Sullivan v. Dorsa* (2005) 128 Cal.App.4th 947, 27 Cal.Rptr.3d 547 to argue that "courts routinely award attorneys their fees despite conflicts of interest that could lead to disqualification." These cases are distinguishable in that none of them involved an actual conflict. [9]

Sheppard Mullin also argues that fees should be allowed because J–M suffered no damage as the result of its ethical violations and because the arbitrators found it acted in good faith. Given Sheppard Mullin's ethical misconduct here, it is irrelevant whether J–M suffered damage. "It is the general rule in conflict of interest cases that where an attorney violates his ... ethical duties to the client, the attorney is not entitled to a fee for his ... services. [Citations.]" (*Cal Pak, supra,* 52 Cal.App.4th at p.14, 60 Cal.Rptr.2d 207.) We note that the *Fair* court rejected a similar argument regarding lack of damage: "No authority cited by *Fair* holds that proof the client was damaged by the attorney's breach of fiduciary duty or conflict of interest is required to void the agreement between the two ... where the breach is sufficiently serious." (*Fair, supra,* 195 Cal.App.4th at pp. 1153–1154, 125 Cal.Rptr.3d 765.) Moreover, forfeiture of attorney fees is intended to be a deterrent, which is invoked because the "damage that misconduct causes is often difficult to assess." (Restatement (Third) of the Law Governing Lawyers § 37 (2000).) J–M's actual damages as result of Sheppard Mullin's breach are irrelevant. [10]

The analysis does not change because Sheppard Mullin has alleged that it is entitled to fees under a quantum meruit theory. In *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 9 Cal.Rptr.3d 693, 84 P.3d 379 (*Huskinson*), the Supreme Court acknowledged that quantum meruit recovery had been denied in cases of ethical violations such as Sheppard Mullin's here. It observed that such cases "involved violations of a rule that proscribed the very conduct for which compensation was sought, i.e., *the rule prohibiting attorneys from engaging in conflicting representation or accepting professional employment adverse to the interests of a client or former client without the written consent of both parties*." (*Huskinson,* 32 Cal.4th at p. 463, 9 Cal.Rptr.3d 693, 84 P.3d 379, italics added, citing *Jeffry, supra,* 67 Cal.App.3d 6, 12, 136 Cal.Rptr. 373 and *Goldstein, supra,* 46 Cal.App.3d 614, 120 Cal.Rptr. 253.) The same result was reached in *Fair,* in which the Court of Appeal concluded that Fair's breach of fiduciary duty precluded recovery of fees in quantum meruit: "[V]iolation of a rule that constitutes a serious breach of fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, warrants denial of quantum meruit recovery. [Citations.]" (*Fair, supra,* 195 Cal.App.4th at pp. 1161–1162, 125 Cal.Rptr.3d 765.)

We have found that Sheppard Mullin's breach of the duty of loyalty set forth in Rule 3–310 was a violation of public policy. A finding that Sheppard Mullin was nonetheless entitled to its attorney fees as if no breach had occurred would undermine this same public policy. We therefore follow the reasoning of *Goldstein* and *Jeffry* and hold that Sheppard Mullin is not entitled to its fees for the work it did for J–M while there was an actual conflict with South Tahoe.

F. Disputed fact issue about when the actual conflict began

There is no question that starting from March 29, 2010, the date Dinkin resumed ***275** work on behalf of South Tahoe while other Sheppard Mullin attorneys were representing J–M in the Qui Tam Action, there was an actual conflict in violation of Rule 3–310(C). At that point Sheppard Mullin "in a separate matter accept[ed] as a client a person or entity [South Tahoe] whose interest in the first matter [the Qui Tam Action] is adverse to the client in the first matter [J–M]." (Rule 3–310(C)(3).) Sheppard Mullin admits that in late March 2010 South Tahoe "reemerged" as a client, and Dinkin stated in his declaration that he worked for South Tahoe in

March, April, June, October, and December 2010, and in January, February, and March of 2011.

There is a fact question, however, as to whether there was an actual conflict between the time J–M signed the Agreement (March 8, 2010) and when Dinkin resumed actively working for South Tahoe (March 29, 2010). Sheppard Mullin argues that South Tahoe was not a current client when the Agreement with J–M was signed because Dinkin had not done any work for South Tahoe for five months before that. J–M argues that an actual conflict nonetheless existed because Sheppard Mullin had an ongoing relationship with South Tahoe for many years. Indeed, Dinkin stated in his declaration that he brought South Tahoe with him as a client when he joined Sheppard Mullin in 2002. Also, in a June 9, 2011 letter to South Tahoe after the conflict came to light, Sheppard Mullin stated, "We have been pleased to provide labor advice to you for the last 9 years."

Sheppard Mullin and South Tahoe executed engagement agreements in 2002 and 2006. The 2006 engagement agreement states, "Termination of Representation. You [South Tahoe] have the right to terminate our representation of you at any time. Subject to our ethical obligation to give you reasonable notice to arrange for alternative representation, we may terminate our representation of you at any time. Unless we agree to render other legal services to the District, our representation will terminate upon completion of the Matter." "Matter" is defined elsewhere in the contract as "general employment matters." The record reveals no engagement agreements with South Tahoe post-dating this 2006 agreement. Dinkin stated in his declaration that he "occasionally handled discrete individual matters and provided advice to South Tahoe" through November 2009 based on the 2002 and 2006 agreements. Therefore, it is unclear whether Sheppard Mullin's representation of South Tahoe was ongoing or if it terminated before the Agreement with J–M was signed. [11]

This is a fact question we will not determine in the first instance. We therefore remand for further proceedings in the trial court to determine this question, and for the court to determine the amount of fees that Sheppard Mullin must reimburse to J–M.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. J–M is awarded its costs on appeal.

We concur:

WILLHITE, Acting P.J.

ZELON, J. *

All Citations

198 Cal.Rptr.3d 253, 16 Cal. Daily Op. Serv. 1205, 2016 Daily Journal D.A.R. 1051

Footnotes

1 All further references to a "Rule" refer to the California Rules of Professional Conduct unless otherwise indicated.

2 Rule 3–310(C)(3) states, "A member shall not, without the informed written consent of each client.... Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

3 In its opposition to Sheppard Mullin's petition to compel arbitration, J–M argued the Agreement was illegal and void as a violation of public policy because of Sheppard Mullin's conflict of interest while it represented J–M.

In its petition to vacate the arbitration award, J–M again argued the Agreement was "void and unenforceable" because of Sheppard Mullin's violation of Rule 3–310. On appeal, J–M argues that "the trial court erred in confirming the arbitration award, thereby enforcing an illegal contract that contravenes ... public polic[y]."

4 Sheppard Mullin also argues that the public policy supporting arbitration compels us to affirm the arbitration award. We recognize the "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Ericksen, supra,* 35 Cal.3d at p. 322, 197 Cal.Rptr. 581, 673 P.2d 251.) But the public policy supporting arbitration does not take precedence over the mandate that contracts comply with California's other public policies. "The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration." (*Loving, supra,* 33 Cal.2d at p. 611, 204 P.2d 23, quoting *Tandy v. Elmore–Cooper Live Stock Commission Co*. (1905) 113 Mo.App. 409, 87 S.W. 614, 618; see also *Moncharsh, supra,* 3 Cal.4th at p. 32, 10 Cal.Rptr.2d 183, 832 P.2d 899 [allowing judicial scrutiny of an arbitral award when a court is presented with "a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration"].) The public policy supporting arbitration therefore does not limit the scope of judicial review of an allegedly unenforceable contract.

5 The trial court erred by characterizing J–M's illegality argument as an assertion based only on fraudulent inducement to be determined by the arbitrators: "Defendant has attempted to characterize this case as one based upon illegality, rather than fraudulent inducement. The Court is not convinced of this distinction...." Indeed, there is a distinction. The Supreme Court has held that under California law, "claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration." (*Ericksen, supra,* 35 Cal.3d at p. 323, 197 Cal.Rptr. 581, 673 P.2d 251.) But in so holding, the court was careful to distinguish cases in which a defendant alleges the contract was illegal or in violation of public policy. "Questions of public policy which are implicated by an illegal agreement, and which might be ill-suited for arbitral determination, are not presented when garden-variety 'fraud in the inducement,' related to performance failure, is claimed." (*Id.* at p. 316, fn. 2, 197 Cal.Rptr. 581, 673 P.2d 251.) Here, although J–M did assert garden-variety fraudulent inducement, it also placed the illegality question squarely before the court. The trial court therefore erred in holding that J–M's illegality argument implicated *only* fraud in the inducement to be determined by the arbitrators.

6 Sheppard Mullin argues that finding the conflict waiver provision inadequate would "upend countless agreements between lawyers and their clients and wreak havoc on the practice of law in this State." We disagree. We would not be the first court to reject an uninformed, blanket advance waiver such as the one at issue in this case. (See, e.g., *Concat, supra,* 350 F.Supp.2d at pp. 801, 821; *Lennar Mare Island, LLC v. Steadfast Ins. Co.* (E.D. Cal. 2015) 105 F.Supp.3d 1100, 1115; *Western Sugar, supra,* 98 F.Supp.3d at p. 1083.) Moreover, our holding is consistent with the purpose of the Rules of Professional Conduct—to "protect the public and to promote respect and confidence in the legal profession." (Rule 1–100(A).)

7 At the time, Rule 5 stated, " 'A member of the State Bar shall not accept employment adverse to a client or former client, ... relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.' " (*Goldstein, supra,* 46 Cal.App.3d at pp. 618–619, 120 Cal.Rptr. 253.)

8 Former Rule 5–102(B) (duty of loyalty) is a predecessor to current Rule 3–310, as is former Rule 4–101 (requiring counsel to preserve the confidentiality of client matters). "The former rules governing attorneys'

duties of confidentiality and loyalty were thus consolidated into a single rule." (*Flatt, supra,* 9 Cal.4th at p. 288, fn. 5, 36 Cal.Rptr.2d 537, 885 P.2d 950.)

9 In *Slovensky*, the court accepted as true the plaintiff's allegations that her former attorneys breached their fiduciary duty by failing to disclose that they were settling a number of plaintiffs' cases together in a global settlement. No actual conflict was demonstrated. (142 Cal.App.4th at p. 1534.)

10 We recognize that disgorgement, when sought as a tort remedy in cases not involving a serious ethical breach, may require evidence of actual damages to avoid providing the client with a windfall. (See, e.g., *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 48; *Slovensky, supra*, 142 Cal.App.4th at pp. 1535-1536.) When a serious ethical breach is at issue, however, an attorney may not recover fees for services rendered. It makes no difference whether the fees have already been collected from the client or if the fees have yet to be paid.

11 Even if South Tahoe was a former client at the time the Agreement was signed, Sheppard Mullin's failure to disclose the relationship to J–M may have violated Rule 3–310(B)(1). As the parties have not briefed this issue, we will not address it here.

* Associate Justice of the Court of Appeal, Second District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

2016 WL 11594701 (Cal.) (Appellate Brief)
Supreme Court of California.

SHEPPARD, Mullin, Richter & Hampton, LLP, Plaintiff and Respondent,

v.

J-M MANUFACTURING CO., INC., Defendant and Appellant.

No. S232946.
December 13, 2016.

After a Decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, Case No. B256314; the Superior Court of Los Angeles County, Case No. YC067332 the Honorable Stuart M. Rice, Presiding

Application for Leave to File Amici Curiae Brief in Support of Plaintiff/Respondent Sheppard, Mullin, Richter & Hampton LLP; the Amici Curiae Brief of the Amici Law Firms

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***1 APPLICATION**

Pursuant to the California Rules of Court, rule 8.520(f), the 51 law firms identified on Exhibit A hereto (the "Amici Law Firms") respectfully request leave to file an amicus curiae brief in support of Plaintiff and Respondent, Sheppard, Mullin, Richter & Hampton, LLP ("Sheppard Mullin"), and in opposition to Defendant and Appellant J-M Manufacturing Company, Inc. ("J-M").

STATEMENT OF INTEREST

The Amici Law Firms include firms with a single California office, multiple California offices, multiple offices in multiple states, and in some instances multiple international offices. These firms range in size from two lawyers on up, and their practices cover a broad range of civil and criminal litigation, alternative dispute resolution, legal ethics counseling, and business and transactional matters.

The Amici Law Firms respectfully submit that the ability of clients and lawyers to order their relationships would be compromised on the important issues of arbitrability, informed consent to conflicts, and fee forfeiture if the novel positions of J-M and the court of appeal were accepted by this Court. The purpose of California's ethical rules - "to protect the public and to promote respect and confidence in the legal profession" - would be undercut rather than advanced by limiting the free choice of California clients and lawyers. The Amici Law Firms' collective experience is that arbitration provisions and informed consent provisions are commonplace in engagement letters, are necessary in the modern world, and are understood and negotiated by clients and their lawyers.

J-M's proclamation that the duty of loyalty "goes to the very heart of the attorney-client relationship" (J-M Answer Brief at 1) does not justify upsetting settled law and expectations governing the arbitration of lawyer- ***2** client disputes, adopting unworkable and unfair requirements for informed consent, or imposing fee forfeitures without regard to lawyer good faith or the extent, if any, of client harm. If the absolutist view of J-M and the court of appeal were to prevail in this State, the detriment to California clients and lawyers would be far-reaching:

● Clients of California lawyers could no longer depend upon the confidentiality, efficiency and other benefits of agreed-upon (and legislatively encouraged) arbitration.

● Clients of California lawyers would be uniquely restrained from negotiating and relying on consents to conflicts that allow clients to engage the lawyers of their choice on the matters of their choice and that allow lawyers to accept representations on the strength of such consents.

● Clients of California lawyers would be encouraged to magnify even innocent, remote and harmless conflicts in order to assert that they should not have to pay for the valuable services they have received.

The Amici Law Firms respectfully request leave to file the attached amici curiae brief for each of these reasons and for the reasons set forth in the brief itself.

In accordance with the requirements of the California Rules of Court, rule 8.520(f), Peter R. Jarvis and his law firm, Holland & Knight LLP, are the authors of this brief, and no other person or entity have made or will make any monetary contribution towards the preparation and filing of this brief. Mr. Jarvis is a co-author of Hazard, Jr., Hodes, and Jarvis, The Law of Lawyering (4th Ed. 2015). He is also the Co-Leader of Holland & Knight LLP's Legal Profession Team, which primarily counsels lawyers,

law firms and corporate and government legal departments on lawyer professional responsibility and risk management issues. Mr. Jarvis has written and spoken extensively on the California Rules of Professional Conduct and the ABA Model Rules, including with respect to conflicts of interest and informed consent to conflicts waiver issues, for decades.

***3** Dated: December 2, 2016

Respectfully submitted,

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*4 INTRODUCTION

I. Summary and Overview

The Amici Law Firms request that this Court reverse the court of appeal and: reject J-M's assault on the arbitrability of lawyer-client disputes; clarify the standards for the validity of informed consent to conflicts; and confirm that the harsh remedy of fee forfeiture requires much more than a post hoc assertion of an allegedly "serious" conflict. The Amici Law Firms submit that the position taken by J-M and the court of appeal on each of these issues is inconsistent with current, accepted practices in California and elsewhere.

A rule allowing assertions of conflicts of interest to defeat agreed-upon arbitration provisions would prevent lawyers and clients from securing the predictability and confidentiality they elected at the outset of their relationship when they knowingly and intentionally chose arbitration as the forum for resolution of disputes. A great many clients welcome arbitration and, indeed demand arbitration clauses in their engagement agreements because they know that if a lawyer-client relationship does degenerate, their privileged communications will be kept from the public record and the dispute will be resolved without intrusive and expensive discovery.

Even were it within this Court's purview to create an exception to the legislative policy in favor of arbitration, such an exception would be ill-advised. There is no evidence that the results of arbitrated lawyer-client disputes are skewed against clients. There also is no evidence that clients are compelled by law firms to accept arbitration provisions as contracts of adhesion, and Amici Law Firms' experience is to the contrary. This case is devoid of any suggestion that J-M did not want an arbitration provision in its engagement agreement (the "Agreement").

***5** It is also the longstanding experience of the Amici Law Firms that informed consent to both present and future conflicts play a critical role in allowing clients of all sizes to hire lawyers of their choice from firms of all sizes and on matters of the clients' choice. Consent or waivers of pure duty-of-loyalty conflicts, where there is no realistic risk of prejudice or leakage of confidential information, are particularly commonplace. Requests for such waivers are also easy for clients to understand - especially where, as here, the client from whom consent was sought was sophisticated and represented by independent counsel. A rule that increases the risk of unenforceability of clear and agreed-upon conflicts waivers, whether present or future, would adversely affect both California lawyers and present and prospective clients. Moreover, no such rule exists in other jurisdictions.

The Amici Law Firms can readily agree that truly unsophisticated clients who do not have the benefit of independent counsel may need more disclosure than sophisticated and separately-represented entities. Nonetheless, it is also true that sophisticated consumers of legal services (some hiring scores of law firms each year in numerous matters) equipped with ever-growing ranks of in-house and outside counsel do not need the protection of singular California-imposed vetoes of such consents. The Amici Law Firms agree with the commentators who have studied the relationship between outside and inside counsel and concluded that inside counsel's "once-inferior status has been elevated and [inside counsel] now allocate, guide, control and supervise

the work of outside counsel." (Whelan and Ziv, *Privatizing Professionalism: Client Control of Lawyers Ethics* (May 2012) 80 Fordham L.Rev. 2577, 2583.) The commentators also note that "OC [Outside Counsel] Guidelines [from corporate clients], requirements, and procedures are commonplace." (Id. at 2585.)

Finally, no state has imposed the equitable remedy of fee forfeiture, let alone full fee forfeiture, without considering such factors as the presence ***6** or absence of lawyer good faith and client harm. This Court should not put California in a class by itself and, in so doing, destabilize thousands of existing and future lawyer-client relationships as clients are presented with arguments that might encourage them to try to avoid contractual obligations to pay their lawyers as agreed for services provided.

II. Public Policy Does Not Invalidate an Agreement to Arbitrate A Case In Which A Violation of the Professional Rules Is Alleged.

This Court should not create a rule that lawyer-client arbitration clauses are unenforceable whenever a violation of the Rules of Professional Conduct ("RPCs") in general or the conflicts rules in particular is alleged to exist or, indeed, is found to exist. "[T]hose who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts," and "when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration." (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247 [205 Cal.Rptr.3d 359, 376 P.3d 506] [emphasis in original, internal citations omitted].) Arbitration provisions such as the one contained in the Agreement must be enforced in accordance with their terms.

Even the court of appeal did not purport to find that there was an insufficiently waived conflict which would "illegalize" the Agreement until three weeks after the document was consummated. (Opn. at p. 17.) Not even fraudulent inducement destroys arbitrability, and it would overturn the expectations of sophisticated commercial actors everywhere if findings of post hoc ethical conflicts could render arbitration provisions void ab initio.

Under section 1598 of the Civil Code, it is only "Where a contract has but a single object, and such object is unlawful" that "the entire contract is void." (Civ. Code § 1598.) As is true of lawyer-client engagement agreements in general, this Agreement had the unquestionably lawful - and ***7** common - primary objective of setting the terms and conditions under which Sheppard Mullin would provide legal services to J-M for the lawful defense of the qui tam and any other matters on which J-M might hire Sheppard Mullin. The informed consent/conflict waiver portion of the Agreement - the only clause attacked by J-M - had a lawful objective as well: compliance with RPC 3-310, with the arbitrators having found that Sheppard Mullin acted "honestly and in good faith" at all times. The arbitrators manifestly did not find that either J-M or Sheppard Mullin was pursuing an illegal objective in any sense.

Even if this Court *were* to conclude that a legally sophisticated client that was independently represented by counsel could not have understood the plain meaning of Sheppard Mullin's informed consent/conflicts waiver language (and it should not), the absolute worst that could then be said is that Sheppard Mullin's effort to obtain informed consent only failed because Sheppard Mullin did not expressly call attention to a then-inactive relationship with South Tahoe that Sheppard Mullin reasonably believed was subject to its own effective conflicts waivers. [1] As noted by the Ninth Circuit in another context, "The very fact that the public policy regarding fee collection by unethical lawyers is so fact-specific suggests that it is not sufficiently 'well defined and dominant' to fall within the public policy exception." (*Arizona Elec. Power Co-op, Inc. v. Berkeley* (9th Cir. 1995) 59 F.3d 988, 992.)

***8** J-M concedes that there are RPC violations including those for unconscionable fees and lawyer fraud, that may be arbitrated. (J-M Answer Brief at 17.) These violations can strike at the duty of loyalty just as much - indeed more so - than a purported

failure to obtain fully informed consent. In other words, the dividing line that J-M presents to this Court does not exist. Worse still, any attempt to draw such a line would seriously burden clients and lawyers who would have to wait for the seriatim development of case law on whether arbitration can be halted, as well as wait for a court determination of where the particular factual circumstances in which they find themselves would fit into the case law.

The destruction of arbitration as an agreed-upon and certain remedy would be accompanied by delay and increased expense for clients as well as lawyers. When a dispute is removed from arbitration to a court, the court needs to allow discovery, request briefs, hold a hearing and issue a reasoned decision. In at least many instances, the court would conclude that arbitration could proceed as to some or all issues, with the result that the parties would then have to start over in a second forum. Multiple, collateral litigation would be the new order, striking at the core of the State's public policy favoring the efficiency (and lower judicial burden) associated with arbitration.

***9** The arbitrators in this case did exactly what a court would have been called on to do - weigh the facts and the full range of equities to determine whether, under these particular circumstances, the remedy of fee forfeiture or disgorgement was appropriate. If J-M's position were to be accepted, a client could conceivably await the result of an arbitration and then, if the result is unpalatable, seek to relitigate de novo what the arbitrators had already decided by claiming "illegality." This is not a permissible ground for reversal of a decision in arbitration, and it should not be a ground for avoiding arbitration in the first instance. "Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation." (Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal.4th 1179, 1182 [77 Cal.Rptr.3d 613, 184 P.3d 739].) [2]

***10 III. Disclosure for Informed Consent Must Focus on the Client's Reasonable Understanding, Not Perfection.**

A. When It Comes to Informed Consent, Reasonable Disclosure and Understanding Is the Only Viable or Appropriate Test.

The Amici Law Firms welcome the opportunity to bring their practical experience to bear on the discussion of the quality and quantity of disclosure and informed consent necessary to make conflict waivers enforceable.

The Amici Law Firms and countless other lawyers seek consents to present and future conflicts in order to serve, not harm, their clients. The development and use of such written waivers was part of a necessary response to the broad duty of undivided loyalty as it began to develop in relatively recent decades. [3] Such waivers allow clients to opt out of the full duty of undivided loyalty when they determine it is in their interest to do so. [4]

***11** The criteria adopted for disclosure and informed consent by the court of appeal would also disadvantage California lawyers vis-a-vis non-California lawyers and firms in other states and countries without such limits. [5] In *Howard v. Babcock* (1993) 6 Cal.4th 409, 421, 423 [25 Cal.Rptr.2d 80, 863 P.2d 1501, this Court noted the need to keep abreast of "sweeping changes in the practice of law" and asserted that "the contemporary changes in the legal profession to which we have already alluded make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality." Here, "[p]utting aside lofty assertions about the uniqueness of the legal profession" (id. at 422-23), experience shows that both clients and lawyers need to be able to execute, and then rely upon, conflicts waivers in California as they are elsewhere.

Although it may be tempting to default to a one-size-fits-all approach, the fact is that many clients are sophisticated business entities supported by other counsel, are bargaining heavyweights in the purchase of legal services, and neither want nor accept

extended conflict waiver letters that exhaustively catalog all potentially relevant details. *In Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 622 [180 Cal.Rptr. 177, 639 P.2d 2481 (Maxwell), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [87 Cal.Rptr.3d 209, 198 P.3d 11], this Court cautioned that the "[w]aiver of the consequences of potential conflicts was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification." The leading practical treatise in the State describes "reasonably foreseeable consequences" as requiring that the attorney:

> [E]xplain, in terms the client can reasonably understand, how the problem might affect the client or the attorney's representation. It is not necessary, however, to disclose and ***12** explain every possible consequence of a potential or actual conflict for a consent to be valid.

(Vapnek et al., Cal. Prac. Guide: Professional Responsibility (The Rutter Group 2016 Update) ¶ 4:10.)

If informed consent can be based on a waiver of a current conflict without a need to meet an unrealistic burden of explaining every conceivable ramification, the same must be true for informed consent to future conflicts. The Amici Law Firms respectfully submit that the test suggested in these authorities - reasonableness of disclosure in light of the client's level of comprehension and access to information - is the only proper test. The experience of the Amici Law Firms also informs us that client who consent to present and future conflicts waivers believe it is in their interest to do so in order keep their lawyers of choice on their matters of choice. There should be strict limits on judicial "discretion to intrude on defendant's choice of counsel in order to eliminate potential conflicts, ensure adequate representation, or serve judicial convenience." (Maxwell, supra, 30 Cal.3d at 613.)

The authorities relied on by Sheppard Mullin to defend the prospective waiver signed by J-M express this policy, and this case of first impression should be informed by their logic. This Court refers to the ABA Model Rules in aid of its interpretation of the RPCs, eschewing the brand of California isolationism advocated by J-M. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771, 135 P.3d 20] (Corba Solutions).) In *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429, 433 [78 Cal.Rptr.3d 37] (Sharp), the court of appeal cites *Cobra Solutions* for support in looking to the ABA Model Rules of Professional Conduct, including the definition of informed consent contained in ABA Model Rule 1.0(e), which provides that:

> ***13** "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The test of disclosure is adequacy or sufficiency, not length. As explained by the Official Comment [6] to ABA Model Rule 1.0:

> The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.... A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person

> assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Official Comment [6] thus makes clear that disclosure does not fall short if the client reasonably understands what is at issue - regardless of the source of the understanding - and that when the client has other counsel review the disclosure, the client "should be assumed to have given informed consent." This is consistent with Ferguson v. Yaspan (2014) 233 Cal.4th 676,680-81 [183 Cal.Rptr.3d 83], which held that the presence of independent counsel is highly pertinent to questions of fairness and the sufficiency of disclosure in the context of Probate Code section 16004.

***14** As Sheppard Mullin has pointed out, the Official Comment [22] to ABA Model Rule 1.7 provides that "if [a] client is an experienced user of the legal services and is reasonably informed regarding the risk that a conflict may arise," an advance conflict waiver "is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation." This is the critical wording now contained in the draft Comment [22] proposed for our State; as shown by the cases cited above, this prescription aligns perfectly with existing law.

California courts have likewise cited with approval the definition of informed consent in the Restatement (Third) of The Law Governing Lawyers. (Sharp, supra, 163 Cal.App.4th at 429 ["Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."] [citing Rest.3d Law Governing Lawyers (2000) § 122(1)] [emphasis added].) Restatement Comment c(i) explains:

> The client must be aware of information reasonably adequate to make an informed decision.... A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid...The requirements of this Section are satisfied if the client already knows the necessary information or learns it from other sources. A client independently represented - for example by inside legal counsel or by other outside counsel - will need less information about the consequences of a conflict but nevertheless may have need of information adequate to reveal its scope and severity.

(Rest.3d Law Governing Lawyers, § 122, com. c(i).) The Restatement's test, as that of other authorities, is whether the client has enough information from all available sources, including other counsel, to be reasonably able to assess the consequences of what the client is being asked to waive. (Accord, Hazard, Jr. et al., The Law of Lawyering (4th Ed. 2015) § 12.34 ["Less ***15** sophisticated or less knowledgeable clients will require not only more disclosure, but also disclosure that is tailored to their apparent level of sophistication"], § 12.35 ["[R]eview by independent counsel... will drastically reduce the risk that a conflicts waiver will not be upheld"].)

Based on their extensive experience, the Amici Law Firms submit that there are generally no more than five factors to be considered when evaluating present or future unrelated matter conflicts consents or waivers. First is the question posed in Flatt v. Superior Court (1994) 9 Cal.4th 275, 284 [36 Cal.Rptr.2d 537, 885 P.2d 950] (Flatt), whether respect has been paid to the "primary value at stake in cases of simultaneous or dual representation" in otherwise unrelated matters, which is "the attorney's duty - and the client's legitimate expectation - of loyalty, rather than confidentiality" (italics in original). In other words, the client must be adequately informed by the lawyer that the lawyer or her law firm as a whole (because, due inter alia to specialization, waivers of the duty of loyalty often involve matters being handled by different lawyers) will not have undivided loyalty to that client but may adversely represent others in factually and legally unrelated matters.

The second factor, as mentioned in *Flatt* (and the Restatement [6]), is the potential effect on confidential client information. If a conflict creates a risk that a client's confidential information would be improperly used or disclosed, a client has the right to expect that to be disclosed, and procedures such as ethical walls will be implemented to mitigate any risk.

***16** The third factor is whether there has been disclosure of the extent of the potential client group covered by the consent or waiver - for example, whether it is limited to specific clients or is open-ended.

The fourth factor is whether there has been disclosure of the types of work that the lawyer seeks to undertake - for example, whether a waiver is sought only for transactional work or also for litigation work and, if the latter, whether only some kinds of litigation are permissible while others are not

The fifth factor is the sufficiency of the lawyer's explication of the potential effect on a client if the lawyer is unable to continue. [7]

The Amici Law Firms need not dispute that truly extreme situations may require greater disclosure. The Amici Law Firms submit, however, that it makes no sense for the extent of required disclosure in more or less typical situations to be based on what might be thought necessary in truly extreme situations. The overwhelming majority of conflicts waiver situations addressed by the Amici Law Firms and other counsel who use conflicts waivers, like the situation from which the current case arises, do not involve these kinds of extreme circumstances.

In the context of this case, for example, J-M - a sophisticated client with sophisticated in-house counsel - has not asserted that it failed to understand what Sheppard Mullin asked to be able to do. This is consistent with the everyday experience of the Amici Law Firms as well: given reasonable disclosure, sophisticated clients comprehend the extent of the situations in which requested waivers will apply. Lawyers do not go about ***17** trying to trick their clients into consents and waivers - a sure recipe for failure.

It would also be untenable to require that consent be obtained again each time a specific conflict arises. The authorities addressing this question have rejected this argument for the simple reason that the need to obtain subsequent consents would in practice prohibit future conflicts waivers altogether. (See, e.g., Maxwell, supra, 30 Cal.3d 606; Visa U.S.A., Inc. v. First Data Corp. (N.D.Cal. 2003) 241 F.Supp.2d 1100, 1106.) In the particular context of this case, J-M was entitled to ask which of the named plaintiffs in the qui tarn action (including but not limited to South Tahoe) Sheppard Mullin might recently have represented or might anticipate representing in the future, but J-M never did so. Similarly, the Amici Law Firm clients who execute waivers typically do not ask for that information. The only reasonable inference is that as long as the representations are on factually and legally unrelated matters and client confidences are preserved, the clients are content to proceed on that basis.

As in Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC (N.D.Tex. 2013) 927 F.Supp.2d 390, 399, 406 (Galderma), which relied on ABA Formal Ethics Opinion No. 05-436 (2005), the waiver that J-M signed was sufficient according to the "circumstances pertaining to the [particular] client;" despite being "general" and "open-ended," it was adequate disclosure for "a sophisticated client who has experience engaging multiple large law firms," and had the "benefit of its own independent

counsel to advise [it] on what the language meant." [8] The possible coming and going of other Sheppard Mullin clients adverse to J-M in wholly unrelated matters was, and necessarily would appear to Sheppard Mullin to be, something that J-M, a separately-represented and experienced user of legal services, knew and understood. In Desert Outdoor Advertising v. Superior Court (2011) 196 Cal.App.4th 866, 872 [127 Cal.Rptr.3d 158], the court of appeal rejected the contention that a lawyer had committed fraud in the execution by failing to inform a client that an agreement with the lawyer's new firm contained an arbitration provision that the prior firm's agreement did not, "[a] cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement." In this instance, J-M and its counsel did read the "contract" with Sheppard Mullin, have never claimed that they did not understand the contract that it signed and have never claimed that the representation of South Tahoe went in any respect beyond the contractual language accepted by J-M and its counsel.

***18 B. Clients Grant Informed Consent for Good Reasons.**

If neither clients nor lawyers can rely on sufficiently and reasonably clear conflicts waivers - particularly those made by legally sophisticated and ***19** independently represented clients - both clients and lawyers are unlikely to be willing to say "yes" to such arrangements. Client choice of counsel will be correspondingly restricted, and the many clients, of all sizes and levels of sophistication, who wish to split their work between firms will have far less opportunity to do so. Indeed, there are multiple reasons why and situations in which many clients seek and consent to conflicts waivers. By way of illustration and limiting the field for the moment to consents to unrelated matter conflicts, clients do in fact consent to current and future conflicts waivers for the following reasons:

● They are indifferent to who is adverse to them on some or all unrelated matters and would prefer to be able to grant consent at the outset rather than having to do so each time a matter arises because it is less disruptive to their internal operations to proceed on this basis.

● They want the specialized knowledge or expertise of a particular lawyer or group of lawyers at a firm for a particular matter but are aware that that firm has other clients that it also needs to serve without the risk of subsequent conflicts claims or motions to disqualify.

● They want to be able to hire a lawyer or firm that has a longstanding client with whom they are sometimes adverse but that lawyer or firm needs to be able to assure the longstanding client that it will not lose the representation of its longstanding counsel because of the new representation.

● They want to do business with other clients of their lawyers under circumstances that might otherwise be problematic (e.g., a bank that uses employment law lawyers from a firm but wants other firm lawyers to have their clients borrow money from the bank).

● They know that opposing parties will find competent counsel on unrelated matters and would prefer to have adverse counsel whom they know and believe to be reputable and reasonable rather than someone they do not know at all.

***20** The Amici Law Firms, like lawyers throughout the country, regularly encounter these and other situations. When clients and lawyers are able to understand and agree on the terms and conditions for consent and a waiver, the representation proceeds. When the clients and the lawyers cannot agree, the clients turn to other counsel. The absence of an avalanche of informed consent/future conflicts waiver cases before this Court shows that by and large, this system works extremely well. While it can be cumbersome at times, this structure has become the functional reality on which the business and legal worlds rely. Furthermore, it is effectively policed by forces including but not limited to the unfettered right of clients to fire their own lawyers, the lawyers'

knowledge that their reputations precede them, as well as the occasional judicial disqualification decisions (and fee forfeiture decisions under the totality of the circumstances test discussed below).

IV. The Law of Fee Forfeiture Should Be Based on the Totality of Circumstances

A. Fee Forfeiture Requires Consideration of the Surrounding Circumstances

The arbitrators in this case addressed the extent to which the conflict of interest alleged to be at its core should require fee forfeiture or prevent a quantum meruit claim by asking whether any breach by Sheppard Mullin was "serious or egregious." The arbitrators concluded that, to the contrary, Sheppard Mullin had acted "honestly and in good faith" at all times. Nonetheless, J-M asserts that actual conflicts must always result in total gross fee forfeiture or disgorgement regardless of presence or absence of bad intent, client harm, quality of legal work, preservation of client confidences, or any other facts or circumstances. This is not and should not be the law.

As stated in authorities including the Restatement (Third) of The Law Governing Lawyers and the court of appeal's decision in ***21** Pringle v. La Chapelle (1999) 73 Cal.App.4th 1000, 1006, fn. 5, "[i]n determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." (Rest.3d Law Governing Lawyers (2000) § 37.) Alternatively stated, no finding of egregiousness sufficient to require total forfeiture/disgorgement can be made solely based on the abstract concept of the seriousness of a type of conflict. Instead, it is necessary to consider the extent to which disclosure was made, the extent to which consent was otherwise "informed," the state of mind of the lawyers, the circumstances surrounding the conflict, the extent of any harm to the client, and any other relevant factors. (Cf. *Rodriguez v. Disner* (9th Cir. 2013) 688 F.3d 645, 654 (citing In re E. Sugar Antitrust Litig. (3d Cir. 1982) 697 F.2d 524, 533 as "upholding the disgorgement of attorneys' fees where [the] 'breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs' the concerns of providing 'the client with a windfall' and depriving the 'attorney of fees earned while acting ethically'").)

In this instance, Sheppard Mullin plainly did a great deal of wholly ethical work and believed in good faith that it did not have an unconsented conflict. This case also illustrates that it can be very difficult for a lawyer or firm reliably to determine which of its recently-served clients are entitled to consider themselves "current clients" of the firm - as the existence of an attorney-client relationship depends in substantial part upon the putative client's reasonable expectations. (See, e.g., Hazard, Jr. et al., supra, § 2.05.)

One illustration of the unfairness of J-M's approach is to consider some of the questions that this approach would make irrelevant in the analysis of whether fee forfeiture is appropriate:

***22** ● Whether the lawyer proceeded without any waiver at all, or whether there was an attempt to obtain a waiver - even if the attempt, when judged after the fact, proved insufficient.

● Whether the conflicts and disqualification questions presented were clear-cut or instead involved disputed questions or inferences of fact and/or equitable or legal decisions that could non-frivolously have gone either way.

● Whether the lawyer acted in bad faith.

● Whether the lawyer alerted the client to the risk of what might happen if the lawyer subsequently had to withdraw.

● Whether, and to what extent, the client was benefitted or harmed. And

● Whether or to what extent the client seeking forfeiture or disgorgement may be responsible for any harm that it may have suffered since one who seeks equity must do equity. (*See Dool v. First Nat. Bank* (1929) 207 Cal. 347, 351 [278 P. 233]; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 [6 Cal.Rptr.3d 441, 79 P.3d 556] ["The community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."] [internal citations omitted].)

***23** J-M's approach lacks any internal logic, consistency or practicality. For example, as J-M concedes, full fee forfeiture or disgorgement is not automatically required for potential conflicts, as distinct from actual conflicts, or for a number of other RPC violations. J-M Answer Brief at 38. [9] Both actual and potential conflicts of interest can be waived under RPC rule 3-310(C), and it can often be difficult to determine the difference between the two. In addition, a conflict that starts as potential may become actual over time - thereby creating further complexity. (See, e.g., Cal. Ethics Opn. No. 1989-115.)

There certainly are circumstances in which forfeiture or disgorgement may be appropriate. The Amici Law Firms submit, however, that the inflexible J-M approach is the wrong approach. J-M's approach would also tend to destabilize attorney-client relationships, as clients would be incented to look for loopholes in conflicts waivers to justify non-payment or a full refund. Lawyers, in turn, would have to be far more suspicious and less trusting of their clients.

B. Automatic Fee Forfeiture Violates Fundamental Fairness and Other Important Doctrines

Following the Anglo-American legal maxim that "equity abhors a forfeiture," forfeitures are traditionally disfavored by California law. (See People v. United Bonding Ins. Co. (1971) 5 Cal.3d 898, 906 [98 Cal.Rptr. 57, 489 P.2d 1385].) In Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal.App.4th 1489 [85 Cal.Rptr.3d 268], for example, a law firm sought to recover contingency fees under its retainer agreements with the defendant. The defendant argued that the agreements were unenforceable because the law firm acquired attorney's liens on the recovery proceeds in the retainer agreements without complying with the disclosure and consent requirements in rule 3-300 of the Rules of Professional Conduct. (Id. at 1522.) The court rejected the defendant's argument, even assuming that the charging liens were invalid, because to hold otherwise would result in an unjust forfeiture and violate the severability principles of contracts:

> We are also persuaded that granting recovery under a contingent fee arrangement although the charging lien may be invalid is consistent with the law of severability of contracts. The need to void contracts in violation of the law ***24** must be tempered by the countervailing public interest in preventing a contracting party from using the doctrine to create an unfair windfall.

(*Id.* at 1523 [internal citations omitted]; see also id. [explaining that severability allows courts "[t]o implement the fundamental rule of law that forfeiture is disfavored"].)

Similarly, in *Latipac, Inc. v. Superior Court of Man County* (1966) 64 Cal.2d 278,279-80 [49 Cal.Rptr. 676,411 P.2d 564], the defendant sought to avoid its contractual obligation to the plaintiff, to whom it owed roughly $430,000 for unpaid labor and costs furnished under their contract, "by reason of plaintiffs failure to strictly comply with the statutory provisions which govern the licensing of contractors." Those provisions, in particular section 7031 of the Business and Professions Code, "den[y] to unlicensed contractors the use of the courts for the recovery of sums owed to them for contracting services." (*Id.* at 279.)

To avoid an unjust forfeiture, this Court concluded that the plaintiff had substantially complied with the statute such that it could still obtain payment for the services it provided, despite the fact that it was unlicensed at certain times. This Court wrote that "[u]nder all the circumstances of this case, we cannot doubt that it is one in which the policy of the licensing statute has been effectively realized, and that defendant has received in full measure the protection intended by the Legislature. Fidelity to precedent and considerations of equity each preclude us from requiring the wholly gratuitous enrichment of defendant at the expense of plaintiff and its creditors." (*Id.* at 287.)

***25** It also cannot be denied that fee forfeitures are a form of punishment. As already noted, for example, Restatement (Third) of the Law Governing Lawyers § 37 and *Pringle, supra,* 73 Cal.App.4th 1000, describe the rule for fee disgorgement as calling for "forfeiture." *(See also, Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 49 [40 Cal.Rptr.3d 221, 129 P.3d 408] [asserting that "The remedy of disgorgement is grossly disproportionate to the asserted wrongdoing on THCs part and would constitute a totally unwarranted windfall to Frye" even though the Court assumed the existence of a statutory violation]. [10] As a matter of California and federal due process, "[t]he imposition of grossly excessive or arbitrary awards is constitutionally prohibited, for due process entitles a tortfeasor to fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *(Simon v. Sao Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 [29 Cal.Rptr.3d 379, 113 P.3d 63] [internal citations omitted] (Simon) see also State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 416-17 [123 S.Ct. 1513, 155 L.Ed.2d 585]; BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 574 [116 S.Ct. 1589, 134 L.Ed.2d 809] (BMW).)

As noted in Simon, supra, 35 Cal.4th at 1172, the single most important factor in deciding whether such awards are grossly excessive or ***26** arbitrary is the reprehensibility of a defendant's conduct. Indeed, the California Legislature has limited punitive damages so that they can only be awarded when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." (Civ. Code § 3294(a) No one has found that here.

The issue becomes even more problematic upon consideration of the other due process limitations on punitive damages. For example, the BMW court noted the excessiveness of the $2 million punitive damage award in that case in light of the fact that the maximum civil penalty under applicable state law was $2,000 and that other states had maxima ranging from $5,000 to $10,000. (BMW, 517 U.S. at 584.) Here, there are no pertinent statutory penalties. In addition, no argument can be made that the amount of forfeiture ordered in this case bears a permissible or reasonable relationship to actual harm even if one were to assume, contrary to the arbitrators, that Sheppard Mullin had not acted honestly and in good faith. For example, J-M chose not to present any evidence of actual harm. (Cf. Johnson v. Ford Motor Co. (2005) 135 Cal.App.4th 137, 150 [37 Cal.Rptr.3d 283] [stating, in a case involving fraud and other reprehensible conduct, that "in the absence of proof that the potential for harm was realized on a large scale, we do not find a special justification for punitive damages exceeding a single-digit ratio"].)

V. CONCLUSION

This Court should clarify the rules regarding arbitrability, informed consents to conflicts and fee forfeitures. Arbitration should be encouraged, and the standards for informed consent should both be realistic and take into consideration the client's legal sophistication and retention of other counsel. Finally, the equitable remedy of fee disgorgement should only be imposed after a full assessment of all facts and circumstances; it should not be employed as a form of limitless and disproportional punishment.

Appendix not available.

Footnotes

1 In fact, and as is not infrequently true, Sheppard Mullin's resumption of work for South Tahoe was only one of a series of events that led to J-M's attempt to invalidate its agreement with Sheppard Mullin. In addition, South Tahoe filed a motion to disqualify; South Tahoe then rejected Sheppard Mullin's offer to pay more than the value of South Tahoe's claim in order to eliminate any claimed conflict; J-M then rejected the option presented to it by the federal court and Sheppard Mullin that the South Tahoe claim be severed and handled by separate counsel at Sheppard Mullin's expense; and the federal court then decided to order disqualification in what it considered a close case without clear precedent. And because J-M seeks to rely upon the alleged statement by two Sheppard Mullin lawyers that they told J-M that there were "no conflicts," the Amici Law Firms also wish to note that it is accepted usage for lawyers, and courts, to use the words "no conflicts" when they mean "no unwaived conflicts." (See, e.g., Richardson v. Defazio (N.J.Super.Ct.App.Div. 2016) 2016 WL 854520 at *2 [Not Reported in A.3d] ["BE also contends there is no conflict in the firm representing defendants and IMG because all of the defendants have consented to BE's joint representations."])

2 As mentioned, the experience of the Amici Law Firms includes numerous instances in which it is the clients who insist on the arbitration of all disputes with their lawyers, contradicting any claim that the obligation of this Court to protect the public and promote confidence in the legal profession requires particular skepticism toward the arbitration of disputes involving lawyers. For example, one major client with far-flung operations in this country and abroad mandates in its outside counsel guidelines that: "Any dispute or controversy arising under or in connection with this [engagement agreement] shall be settled by arbitration before a panel of three (3) arbitrators in accordance with the commercial arbitration rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitral award in any court having jurisdiction. Each party will be responsible for selecting one (1) arbitrator, and then the two (2) selected arbitrators shall jointly select the third arbitrator to be a member of the arbitration panel. The place of arbitration shall be chosen by the Company. The arbitral award shall be final and binding."

3 See, e.g., Bussel, No Conflict (2012) 25 Geo. J. Legal Ethics 207, 217-18 ("Not until 1982 in [ABA] Informal Opinion 1495 did the ABA explicitly interpret DR 5-105 to bar concurrent representation of clients adverse in unrelated matters.").

4 In the collective experience of the Amici Law Firms, many clients have adopted written policies governing the use of present and future conflicts waivers. (See, e.g., Kobak, *Dealing with Conflicts and Disqualification Risks Professionally* (2015) 44 Hofstra L.Rev. 497, 529-530 [noting practice of clients drafting engagement letters with conflict terms]; Whelan and Ziv, *Privatizing Professionalism: Client Control ofLawyers Ethics* (May 2012) 80 Fordham L.Rev. 2577, 2588 fn. 60 [noting use of outside counsel guidelines covering conflicts of interest].) The Ami Law Firms also have experience with many corporate counsel organizations that offer myriad forms for conflict waivers and arbitration provisions.

5 See also RPC, rule 1-100(D) (requiring California attorneys to obey the California RPCs unless the RPCs of another jurisdiction require a different result).

6 See, e.g., Rest.3d Law Governing Lawyers, § 121, com. b ("The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor and confidentiality" and informed clients have the right to elect "less than the full measure of protection that the law otherwise provides. For example,... a client might consent to a conflict where that is necessary to obtain the services of a particular law firm.").

7 These same factors emerge, albeit in somewhat different settings, in the context of the joint representation of a number of clients in a single matter. For example, multiple plaintiffs, multiple defendants or multiple would-be incorporators must be or become informed about the effects that sharing a lawyer may have on individual client confidentiality and on the ability of the lawyer to advocate for what is in the interests of less than all of the clients. (See generally, Hazard, Jr. et al., supra, at § § 12.34-12.36.)

8 The *Galderma* waiver was less extensive than the one in this case:

> We [the law firm] understand and agree that this is not an exclusive agreement, and you [the client] are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

(*Id.* at 393.)

9 This Court's caselaw on quantum meruit recovery compels this result. (*See, e.g., Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 458 [9 Cal.Rptr.3d 693, 84 P.3d 379] ["Quantum meruit refers to the well-established principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered"] [internal citation omitted]; *Calvert v. Stoner* (1948) 33 Cal.2d 97, 105 [199 P.2d 297] [even "assuming the invalidity of the entire contract by reason of the inclusion of the provision, the defendant would be entitled to compensation based on the reasonable value of services performed"].)

10 See a*lso Chism v. Tri-State Const., Inc. (2016) 193 Wash.App.* 818, 840-41 [374 P.3d 193] (describing fee disgorgement as a way to discipline breaches of the rules of professional conduct, as disciplinary penalties and as punishment); In re Koliba (N.D.Ohio 2006) 338 B.R. 48, 52 ("The goal of disgorgement is not to compensate, but is rather punitive, designed to discourage behavior and punish attorneys for their violations"); Agostin-Knops v. Knops (N.Y.Sup.Ct. 2003) 2003 WL 1793054 at *9 [Not Reported in N.Y.S.2d] ("the court finds that the relief of disgorgement of fees or 'punishment' sought by plaintiff is not available in this particular case"); Berkeley Ltd. Partnership v. Arnold, White & Durkee (D. Md. 2000) 118 F.Supp.2d 668, 674 ("Compensatory damages are intended to make the plaintiff whole for any losses they suffered. Whereas, disgorging the legal fees is in the nature of a punitive measure designed to discourage behavior and punish attorneys for their violations."). Similarly, Burrow v. Arce (Tex.Sup.Ct. 1999) 997 S.W.2d 229, 239, fn. 36, combines a discussion of fee forfeiture and fee disgorgement cases into the same footnote.

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241 F.Supp.2d 1100
United States District Court,
N.D. California.

VISA U.S.A., INC., Plaintiff,
v.
FIRST DATA CORPORATION, et al., Defendants.

No. C–02–1786 PJH.
|
Jan. 29, 2003.

Synopsis
Credit card company brought action against financial transaction processor alleging trademark infringement, dilution, and various breach of contract claims. Processor brought motion to disqualify counsel for credit card company. Amending and superceding its prior opinion, 2002 WL 31949766, the District Court, Hamilton, J., held that: (1) law firm was not automatically disqualified from concurrently representing both parties; (2) law firm's use of prospective waiver was proper; (3) second waiver was not warranted once actual conflict arose; (4) processor knowingly consented to conflict that later arose; (5) processor was knowledgeable and sophisticated user of legal services, expected to understand full extent of what it waived when it signed law firm's explicit waiver letter; and (6) law firm did not breach its duty of confidentiality to processor.

Motion denied.

Attorneys and Law Firms

***1101** Geraldine Mary Daly Alexis, Jonathan P. Hersey, Raymond Lara, Beth H. Parker, Victoria Wong, David J. Zack, Bingham McCutchenLLP, San Francisco, CA, for Defendants.

***1102** M. Laurence Popofsky, Stephen V. Bomse, Scott A. Westrich, Aaron M. Armstrong, Jarrod Wong, Heller Ehrman White & McAuliffe LLP, San Francisco, CA, for Plaintiff Visa U.S.A., Inc.

George A. Riley, Scott A. Schrader, O'Melveny & Myers LLP, San Francisco, CA, for Heller Ehrman White & McAuliffe LLP.

AMENDED ORDER DENYING MOTION TO DISQUALIFY COUNSEL [1]

HAMILTON, District Judge.

Defendant First Data Corporation's motion to disqualify the law firm of Heller Ehrman White & McAuliffe as counsel for plaintiff Visa came on for hearing on October 9, 2002 before this court, the Honorable Phyllis J. Hamilton presiding. First Data appeared by its counsel, Geraldine M. Alexis; Visa appeared by its counsel, M. Laurence Popofsky; and Heller appeared by its counsel, George A. Riley. [2] Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court rules as follows for the reasons stated at the hearing.

BACKGROUND

Plaintiff Visa sued defendant First Data in April 2002 for trademark infringement, dilution, and various breach of contract claims. First Data has contracted with Visa to process financial transactions on Visa's (and other credit card companies') behalf. First Data has recently launched a new business initiative, which will allow First Data to bypass Visa's regulations on the processing of certain Visa-related transactions (known as “private arrangements”). Visa claims these private arrangements violate its contractual and trademark rights.

Visa is represented in this matter by Heller's San Francisco office. In March 2001, before this lawsuit was filed, First Data was sued in an unrelated patent infringement action currently pending in the District of Delaware. First Data sought to retain Heller's Silicon Valley office as counsel in the Delaware action. After running a conflicts check, Heller informed First Data that it had a long-standing relationship with Visa. While Heller did not see any conflicts between the two parties at that time, Heller could not represent First Data in the patent infringement case unless First Data agreed to permit Heller to represent Visa in any future disputes, “including litigation,” that might arise between First Data and Visa. First Data consented to those terms, which were memorialized in an

engagement letter between Heller and First Data. The relevant portion of the letter states:

> Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, "Visa") in matters which are not currently adverse to First Data. Moreover, ***1103** as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.

Jeronimus Decl. Exh. A ("waiver letter"). After First Data agreed to the waiver, Visa also agreed to Heller's dual representation. Allen Decl. ¶ 20.

A few months later, in July 2001, First Data publicly announced its intention to launch its new private arrangement plan, and in the beginning of 2002, First Data officially notified Visa. Visa then sued First Data. First Data in response threatened antitrust counterclaims against Visa, and then began settlement discussions. Almost four months after the complaint was filed, and shortly after settlement talks broke down, First Data informed Visa in August 2002 that it intended to move to disqualify Heller as counsel for Visa in this matter. [3]

First Data claims that when it signed the waiver letter, it was not adequately informed of the possibility that its patent counsel could sue it for millions of dollars in damages and raise claims disparaging First Data and attacking the very core of its business. First Data contends that under the California Rules of Professional Conduct, Heller at a minimum was required to reaffirm First Data's prospective consent when the actual conflict between Visa and First Data arose. First Data has also indicated that it believes that Heller's patent lawyers have access to confidential information from First Data that Visa could use against First Data in this action.

Heller and Visa argue that First Data was fully informed about the situation and agreed to allow Heller to represent Visa in future litigation against First Data. Heller and Visa argue that the California Rules of Professional Conduct and other ethical rules expressly permit prospective written consent to a conflict waiver, and that no rules require Heller to obtain a second consent to continue in their representation of Visa. Heller also indicates that it has put an ethical wall in place that adequately protects First Data's confidential information.

DISCUSSION

A. Motion to Disqualify Counsel—Legal Standards

The Northern District of California has adopted the California Rules of Professional Conduct at Civ. L.R. 11–4, and attorneys practicing in this court are required to adhere to those standards, as articulated in the rules and any court decisions interpreting them. *See* Civ. L.R. 11–4 commentary. The right to disqualify counsel is within the discretion of the trial court as an exercise of its inherent powers. ***1104** *See United States v. Wunsch,* 84 F.3d 1110, 1114 (9th Cir.1996) (district court has inherent power to sanction unethical behavior); *Image Technical Serv., Inc. v. Eastman Kodak Co.,* 820 F.Supp. 1212, 1215 (N.D.Cal.1993) (incorporating California state law standard for disqualification of counsel in the Northern District); Cal.Code Civ. Proc. § 128(a)(5).

Motions to disqualify counsel are strongly disfavored. *See, e.g., Gregori v. Bank of America,* 207 Cal.App.3d 291, 300–301, 254 Cal.Rptr. 853 (1989) ("[M]otions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent."); *In re Marvel,* 251 B.R. 869 (Bankr.N.D.Cal.2000), aff'd 265 B.R. 605 (N.D.Cal.2001) ("A motion for disqualification of counsel is a drastic measure which courts should hesitate to impose except when of absolute necessity. They are often tactically motivated; they tend to derail the efficient progress of litigation."). Thus, such requests "should be subjected to particularly strict judicial scrutiny." *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.,* 760 F.2d 1045, 1050 (9th Cir.1985) (citations omitted).

In reviewing a motion to disqualify counsel, the district court must make "a reasoned judgment and comply with the legal principles and policies appropriate to the particular matter at issue." *Gregori* at 300, 254 Cal.Rptr. 853 (citations omitted). The district court is permitted to resolve disputed factual issues in deciding a motion for disqualification and must make findings supported by substantial evidence. *Dept. of Corporations v. SpeeDee Oil Change Syst.,* 20 Cal.4th 1135, 1143, 86 Cal.Rptr.2d 816, 980 P.2d 371 (1999).

B. Simultaneous Representation of Adverse Clients and Written Waivers

1. Conflict Waiver Letters

First Data claims that Heller has violated Cal. Rule of Prof. Conduct 3–310(C)(3), which states:

> A member [of the California State Bar] shall not, without the informed written consent of each client:
>
> ... (3) represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.[4]

First Data argues that this rule automatically disqualifies Heller from representing both Visa and First Data, even though First Data's patent litigation is unrelated to this action, citing *Flatt v. Superior Court,* 9 Cal.4th 275, 284–285, 36 Cal.Rptr.2d 537, 885 P.2d 950 (1994) and *Mindscape, Inc. v. Media Depot,* 973 F.Supp. 1130, 1131 (N.D.Cal.1997).

When evaluating whether a law firm may concurrently represent two clients, even on unrelated matters, it is presumed that the duty of loyalty has been breached and counsel is automatically disqualified. ***1105** *Flatt,* 9 Cal.4th at 284–85, 36 Cal.Rptr.2d 537, 885 P.2d 950. But, as Visa and Heller note, the presumption may be rebutted and a law firm may nonetheless simultaneously represent two adverse clients if full disclosure of the situation is made to both clients and both agree in writing to waive the conflict. *Id.* at 285 n. 4, 36 Cal.Rptr.2d 537, 885 P.2d 950. Here, it is undisputed that Heller and First Data executed a conflict waiver letter. *See* Waiver Letter. Neither *Flatt* nor *Mindscape* involved situations where a conflict waiver letter had been executed, and thus they do not control. *Flatt,* 9 Cal.4th at 285 n. 4, 36 Cal.Rptr.2d 537, 885 P.2d 950 (specifically noting that no written conflict letter was executed); *Mindscape,* 973 F.Supp. at 1133 (no waiver letter at issue). Thus, Heller is not automatically disqualified from representing both Visa and First Data.

2. Prospective Waivers

First Data next argues that Heller's use of a prospective waiver, which purported to waive all future conflicts between Visa and First Data, was improper without, at minimum, a second disclosure and waiver once the situation between Visa and First Data ripened into an actual conflict. Visa and Heller argue that the prospective waiver signed by First Data was proper and fully informed, and thus no second waiver was required.

An advance waiver of potential future conflicts, such as the one executed by First Data and Heller, is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict. *Maxwell v. Superior Court,* 30 Cal.3d 606, 622, 180 Cal.Rptr. 177, 639 P.2d 248 (1982) (not requiring counsel to outline every conceivable possibility of potential conflict for a prospective waiver to be valid); Cal. State Bar Formal Ethics Op.1989–115 IIA–315, IIA–315 (1989) ("*Maxwell* stands for the general proposition that an advance waiver of both conflict of interest and confidentiality protections is not, *per se,* invalid"); *Zador,* 31 Cal.App.4th at 1301, 37 Cal.Rptr.2d 754 (in a situation involving a prospective waiver, "California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid."). The only inquiry that need be made is whether the waiver was fully informed. Cal. Ethics Op. at IIA–316. *See also, e.g.,* ABA Model Rules of Prof. Cond. 1.7(b)(4); Restatement (Third) of the Law Governing Lawyers § 122 (2000) (defining "informed consent" as "requir[ing] that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client"); ABA Formal Op. 93–372 (Apr. 16, 1993); NYCLA Ethics Op. No. 724 at 3 (Jan. 28, 1998). In some circumstances, a second waiver will be warranted, but only if the attorney believes that the first waiver was insufficiently informed. There is no case law requiring a second disclosure in all circumstances for an advance waiver to be valid.

Zador does not hold differently. In *Zador,* which also involved Heller, Heller represented both a corporation, Zador, and an agent of the corporation, Kwan, in the same litigation. Kwan agreed to waive any conflict that might arise out of "any adversity" that might develop between Zador and Kwan and to permit Heller to continue representing Zador. Subsequently, a conflict arose between Zador and Kwan. Heller advised Kwan to obtain separate counsel, which he did. Heller also requested that Kwan reaffirm his consent to Heller's continued representation of Zador, which he also did. 31 Cal.App.4th at 1300, 37 Cal.Rptr.2d 754. Zador, represented by Heller, then sued Kwan, and Kwan moved to disqualify.

***1106** *Zador* does not in fact require a second consent by a waiving party in First Data's position. [5] *Zador* upheld the validity of the original consent that Kwan signed before Heller discovered the conflict between Zador and Kwan. That consent stated that Kwan would waive any conflicts of interest arising from Heller's continued representation of Zador, "notwithstanding any adversity that may develop." 31 Cal.App.4th at 1300, 37 Cal.Rptr.2d 754. The court found that the phrase "any adversity" clearly contemplated future litigation by Zador against Kwan. *Id.* at 1301–02, 37 Cal.Rptr.2d 754. Kwan was held to have given full and knowing consent to waive conflicts as to future litigation in his first consent. *See also* Cal. Ethics Op.1989–115 at IIA–316 (requiring a second waiver in light of an actual conflict under 3–310(C)(3) only when it becomes clear that the client did not fully understand the first prospective waiver).

3. Fully Informed Waiver

A second waiver by First Data in a non-related litigation would only be required if the waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between Visa and First Data. Thus, to prevail on this motion, First Data must show that it was not fully informed about the consequences of its conflicts waiver when it signed the waiver letter. To show full disclosure, Heller must demonstrate that it "communicated information reasonably sufficient to permit the client to appreciate the significance of the matter in question." ABA Formal Op. 93–372 at 29 (citing ABA Model Rules).

An evaluation of whether full disclosure was made and the client made an informed waiver "is obviously a fact-specific inquiry." Cal. Ethics Op.1989–115 at IIA–315. Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice. [6] *See, e.g., Dept. of Corporations,* 20 Cal.4th at 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (listing factors, citations omitted); *Zador,* 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754; *Image,* 820 F.Supp. 1212; CA. Eth. Op.1989–115; ABA Model Rule 1.7 cmt. 22 (2002); *General Cigar Holdings, Inc. v. Altadis, S.A.,* 144 F.Supp.2d 1334 (S.D.Fla.2001). In evaluating all these factors, there is substantial evidence showing that Heller made a full and reasonable disclosure to First Data and First

Data knowingly waived any conflicts concerning ***1107** Heller's ongoing representation of Visa.

a. Heller Fully Disclosed the Conflict to First Data.

Most significantly, the waiver letter itself demonstrates that Heller fully explained to First Data the nature of the conflict waiver at issue. When First Data first approached Heller to represent it in the patent litigation, Heller explained to First Data that, even though there were no present conflicts between Visa and First Data, there was a significant risk of future adversity because Visa and First Data were major competitors in the processing side of the credit card business. Haslam Decl. ¶ 4. Heller thus informed First Data that it would not be able to take the matter unless First Data would waive any conflicts that might arise out of Heller's ongoing work for Visa in matters up to and including possible future litigation. *Id.* ¶ 3. This understanding was confirmed in the written waiver letter.

> Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," *including litigation* in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, *we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International* ... in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, *we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data,* provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction ...

Waiver Letter (emphasis added).

The letter identifies the adverse client, Visa, and discloses as fully as possible the nature of any potential conflict that could arise between the two parties. The letter also clearly states that the waiver contemplates Heller's representation of Visa against First Data in matters "including litigation."[7] First Data was given ample information concerning the conflict in question that it was asked to waive, reviewed this information, and then agreed to the waiver. First Data has failed to demonstrate that it was not fully and reasonably informed when it signed the waiver letter. *See, e.g.,* ABA Formal Op. 93–372 at 1001:177 ("the closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified," the more likely the prospective waiver is ethically permissible).

The cases where law firms have been disqualified for insufficient disclosures involve situations much more egregious than the facts presented here. For instance, in ***1108** *Image,* Kodak successfully disqualified Coudert Brothers, Image's attorneys, from representing Image in that action because Coudert had also represented Kodak in unrelated corporate matters. Kodak produced evidence that Coudert had deliberately misrepresented the scope of their representation of Image to Kodak by downplaying their actual conflict. Specifically, Coudert failed to mention to Kodak's business people that they would be arguing against Kodak before the U.S. Supreme Court in a landmark antitrust case that had been litigated for six years. They also failed to disclose any of this information to Kodak's in-house counsel, and failed to obtain a written consent. After weighing these factors, the court determined that this could not constitute full disclosure and ordered Coudert disqualified. 820 F.Supp. at 1216–17. *See also Florida Insurance Guaranty Assoc. v. Carey Canada, Inc.,* 749 F.Supp. 255, 257 (S.D.Fla.1990) (a brief paragraph at the end of a letter to a low-level employee that downplayed the law firm's simultaneous representation of 80,000 pending asbestos claims against the client, and the law firm's subsequent failure to notify either general

counsel or higher management of the conflict warranted disqualification).

Here, in contrast, Heller notified First Data's director of intellectual property and division general counsel of the potential for a future conflict, fully discussed the nature of that conflict, and informed First Data that Heller would be unable to represent First Data unless the conflict was waived. The facts and law do not support a finding that First Data was not given sufficient information to understand the scope of its waiver. *See also, e.g., Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.,* 142 F.Supp.2d 579, 583 (D.Del.2001) (finding full disclosure and informed consent for prospective waiver when law firm identified existence of potential conflicts, when client independently knew of the possibility of suit on the subject matter in question, and when conflict was discussed between the two parties).

b. Knowing Consent

There is also substantial evidence in the record that First Data was aware of this potential conflict with Visa and Heller when it signed the waiver letter, and thus First Data knowingly waived that conflict in order to have Heller to represent it in the patent litigation. First Data in its Answer stated that it had been contemplating its new private arrangement initiative and had given preliminary notice to Visa about it "as early as 1999." First Data Answer ¶¶ 71, 81. In 2000, First Data had also indicated that Visa's business plans concerning private arrangements raised antitrust concerns for the payment-card industry in amicus papers and motions to intervene in the Department of Justice antitrust litigation against Visa. *See* Westrich Decl. Exhs. 2–4 (papers filed by First Data). Visa was represented in that litigation by Heller. *See* Bomse Decl. ¶ 6.

First Data does not deny that it first began contemplating this arrangement in 1999 or that it foresaw antitrust concerns in 2000 over Visa's position on private arrangements. Instead, First Data argues that it did not realize that Heller would represent Visa in those matters and had assumed that Heller would, at most, represent Visa against First Data on incidental matters such as implementation and enforcement of payment processor rules. Marx Decl. ¶¶ 3, 4. First Data admits that it is "unlikely" that such matters would result in litigation with Visa. *Id.* ¶ 5.

This is not credible. Heller informed First Data that it represented Visa in large-scale commercial litigation, and that ***1109** due to the nature of the potential conflicts between the two parties, Heller would not be able to represent First Data at all without a broad prospective waiver. Haslam Decl. ¶ 4. First Data had also submitted briefs in high-profile antitrust litigation in which Heller was representing Visa, and where First Data had threatened Visa with further antitrust claims. *See* Westrich Decl. Exhs. First Data knew that Heller was Visa's counsel on major matters that could potentially involve First Data. Given this information, First Data could not have believed that Heller would be uninvolved in any major litigation that could potentially arise between Visa and First Data, or that Visa would have restricted itself to hiring Heller solely for relatively minor regulatory disputes between the two parties.

First Data contended on reply and at the hearing that even if it did know in 2001 when it signed the waiver letter that Visa and First Data could potentially be involved in high-stakes litigation over First Data's private arrangement initiative, First Data had no duty to recognize that conflict on its own. First Data argues that it was instead Visa and Heller's duty to inform First Data of these risks, citing *State Farm Mut. Auto. Ins. Co. v. Federal Insurance Co.,* 72 Cal.App.4th 1422, 1435, 86 Cal.Rptr.2d 20 (1999). In *State Farm,* though, the law firm in question had made no disclosure to the junior client, and then argued that because the two clients were aware of the conflict when the junior client hired the law firm, they had implicitly consented to a conflict waiver. The court found that the attorneys were still required to disclose the conflict and obtain explicit consent from the clients in that circumstance. *Id.* at 1434–35, 86 Cal.Rptr.2d 20. *See also Blecher & Collins, P.C. v. Northwest Airlines, Inc.,* 858 F.Supp. 1442, 1455 (C.D.Cal.1994) (same; cited in *State Farm*). *State Farm* requires only that the attorneys disclose conflicts to clients in accordance with Cal. Rule of Prof. Conduct 3–310(C). Here, those requirements were met when Heller disclosed the existence of the potential Visa conflict before forming an attorney-client relationship with First Data and obtained a written conflict waiver agreement. No case law allows First Data to ignore its own additional knowledge concerning the nature of the potential conflict when deciding whether to waive. [8]

c. First Data is a Sophisticated User of Legal Services

In determining whether First Data gave informed consent in the waiver letter, the court may also properly consider First Data's level of experience with legal services. *See, e.g.,* ABA Model Rule 1.7 cmt. 22 (2002) (prospective consent may be acceptable "if client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise"); *General Cigar,* 144 F.Supp.2d at 1339 (finding informed consent when prospective consent ***1110** granted by "knowledgeable and sophisticated parties"); Restatement (Third) of the Law Governing Lawyers § 122 cmt. d (prospective waiver acceptable if "client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent"); NYCLA Ethics Op. No. 724 (blanket waiver may be permissible, "depending on the client's sophistication, its familiarity with the law firm's [multidisciplinary] practice, and the reasonable expectations of the parties at the time consent is obtained").

First Data is a Fortune 500 company with over $6 billion in annual revenues. *See* Schrader Decl. Exh. A. It is a knowledgeable and sophisticated user of legal services. It has a legal department of about fifty attorneys and routinely hires top-tier national law firms such as Bingham McCutchen, Heller, and Sidley Austin to handle its complex corporate transactions and litigation matters. *See* Schrader Decl. Exhs. B, C. First Data can and should be expected to understand the full extent of what it waived when it signed Heller's explicit waiver letter.

C. Ethical Walls

It is undisputed that Heller immediately put an intra-firm ethical wall in place when Visa sued First Data, which barred contact between the Heller attorneys representing First Data and the Heller attorneys representing Visa. *See* Epsen Decl. ¶ 4, Exh. A. First Data argues that the institution of an ethical wall is insufficient to repair Heller's breach of its duty of loyalty, and that Heller has breached its duty of confidentiality to First Data by its dual representation of Visa and First Data. Heller conceded at oral argument that if it had breached its duty of loyalty to First Data through its dual representation of Visa and First Data, an ethical wall would not be sufficient to cure the breach. *See William H. Raley Co., Inc. v. Superior Court,* 149 Cal.App.3d 1042, 1049, 197 Cal.Rptr. 232 (1983), *criticized on diff. grounds by River West,* 188 Cal.App.3d at 1308, 234 Cal.Rptr. 33. But Heller did not breach its duty of loyalty to First Data by agreeing to represent Visa in this matter after receiving a valid prospective conflict waiver from First Data. Heller thus is not claiming that the ethical wall is necessary to protect Heller's duty of loyalty to First Data.

Rather, Heller instituted the ethical wall to protect Heller's duty of confidentiality to its client First Data. First Data states that it has shared information concerning its finances and its general business plan to its patent lawyers, and argues that such information is presumed imputed to all Heller attorneys. *See, e.g., Henriksen v. Great American Savings & Loan,* 11 Cal.App.4th 109, 114–15, 14 Cal.Rptr.2d 184 (1992). Heller can rebut that presumption by "showing that effective screening procedures were implemented to prevent the passing of information between the tainted lawyer[s] and other members of the firm." *Panther v. Park,* 101 Cal.App.4th 69, 76, 123 Cal.Rptr.2d 599 (2002). Because First Data makes no showing in its papers beyond the presumption of shared confidentiality in support of its allegations, and because Heller has demonstrated that it immediately put an ethical wall in place as soon as Heller was retained as Visa's counsel in this action, *see* Epsen Decl. Exh. A, there has been no breach of the duty of confidentiality here.

The motion to disqualify Heller is DENIED. This order fully adjudicates the motions listed at 25 and 41 on the clerk's docket for this case.

IT IS SO ORDERED.

All Citations

241 F.Supp.2d 1100

Footnotes

1 This order amends the order filed on October 16, 2002 by removing the “Not for Citation” designation and correcting typographical errors.

2 Given the nature of the charges raised by First Data against Heller and the existence of an ethical wall between certain attorneys at Heller, Heller hired independent outside counsel to represent its interests in this motion. The court finds good cause to permit Heller to appear through outside counsel on this motion.

3 In light of this motion and the allegations that First Data has raised against it, Heller has offered to withdraw as counsel on the patent litigation matter, but First Data has insisted that Heller stay on. *See* Epsen Decl. Exhs. E–F.

4 At oral argument, First Data claimed that Cal. Rule of Prof. Cond. §§ 3–310(C) (1) and (2) also applied to Heller's conduct. Sections 3–310 (C)(1) and (2), though, apply only to the simultaneous representation of parties in the same action, as First Data itself admits. *See* Cal Rule of Prof. Conduct 3–310(C) (“a member shall not, without the informed written consent of each client, (1) accept representation of more than one client in *a matter* in which the interests of the clients potentially conflict, or (2) accept representation of more than one client in *a matter* in which the interest of the client actually conflict;” emphasis added); *see also Zador Corp., N.V. v. Kwan,* 31 Cal.App.4th 1285, 1294, 37 Cal.Rptr.2d 754 (1995) (stating that 3–310(C)(1) and (2) apply only to joint representations in the same action); First Data Opening Br. at 10 (same). Those sections thus are not at issue here.

5 *Zador* involved representation of two clients in the same action under sections (1) and (2) of Cal. Rule of Prof. Conduct 3–310, and not section (3). While a second consent is required in that circumstance, a second consent is not required when the dual representation is of two clients in separate matters. Cal. Rule of Prof. Conduct 3–310 discussion § 7 (requiring reaffirmation of consent only when conflict arises between parties in the same litigation).

6 Visa and Heller argue that the prejudice to Visa caused by the disqualification of its counsel of choice should be taken into account. The court, however, may not balance Visa's interests against First Data's unless there is a showing that First Data unreasonably delayed bringing this motion for tactical reasons. *Dept. of Corporations,* 20 Cal.4th 1135, 1145 n. 2, 86 Cal.Rptr.2d 816, 980 P.2d 371 (1999); *River West, Inc. v. Nickel,* 188 Cal.App.3d 1297, 1307–09, 234 Cal.Rptr. 33 (1987). The record does not support such a finding here.

7 The language used by Heller in the First Data letter is in fact more explicit than blanket waivers that have been upheld in similar situations by other courts. *See, e.g., Zador,* 31 Cal.App.4th at 1301, 37 Cal.Rptr.2d 754 (a waiver of conflict with named client “notwithstanding any adversity that may develop” sufficient to bar disqualification in subsequent litigation); *General Cigar,* 144 F.Supp.2d at 1336 (a waiver of conflict with named client “in any matter not substantially related to this representation” sufficient to bar disqualification in subsequent litigation).

8 First Data states that its IP counsel does not regularly communicate with other members of its legal department and therefore Visa and Heller should have informed First Data in 2001 that Visa could potentially sue it over the expansion of its private arrangements. At that point, before this suit had been filed, that information was protected under attorney-client and work-product privileges, and Heller would have been prohibited from disclosing it. The main purpose of the conflict waiver rules is to permit First Data the lawyer of its choice. *See, e.g., Flatt,* 9 Cal.4th at 285 n. 4, 36 Cal.Rptr.2d 537, 885 P.2d 950; *Zador,* 31 Cal.App.4th at 1295, 37 Cal.Rptr.2d 754. It is preferable to require First Data to coordinate communications between attorneys in its 50–person legal department before agreeing to a conflict waiver designed for First Data's

benefit rather than force Visa, the senior client, to disclose privileged information or risk losing the lawyers it hired first.

31 Cal.App.4th 1285
Court of Appeal, Sixth District, California.

ZADOR CORPORATION, N.V.,
Cross–Complainant and Appellant,
v.
C.K. KWAN, Cross–Defendant and Respondent.

No. H012341.
|
Jan. 30, 1995.
|
Rehearing Denied Feb. 17, 1995.

Synopsis

Action was brought relating to purchaser of real property. After purchaser named agent in its cross-complaint, agent filed motion to disqualify purchaser's counsel. The Superior Court, Santa Clara County, No. 699571, Mary Jo Levinger, J., granted disqualification, and purchaser appealed. The Court of Appeal, Elia, J., held that disqualification was not warranted, despite counsel's former joint representation of purchaser and agent, in light of agent's written consent to counsel's continued representation of purchaser.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****755** ***1288** Heller, Ehrman, White & McAuliffe, Curtis M. Caton, Michael J. Coffino and Michael H. Charlson, San Francisco, for appellant.

Wilson, Sonsini, Goodrich & Rosati, James A. Diboise, Robert A. Fabela and Peter M. Lefkowitz, Palo Alto, for respondent.

Opinion

ELIA, Associate Justice.

Zador Corporation appeals after the trial court disqualified Heller, Ehrman, White & McAuliffe (Heller) from serving as Zador's counsel. For reasons we shall explain, we reverse.

Facts and Procedural Background

In 1983, Zador purchased the "Platt Property." The Young family owned Zador. C.K. Kwan, acting as agent for the Young family, received the Platt Property on the Young's behalf. It was then transferred to Zador.

***1289** A partnership sold the Platt Property. James Claitor and Roy Bolton were principals in the partnership. Pursuant to the sales agreement, Zador was to convey 15 percent of its interest in the Platt Property to Claitor or a business entity as directed by Claitor. This 15 percent interest formed the basis for the underlying litigation.

In 1990, Bolton filed suit against Zador, Kwan, and Claitor. Bolton claimed he was an intended third party beneficiary of the agreement relating to the 15 percent interest. Bolton also alleged that defendants fraudulently transferred the property to a wholly-owned Zador subsidiary.

Zador cross-complained against the seller partnership, and its partners, including Claitor and Bolton. Zador alleged that the sellers sold the property at a grossly inflated price thereby divesting Zador of its assets.

On May 1, 1990, Zador asked Heller to defend it. Heller had represented the Young family for about 10 years. When Kwan ****756** learned of the lawsuit, he requested indemnity from Zador because he acted as Zador's agent. On May 23, 1990, Heller met with Kwan and Amelia Mak, Zador's Hong Kong in-house counsel. It was confirmed that Heller would represent Kwan and Zador in the action.

On June 22, 1990, Kwan met with Heller. Heller presented Kwan with a waiver and consent form. Heller told Kwan that the conflicts letter was standard. Heller stated that clients were required to sign such a letter when Heller represented multiple parties in the same litigation.

The letter provided, in pertinent part:

> "Based on the information that has been provided to us, we do not believe that our representation currently involves any actual conflict of interest. You should be aware, however, that our representation may in the future involve actual conflicts of interests if the interests of the Co-

defendants become inconsistent with your interests. Should that occur, we will endeavor to apprise you promptly of any such conflict so that you can decide whether you wish to obtain independent counsel.

"Multiple representation may result in economic or tactical advantages. You should be aware, however, that multiple representation also involves significant risks. First, multiple representation may result in divided or at least shared attorney-client loyalties. Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such divided or shared loyalty, it is possible that issues may arise as to which our representation of you may be materially limited by our representation of the Co-defendants.

***1290** "Furthermore, because we will be jointly retained by both you and the Co-defendants in this matter, in the event of a dispute between you and the Co-defendants, the attorney-client privilege generally will not protect communications that have taken place among all of you and attorneys in our firm. Moreover, pursuant to this 'Joint Client' arrangement, anything you disclose to us may be disclosed to any of the other jointly represented clients.

"In the event of a dispute or conflict between you and the Co-defendants, there is a risk that we may be disqualified from representing all of you absent written consent from all of you at that time. We anticipate that if such a conflict or dispute were to arise, we would continue to represent the subsidiary companies of Miramar Hotel & Investment Co., Ltd. (the 'Companies'), whose legal interests in this matter are aligned, notwithstanding any adversity between you and the Companies' interests. Among the Companies are Zador (California) Corporation, Zador Corporation N.V. and YCS Investments. *Accordingly, we are now asking that you consent to our continued and future representation of the Companies and agree not to assert any such conflict of interest or to seek to disqualify us from representing the Companies, notwithstanding any adversity that may develop.* By signing and returning to us the agreement and consent set forth at the end of this letter, you will consent to such arrangement and waive any conflicts regarding that arrangement. Notwithstanding such waiver and consent, depending on the circumstances, there remains some degree of risk that we would be disqualified from representing any of you in the event of a dispute.

"Notwithstanding these risks, you have advised us that in this matter at the present time you do not desire to seek other counsel but instead you desire that we represent multiple interests of yourself and the Co-defendants. Because the interests of the Co-defendants may become inconsistent with your interests, under the ethical standards discussed below we are required to bring this matter to your attention and to obtain your consent, as well as the consent of the Co-defendants, before representing you in the matter described above....

"Accordingly, we request that you signify your informed written consent by signing and returning this letter to us. We encourage you to seek independent counsel regarding the import of this consent, if you so desire, and we emphasize that you remain completely free to seek independent ****757** counsel at any time even if you decide to sign the consent set forth below...."

After spending twenty minutes studying the form, Kwan signed it. After this meeting, Kwan met with Heller several times to discuss the case. Heller ***1291** interviewed Kwan, discussed Kwan's answer to the complaint, and prepared and responded to interrogatories on Kwan's behalf.

With respect to the interrogatories, Kwan had informed the Youngs that $4 million was a reasonable value for the Platt Property. However, according to the interrogatory response, "the Platt property had a value far less than the approximately $4.1 million price paid by Zador...." Kwan objected to submitting this response. He believed $4.1 million was a fair price. However, at Heller's urging, Kwan endorsed the interrogatory response.

On August 7, 1990, Heller reviewed documents produced by Bolton. The documents suggested Kwan might have received money from the sellers during the Platt Property transaction. On August 8, 1990, Heller attorneys met with each other to discuss this information. On August 13, 1990, Heller informed Kwan that this information suggested a possible conflict between his interests and Zador's interests. Heller told Kwan that he needed to retain separate counsel. Kwan agreed. Kwan also reaffirmed his consent to Heller's continued representation of Zador.

In an August 20, 1990, letter, Heller confirmed its discussion with Kwan. Among other things, the letter stated, "*Consistent with your agreement and consent dated June 22, 1990, which you have recently reaffirmed, we will continue to represent the Co-defendants in this lawsuit.*" (Emphasis added.)

On August 22, 1990, Wilson, Sonsini, Goodrich & Rosati (Wilson) advised Heller it was representing Kwan. Wilson requested a meeting with Heller. At the meeting, Wilson requested that Zador indemnify Kwan. Wilson said that if Zador sued Kwan, Wilson would move to disqualify Heller.

In a September 26, 1990, letter, Heller denied Kwan's request for indemnity. Heller explained that Kwan may have conspired to defraud Zador. However, Heller added that "If at some point in the future it becomes clear that Dr. Kwan did not act in complicity with James Claitor, Roy Bolton and the other Cross-defendants, and is otherwise entitled to indemnity, we can revisit the indemnity issue at that time."

After a year of negotiations over the indemnity issue, the parties signed an indemnity agreement. Indemnity was limited to the extent that "Kwan has acted in good faith and in a manner he reasonably believed to be in the best interests of Zador." The indemnity agreement specifically referred to the possibility that Kwan may have "breached any of his duties" to Zador and expressly contemplated the possibility of litigation between Kwan and Zador.

***1292** Heller also drafted and signed a Joint Defense Agreement with Wilson. In the agreement, it was acknowledged that Zador and Kwan had a "certain mutuality of interest in a joint defense...." Zador, however, ultimately refused to sign the agreement.

In February 1991, Claitor cross-complained against Kwan for indemnity and contribution. The cross-complaint sought to transfer Claitor's liability to Zador to Kwan, among others.

In July 1992, Claitor was deposed. In his deposition, Claitor implicated Kwan in the conspiracy to defraud Zador. Heller invoked Kwan's duty to cooperate under the indemnity agreement and demanded an explanation. On April 15, 1993, Kwan and Wilson met with Heller. At the meeting, Kwan acknowledged that he had in fact profited from the Platt Property deal.

In July 1993, Zador formally withdrew from the indemnity agreement with Kwan. It also demanded refund of the sums it had paid for Kwan's separate defense.

On August 17, 1993, Heller amended its cross-complaint to name Kwan as a cross-defendant. Heller's claims against Kwan were based in part on the allegation that the Platt Property was overvalued.

In December 1993, Kwan moved to disqualify Heller. In January 1994, the trial court concluded that there was a substantial ****758** relationship between Heller's prior representation of Kwan and the current litigation. Accordingly, the motion to disqualify was granted.

Zador petitioned for a writ of mandate to this court. On March 1, 1994, we denied Zador's petition on the ground that Zador had an adequate legal remedy. On March 8, 1994, Zador filed its notice of appeal. On March 22, 1994, Zador petitioned for a writ of supersedeas or other appropriate stay order. On April 12, 1994, we entered an order staying proceedings below pending disposition of this appeal.

Standard of Review

The authority to disqualify an attorney stems from the trial court's inherent power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ.Proc., § 128; *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585, 283 Cal.Rptr. 732.) In reviewing a disqualification motion, we will ***1293** uphold the trial court's decision absent an abuse of discretion. (*Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 758, 261 Cal.Rptr. 100; *Bell v. 20th Century Ins. Co.* (1989) 212 Cal.App.3d 194, 198, 260 Cal.Rptr. 459.) "The trial court's exercise of this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action." (*In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at p. 585, 283 Cal.Rptr. 732; see also *Bell v. 20th Century Ins. Co., supra,* 212 Cal.App.3d at p. 198, 260 Cal.Rptr. 459; *Mills Land & Water*

Co. v. Golden West Refining Co. (1986) 186 Cal.App.3d 116, 126, 230 Cal.Rptr. 461.)

Discussion

Appellant contends the trial court erred in granting the disqualification motion. Before addressing this contention, we first review the pertinent legal principles.

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides.*" (*Cox v. Delmas* (1893) 99 Cal. 104, 123, 33 P. 836, emphasis in original; see also *Kornbau v. Evans* (1944) 66 Cal.App.2d 677, 685, 152 P.2d 651.) Among other things, the fiduciary relationship requires that the attorney respect his or her client's confidences. (Bus. & Prof.Code, 6068, subd. (e); *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.) It also means that the attorney has a duty of loyalty to his or her clients. (*Anderson v. Eaton, supra,* 211 Cal. 113, 116, 293 P. 788; *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 723, 300 P.2d 78.)

Because of this fiduciary relationship, it is improper for an attorney to assume a position which is inconsistent with the interest of present of former clients. (*Dettamanti v. Lompoc Union School Dist., supra,* 143 Cal.App.2d at p. 723, 300 P.2d 78; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890, 250 Cal.Rptr. 339.) In such circumstances, the present or former client may move the trial court to disqualify the attorney with the adverse interest. (*Weidekind v. Water Co.* (1887) 74 Cal. 386, 388, 19 P. 173.)

In deciding whether disqualification is required, the "substantial relationship" test is often utilized. "Under the 'substantial relationship' test: '[T]he former client need show no more than that the matters embraced within the pending suit wherein his attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. ***1294** It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.' " (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1302–1303, 234 Cal.Rptr. 33, quoting *T.C. Theatre Corp. v. Warner Bros. Pictures* (S.D.N.Y.1953) 113 F.Supp. 265, 268–269.)

****759** As noted above, the substantial relationship test determines whether client confidences were likely disclosed. Under the test, if there is a substantial relationship between the pending suit and the prior representation, then such disclosure is presumed. At this point, disqualification is justified.

However, when the prior representation involves joint clients, and the subsequent action relates to the same matter, the substantial relationship test adds nothing to disqualification analysis. This is because a substantial relationship between the former representation and the subsequent action is *inherent* in such situations. In other words, clients A and B are jointly represented by C until C discovers a conflict between the legal position of A and B. Client B retains separate counsel. Client A then sues Client B. In these circumstances, a substantial relationship will always exist between C's prior representation of B and the litigation between A and B. Accordingly, in this situation, the substantial relationship test does not "test" anything. It should not determine whether C should be disqualified from representing A.

In addition, although the substantial relationship test determines whether confidences were likely disclosed, in a joint client situation, confidences are necessarily disclosed. In fact, the joint client relationship is an exception to the attorney-client privilege. "Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his[/or her] successor in interest) and another of such clients (or his[/or her] successor in interest)." (Evid.Code, § 962.)

"In California, the 'joint client' or 'common interest' exception [to the attorney-client privilege] applies only where 'two or more clients have retained or consulted a lawyer upon a matter of common interest,' in which event neither may claim the privilege in an action by one against the other. [Citations.]" (*Rockwell Internat. Corp. v. Superior Court*

(1994) 26 Cal.App.4th 1255, 1267, 32 Cal.Rptr.2d 153; see also *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 567, 237 Cal.Rptr. 528.)

Accordingly, in such circumstances, the propriety of disqualification is not dependent upon the substantial relationship test. Rather, it generally ***1295** turns upon the scope of the clients' consent. We explain this conclusion below.

Not all conflicts of interest require disqualification. In some situations, the attorney may still represent the client if the client's consent is obtained. (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 31, 138 Cal.Rptr. 532; *River West, Inc. v. Nickel, supra,* 188 Cal.App.3d 1297, 1304–1310, 234 Cal.Rptr. 33; *In re Lee G.* (1991) 1 Cal.App.4th 17, 34, 1 Cal.Rptr.2d 375; see also Wolfram, *Modern Legal Ethics* (1986) § 7.2, p. 337.) "Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client's legal entitlements." (Wolfram, *Modern Legal Ethics, supra,* § 7.2.2, p. 339.)

In some circumstances, informed client consent is required. For example, informed written consent is required before an attorney can jointly represent clients in the same matter. California Rules of Professional Conduct, Rule 3–310(C)(1) requires an attorney to obtain each client's informed written consent before accepting representation of more than one client in a matter in which the interests of the clients potentially conflict. Similarly, Rule 3–310(C)(2) requires an attorney to obtain each client's informed written consent before accepting or continuing representation of more than one client in a matter in which the interests of the clients actually conflict.

As the drafters of the rules explain, "Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction ****760** or in some other common enterprise or legal relationship.... In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid.Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2)."

The Rules of Professional Conduct also require informed written consent before an attorney accepts "employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (Cal.Rules of Prof.Conduct, Rule 3–310(E).)

***1296** The California Supreme Court examined the client consent issue in *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 180 Cal.Rptr. 177, 639 P.2d 248. In that case, a defendant was charged with multiple robbery and murder counts. Some of the murder counts involved special circumstances, thereby raising the possibility that defendant could be sentenced to death. Defendant retained attorneys to provide a defense. As part of the retention agreement, defendant signed a fee contract. In the contract, defendant assigned, as the attorney's fees, " 'any and all right, title, interest, of any kind, nature and description throughout the world in and to the story of [his] entire life ...' including all entertainment and commercial exploitation rights." (*Maxwell v. Superior Court, supra,* 30 Cal.3d at p. 610, 180 Cal.Rptr. 177, 639 P.2d 248.) Under the contract, defendant was to received 15 percent of the "net amount" realized by the exploitation. Defendant agreed to cooperate in the effort to exploit his life, and promised not to disclose his story to others except with counsel's consent, or as required by law or his defense. Defendant also agreed to waive the attorney-client privilege. Under the contract, defendant agreed that counsel could "(1) create damaging publicity to enhance exploitation value, (2) avoid mental defenses because, if successful, they might suggest [defendant's] incapacity to make the contract, and (3) see [defendant] convicted and even sentenced to death for publicity value." (*Id.* at p. 611, 180 Cal.Rptr. 177, 639 P.2d 248.)

The contract also provided that " 'The Lawyers will raise every defense which they, in their best judgment based upon their experience feel is warranted by the evidence and information at their disposal and which, taking into consideration the flow of trial and trial tactics, is in [defendant's] best interests. The Lawyers will conduct all

aspects of the defense of [defendant] as would a reasonably competent attorney acting as a diligent conscientious advocate.' " (*Ibid.,* emphasis omitted.)

Upon its own motion, the trial court questioned defendant about the contract. Defendant indicated that he understood the contract provisions. He also indicated he was satisfied with his counsel's conduct. After considering psychiatric reports submitted, the trial court ruled that defendant had knowingly and willingly chosen not to seek outside advice, that he was satisfied with his attorneys, and that counsel's competency was not at issue. Nonetheless, the trial court decided counsel should be recused because of the inherent conflict created. Defendant petitioned for a writ of mandate to overturn the trial court's decision. (*Id.* at pp. 610–612, 180 Cal.Rptr. 177, 639 P.2d 248.)

The Supreme Court granted defendant's petition. In so deciding, the court explained that "We stress that our opinion connotes no moral or ethical ***1297** approval of life-story fee contracts. We have addressed only this narrow question: May a criminal defendant (here charged with capital crimes) be denied his right to representation by retained counsel simply because of potential conflicts or ethical concerns even when he has asserted, after extensive disclosure of the risks, that he wishes to proceed with his chosen lawyer and not others? Our answer is No." (*Id.* at p. 622, 180 Cal.Rptr. 177, 639 P.2d 248.)

Client consent was also addressed in *Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 257 Cal.Rptr. 383. In *Cornish,* a dispute arose between a contractor and its subcontractor. Contractor notified subcontractor's ****761** bonding company that contractor was seeking the penal sum on the bonds because of stop notices. The bonding company retained a law firm to investigate the validity of these claims. Law firm contacted the contractor and requested the contractor's records and cooperation. The contractor agreed. Subsequently several lawsuits were filed relating to the project. (*Id.* at pp. 471–472, 257 Cal.Rptr. 383.)

Contractor tendered defense of some of the claims to the bonding company. In accepting the defense on the bonding company's behalf, the firm wrote the contractor that " '[i]f [bonding company] elects to re-tender the defense ... or if [contractor] ... and [bonding company] become adversaries in future litigation, it is expressly agreed that [bonding company's] counsel, whether [law firm] or another firm, shall be entitled to continue representation of [bonding company] and that no conflict of interest will be deemed to exist by reason of this firm's having provided a defense....' " (*Id.* at p. 472, 257 Cal.Rptr. 383.)

Subsequently, the bonding company was placed in conservatorship by the Insurance Commissioner. The law firm advised contractor's attorney that it could no longer provide contractor with a defense. Bonding company then filed an action alleging that contractor had engaged in fraud, thereby entitling bonding company to rescind and exonerate its obligation under the bonds. Contractor's attorney demanded that law firm recuse itself from the action due to the conflict. After law firm refused, contractor moved to disqualify the firm. (*Cornish v. Superior Court, supra,* 209 Cal.App.3d at p. 473, 257 Cal.Rptr. 383.)

In upholding the trial court's denial of the disqualification motion, *Cornish* cited *Christensen v. U.S.D. Court For Cent. D. of Cal.* (9th Cir.1988) 844 F.2d 694, 698. In that case, the court decided that the substantial relationship test was not implicated unless the attorney might have received information that his or her former client would reasonably assume would be withheld from the law firm's present client.

***1298** *Cornish* also relied upon *Allegaert v. Perot* (2d Cir.1977) 565 F.2d 246. In *Allegaert,* the court also found that the substantial relationship test did not apply "because [the former client] necessarily knew that the information given to [the law firms] would certainly be conveyed to their primary clients ... the substantial relationship test is inapposite. Neither [the former client] nor anyone connected with it could have thought that the ... firms were representing [the former client] without [the primary client's] knowledge and approval, or that any information given to the law firms conceivably would have been held confidential from the primary clients of the firms." (*Id.* at p. 250.) According to *Cornish,* three facts were critical to *Allegaert's* conclusion. These were "(1) the continuous, unbroken relationship between the law firm and its primary client, even during the time the firm also represented [the former client]; (2) [the former client's] knowledge of this ongoing relationship; and (3) [the former client's] independent counsel which advised it at all times." (*Id.* 209 Cal.App.3d at p. 476, 257 Cal.Rptr. 383.)

Cornish also relied upon *Croce v. Superior Court* (1937) 21 Cal.App.2d 18, 68 P.2d 369. *Croce* held that an attorney who

had previously represented several clients in an action could later represent one client against the other even though the action was substantially related to the prior representation. The court relied upon the joint-clients exception to the attorney-client privilege. According to *Croce,* since either client could require the attorney to disclose all information acquired in the former representation, no purpose would be served in not allowing the attorney to represent one client against the other.

E.F. Hutton & Company v. Brown (S.D.Texas 1969) 305 F.Supp. 371, 394, criticized *Croce* for not recognizing that the rule prohibiting conflicting interests is broader than the attorney-client privilege. *Hutton* stated, "The evidentiary privilege and the ethical duty not to disclose confidences both arise from the need to encourage clients to disclose all possibly pertinent information to their attorneys [fn. omitted], and both protect only the confidential information disclosed. [Fn. omitted.] The duty not to represent conflicting interests, on the other ****762** hand, is an outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary, in a broader sense. Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting-interests rule, on both." (*Id.* at p. 394.)

After considering these authorities, *Cornish* explained, "While we agree an attorney should not always be free to represent one former joint client ***1299** against another merely because of the joint-client exception to the attorney-client privilege and we can easily envision situations where such action would seriously undermine the integrity of the attorney-client relationship, the present case is not such a situation. Here petitioner maintained an attorney-client relationship with his personal attorney. There is no evidence petitioner ever reposed confidence and trust in [the law firm] or ever sought or obtained advice from [the law firm] but rather at all times looked solely to [its] personal attorney not only to advise [it] but to represent [its] interests vis-a-vis [the law firm] and the [bonding company]. [The contractor] knew [the law firm] considered the [bonding company] its primary client and knew that in the event of a conflict between [the contractor] and [the bonding company], [the law firm] would continue to represent [the bonding company]." (*Id.* 209 Cal.App.3d at pp. 477–478, 257 Cal.Rptr. 383.) For these reasons, *Cornish* concluded that disqualification was not required.

In *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 211 Cal.Rptr. 802, a teacher sued two school districts. The two districts were jointly represented by the same counsel pursuant to agreement. Subsequently, counsel discovered a conflict in their legal positions. Under the agreement, either party could secure its own separate counsel in the event of a conflict. Subsequently, one district retained separate counsel, and filed a cross-complaint against the other district. They also moved to disqualify the other district's counsel. The trial court denied the motion, and the Appellate Court affirmed. The court stated, "By signing the joint powers agreement [school district] waived its right to disqualify [the law firm] from representing other signatories to that agreement based on a presumption from a substantial relationship between [law firm's] former representation and its current representation. It did not waive its right to disqualify [law firm] if [law firm] acquired in the former representation confidential information pertaining to the current representation. However, [school district] offered no substantial evidence that it had imparted confidential information to [law firm] on this case." (*Id.* at p. 573, 211 Cal.Rptr. 802.)

In *Elliott,* the agreement was not as detailed or explicit as the agreement here. The *Elliott* agreement provided, " 'In the event that two or more parties hereto are unable to resolve a legal issue between or among them without legal proceedings, the party or parties in contra-position to that of legal counsel employed as set forth herein on the legal issue involved shall secure its/their separate legal counsel at its/their own expense....' " (*Id.* at p. 568, 211 Cal.Rptr. 802.) Based upon this provision, the court concluded, "[w]e believe the quoted provision ... constitutes written consent to [law firm's] continued representation...." (*Ibid.*)

***1300** The court concluded, therefore, that disqualification was justified only if counsel violated rule 4–101, which prohibited attorney from accepting employment adverse to former client, without informed written consent, "relating to a matter in reference to which he [or she] has obtained confidential information...." (*Id.* at p. 567, 211 Cal.Rptr. 802, emphasis omitted.)

Having examined these authorities, we next consider the situation here. In this case, Heller advised Kwan that it would represent Kwan only if Kwan signed a detailed waiver. Kwan studied the form for twenty minutes and then signed it. By signing the form, Kwan waived the attorney-client privilege. Kwan was also advised that Heller would continue to represent Zador if a conflict existed. Kwan was advised that he had the right at any time to obtain separate counsel. Kwan also agreed to the following provision, "Accordingly, we are now asking that you consent to our continued and future ****763** representation of the Companies and agree not to assert any such conflict of interest or seek to disqualify us from representing the Companies, *notwithstanding any adversity that may develop.*" (Emphasis added.)

Subsequently, after reviewing documents produced by Bolton, Heller decided a possible conflict existed. It advised Kwan to retain separate counsel. Kwan agreed. Heller also asked Kwan to reaffirm his consent to Heller's continued representation of Zador. Kwan *again agreed.* Heller confirmed this agreement in writing: "*Consistent with your agreement and consent dated June 22, 1990, which you have recently reaffirmed, we will continue to represent the Co-defendants in this lawsuit.*" (Emphasis added.) Kwan raised no objections.

In July 1992, Claitor was deposed. In his deposition, Claitor implicated Kwan in the conspiracy to defraud Zador. Heller invoked Kwan's duty to cooperate under the indemnity agreement and demanded an explanation. On April 15, 1993, Kwan and Wilson met with Heller. At the meeting, Kwan acknowledged that he had in fact profited from the Platt Property deal.

In July 1993, Zador formally withdrew from the indemnity agreement with Kwan. It also demanded refund of the sums it had paid for Kwan's separate defense. On August 17, 1993, Zador amended its cross-complaint to name Kwan as a cross-defendant. Zador's claims against Kwan were based in part on the allegation that the Platt Property was overvalued. Finally, in December 1993, Kwan moved to disqualify Heller.

As these events show, Kwan consented to Heller's continued representation of Zador. The waiver and consent form was detailed. Kwan agreed not ***1301** to disqualify Heller "*notwithstanding any adversity that may develop.* " (Emphasis added.) When adversity did develop, Kwan obtained separate counsel but reaffirmed his agreement to the consent form and to Heller's continued representation of Zador.

Kwan contends he did not consent to being sued by Zador. He states that he did not believe that "any adversity" included the possibility of a lawsuit. We are not persuaded. In these circumstances, involving legal disputes between former joint clients, we believe that "any adversity" quite naturally includes litigation.

California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid. Indeed, in *Maxwell v. Superior Court, supra,* 30 Cal.3d at page 622, 180 Cal.Rptr. 177, 639 P.2d 248, the California Supreme Court recognized that "Waiver of the consequences of potential conflict was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification."

The State Bar of California has reached a similar conclusion. In Formal Opinion 1989–115, the issue was whether a blanket waiver of the client's right to disqualify was ethically proper. In that matter, lead counsel requested local counsel's trial assistance. Local counsel represented several clients whose interests were presently or potentially adverse to lead counsel's client. Local counsel agreed to assist lead counsel but only if lead counsel's client waived its right to disqualify local counsel in any matter in which local counsel represented parties adverse to lead counsel's client. The Committee decided such blanket waivers were not per se improper. The Committee noted, "In addition, the nature of the subsequent conflict of interest may range from simply representing two clients in entirely unrelated matters to actually representing both sides in the same dispute. While a court would doubtless preclude a lawyer from representing both sides simultaneously [fn. omitted], the Committee believes that in such situation, *if the original waiver was informed, local counsel could withdraw from its representation of lead counsel's client and continue to represent its own client even if otherwise confidential information would be used against lead counsel's client.*" (*Id.* at p. 2, emphasis added.)

Accordingly, we conclude that Kwan consented to Heller's continued representation of Zador "notwithstanding any adversity" that developed. The consent form was detailed.

Kwan subsequently reaffirmed his consent. In September 1990, Wilson said it ****764** would move to disqualify Heller if Zador sued Kwan. Thus, over three years before the motion to disqualify was filed, it was recognized that litigation between Zador and Kwan might ensue.

***1302** Although this case differs from *Cornish* because *Cornish* emphasized that the former client at all times retained independent counsel, we do not believe this difference is controlling. In *Cornish,* as here, there was a continuous relationship between the law firm and the ongoing client Zador. In *Cornish,* as here, the former client knew about this ongoing relationship. Most importantly, in this case, unlike *Cornish,* there was a *detailed consent form* in which Kwan explicitly consented to Heller's continued representation of Zador. Likewise, the former client's consent in *Elliott* was not nearly as encompassing as the consent form here.

In addition, we may consider Kwan's delay in bringing the motion. Motions to disqualify are often used as a tactical device to delay litigation. "Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client, disqualification should not be ordered. The burden then shifts back to the party seeking disqualification to justify the delay. [Citation.] Delay will not necessarily result in the denial of a disqualification motion; the delay and the ensuing prejudice must be extreme. [Citation.]" (*Western Continental Operating Co. v. Natural Gas Corp., supra,* 212 Cal.App.3d at pp. 763–764, 261 Cal.Rptr. 100.)

In this case, Kwan explains that he promptly moved to disqualify Heller soon after Zador filed suit against him. Although this is true, it is also true that the possibility of litigation was evident nearly three years before Kwan filed his motion. In 1990, Heller advised Kwan of the potential conflict. Kwan retained separate counsel. Further, Kwan's counsel threatened to disqualify Heller if Zador sued Kwan. Thus, it is a possibility that the motion to disqualify was used as a litigation tactic. Finally, we note that there is some indication that Kwan all along realized that his position conflicted with the position of Zador. If he did not, then he should have, since he admitted profiting from the overvalued Platt Property transaction.

"Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. [Citations.] On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his [or her] choice suffers a particularly heavy penalty where, as appears to be the case here, his attorney is highly skilled in the relevant area of the law." (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300, 254 Cal.Rptr. 853.)

***1303** "Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citation.] Such motions can be misused to harass opposing counsel [citation], to delay the litigation [citation], or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. [Fn. omitted.] [Citations.] In short, it is widely understood by judges that 'attorneys now commonly use disqualification motions for purely strategic purposes....' [Citations.]" (*Id.* at pp. 300–301, 254 Cal.Rptr. 853.)

Although we review the trial court's findings under an abuse of discretion standard, that standard does not assist us when the trial court employed the wrong legal analysis. "The trial court's exercise of this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action." (*In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at p. 585, 283 Cal.Rptr. 732; see also *Bell v. 20th Century Ins. Co., supra,* 212 Cal.App.3d at p. 198, 260 Cal.Rptr. 459; *Mills Land & Water Co. v. Golden West Refining Co., supra,* 186 Cal.App.3d 116, 126, 230 Cal.Rptr. 461.) In this case, the trial court applied the substantial relationship test ****765** to disqualify Heller. In these circumstances, that test was not determinative. Because Kwan consented to Heller's continued representation of Zador "notwithstanding any adversity that developed," the trial court should have denied the disqualification motion.

Disposition

The judgment is reversed. The April 12, 1994 order staying proceedings below is lifted. Costs on appeal to Zador.

PREMO, Acting P.J., and BAMATTRE–MANOUKIAN, J., concur.

All Citations

31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754

Rule 1.0.1 Terminology
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) "Belief" or "believes" means that the person* involved actually supposes the fact in question to be true. A person's* belief may be inferred from circumstances.

(b) [Reserved]

(c) "Firm" or "law firm" means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.*

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances.

(g) "Partner" means a member of a partnership, a shareholder in a law firm* organized as a professional corporation, or a member of an association authorized to practice law.

(g-1) "Person" has the meaning stated in Evidence Code section 175.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm* that are adequate under the circumstances (i) to protect information that the isolated lawyer is

obligated to protect under these rules or other law; and (ii) to protect against other law firm* lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

(l) "Substantial" when used in reference to degree or extent means a material matter of clear and weighty importance.

(m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(n) "Writing" or "written" has the meaning stated in Evidence Code section 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person* with the intent to sign the writing.

Rule 1.6 Confidential Information of a Client
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Rule 1.7 Conflict of Interest: Current Clients
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

This form is not for use. Consult with counsel for advice in preparing a conflict consent letter.

DATE

[Addressee 1]

[Addressee 2]

[Salutation]:

As you are aware, _____ ("we" or the "Firm") is counsel to both [Client 1] ("[Short Reference for C1]") and [Client 2] ("[Short Reference for C2]"). Recently, [C1] made a proposal to [C2] to [describe subject relationship (the "[Short Reference for Matter]"). Each of [C1] and [C2] has asked the Firm to represent it in connection with the [Matter]. Because both of [C1] and [C2] are clients of the Firm and because their interests may conflict with regard to the [Matter], the Firm cannot represent either of [C1] or [C2] in respect of the matter without the informed, written consent of both affected clients. Thus, in order for us to represent both [C1] and [C2] in connection with the [Matter], we must first obtain the written consent of both clients, after each of the clients has been advised of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to that client.

I am writing to you as a member of the Firm's Conflicts Committee, and will not represent any party in the [Matter]. We would not seek this consent if we believed that this simultaneous representation would prejudice any party, and after speaking to the attorneys who will be involved, I have satisfied myself that, if we take the precautions described in this letter, the concurrent representations described in this letter will not prejudice either of the parties. We will advise you promptly if our view in this regard changes. In this letter, I will describe the potential risks of adverse consequences that we believe are reasonably foreseeable and the steps we will take to attempt to ameliorate those risks.

While we would be happy to answer any questions that either client may have regarding the issues discussed in this letter, we urge each of you to consult with independent counsel regarding whether you should give the consents discussed in this letter.

By way of background, [C1] [and its principals/affiliates] [has/have] been client[s] of [name of primary Firm attorney] and of the Firm since approximately [date]. [C2] [and its principals/affiliates] [has/have] been client[s] of [name of primary Firm attorney] and of the Firm since approximately [date].

[C1 primary attorney] and other attorneys in the Firm do and will continue, both during and following the completion of the [Matter], to represent [C1] and its affiliates and principals in other matters unrelated to the [Matter] (the "[C1] Unrelated Matters"), and Firm personnel will

assist them. Conversely, [C2 primary attorney] and other attorneys in the Firm do and will continue, both during and following the completion of the [Matter], to represent [C2] and its affiliates and principals in other matters unrelated to the [Matter] (the "[C2] Unrelated Matters"), and Firm personnel will assist them.

If signed by [C1], this letter will confirm that, after consideration of the disclosures in and the terms of this letter, [C1] consents to our representation of [C2] adversely to [C1] in the [Matter] and our representation of [C2] in the [C2] Unrelated Matters, while at the same time the Firm represents [C1] adversely to [C2] in the [Matter] and represents [C1] in the [C1] Unrelated Matters.

If signed by [C2], this letter will confirm that, after consideration of the disclosures in and the terms of this letter, [C2] consents to our representation of [C1] adversely to [C2] in the [Matter] and our representation of [C1] in the [C1] Unrelated Matters, while at the same time the Firm represents [C2] adversely to [C1] in the [Matter] and represents [C2] in the [C2] Unrelated Matters.

If signed by them, this letter will further confirm the agreement of [C1] and [C2] that if a dispute should arise in connection with the Matter that cannot be resolved by agreement between the parties, and either or both of the parties choose to resort to litigation, arbitration, or another dispute resolution mechanism to resolve such dispute, then the Firm will not represent either [C1] or [C2], or their respective principals or affiliates in such proceeding and each party will be represented by independent counsel of its choosing.

In deciding whether or not to consent to our representation of the other party in the [Matter], each of [C1] and [C2] should consider the following consequences of its doing so. First, because of past relationships and our actual and potential representation of the parties and their principals and affiliates in unrelated matters, each of [C1] and [C2] may have concerns that we may not be as aggressive in our representation of its interests in the Transaction as might otherwise have been the case if the adverse party were a different person or entity with whom the Firm had no such relationships. Second, while the attorneys in the firm representing [C1] in the [Matter] will have undivided loyalty to [C1] in the [Matter] and the other attorneys in the firm representing [C2] in the [Matter] will have undivided loyalty to [C2] in the [Matter], either client may feel that their attorneys in the [Matter] have divided loyalties in the [Matter], since we represent both clients in the [Matter] in which their interests are clearly adverse to each other. Third, while the Firm would have undivided loyalty to [C1] in the [C1 Unrelated Matters] and would have undivided loyalty to [C2] in the [C2 Unrelated Matters], either party may feel that their representation in those matters may be affected by divided loyalties for the same reason, *i.e.*, since we represent both clients in the [Matter] in which their interests are clearly adverse to each other. Fourth and finally, while the consent we are seeking does not allow us to use or disclose to [C1] any confidential information we receive in our representation of [C2] or any attorney-client privileged communications we have with [C2] and while, conversely, the consent

we are seeking does not allow us to use or disclose to [C2] any confidential information we receive in our representation of [C1] or any attorney-client privileged communications we have with [C1], either of [C1] and [C2] may nonetheless have a concern that its confidential information may be at risk because the Firm represents the other client and the attorneys involved in each client's matters are members of the same law firm.

To protect against disclosure of your privileged communications and other confidential information, and to reduce the risk that divided loyalties may undermine your confidence in your counsel, we represent and warrant to [C1] that no confidential information regarding [C1] has been or will be shared by any attorneys or staff members who have worked (or are working) on the [Matter] or any [C1 Unrelated Matters] with any attorneys or staff members representing [C2] in connection with the [Matter] or any [C2 Unrelated Matters] and we represent and warrant to [C2] that no confidential information regarding [C2] has been or will be shared by any attorneys or staff members who have worked (or are working) on the [Matter] or any [C2 Unrelated Matters] with any attorneys or staff members representing [C1] in connection with the [Matter] or any [C1 Unrelated Matters]. In addition, we have reviewed our records to identify all of our attorneys who have in the past represented either [C1] or any of its affiliates in the past and, absent further written consent, no such attorney will represent [C2] in the [Matter]. We have also reviewed our records to identify all of our attorneys who have in the past represented either [C2] or any of its affiliates and, absent further written consent, no such attorney will represent [C1] in the [Matter]. Those attorneys who have in the past represented both [C1] or its affiliates and [C2] or its affiliates will not, absent further written consent, represent any party in the [Matter]. However, we have disclosed to the attorneys and staff members working on the Transaction for each of the parties that we are preparing this conflict consent letter and the memorandum referred to in the following paragraph.

In order to prevent any disclosure from occurring on a going forward basis, we will prepare and circulate a memorandum (the "Memorandum") to all attorneys and staff members in the Firm instructing them to maintain the separateness of the teams working on behalf of [C1] with regard to the [Matter] and the [C1] Unrelated Matters (the "[C1] Team") from the teams working on behalf of [C2] with regard to the [Matter] and [C2] Unrelated Matters (the "[C2] Team"). The Memorandum will inform all attorneys and staff in the Firm that the attorneys and staff that are part of [C1] Team may not share with, disclose to or discuss in the presence of any other attorneys or staff in the Firm any information regarding [C1]'s interests in the [Matter] or any [C1] Unrelated Matters during the course of the [Matter]. Similarly, the Memorandum will inform all attorneys and staff in the Firm that the attorneys and staff that are part of the [C2] Team may not share with, disclose to or discuss in the presence of any other attorneys or staff in the Firm any information regarding [C2]'s interests in the [Matter] or any [C2] Unrelated Matters during the course of the [Matter]. In addition, during the pendency of the Transaction, we will restrict access to both paper and electronic files containing information regarding work of the [C1] Team on the [Matter] or any [C1] Unrelated Matters, so that no attorneys or staff personnel other than the [C1] Team will be able to access such files. Similarly, during the pendency of the

[Matter], we will restrict access to both paper and electronic files containing information regarding work of [C2] Team on the [Matter] or any [C2] Unrelated Matters, so that no attorneys or staff personnel other than [C2] Team will be able to access such files.

As stated above, we urge you to consult with independent counsel before consent to this representation.

If you consent to the representations described in this letter and the terms stated in this letter, and accept the foregoing disclosures as sufficient, you may confirm that consent and agreement by signing below in the appropriate space and returning this letter, so signed, to me at your earliest convenience. The parties agree that this letter may be executed in counterparts (and by facsimile or emailed signatures), each of which shall be deemed an original but all of which shall constitute one and the same agreement.

Sincerely,

_____

AGREED AND CONSENTED TO:

"[C1]"

[C1]

By:_____
[Name], [Title]

"[C2]"

[C2]

By:_____
[Name], [Title]

THIS FORM IS NOT FOR USE. CONSULT WITH COUNSEL FOR ADVICE IN PREPARING A CONFLICT CONSENT LETTER.

[Date]

[Client 1]

[Client 2]

Re: Transaction between [Client 1] and [Client 2]

Dear [Clients]:

We have been asked to represent [Client 1] ("[C1]") in [describe matter] and, in connection therewith, to [describe relationship of matter to client 2] [Client 2] ("[C2]") (the "Transaction"). We have represented each of [C1] and [C2] in the past and are currently representing each on matters unrelated to the other party. Because both [C1] and [C2] are clients of the firm, we cannot represent [C1] in the Transaction without the written consent of both [C1] and [C2].

In deciding whether or not to give such consent, [C1] and [C2] should consider the following consequences of doing so. First, if we represent [C1] in the Transaction, we will owe a duty of loyalty only to and will only be acting on behalf of [C1] in respect of the Transaction and we will not be able to give [C2] any legal advice in connection with the Transaction. [C2] should instead seek such advice from other professionals whom it selects. Second, while the firm will have undivided loyalty to each of [C1] and [C2] in the matters in which the firm represents each of them (including our possible representation of [C1] in the Transaction), either [C1] or [C2] may feel that the firm has divided loyalties that may adversely impact its

relationship with firm in the matters in which the firm is representing it. Third, while the consent discussed in this letter does not allow this firm to use for or disclose to either [C1] or [C2] any of the other client's confidential or proprietary information, either [C1] or [C2] may have a concern that its confidential information may be at risk because of the fact that the firm represents both clients in different matters. Even if the consent discussed in this letter is given, the firm will keep confidential for [C1] all information received in the course of the firm's representation of [C1] and will keep confidential for [C2] all information received in the course of the firm's representation of [C2]. [To protect against inadvertent disclosure or use of such information, none of the legal or paralegal personnel who are working on any [C1] matter will also work on the Transaction[, and a memorandum will be circulated to all firm personnel establishing "ethical wall" policies to prevent access to each client's confidential information and documents by any of the firm personnel working on the other client's matters].] Fourth, in the event litigation should ensue between [C1] and [C2] with respect to the Transaction, [our firm will not represent either [C1] or [C2] in that litigation, and both [C1] and [C2] would need to seek other counsel for such litigation][our firm will represent [C1] in that litigation, and [C2] would need to seek other counsel for such litigation]. Finally, if either [C1] or [C2] has any questions as to whether it should give the consent discussed in this letter, we encourage it to seek the advice of another attorney.

If [C2] consents to this firm's representation of [C1] in the Transaction while, at the same time, the firm continues to represent [C2] in other matters, [C2] may confirm that consent by signing the enclosed copy of this letter and returning it to me. If [C1] consents to this firm's continued representation of [C2] in other matters while, at the same time, the firm represents [C1] in the Transaction, [C1] may confirm that consent by signing the enclosed copy of this

letter and returning it to me. Please feel free to call me if you have any questions about the matters addressed in this letter.

Sincerely,

[Attorney]

ACKNOWLEDGED AND CONSENTED TO:

[Client 1]

By:_____

Its:_____

[Client 2]

By:_____

Its:_____

CONTINUING EDUCATION CREDITS

MCLE. UCLA School of Law is a State Bar of California approved MCLE provider. By attending the 47th Annual UCLA Entertainment Symposium Hybrid Series on June 7, 2023, you may earn Minimum Continuing Legal Education credit in the amount of up to **1 HOUR OF LEGAL ETHICS** credit for Representing Everyone, Everywhere, All at Once: Entertainment Industry Conflicts and How to Navigate Them and **1 HOUR OF GENERAL** credit for New Frontiers: How Artificial Intelligence Presents New Opportunities (and Risks) for the Entertainment Industry.

In order to receive credit, **YOU MUST VERIFY YOUR PARTICIPATION**. During each of the two presentations of each weekly webinar, **A UNIQUE CODE WORD WILL BE ANNOUNCED**. Each attendee will need to input the unique codes in the Google Form provided under the "Resources" header in the bottom left of the weekly webinar window and sent to each attendee at the conclusion of the weekly webinars. Certificates and evaluation forms will be emailed separately upon successful verification of your attendance. If you have any questions and/or issues, please email mcle@law.ucla.edu.

UCLA School of Law certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing Minimum Continuing Legal Education.

WEDNESDAY, JUNE 7, 2023

6:10 - 7:10pm PDT

New Frontiers: How Artificial Intelligence Presents New Opportunities (and Risks) for the Entertainment Industry

Moderator:

Nathaniel L. Bach

Partner, Manatt, Phelps & Phillips, LLP

Panelists:

Travis Cloyd

CEO, WorldwideXR, *Global Futurist*,Thunderbird School of Global Management

Ted Schilowitz

Futurist-in-Residence, Paramount

P.J. Shapiro

Partner, Johnson Shapiro Slewett & Kole LLP

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NEW FRONTIERS: HOW ARTIFICIAL INTELLIGENCE PRESENTS NEW OPPORTUNITIES (AND RISKS) FOR THE ENTERTAINMENT INDUSTRY

OUTLINE OF TOPICS/ISSUES

Description: Artificial Intelligence and machine learning has had a swift impact on society and the entertainment industry in particular. Increasingly powerful and sophisticated generative AI in particular presents new opportunities for creators, talent, and studios, but also numerous risks for all these stakeholders. From copyright questions to labor rights, from virtual production spaces to posthumous deepfakes, it is a time of excitement and trepidation. Our panel will discuss these issues from a variety of perspectives, staying abreast of the most recent technological and legal developments in this fast-moving space.

Overview of Panel Discussion

1. Creators
    a. How to protect creators (artists, actors, writers, musicians, etc.).
    b. What new opportunities are there for creators with the development of A.I.?
    c. How is A.I. and other similar advanced technology coming up now in negotiations in the entertainment space?
        i. For example, right of publicity, deepfakes, ageing/de-aging, etc.
    d. Are we going to see talent use A.I. to take on a posthumous life that will give us, for example, Tom Cruise starring in *Mission Impossible* into the next century?
2. How studios and licensors are adopting and considering the technology?
    a. What is the state of the art with respect to new production technology that incorporates machine learning or virtual reality (VR)?
    b. What is the role of visual effects (VFX) and post-production?
    c. Are there on-going or new concerns regarding the protection of existing intellectual property?
    d. How is A.I. and similar advanced technology coming up now in the negotiations?
3. A.I. and the guilds/on-going strikes.
4. How are the panelists approaching the prospect of regulation and legislation around A.I.?
5. Is the current legal framework sufficient to address A.I.? Why or why not?
6. What are the panelists predictions on A.I. for the next year and into the next five years?

Where Actors Could Make a Deal With Studios on AI

By Ashley Cullins
May 18, 2023 9:15AM

With AI no longer a theoretical issue and lawyers looking for ways to protect talent without stifling innovation, SAG-AFTRA has a new rallying cry: "augmentation, rather than replacement."

Just about six weeks before artificial intelligence became a hot-button issue in the writers strike, a Berlin-based photographer took the internet by storm with *Harry Potter by Balenciaga*, a video melding characters from the wizarding world with avant-garde models representing the luxury fashion brand. Even more recently, a company called Curious Refuge used AI to create a viral trailer for a Wes Anderson *Star Wars* film called *The Galactic Menagerie*. While clearly these are spoofs that aren't trying to fool anyone, they show that re-creating someone's likeness and voice using AI is no longer merely sci-fi fodder — in fact, Robert Zemeckis' upcoming movie *Here* will use a tool called Metaphysic Live to de-age Tom Hanks and Robin Wright.

Just as AI became a sticking point during the Writers Guild's talks with studios, the tech's impact on onscreen talent will likely be an issue when SAG-AFTRA heads to the negotiating table in June. "For writers, the AI construct is limited to language. Whereas for actors an entire scene can be impacted in a multitude of ways by AI — from lighting, to the age of the actor, to removing a blemish, to superimposing a rocket ship in the scene," says talent lawyer Darren Trattner.

"We are transitioning into an era of assistive computing," notes Amy Webb, founder and CEO of Future Today Institute, which does long-range scenario planning and consultation for Fortune 500 companies and Hollywood creatives. "I can totally envision a very near future in which some new person on the set, some type of AI specialist, puts in a line of code that says 'de-age Tom Hanks 20 years' and it just applies it automatically throughout."

She notes that smartphone apps already do this on a lesser scale, allowing people to make themselves look like a baby, or 10 years older, or a Renaissance painting. So it's only a matter of time before the tech is available in the more sophisticated context of filmmaking. Says Webb, "We're getting pretty close to that happening, [in a way] that is affordable and just frictionless and easy."

That potential raises questions about just how much AI could be used to change, or even re-create, an actor's image — and how much control talent will have over it. "The talent normally surrenders a lot when signing up to act in a project," says Trattner, adding that "there is typically a full page of methods by which the studio or financier can alter the talent's image and/or voice."

He suggests that existing deal points like body double approval or nudity waivers could provide some framework for obtaining consent for AI alterations — but a threshold issue will be defining

what qualifies as AI. “For certain talent we negotiate approvals over how photos look and how they get touched up,” says Trattner. “Is photoshopping the same as AI? What if the camera has a filter to make an actor look better or different? Where are we drawing the line? Will we require disclosures to the talent saying the role will require computer enhancements of the talent’s image?”

Meanwhile, talent lawyer Leigh Brecheen notes that reps are also looking for ways to protect actors after a project ends. “We now try to insert language to prevent client performances and work from being used to train AI as well as to prohibit the creation of digital versions of our clients and their work,” she says. “Reps are making more and more comments aimed at curtailing the use of the rights granted and limiting them to the specific production for which they are being paid. I always comment that the client’s name, image, likeness and performance can only be used in and in the work for which they are being hired.”

Ahead of the SAG-AFTRA talks, the guild’s position is that these issues shouldn’t be ruled by what is or isn’t in any individual talent contract. “This is, from our point of view, clearly a mandatory subject of bargaining,” says SAG-AFTRA national executive director and chief negotiator Duncan Crabtree-Ireland. “To the extent that the companies want to do something new with AI, they have to negotiate that with us. It’s not like if it’s not mentioned in the contract they can just do what they want. They have to bargain for it, just like any other term and condition of employment that doesn’t exist today that they want in the future.”

Talent lawyer Richard Thompson says it may seem like “a no-brainer” for the guild and talent to demand transparency and consent, “but it isn’t that simple because a lot of AI uses will be harmless, and it is hard to predict what will be possible or become standard in advance.” Thompson says he could easily come up with examples of problematic ways AI may be used, but that for each of those it’s just as easy to find a reason why a competing interest should outweigh an actor’s approval. While it’s not advisable to put off the issue entirely, he warns that too much regulation too early could backfire: “If we start stabbing in the dark now, we will miss important issues and we will do things that will inhibit beneficial developments.”

Dubbing is one of the areas where experts see potential. Crabtree-Ireland points to Flawless AI as an example: “They can actually modify the mouth and facial movements of performers to match a dubbing track so that the scripts don’t have to be modified in order to match the mouth movements, which lets them have a more authentic translation product.”

He emphasized that this application isn’t using synthetic voices to replace human dubbing performers and says the tech can’t replicate their artistry. “As an example, if you use Apple’s new text-to-speech tool for reading an audio book it’s not the same thing as listening to an audio book that’s been recorded by a professional performer,” Crabtree-Ireland says. “It’s like listening to someone read a tax return.”

SAG-AFTRA sees another potential upside to the emerging technology, too. “One of the things that can really harm a performer’s career is lack of availability to take on other projects that they might be offered,” Crabtree-Ireland explains. “To the extent that AI technology can help with

reshoots that otherwise they would have to remain available for, and therefore decline other work opportunities, that could be a real plus for our members."

Of course, the possibility of entirely AI-generated actors is a real concern — even if the copyright implications might be a deterrent. (Currently, AI-generated content doesn't qualify for copyright protection.)

"Mid Journey and Stable Diffusion create images based off of text," notes Trattner. "They can create a scene where the actor is not real and not based on a real person. Can a studio make an AI-generated cast member and save costs by not hiring an actual person to play the role?"

To provide protection for actors without stifling innovation, SAG-AFTRA will want to ensure AI is used for "augmentation rather than replacement," the negotiator says.

"Obviously, there are other kinds of implementations of generative AI that we are concerned about that seem to replace performers," says Crabtree-Ireland. "But if there are appropriate human-centered ethics and guardrails around them, it's not fundamentally the technology that's the concern. It's the use. When it's used with informed consent and compensation for real-life performers, we think that can be OK."

A version of this story first appeared in the May 17 issue of *The Hollywood Reporter* magazine.

Technologies Like AI & Unreal Engine Are A Having Big Impact On The Entertainment Business, But Where Will It Go From Here?

By Diana Lodderhose
International Features Editor

May 21, 2023 8:08am

The Greek philosopher Heraclitus once said, "Change is the only constant in life." The entertainment sector is no exception to this adage. It's an industry that has long benefited from advancements in technology that have increasingly enriched the quality of films and programs and have also condensed the filmmaking process across the entire pipeline from pre-production to distribution and exhibition.

But while it's easy to look back and see how digital tech has improved the sector, assessing the future of the business as it stands on the threshold of two hot button topics — Artificial Intelligence (AI) and Epic Games' Unreal Engine — is much less clear.

AI has been increasingly polarizing, with Twitter owner and Tesla CEO Elon Musk and Apple co-founder Steve Wozniak among more than 1,100 signatories of an open letter calling for a six-month moratorium on the development of advanced AI systems, citing "risks to society". Meanwhile, Epic's free Unreal Engine platform is popularizing the concept of the metaverse with its real-time 3D platform, which has been used in projects such as Rogue One: A Star Wars Story, The Batman and Ford v Ferrari. Significantly, Lucasfilm and Jon Favreau used Unreal Engine to build entire 3D environments for The Mandalorian, a real turning point for the technology.

But what does it all mean? Here, a number of experts in both fields help break down how these two tech advancements are disrupting the production sphere and what the future of the business looks like when they become a part of the everyday process of filmmaking.

Unreal Engine

According to Framestore's Chief Creative Officer Tim Webber, "Things are moving so quickly and unpredictably at the moment that it's really hard to know what's going to be happening even in five years time."

Webber, who won an Oscar for his VFX work on Gravity, says he and his team have been using Unreal Engine for a decade or more in pre-production for virtual production and the immersive division, virtual reality experiences and experiential setups. "Most of Unreal's lifespan and history has been dedicated to the games industry, and that's what has shaped it up until this time," he says. "But more people, such as the film industry, are tailoring it to other needs, so it's getting better and better all of the time."

The tech has, he says, been impactful in planning and experimenting in a virtual space. “You can have people being motion captured in real time and see them as evolving creatures, and you can get an immediate response to it in real time.”

Framestore VFX supervisor Theo Jones adds, “It’s so useful in preproduction because it’s very good for rapid iteration and, obviously in preproduction, making a lot of changes very quickly and that interaction and interactivity is really key.”

Most notably, Unreal Engine has been popularized for use in in-camera effects, or what many refer to as ‘virtual production’, where, as in The Mandalorian, one can film in a space where the background is rendered in real time and put onto a wall behind the actors.

“There are things that we do that are fundamentally different than any sort of DCC [digital content creation] renderer, that’s out there, such as how it approaches things in the real world, with real physics and real spatial depth,” says Miles Perkins, Industry Manager of Film & Television at Epic Games. “The big thing with Unreal Engine is that it can render in real time at least 24 frames per second, if not 60. And you interface with it in much the same way you would interface with a real set. That, to me, is what’s incredibly exciting.”

Perkins, who spent 23 years at Lucasfilm before moving to Epic Games, recalls first using Unreal with Steven Spielberg on 2001 title A.I. The forward-thinking director used an Unreal Tournament game engine to plan out his scenes for the sci-fi project.

“We were able to immediately visualize what it was going to be so that he could block out all of these shots,” he recalls.

The exec compares the change in technology at Epic to the first time he saw a test screening of Jurassic Park. “When I first saw the test and walked into the theater, I just knew that the industry was going to change because of computer-generated imagery. The exact same thing happened to me in 2019 when I joined Epic and I saw what we were doing with The Mandalorian.”

Indeed, since The Mandalorian, the proliferation of the tech on these LED walls has been, says Perkins, “almost hard to keep up with”. In 2019, there were just three of these stages, but now, according to the exec, there are more than 300.

Unreal has been particularly useful in the animation space, with companies such as Reel FX using the game engine to animate its Netflix series Super Giant Robot Brothers!. The company was the first to use the game engine to create an animation pipeline to visualize and render every aspect of the show. Perkins recalls the show’s director, Mark Andrews (Brave), turning around 140 shots per week instead of the normal 12-20. “Imagine what it means for the filmmaker,” Perkins says. “It frees them up to engage with the visuals. We’re really only on the precipice of what this is going to mean long-term.”

The exec thinks that real-time technology will soon start to attract directors from outside the animation space. “Directors are now engaging with the animation in the same way they would with live-action, or near to that, so all of a sudden you’re going to start to see animation open up to people who are more traditionally live-action filmmakers.”

> “Directors are now engaging with the animation in the same way they would with live-action, or near to that, so all of a sudden you’re going to start to see animation open up to people who are more traditionally live-action filmmakers.”
> MILES PERKINS, EPIC GAMES

Webber and Jones recently finished shooting a short animation title dubbed Flite, a live-action animation hybrid, entirely in Unreal Engine. Specifically, it used its in-house VFX pipeline FUSE (Framestore Unreal Shot Engine) to make the innovative short. With Unreal Engine at its heart, the purpose was to build a pipeline that enabled them to work at the scale of a feature film, utilizing all of the different specialist artists within the company for one project.

“Previously this wasn’t possible, and it had to be small teams working together,” Webber says. “But with Flite we wanted to build it so you could have your crew of 250 people with all the different expertise they’ve built over 20 years, all working together on something with hundreds of shots.”

It’s a great example, says Jones, of how the real-time technology can be rolled out into a pipeline that will “create a much more efficient way of working.”

Germany-based Telescope Animation is another outfit that is benefiting from this technology. The company was recently a recipient of Epic Games’ MegaGrants and a grant from the EU’s Creative Europe Media, which will see the company use Unreal Engine 5 for a multi-platform project The Last Whale Singer. In addition to a feature film, there is a planned prequel video game, episodic series and AR/VR projects that will use the same assets across all platforms.

For Telescope Animation founder Reza Memari, use of the game engine is revolutionizing the kind of animation coming out of Germany. While the European nation is a powerhouse when it comes to exporting animation, these projects are typically done at much smaller budgets (€8 million-€12 million) than their U.S. counterparts. The speed of rendering that Unreal can offer, plus the ability to create a larger pipeline for other platforms, makes it more efficient for smaller teams.

“Unreal has really accelerated the development toward the kind of animation that we are doing,” Memari says. “For small indie studios, it always meant there was a quality reduction, because we could never achieve the kind of polish that American studios can achieve because they have the money and the teams to keep reworking on it and revising it until it’s perfect. We just don’t have that kind of capacity, but Real Time allows us to work on it non-stop.”

Artificial Intelligence

While there is a sense that Unreal Engine is propelling the industry forward in the virtual production space, the effects that AI will have on the business are still much less defined. AI, as we know it now, has a much broader use across the business, from screenwriting to VFX and distribution. As recent months have seen with the eruption of publicly available AI systems such as GPT-4 and ChatGPT, the film industry is — understandably — contemplating what the potential benefits and pitfalls of this technology could mean.

To start, there's the efficiency side of it. For some in the business, particularly on the postproduction side, there are tools starting from the bottom up that are, Jones says, "taking some of the repetitive drudgery out of some of the tasks that artists have to do."

Jones is currently using it on Disney's live action Peter Pan & Wendy, and he says it's been useful for "giving our artists better feedback".

> "One of the key characters that we are bringing to life, we are able to use machine learning to give our animators much higher resolution characters to work with.
> THEO JONES, FRAMESTORE

"One of the key characters that we are bringing to life, we are able to use machine learning to give our animators much higher resolution characters to work with," he says. "So, normally, because our animators need to work interactively, they need to make very quick decisions and what we normally have to do is create a very, very high-resolution rig for the final images, which includes skeleton, muscles, skin, fascia, all of these things and how they interact, which is computationally expensive so we can't normally get even close to that."

With the use of AI, Jones has been able to give that representation to animators so they can review their work in real time and make creative decisions quicker. "A rig that was taking 20 to 30 seconds to move one frame forward, is now taking between two and six milliseconds to do the same computation."

Indeed, it's a handy tool to enable artists to make these decisions so they can spend more time on the creative process and less time waiting for timelines to update. But Webber cautions that they would never use the AI to create any kind of final image, as the uncertainty of copyright issues is too murky.

"At the moment, AI is a bit of a black box," he says. "This is the problem with it in all areas, not just in the visual arts. You input something and you get an image or an essay, but you've got no idea what's going on in between and you can't tweak it very easily. That's where it is now, but the big change will come where what you get out is something you can then manipulate yourself a little and adjust it."

Last month, the Writers Guild of America clarified its stance on the use of AI in the writing process and says it plans to "regulate use of material produced using artificial intelligence or similar technologies". It also warned that AI could not be used as source material to "create

MBA-covered writing or rewrite MBA-covered work, and AI-generated text cannot be considered in determining writing credits."

It's an interesting conversation that continues to be had, says producer and analyst Stephen Follows, who last year teamed up with a particle physicist to secure a professional script development deal to create a feature film script entirely written by AI.

"The WGA step is encouraging," he says. "They're taking a step where they've said, 'OK, we obviously don't want writers to be replaced.'"

In his experiment, Follows says his experience showed that the only thing that defines the quality of the output was the quality of the input in the text-generated AI. With this in mind, he feels that writers would largely be the ones who would benefit the most through using AI. "They are the most likely to get the most out of it to be able to protect their area of speciality and then also to be able to avoid things that are inherent."

While he says the tech was half-decent at coming up with ideas, it was even better at giving good feedback. "Some of the best things we found were setting up important questions and getting them to answer them," he says. "That's its biggest strength. It comes up with a lot of ideas — and it comes up with a version of Alice in Wonderland quite a lot — but it's shooting for the generic middle. However, if you're coming up with so many ideas, you only need one nugget."

Additionally, Follows found that the AI was good at problem-solving. "When you get a problem that we can't think of an answer to, it can give a very concise answer that can be very convincing."

He says, "Ultimately, with this technology, our concept of IP control and copyright is going to completely break down. It will also be a detriment to people who have very formulaic jobs — people whose main job has been gatekeeping."

More recently, Miramax tapped AI tech developer Metaphysic to help de-age actors such as Tom Hanks and Robin Wright in Robert Zemeckis' upcoming movie Here. Meanwhile, neural network lab Flawless has developed software called TrueSync, which utilizes AI to change the movement of an actor's mouth for dubbing in different languages.

But the real questions on everyone's mind are, will AI really be stealing all the creative work from humans in the film business, and will we all be living in The Matrix in the coming years? Jones thinks not. "AI will definitely be used in our industry increasingly going forward. But it will be used as a tool to help the creative process in the hands of artists, as opposed to replacing them, which people kind of get worried about. In fact, it will be giving them much better tools, and that's what we're seeing at the moment."

The Road Ahead For AI-Generated Works And Copyright

By: Nathaniel Bach, Jessica Wood, Sandra Bignone

April 10, 2023 6:19 PM EDT

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On March 16 — during the same week that saw the release of OpenAI's Chat GPT-4 and Midjourney v5, and on the eve of Google LLC announcing Bard, its own large language model chatbot — the U.S. Copyright Office issued a statement of policy titled "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence."[1]

The Copyright Office's policy statement follows its recent decision partially canceling a registration for the "Zarya of the Dawn" graphic novel, and articulates principles that underlay that decision, namely, that human-authored elements combined with images generated by the Midjourney AI service were copyrightable, but the images themselves could not be protected by copyright.

Specifically, the Copyright Office has confirmed that in determining whether to register AI-created works, it will do so on a case-by-case basis depending "on the circumstances, particularly on how the AI tool operates and how it is used to create the final work."

Here are some of the key takeaways from the Copyright Office's guidance for those seeking potential registration — and those who might wish to challenge registrations — of AI-created works.

The Human Authorship Requirement

The office's policy statement is rooted in the long-standing principle that copyright protection can only be provided to material that is the product of human creativity, and that the term author excludes nonhumans. This is in line with decisions of the U.S. Supreme Court and federal appellate courts, and the office's preexisting registration guidance.

Applying the human authorship requirement to AI-generated material, "the Office will consider whether the AI contributions are the result of 'mechanical reproduction' or instead of an author's 'own original mental conception, to which [the author] gave visible form.'"

Only those works that are a product of human authorship will result in copyright protection. According to the office, determining whether material is the result of mechanical reproduction necessarily is a case-by-case inquiry, as it depends on the circumstances and particularly how the AI tool operates.

The office advises that when the traditional elements of authorship, i.e., literary, artistic or musical expression or elements of selection, arrangement, etc., are determined and executed by a machine or technology instead of the human user, the result will not be registered.

For example, under current AI technologies that receive a human prompt and produce written, visual or musical works, when a user instructs AI technology to write a poem in a specific style, it is "the technology [that decides] the rhyming pattern, the words in each line, and the structure of the text," not the user.

Those expressive elements are not the result of human authorship and thus that poem is not protected by copyright. That said, it seems the office leaves open the possibility that future versions of generative AI technologies could give users sufficient creative control over the output to qualify for protection.

Further, there are other situations now where contributions by a human author to AI-generated material may be sufficient for copyright protection.

The office provides that when a human author "select[s] or arrange[s] AI-generated material in a sufficiently creative way" or when an artist alters AI-generated material to such a degree that the modifications meet the standard for copyright protection, then the independent, human-authored aspects of the work will be copyrightable.

Key Takeaways for Applicants Whose Works Were Created Using AI

Because AI-generated content without sufficient human authorship will not be protected by copyright, applicants should be aware that expressive works created using currently existing AI tools likely will not be protectable by copyright, but that as technologies advance, creators may be able to assert sufficient human control for their content to qualify for protection.

The good news is that the use of generative AI is not a complete barrier to registration for a work that comprises both AI-created elements and human contributions. In this case, applicants may seek copyright protection over the human-created parts of their work including, but not limited to, the selection and arrangement of nonprotectable elements.

Applicants must disclose, or if applicable, exclude, AI-generated content in a copyright application for the office to make a determination on registration. Accordingly, applicants with a pending application or registration containing AI-generated material should take active steps to correct their application or registration to avoid running the risk of losing their registration.

While the office will surely be burdened by questions relating to AI-created works, applicants should not assume that they can obtain and keep a valid registration by providing incomplete or misleading information on an application.

As the Zarya decision makes clear, if it comes to the office's attention that a registration may not have been validly obtained, the office may revisit that decision on its own.

Valid copyright registration is a prerequisite to filing a lawsuit for copyright infringement. Therefore, potential plaintiffs should consider whether they are seeking to enforce portions of works that are (1) registered, and (2) for which any AI assistance was appropriately disclosed.

Likewise, defendants should consider whether there is a possibility that the plaintiff's work is a product of insufficient human contribution such that the registration is subject to challenge.

What's Next From the Copyright Office

In its statement of policy, the office stated that it has launched an agencywide initiative to delve into a wide range of AI-related issues and that it intends to publish a notice of inquiry later this year seeking public input on additional legal and policy topics, including how the law should apply to the use of copyrighted works in AI training and the resulting treatment of outputs.

Surely, content creators, litigants, courts and others facing immediate issues involving AI-generated

expressive works would appreciate the office's further guidance, but given how quickly the AI technologies seem to be proliferating and advancing, and that lawsuits involving training sets and other input- and output-based infringement claims are already underway, such guidance may lag behind.

The office has also created a new website landing page for its AI efforts, https://copyright.gov/ai/, where it is publicizing upcoming public listening sessions from April-May on literary works, visual works, audiovisual works, musical works and sound recordings.

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[1] 37 C.F.R. 16,190 (2023).

How the WGA Decided to Harness — but Not Ban — Artificial Intelligence

Inside the working group talks that formed the guild's proposals to tame the AI threat

By Gene Maddaus
May 23, 2023 7:48am PT

Last summer, Van Robichaux ran for the board of directors of the Writers Guild of America West. Out of 17 candidates, he was the only one who raised a concern about artificial intelligence in his campaign statement.

“As far as I know, this issue is not on the radar of anyone else running for the board and while I might sound like a paranoid lunatic talking about it today, in 10 years I’m confident you’ll be glad I brought it up now,” he wrote.

He did not win.

AI has since become the hottest topic in the creative economy, spurred by the release of models like Stable Diffusion last August and ChatGPT in November. Across disciplines – graphic design, animation, acting, music, writing – artists are terrified of being replaced by robots.

“I think they’re right to be concerned,” said Bruce Schneier, a lecturer in cybersecurity at the Harvard Kennedy School of Government. “Things are changing so fast, that things that were true three months ago aren’t true today.”

AI has also become a central issue in the writers strike, displacing more familiar fears like the rise of streaming and the decline of residuals. Writers on the picket lines fear that movie studios will use AI to write scripts – either in whole or in part – diminishing the role of writers or even making the job obsolete.

“The corporations will push us all into extinction if they can,” said Chap Taylor, a screenwriter and professor at New York University. The AI issue “is life and death,” he said. “That’s the one that turns us into the makers of buggy whips.”

Though he did not win his election, Robichaux was partly responsible for pushing AI into the center of the conversation. After his defeat, he was approached and invited to join the guild’s AI working group. Many of the writers in the group worked on sci-fi shows and had a deep interest in technology and computer science.

Over several months of Zoom meetings, they crafted what would become the WGA proposals on artificial intelligence – the framework of regulations that would be presented to the studios during collective bargaining.

Those proposals began with an appreciation for both the threat and possibilities of AI. They did not seek to outlaw it. Instead, they focused on protecting screenwriters from economic harm, while allowing them the freedom to use AI if they want to. The framework was fundamentally optimistic, holding that AI could be both constrained and harnessed for good.

“I don’t think you can ban a tool,” said John Rogers, another member of the group. “What we’re saying is, ‘Use it as a tool.’”

What they were trying to do was ambitious. They were trying to coax multibillion-dollar corporations to accept their vision of the future, and to swear off competing visions. Their only leverage was the threat of a strike.

Getting to yes would also take more than just leverage. It would take a healthy amount of communication, sophistication, and trust. But after weeks of talks in March and April, the AI conversation dissolved in mutual suspicion and misunderstanding.

When they called a strike, WGA leaders said that the studios refused to rule out using AI in the future. The Alliance of Motion Picture and Television Producers, the organization that bargains on the studios’ behalf, has not denied that.

But in their proposal, the writers aren’t ruling it out either.

At this stage, it’s not clear whether AI will be helpful or legally permissible in screenwriting. But if it passes those tests, it’s hard to imagine it won’t be used. The real question may be, “On whose terms?”

The AI working group was made up of seven or eight people and led by Deric Hughes, a WGA West board member who has written on shows such as “Quantum Leap,” “Arrow,” and “The Flash.” Another member of the group, John Lopez, also writes on sci-fi shows, and among his specialties is dreaming up the mysterious technologies wielded by alien civilizations.

They talked on email chains and traded text messages about the latest developments. They also experimented extensively with AI models and began gaming out scenarios. One thing they determined early on was that in its current form, AI isn’t good at writing screenplays.

“It’s good at summarizing things,” said Robichaux, whose credits include “Brooklyn Nine-Nine.” “It’s good at trying to kind of complete lists of things. It’s not so great at the kind of work we do.”

Rogers agreed.

“The capabilities are wildly overblown,” he said. “A lot of this hype is because Silicon Valley needs the next big thing and they don’t have one. So this is it.”

Lopez spent hours on ChatGPT, trying to get a better grasp of the threat. He fed it prompts over and over, trying to generate something worthwhile.

“It took almost as much work as writing it from scratch myself,” he said. “It did make me freak out a little bit less.”

Aside from functional problems, there are also legal hurdles. AI models train on massive troves of published material, much of which is protected by copyright. Lopez said a friend referred to AI systems as “plagiarism machines.”

The developers of these models have argued that the output is “fair use.” But many in the creative world are starting to raise alarms, and file lawsuits, about the misuse of protected material.

In part for that reason, Robichaux said he doubts any studio would bother trying to use AI to replace writers during the strike.

“I have worked with all of the studios in town,” he said. “There is no chance the legal department is letting them actually use any of these AI models that are trained on other stuff… These people won’t let you wear a Nike shirt. I don’t buy for a second that there’s any sort of meaningful computer scabbing going on. I just don’t buy that threat.”

Some members of the group were surprised, in fact, that the studios have not already filed lawsuits to protect their own IP from being used to train AI systems.

The group had mixed views about whether the technology will ever be good enough to replace writers.

Lopez worried it could become more of a threat over time, but he is not quite convinced that it will make writers obsolete.

“I ultimately don’t think there will be a shortcut to the creative process,” he said. “You’re still going to have to figure out what you want to say.”

Given the uncertainty, though, Rogers argued it’s best to put guardrails in place now.

“Should you be worried? Absolutely,” he said. “They’re going to try to use AI to replace writers. Will the shows be good? No. Will that stop them? No.”

Still, the group did not want to ban AI outright. They also did not want to enact a moratorium, which might give everyone breathing space to figure out how to approach the subject.

“Banning it puts us out of the game,” Rogers said. “There’s a lot of hot, dumb money behind this. It’s better to channel it than get run over by it.”

They feared that if they proposed a ban, they would be caricatured as anti-technology. And they did not trust the studios to adhere to a moratorium. Instead, they decided it would be better to assert their interests now, rather than trying to prevent an inevitable future.

“It feels like that was a road to extinction,” Lopez said. “Silicon Valley is going to spend a lot on this. It felt like saying, ‘Let’s ban the internet’ when AOL was starting up.”

In Lopez’s words, the goal was to make sure writers are “not getting crushed by the wave, but figuring out how to surf it and ride it.”

Some of them could also foresee a time when AI is actually useful, in limited ways, to screenwriters.

Lopez said it might be good for condensing a long chunk of text. Robichaux likened it to tools that already exist in Final Draft, which can fill in a character’s name when the writer types the first letter.

“An AI system would be able to, when I hit enter, without hitting ‘C’ it would type ‘Charlie,’” he said. “Now I’m being more productive. I’m using AI, but not in the way where it’s generating the idea for me. There are ways to create new useful tools for writing with this technology that aren’t undermining our process.”

The cases they imagined are similar to the way visual effects artists already use AI — as a tool, but with the creative person still firmly in charge.

Lopez said that for him, the jury is still out as to how useful AI could turn out to be. He compared it to the possibilities created by splitting the atom.

“It’s powerful and dangerous,” he said. “There could be incredible good and incredible harm.”

The AI working group ultimately developed three basic proposals, Robichaux said.

First, AI-generated material would not be considered “literary material” or “source material” under the union’s contract. That would prevent studios from paying writers less, or depriving them of credit, if they rely on AI material.

Second, they said that AI should not be allowed to write on its own. Studios would be forbidden from having AI programs create scripts independently, or having them rewrite scripts submitted by a human writer.

And third, a studio’s AI program would be barred from training on WGA members’ work. If the studios rejected that, guild members might agree to allow it in exchange for a license fee.

Heading into negotiations, the top WGA leaders did not see AI as one of their main issues. Instead, they planned to focus on TV staffing and other core economic concerns. The only public hint that AI would even be mentioned in the talks came on Feb. 27, when the guild revealed a long list of agenda items, including a proposal to “regulate” the use of AI technology – not “ban” it.

The regulatory approach was consistent with how negotiating committee members were thinking about the issue. “Scriptnotes” co-host John August, who is on the committee, was quoted in The Hollywood Reporter in January saying that AI was all but inevitable.

“There certainly is no putting the genie back in the bottle,” he said. “It’s going to be here, and we need to be thinking about how to use it in ways that advance art and don’t limit us.”

August was among the writers who had taken an early interest in AI. He had even invested in Sudowrite, an AI fiction-writing platform. (In a blog post on Friday, August explained how he got involved with the company, and said that he has not made “a cent” from the investment. His picture and endorsement were also removed from the Sudowrite website.)

The AI group presented its working paper to the WGA negotiating committee. Chris Keyser, co-chair of the committee, said in an interview that it received input from multiple sources as it formulated the proposals that would be submitted to the AMPTP. He also said that the working group “was not an official organ of the negotiating committee.”

The proposal submitted to the AMPTP consisted of only one item, according to a studio executive who requested anonymity to speak candidly about negotiations. It was the first item developed by the working group: that AI-generated material would not be considered literary or source material.

It was definitely not a ban. In fact, it contained no limit at all on how AI could be used.

That version – a single sentence – leaked to Variety, which reported that it appeared the WGA wanted to allow screenwriters to use AI as a tool, provided they didn’t lose money or credit because of it.

The story generated both disbelief and outrage. At a time when creative professionals were waking up to the threat of AI, the WGA appeared to be fine with it, so long as it didn’t affect members’ income.

“The Guild doesn’t fear AI as much as it fears not getting paid,” screenwriter Paul Schrader wrote on Facebook. “This I think is the WGA position: If a WGA member employs AI, he/she should be paid as a writer. If a producer uses AI to create a script, they must find a WGA writer to pay.”

As backlash mounted, the guild rolled out a new AI policy on Twitter. The tweets said that the guild’s position was that AI could not be “used” as source material, nor could it be used to “generate” literary material. The tweets also stated that AI material “has no role in guild-covered work.” That left the impression that the guild was trying to ban it.

The topic was not discussed again in the negotiating room until weeks later. At the beginning of April, the negotiators took a two-week break while the WGA obtained a strike authorization vote. When they returned the week of April 17, the writers brought a revised proposal, the executive said.

Despite the tweets, it was still not a ban.

The new proposal stated that AI-generated material "shall not be considered source material or literary material on any project covered by this or any prior Basic Agreement." In other words, AI material could be used — it just would not count against writers in determining credit and pay. The WGA also proposed that the studios could not train their AI programs on guild members' work.

Negotiating committee members took turns discussing other issues in the room that week. But when it came time to present on AI, the task was given to Charles Slocum, a longtime member of the WGA staff. Without going into details of the proposal, Slocum warned about the uncertain copyright landscape surrounding AI, and seemed to suggest that AI was too risky to use at all.

Toward the end of his presentation, he invoked "Mrs. Davis," a Peacock show that pits a nun against an all-powerful AI system. "'Mrs. Davis' was written by humans," he concluded.

The studio lawyers did not know quite what to make of that. The tweets said one thing. The proposals said something else. And instead of trying to clarify what writers want, Slocum was talking about copyright, which is primarily a studio concern.

"They didn't want to admit out loud that they want to use it," the studio executive said.

Keyser did not dispute that account, except to say that the proposal did not change over the course of bargaining. He also said he did not recall the precise language of the proposal. Otherwise, he said he would not discuss confidential negotiations.

"Whatever happened in the negotiating room was subject to a press blackout," he said. "If you heard that, it was from somebody violating the agreement. I'm not going to do that."

Slocum declined to comment.

The AMPTP lawyers did not come to the table with their own AI proposal. After Slocum's speech, there was little in the way of engagement on the issue.

The AMPTP rejected the guild's proposals, but offered a "side letter" that would underscore existing contract language specifying that a writer must be a person. The AMPTP also offered to hold meetings, at least annually, to discuss advances in AI technology.

According to the WGA, AMPTP president Carol Lombardini also said that the studios do not want to rule out using AI in the future. Keyser and negotiations co-chair David Goodman have said that remark was alarming.

AI "was always on our radar," Keyser said. "It has risen in importance for us in large part because of the studios' response to what we thought was going to be a simple agreement to restrict it for our and their benefit. We need to be more worried than we thought."

Appearing before a crowd of 1,800 writers at the Shrine Auditorium on May 3, Keyser warned of a future in which hundreds of shows could work with one writer and a machine. That fear has struck a chord on the picket lines.

“AI has become my number one issue,” said TV writer Chris Duffy, who was marching outside Disney headquarters in Burbank. “I think it’s an existential one. The fact that they refused to negotiate made me be like, ‘Oh, you really want to use it.’”

Kelly Wheeler, also a TV writer, said she too is “most scared about AI.”

“I love writing and I love being around writers,” she said. “And the idea that that creative energy can just be stripped away from television, and instead have a robot do our job – or attempt to – is terrifying.”

From being an afterthought, AI has become perhaps the strike’s most potent issue.

“The more this goes on, the more this becomes a strike over AI issues,” said Michael Colton, co-creator and executive producer of the ABC sitcom “Home Economics.” “I don’t think people are feeling like tomorrow AI is going to write a perfect sitcom script. But the fear is that studios will use AI to turn out a crappy first draft, and then turn it over to writers who they hire for a few days or a week to turn it into something good. And they won’t pay them as if it’s an original script. That is the fear.”

Howard Rodman, a past president of the WGA West, recognizes the importance of the guild addressing this amorphous issue.

“When you are out on strike, it’s all about the hopes of the membership and the fears of the membership,” said Howard Rodman, a past president of WGA West. “This certainly speaks to the fears.”

In the interview, however, Keyser acknowledged that the committee is not trying to “ban” AI.

“There are all kinds of uses that AI might be put to,” he said. “Our job is to protect writers from the ways in which AI will undermine the writing process… That’s what we’ve done and we stand by that.”

Robichaux put it much the same way.

“It sometimes get reported as, ‘The WGA is asking studios to not use AI,’” he said. “That’s not the current ask. The current ask is that you cannot use AI to undermine our contract and stop us from getting protections that would otherwise be guaranteed.”

The members of the guild’s AI working group were not in the negotiating room, and were not privy to what happened there.

But they were dissatisfied with the AMPTP's response. Some interpreted the offer of annual meetings as a stalling tactic that would allow the studios to get a head start on using the technology to undermine writers' economic standing.

"Whenever a company says, 'Absolutely not, we're not discussing it,' that means there's a roomful of humans trying to figure out how to do it," Rogers said. "The AI line is a hard line for us. At some point they will have to come up with a counter."

Robichaux had not heard about the side letter. But when told of it, he said it would not be sufficient to allay writers' fears.

"The concern would be that this is a way for them to say one thing, but leave themselves the wiggle room to do another thing," he said.

The WGA proposal would give writers a lot of flexibility to use AI as a tool. It contains no language limiting the amount of AI material a writer could incorporate. Any limits would have to come from copyright law, which is unsettled on the subject. In March, the U.S. Copyright Office issued policy guidance, saying that material generated purely by a computer — without any human authorship — is not eligible for copyright protection.

But at the same time, the office stated that if a person selects or arranges AI-generated material, that could still be eligible. A writer could potentially use AI to brainstorm, create lists of character names, come up with plots, or even churn out rough drafts, and still qualify for copyright protection so long as the writer remained in control of the finished product.

Hollywood writers must sign certificates of authorship, in which they represent that the work they are submitting is original and copyrightable. If AI becomes a significant factor in screenwriting, it might be important to require disclosure of how, or how much, AI material was used.

The studios have been monitoring the copyright issues around AI for years, especially with regard to visual effects and post-production. The Motion Picture Association, which lobbies on their behalf, said at a U.S. Copyright Office hearing last week that they see "great promise in AI."

"The studios see it as a tool," said Ben Sheffner, associate general counsel of the MPA, in an interview. "They do not view it as a way to replace humans. It's a tool, and it's going to make the filmmaking process better and make better experiences for audiences."

Sheffner made clear in his testimony that the studios are wary of being hemmed in by AI regulation. He argued that courts and regulators should "not jump to early, definitive conclusions" based on limited experience.

The studios may be just as reluctant to accept constraints from the WGA, which could be hard to change in future rounds of bargaining. Despite that, Robichaux said he expected that the WGA and the companies can come to a reasonable agreement.

Lopez agreed.

“It’d be great if the studios would say, ‘Hey, we do need rules,'” Lopez said. “Regulations exist for a reason. And it’s a hard job. It requires discussion, consensus and consent. The guild wants to do that. The AMPTP is not an active participant in that offer.”

Jennifer Maas and Cynthia Littleton contributed to this story.

IATSE Creates Commission to Study Artificial Intelligence

The crew union wants to make sure the industry's embrace of the technology "prioritizes the interests and well-being of our members and all entertainment workers," says international president Matthew Loeb.

By Katie Kilkenny

May 11, 2023 10:50AM

As the technology rapidly develops, crew union IATSE is launching a commission to study the evolution of artificial intelligence and its effect on the Hollywood workforce.

The group, comprised of union members and representatives as well as academics and tech workers, will be tasked with determining the "challenges and opportunities" that AI poses to the union, international president Matthew Loeb announced on Thursday. The commission will begin convening immediately and will present on its work at the union's 2023 general executive board midsummer meeting, beginning July 31.

"As AI continues to evolve and proliferate, it is critical that our union is at the forefront of understanding its impact on our members and industry," Loeb said in a statement. "Just as when silent films became talkies and as the big screen went from black-and-white to full color, the IATSE Commission on Artificial Intelligence is part of our commitment to embracing new technologies." He added that the commission will seek to "equip our members with the skills to navigate this technological advancement" as well as make sure that the industry's embrace of the technology "prioritizes the interests and well-being of our members and all entertainment workers."

Artificial intelligence is already being used at multiple levels of the industry, including in work covered under IATSE contracts, such as in editing and operations on animated projects. The technology is being increasingly used in visual effects work, a largely non-union area that IATSE is currently endeavoring to organize. The rapid development of certain generative AI tools since late last year, however, has accelerated conversations in Hollywood about how to incorporate the technology into industry workflows — and also how it might pose a threat to certain roles in Hollywood.

AI has become a major sticking point in the Writers Guild of America's ongoing negotiations with the Alliance of Motion Picture and Television Producers, the group that negotiates on behalf of studios and streamers with all industry labor groups, including IATSE. The WGA, which is now on strike over this impasse and others, proposed that AI couldn't write or rewrite what is considered "literary material" under the contract and couldn't be used as original work that human writers must then adapt. The WGA claims that the AMPTP countered by offering an annual meeting to discuss technology; in their own statement, the AMPTP says the technology "raises hard, important creative and legal questions for everybody" and "requires a lot more discussion."

That exchange has alarmed members of separate unions in the industry, with multiple members of the Directors Guild of America telling The Hollywood Reporter that they are hoping their union will address the issue in its current contract negotiations.

With its commission, IATSE wants to "consider how contract provisions, legislation, and training programs can be adapted to ensure the fruits of increased productivity through AI are shared equitably among all stakeholders," the group said in its statement. IATSE's current Basic Agreement covering the union's West Coast Locals expires July 31, 2024.

Hollywood's A.I. Art Heist Problem

By Baratunde Thurston
May 14, 2023

With the Hollywood writers' strike showing no signs of immediate resolution, I've found myself increasingly concerned about the rights and roles of artists in this emerging world of generative artificial intelligence tools. Namely, how can we build and deploy these tools with much more robust systems of consent, control, and compensation for human creators? Despite calls for a pause, signed by 30,000 (and growing) of the world's leading business leaders and academics, the industry is not slowing down.

In fact, the opposite seems to be true. Consider Anthropic, one of the leading large language model-based companies, which recently boasted that the "context window" in its model can handle twice as much as its well-known rival, OpenAI. The result? "Claude" (why are we giving these things human names?) can ingest and process a novel in seconds and can maintain the thread of a chat conversation for much longer without "hallucinating." This will make it much easier to interrogate large sets of documents, or analyze and summarize data sets and long texts. It also means these systems can increase the size of their outputs, so they can write novel-length texts, too. A machine that can devour or even generate a full novel in mere minutes. Is that impressive, terrifying, or utterly silly? The answer is yes.

Meanwhile, Google increasingly wants in on the game. At its I/O developer conference last week, the company announced long-expected deeper integration of A.I. into its Google Workspace productivity suite via Duet AI (similar to Microsoft's Co-Pilot AI for Office apps). A.I.-generated music and search are on the horizon, with their chatbot, Bard, now fully public. I gave Bard a little spin, testing it on its knowledge of me. It got the broad strokes right, but completely invented "facts" about me that were utterly untrue—or maybe the bot just believes deeply in the act of manifesting, and hopes that by declaring that I'm the co-founder of organizations I didn't found, a writer for publications I don't write for, and host of TV shows that don't exist, that it might inspire me to do those things!

In the past few months, we've witnessed radically new ways to make music, words, and images that require exponentially less human effort compared to this time only one year ago. We've heard a lot from the machines themselves, as well as from the people programming them and experimenting with their capabilities. But now, the chorus of human artists who will be impacted by these changing norms is growing louder, and they want to draw a clear line in the shifting sands as these technologies settle into our reality, not only upending the creative practices but livelihoods in the process.
A.I. usage is one of the key sticking points in negotiations between the striking Writers Guild of America (disclosure: I'm a member of WGA East) and the Alliance of Motion Picture and Television Producers. Writer, show creator, and WGA Negotiating Committee member Adam Conover shared a summary of the union's proposals, and the AMPTP's responses. The union demanded limits on how artificial intelligence could be used, saying, "A.I. can't write or rewrite

literary material; can't be used as source material; and MBA-covered material can't be used to train A.I." According to the union, the AMPTP's counter was to offer "annual meetings to discuss advancements in technology." ("MBA" is short for "Minimum Basic Agreement" and refers to the collective bargaining agreement that covers most work done by WGA members). We haven't heard about many instances of A.I. displacing human scriptwriters yet, but it's clearly increasingly possible, so I'm glad the Guild is trying to get a handle on it sooner than later. Given how quickly we've gone from spellcheck and autocomplete to self-writing emails, I don't think an annual "meeting" to discuss vague advancements in technology is enough.

Meanwhile, visual artists are also trying to get ahead of the A.I. tidal wave. Artist Molly Crabapple is a friend who I've cited in these pages before about her opposition to A.I. art, and even the use of the word "art" to define images created by generative systems. She and the Center for Artistic Inquiry and Reporting published an open letter signed by over 3,000 artists, actors, writers, and academics calling for publishers to not use AL-generated art in their publications. Imagine newspaper cartoons, book and magazine cover art, those human-made portraits certain media outlets use to portray interview subjects, all replaced by images created by a system like DALL-e or Midjourney. The letter isn't opposed to A.I. illustrations simply for the sake of maintaining a nostalgic creative enterprise: The signatories make a twofold economic and justice-focused argument to preserve the livelihoods of artists, striking at the very foundation of these oft-dubbed "foundation models."

The letter says what the founders and funders of technology companies generally don't: "A.1.-art generators are trained on enormous datasets, containing millions upon millions of copyrighted images, harvested without their creator's knowledge, let alone compensation or consent. This is effectively the greatest art heist in history. Perpetrated by respectable-seeming corporate entities backed by Silicon Valley venture capital. It's daylight robbery." To put a finer point on it, the letter goes on to describe A.I. art as "vampirical, feasting on past generations of artwork even as it sucks the lifeblood from living artists." That's good human writing right there.

While I witness and sometimes join this opposition, I'm also experimenting with, and thinking about, positive use cases for A.I. We are in the chaotic early days of a technology that will fundamentally alter how we tell our stories. Now is the time to get serious about organizing our laws, economies, and norms to provide something that feels like fairness and a life of opportunity for more than the handful of folks making and financing these tools. In that spirit, here are a few thoughts-in-progress about where this all goes.

First, I'm skeptical of the overly-simplified, robot-for-human substitution narrative. Of course, there will be businesses that hire fewer humans to write words, compose sounds, or draw images because they can command a computer system to do it instead. But as with all forms of creativity, technology will enable existing creators to create more, or differently, than before. Here's an overly simple example: I'm a writer. I can write a lot faster with the keyboard I'm using than with my hand. Not only that, I can physically move ideas around, change words and punctuation, all in seconds. The simple technology of word-processing probably displaced the writer or note-taker hired to note things by hand. But most of us just learned to type and kept the writing going. And as these technologies lower the barrier to entry for creative expression, it seems likely that more people will engage in media-making than ever before. Think about how

many of us became “photographers” once a camera was built into our phones. A similar expansion, in ways that are now hard or impossible to predict, will happen because of generative A.I.

Second, what we create may not be art, but it will undeniably be media—and I believe the volume and ease of output will touch almost every corner of culture. Writing, for example, was once a sacred art, limited to scribes living in monasteries who painstakingly crafted complex characters in an attempt to memorialize ideas. Now, children will be able to generate scripts for their bespoke school plays because they can do so cheaply. We’re also entering a world in which music, already overrun by digital, nearly-free production and distribution, is in even greater supply. Hotels might fill their rooms with custom (and shitty) A.I. “paintings” on the wall.

Third, it’s going to be increasingly difficult to identify where the digital tool ends and human creativity begins. When a painter applies paint to canvas, there’s no disputing where the creative act came into play, but when a D.J. builds a set using pre-recorded tracks, they essentially function as a curator of sounds made by others, and they blur the line between technology and human creativity. Generative A.I. will take this to the next level. What happens when the human doesn’t even need to do the work of finding the existing material to curate? What does it mean when the paintbrush makes its own strokes, and the human is merely there to request, summon, or prompt the technology?

Of course, this distinction is slippery, and things get philosophical pretty quickly. Preparing a meal once meant growing vegetables, processing animals, and building a fire; now it might mean buying a frozen meal and placing it in the microwave. In the future we might get those Star Trek replicators to synthesize a meal by rearranging subatomic particles. In all these cases we’ll eat, but the meaning of “chef” or “cook” changes; and we’re probably moving to a place where the meaning of “artist” is going to change. But beyond the tools, a vital piece of making art is the imagination of the artist—the creative vision. And this is where generative A.I. seems to break with the history of steadily improving tools, because these new tools also contain content.

Fourth, there needs to be clarification around source material, and where the underlying ability of these generative tools comes from, in order to manage the confusion around representation once their creations are out in the world. As the CAIR letter makes clear (as well as several lawsuits), these generative systems have hoovered up a tremendous amount of “training data”—which is coded language for saying they’ve ingested and copied from vast troves of existing work and intellectual property. I’m sure OpenAI didn’t get signed release forms from all the writers and artists that inform its model. They will argue it’s “fair use,” but in practice, the program can unfairly commercialize someone else’s work. A prompter like me can say, “make me an image of Joe Biden in the style of Molly Crabapple,” without me actually having to learn her style at all, and while Molly is still very much alive and might never agree to make that work herself. What I might intend as flattery can also be exploitation.

As my friend Dr. A.D. Carson, a professor of hip hop at the University of Virginia, told me recently about these tools, “It perfects the trend of making Black art without Black bodies.” Basically, what Elvis did to Black music can now be accomplished at scale. You can “generate” hip hop without all the fuss of engaging with humans and history, and with the lived experience

of humans born of that history. It's possible to make the A.I.-generated hip hop sound Black by using the existing voices of real Black artists without their consent, harkening back to the old days of shady record deals that denied Black artists rights and ownership over their words or voices. And those days of course harken back even further, to an era when Black people lacked rights over their very selves. We are going backwards even as we go forwards.

To meet these challenges, a new system of regulation is required to manage consent, offer control, and provide compensation to humans who unwittingly provided the raw material for this new form of synthetic content. In other words, because these generative systems only work by ingesting gobs and gobs of preexisting media and art, largely without compensating or acknowledging those creators, any art generated by these systems can be seen as collectively produced. So we'll need collective compensation. There's something disturbing about asking a writer not to write, but to instead rewrite or punch up a "first draft" generated by an A.I.—which was only able to make that first draft by regurgitating the work of human writers. It reminds me of feeding bacon to a pig. If your book or TV episode is an ingredient in the large language model being used to replace you, then you are due for something like, wait for it… residuals, similar in spirit to the residuals you would have gotten if someone resold or re-monetized a content catalog you'd contributed to.

As always, there's more on my mind than I have space for in a single dispatch. You could say my context window has reached its limit for now. But I think these emergent problems should encourage us to think actively about what parts of being human we value. Sam Altman at OpenAI has been open about the company's desire to create machines that are more human, an "artificial general intelligence," capable of learning and accomplishing any intellectual human task. Yes, the driving force behind A.I.'s progress is an economic system that values output, efficiency, and profit. There's much more to the human experience than these. But as we interact with these technologies, born of that economic impetus, and they become more pervasive throughout our lives, they'll make us more like machines, rather than the other way around.

Goteborg's Nostradamus Report Predicts Wholesale Industry Restructure Within 5 Years Due To AI Integration — Cannes

By Zac Ntim
International Reporter

May 22, 2023 4:18am

Artificial Intelligence will be fully integrated into the production process within five years, offering new creative opportunities while endangering the future of creative jobs, according to the latest edition of the Goteborg Film Festival's Nostradamus report.

The tenth annual report, traditionally released at the Swedish festival in January, launched for the second time today in Cannes. The report charts the near future of the audiovisual industry through interviews with experts and analysis by author Johanna Koljonen. This year's report is titled *Nostradamus Report: Everything Changing All At Once*.

The headline finding presented in the report is the speed with which experts expect AI to be fully integrated into the film and TV production process. The report predicts that full integration will occur within 3-5 years and will: "unlock resources and creative capacity." However, for the industry as a whole, "jobs will start disappearing, and most of them will change."

The report also delves into the evolving nature of TV as a streaming platform and examines the industry's challenges in remaining attractive to young audiences.

"Cutting content investment targeted at Gen Z is a very short-sighted strategy for financial as well as ethical reasons, and because a disinterest among young people for their local scripted drama is a threat to the talent pipeline," the report reads.

"Our lack of diversity and abysmal work environment makes us unattractive, and the traditional allure of working adjacent to glamour is fading."

Key findings from the report include:

- Within the next 3–5 years, AI support will be integrated into all fully or partially digital workflows, supercharging Virtual Production in particular. For individuals and productions, the technologies unlock resources and creative capacity. For the industry as a whole it means jobs will start disappearing and most of them will change.
- In the next 3–5 years, the economy will place a damper on the film and TV sectors. At the same time, new production technologies are taking off, bringing a new sense of excitement and dramatic efficiency gains to the sector. The wider context is one of conflict, famine, extreme weather, fundamentally transformed economies, and existential threats.

- Streamers are correcting away from debt-funded growth to more normal expectations of profitability, forcing changes on drama content, formats, and budgets. The number of productions will decrease. Financial pressures have created an atmosphere of caution that drives series content towards the middle of the road.
- The creator economy increasingly overlaps with the film & TV industry. Content that would once have existed only on television is expanding organically onto a range of video platforms. Existing in these environments is a necessity, both because of the business opportunities inherent in the audience, and because we must learn from their professional creators
- The business of movie-making will be conceptually separated from the business of cinemas. Most production companies that survive five years hence will have truly diverse output—not platform agnostic, but platform harmonic. A range of formats, business models, and distribution paths will flourish with audiences, and therefore relevance, at the centre.

The experts interviewed this year include Sened Dhab, VP Young Adult Drama, France Télévisions; Rikke Ennis, CEO REinvent Studios; Max Malka, Head of Scripted, EndemolShine Finland; Neil Peplow, Director, London Film School; Alex Pumfrey, CEO, Film and TV Charity; Sten-Kristian Saluveer, Founder and CEO at Storytek Innovation and Venture Studio; Danna Stern, Managing Director, In Transit Production, and Will Richmond, Editor, and Publisher, VideoNuze.

The report presentation at Cannes was followed by a panel feature Ennis, Peplow, and Saluveer.

The 2024 Goteborg runs January 26 — February 4, 2024.

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