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Celebrity/Employee Confidentiality Agreements: How to Make Them Work

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ABSTRACT

It has come to light in recent years that confidentiality agreements between celebrities and their employees do not effectively protect celebrity privacy. Even celebrities as rich and powerful as David and Victoria Beckham and Michael Jackson have been unable to use confidentiality agreements to stop the publication

of embarrassing information. This essay first examines the problem and highlights the danger of focusing on privacy as the controlling interest motivating confidentiality agreements. This conceptual framework is applied to the confidentiality agreements drafted by representatives for David Beckham, Tom Cruise, Michael Jackson and Aaron Spelling. Mechanisms that might discourage employees from breaching confidentiality agreements, or to contain it should a breach occur, are discussed.

KEYWORDS

Confidentiality – Privacy - Confidentiality Agreements – Drafting

INTRODUCTION

It is a popular truism that with great power comes grea responsibility. In the world of sports and entertainment is equally accepted that with great celebrity comes the likelihood of great scandal. Sport and entertainment are businesses, and business solutions have been applied t prevent the release of scandalous or potentially damagi information. Confidentiality and non-competition agreem are standard in virtually every business transaction. The particularly effective as between businesses and their employees (Radack, 1994; Pollick, 2006)

However, unlike other business transactions, confidentia clauses have not been effective vis-à-vis celebrities and employees. Footballer David Beckham' s nanny signed fo confidentiality agreements, but still revealed – with a ju blessing – salacious details of the Beckhams' private life notorious English tabloid,*The News of the World.* The late Hollywood producer Aaron Spelling's personal aide atter to sue him for sexual harassment, and the Spellings the countersued her for violating a confidentiality agreemen the details of which have now become public record (*Ric v. Spelling* (2006) Los Angeles County Superior Court, C No. BC 346 448; (2005) Los Angeles County Superior Co Case No. BC 343 518).

Even the secretive and thoroughly lawyered Michael Jac could not rely on a confidentiality agreement to prevent former wife, Deborah Rowe, from revealing details abou private life (*Jackson v. Jackson*, (1999) Los Angeles Supe Court Case No. BD 310 267). Rowe was less Jackson's w than she was his employee. She was essentially hired t provide Jackson with children and, once her work was d her employment was terminated and any details of Jack life she might have learned while in close proximity with King of Pop were subject to a confidentiality agreement.

Why is this happening? Why are confidentiality agreeme seemingly breached at will and with court approval? Is t any way to protect celebrities from employees who atte to profit at their expense?

The answer to the final question is yes, there is a soluti
But to understand the solution, it is necessary to first
understand the subtle nature of the problem. It is impor
to realize that confidentiality agreements used within th
sports and entertainment industries can be, and have b
successfully breached because those responsible for dra
confidentiality agreements make fundamental *conceptua*
errors that lead to potentially devastating *drafting* error
essay outlines a conceptual frameworkfor confidentiality
agreements and applies it to actual celebrity confidentia
agreements. In light of the offered analysis, this essay
some suggestions for the development of effective draft
techniques.

CONCEPTUAL FRAMEWORK

Before an attorney, an agent or anyone *hubristic* enoug
believe they can draft a confidentiality agreement for a
celebrity puts pen to paper or fingers to keyboard, it is
important for the drafter to know why some agreement
effective and others fail. This knowledge is achieved by
understanding the nature of the relationship between,
one hand, the characterization of the interests the
agreement is *meant* to protect, and on the other, recogn
the kinds of interests courts are *likely* to protect versus
that courts are *not* likely to protect.

Contracts are the natural product and fundamentally
necessary building blocks of any endeavours concerned
business and commerce. It is fair to observe that the wo
increasingly business oriented, and business relations a
regulated and defined by contracts. In relation to the
Western perspective, contract law has been a part of
Western Civilization for a very long time. The Emperor
Justinian's Law Books – dating from the 6th Century A.D
show that the Romans had a long familiarity with contra
law. Present day Anglo-American contract law – which is
spreading across the globe through such institutions as
World Trade Organization and world-spanning treaties s
as the Agreement on Trade-Related Aspects of Intellect
Property Rights (aka TRIPs) has its roots in 12th Century
England (*Vynior's Case* (1609) 77 Eng. Rep. 597 (K.B)).

Confidentiality and non-competition agreements use
standard, contractual devices to protect an employer' s
financial interests (such as trade secrets, client lists,
intellectual property, the list is endless) from being
taken/misappropriated by an employee or former emplo
for their own, or a successor-employer's profit (Radack,
1994). ' Misappropriation' is the conceptual foundation
underlying virtually all non-celebrity confidentiality
agreements, with such agreements designed to preven
minor party from misappropriating something of immedi
ultimate value that the major party wants to keep for its
(Finch, n.d).

Unlike contract law, privacy law is comparatively new. Pr
as a right is a modern idea, often implied from other rigl
and, at least in the United States, created by judicial act
The very notion that people have a right of privacy is cre
as beginning with a law review article written by Samue

Warren and Supreme Court Justice Louis D. Brandeis mo
than 100 years ago (Warren and Brandeis, 1890). The
concept has been hotly debated in common law jurisdict
ever since. In *Wainright v. Home Office* [2003] 4 All ER 96
Lord Hoffman extensively analyzes the convolutions of
modern privacy law.

The debate concerning the existence and application of
privacy rights intensified when, as recently as 1973, the
United States Supreme Court affirmed a woman's right t
abortion by implying a constitutional right to privacy bet
a woman and her doctor by examining the 'penumbra of
Bill of Rights' - despite a frank acknowledgment that the
Constitution does not mention privacy as a right (*Roe v.*
(1973) 410 U.S. 113). *Roe* depended in part on a dissen
opinion by Brandeis in *Olmstead v. United States* (1928)
U.S. 438, 478. Ironically, *Roe*'s 'penumbra' conceptualiza
was borrowed from Justice Holmes' majority opinion - w
disagreed with Brandeis' analysis.

The state of privacy law in England is even more recent
uncertain than it is in America. This is best illustrated by
comparing and contrasting *Campbell v. Mirror Group Newspapers*[2003] EMLR 2 with *Douglas v. Hello! Ltd* [200
ER (D) 280. Both case struggle with English privacy law
relation to privacy claims made by different international
recognized celebrities. Although the law applied is the s
the results are quite different.

CAMPBELL V. MGN

On 1 February 2001, *The Mirror* – a newspaper owned b
MGN, Ltd. - published a front-page story with a headline
reading 'Naomi: I am a drug addict' . The article detailed
Campbell's private attempt to rehabilitate from drug use
featured photos of her attending Narcotics Anonymous
meetings. Campbell sued for breach of confidence and
received £3,500 in damages (*Campbell v. MGN Ltd* [2002
EWHC 499 (QB)). MGN appealed, and the appellate cour
discharged the trial judge's order on the grounds that t
publication was within the public interest (*Campbell v. M*
Ltd [2002] EWCA Civ 1373, [2003] QB 633). Campbell
appealed to the House of Lords (*Campbell v. MGN Ltd* [2
UKHL 22).

The House of Lords agreed with the appellate court's
reasoning and held for the newspaper. Delivering the co
opinion, Lord Nicholls of Birkenhead first noted that, unli
American law, English law does not recognize 'an all-
embracing' tort for invasion of privacy, but English law h
utilized equitable principles influenced by the European
Convention on Human Rights (ECHR) to spawn a privacy
related cause of action for ' breach of confidence.' Lord
Nicholls went on to recognize that everyone has the rig
private personal life, but also noted that '...the touchsto
private life is whether in respect of the disclosed facts th
person in question had a reasonable expectation of priv
The Court went on to hold that Ms. Campbell did not ha
reasonable expectation of privacy because she affirmati
sought out press coverage on the issue of her alleged d
use, and therefore did not have a viable cause of action

breach of confidence. The court essentially pointed out t
Campbell lost her reasonable expectation of privacy – a
therefore whatever privacy rights she had, if any – whe
voluntarily thrust herself into 'the vortex of public opinio
(Boylan, 2005).

Douglas v. Hello!

On 18 November 2000, Michael Douglas and Catherine Z
Jones married at the Plaza Hotel in New York City. OK!
Magazine licensed the exclusive right to all wedding pho
with the Douglases maintaining control over which phot
were published. Security for the wedding was extraordi
tight – to the point of being described as 'paranoid' - bu
unauthorized photographer gained unauthorized entry
the wedding location. He took photos and sold them to
rival, Hello! Magazine. The Douglases obtained an injun
preventing publication pending a trial on the issues, clai
both privacy and economic interests that required injun
protection.

On appeal, the court independently applied the same reasoning used by the *Campbell* court, first stating that was no concrete privacy right under English law but recognizing that English equitable principles have combi with the Human Rights Act 1998 to create a 'breach of confidence' cause of action to 'fill the gap' in English law is filled by privacy law in other developed countries. Sim *Campbell*, the *Douglas* court opined that privacy is due w it can be reasonably expected.

But the Douglases did something that Naomi Campbell d do: in addition to alleging the violation of their privacy interests, the Douglases claimed that their economic int were at risk – which the appellate court acknowledged noting that the 'intrusion was by uncontrolled photogra for profit of a wedding which was to be the subject of controlled photography for profit' and that 'the major pa the claimants' privacy rights have become the subject o commercial transaction.' The court discharged the injun on the grounds that the Douglases could be compensat their primarily monetary injuries through monetary dam

The case tried in 2003. The trial judge, Mr. Justice Lindsa attempting to reconcile English tort law, contract law an ECHR- entered judgment in favor of the Douglases and granted a perpetual injunction on their breach of confid claim; but he ruled against the Douglases on their breac privacy claim (*Douglas v Hello! Ltd* [2003] 3 All ER 996). J Lindsay repeated that even though there is no English r of privacy, privacy is nevertheless granted where it is reasonably expected.

Hello! appealed the trial court's judgment. Citing *Campb MGN Ltd,* the appellate court, in a *per curiam* decision, repeated Justice Lindsay's observation that the controlli principle was 'whether there is a reasonable or legitima expectation of confidentiality or privacy,' then dismissed appeal and reinstated the injunction against Hello! on t grounds that '[o]nly by the grant of an interlocutory inju could [the Douglases] rights have been satisfactorily protected'(*Douglas v. Hello! Ltd* [2006] QB 125). The cou

appeal also specifically recognized that the Douglases h
taken steps that amounted to creating a 'trade secret' t
Hello! had violated.

It is instructive to note that the steps the Douglases to
protect their privacy essentially created a trade secret a
defined by TRIPs because their wedding pictures 1) wer
'generally known among or readily accessible' to any
publication; 2) had commercial value because they were
secret; and 3) were subject to reasonable steps by the
Douglases to keep them secret (TRIPs, Section Seven, A
39, Protection of Undisclosed Information
http://www.wto.org/english/tratop_e/trips_e/t_agm3_e

Comparing *Douglas v. Hello*! and *Campbell v. MGN, Ltd.* sh
the confused state of English privacy law. Due in large
measure to the impact of Convention rights on English l
'privacy law' mixes tort, contract, equity and regulatory
thus boot-strapping a privacy tort out of breach of confi
theory and seemingly indicating that contract rights can
precedent over rights to freedom of expression. Howeve
the purposes of this essay, the *Douglas* decisions vis-à-
Campbell are important because they show that i) Englis
courts are uncomfortable when dealing with privacy issu
the outcome of a case can depend on whether the inter
being protected is privacy or money; and iii) that even w
the jumbled state of English privacy law, it is universally
recognized that the level of privacy afforded is proportio
related to a celebrity's reasonable expectation of privac

As shown earlier in this essay, American privacy law is m
settled than English privacy law. This is especially true i
various state jurisdictions within the United States, whe
unlike the United States Federal Constitution - privacy is
often, but not always, expressly enumerated as a state
constitutional right, For example, California Constitution,
s. 1 guarantees the constitutional right to privacy
http://www.leginfo.ca.gov/.constwhereas the New York
Constitution does not include privacy as an enumerated
http://www.senate.state.ny.us/lbdcinfo/senconstitution
However, the differences between American and Englis
privacy law, for purposes of drafting confidentiality
agreements, are distinctions without any practical differ
Regardless of how privacy law has developed in any
particular Anglo-American legal jurisdiction, one universa
stands out: non-'public figures' have a higher expectatio
privacy – and therefore more rights to privacy – than pu
figures (Boylan, 2005). In pragmatic terms, this means t
the more famous someone is – i.e., the more they thrus
themselves into the vortex of public opinion - the less lik
is that a judge will protect their privacy because the mo
famous a celebrity, the lower his or her reasonable
expectation of privacy. Consequently, confidentiality
agreements that focus on protecting a celebrity's privac
rights are very likely to fail if and when judicially tested.

Application of the Conceptual Framework

Failing to recognize the difference between monetary
interests and privacy interests is the reason confidentia
agreements drafted on behalf of celebrities are rarely w

the paper they are written on. An analysis of celebrity confidentiality agreements shows that the failure to pro characterize the interest protected is a common mistake

Beckham v. Gibson

In August 2003, international footballer David Beckham his former Spice Girl wife, Victoria, hired Abbie Gibson as nanny for their children. During her employment, Gibson executed four confidentiality agreements promising to k secret the Beckhams' private lives. In April 2005, Gibson her employment with the Beckhams 'after an argument' Despite her four confidentiality agreements, Gibson told *News of the World* – a tabloid publication – that the Beck fought often about David's infidelities and that the coup were close to divorce; the *News of the World* paid Gibson £300,000 for this information. The Beckhams attempted failed, to enjoin the *News of The World* and to enforce th confidentiality agreement.

The confidentiality agreements between David Beckham his former nanny, Abbie Gibson, are not yet part of the p domain, but collateral sources show that the Beckhams' attorneys, in an attempt to enforce the confidentiality agreement, made the tactical and strategic error of attempting to justify injunctive relief as the means nece to protect the Beckham family's privacy. Comparing the *Beckham v. Gibson* results with the *Douglas v. Hello!* resu places the pragmatic differences between privacy and economic interests into sharp relief: the Beckhams' requ for injunctive relief to protect privacy interests was deni the Douglases' request for injunctive relief to protect contractual monetary interests was granted. *The News World* argued that disclosure of the information was with the public interest because the Beckhams intentionally s publicity and 'made millions' projecting the image of a pe happily married couple, when that was not the truth, *Na Campbell v. Mirror Group Newspapers* [2003] EMLR 2 hold part that, when a public figure lies, a newspaper may pu private information about the celebrity 'to put the record straight'.

Rowe v. Jackson

In 1999, Michael Jackson and his wife, Deborah Rowe, entered into a stipulated divorce agreement wherein Ro gave up her rights to child custody of the couple's two children (*Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267; *In re Marriage of Jackson* (20 136 Cal.App.4th 980, 984-985. In 2001, Rowe gave up a parental rights. As part of the stipulated divorce agreem Jackson and Rowe also executed a confidentiality agree designed to prevent Rowe from disclosing damaging det about Michael Jackson. Afterwards, when Michael Jackso was prosecuted criminally for child abuse, Rowe petition the Los Angeles Superior Court to modify the stipulated judgment to award her custody of her children on the grounds that Jackson endangered the children's welfare was at risk of leaving the country with the children (*Jack Jackson* (1999) Los Angeles Superior Court Case No. BD 267).

Jackson successfully sealed all files associated with the custody dispute. TMC.com and the television program Celebrity Justice moved the court to unseal the files. The court agreed. Rowe claimed that she did not have possession of various documents in the case, including the confidentiality agreement between the parties. On March 27, 2006, the court ordered Jackson to file duplicates of the missing documents. On April 26, 2006, Jackson's attorney filed duplicates of the missing documents, including the confidentiality agreement, specifically stating in an accompanying declaration that Jackson '... does not request that the Court consider any of these documents for filing under seal. Respondent does not file any of these documents in redacted form' (*Declaration re: Filing of Duplicate Original Documents*, *Jackson v. Jackson*, Los Angeles Superior Court Case No. BD 310 267). Despite the aforementioned order affirming declaration, the confidentiality agreement is missing from the court file (*Case Filing Docket, Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267). While details of the agreement can be found (*Declaration of Iris Joan Finsilver re: Respondent's Request to Seal Records, Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267), it remains the case that despite record documents showing that a duplicate of the Jackson/Rowe confidentiality agreement was filed, the agreement is mysteriously missing from the court record.

However, like the *Beckham* case, collateral sources show that Jackson argued that privacy interests justified enforcing the confidentiality agreement. Iris Joan Finsilver (Rowe's attorney throughout her marriage and subsequent disputes with Jackson) filed a declaration opposing Jackson's attempt to seal the court files, stating that Jackson's attorneys argued that the confidentiality agreement should remain secret because the parties wanted to protect the privacy of their children (*Declaration of Iris Joan Finsilver, Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267). In light of the observations and analysis presented in this essay, it should be no surprise that the court ultimately unsealed the case files.

Gomez v. Cruise

In 1993, Tom Cruise and Nichol Kidman hired Judita Gomez to serve as nanny for their children. Ms. Gomez signed the first of two confidentiality agreements, in which Gomez acknowledged that breaching the agreement would 'result in an invasion of the privacy of Cruise, which I acknowledge they are entitled to maintain.' This confidentiality agreement is problematic for a number of reasons. In addition to focusing on privacy as the interest protected by the agreement, the agreement itself contains no provision identifying consideration, which renders the agreement unenforceable in most common law jurisdictions. This agreement is nothing more than an unenforceable promise that can be breached at any time without consequence to Gomez.

A little less than a year later, Gomez executed a second, vastly improved confidentiality agreement. Unlike the first agreement, the second agreement is expressly supported by consideration. The second agreement also attempts to

characterize the Cruises' interests in maintaining confidentiality in terms of monetary and proprietary inte and includes a liquidated damages clause. The second agreement nevertheless muddies the conceptual water also focusing on protecting privacy interests, specifically stating on the first page that '[e]mployee shall at all tim during and after the Employment, respect and preserve privacy of each member of the Cruise Family'. Including a privacy emphasis in the confidentiality agreement only s to tempt an attorney to argue privacy as the basis for enforcement at a hearing or trial. It also opens the door the court's *sua sponte* application of privacy law to resol dispute against the celebrity's interests. The better prac to refrain from mentioning privacy in a confidentiality agreement and thereby avoid opening the door to thos possibilities.

Spelling v. Richards

Aaron Spelling was a well-known television and film pro In November 2004, the Spelling family hired Charlene Richards to act as Mr. Spelling's nurse. One year later, Richards hired a law firm to sue Spelling for sexual harassment. In order to prepare this lawsuit, the law fir sent letters to hundreds of women – including numerou publicists and talent managers - asking them if Spelling sexually harassed them as well. On November 30, 2005 Spelling filed a lawsuit for defamation and breach of con breach of the confidentiality agreement (*see Spelling v. Richards* (2005) Los Angeles County Superior Court, Cas BC 343 518). Per the requirements of California law, a c the confidentiality agreement was filed along with the complaint. The agreement between Spelling and Richard one of the finer examples of a celebrity confidentiality agreement. It attempts to characterize the interest to b protected as monetary and proprietary. Even so, the dra could not resist the temptation to include privacy as one the interests protected by the agreement.

Explanation: Confusion and the Attorney-Client Relationship

One would expect that rich and famous celebrities such Beckham, Cruise, Jackson and Spelling could and would attorneys who know better than to draft confidentiality agreements that focus on their clients' interests in prote privacy. One would expect that such attorneys would kn that it is virtually impossible to successfully argue that u famous celebrities have any expectation of privacy and they have a better chance of prevailing on monetary cla So what is going on?

There are two apparent answers to this question. First, the very best attorneys and experts inexplicably do not understand the problem. After the *Beckham* ruling allow the *News of The World* to publish Gibson's allegations, Da Hooper – one of Britain's leading authorities on privacy defamation – proclaimed the *Beckham* ruling 'a dramatic change in the law' (BBC News, 2005). In light of the ana and discussion contained in this essay, Mr. Hooper's observation is clearly incorrect. At the time of the *Beckha* ruling, the *Douglas* and *Campbell* decisions had already b

rendered. The *Beckham* ruling created nothing new; it m
reflected the easily recognized and long standing judicia
reluctance to enforce public figure privacy rights. The
Beckhams' attempt to enforce Gibson's confidentiality
agreement to protect their privacy was doomed from its
inception.

The second reason for attorney failure to specify a celeb
monetary interests as the key interest to be protected b
confidentiality agreements is based in the natural relati
between an attorney and his client. Attorneys are hired
advance the interests of their clients. And here, the *true*
interest of a celebrity is to maintain as much privacy as
possible. A good attorney will be able to identify these t
interests. It is then a natural jump to reflect those inter
whatever document the attorney has been hired to draf

But, as we have seen, when the confidentiality agreeme
breached and the celebrity attempts to enforce the
agreement, this turns out to be a fatal mistake if docum
focuses on protecting the celebrity's privacy interests. A
we have seen, even the best attorneys can fall into this
relational trap. The better practice is to educate a celeb
client that the best way to protect their privacy is to
characterize their interest as *economic*. Privacy is still th
goal, but basing the confidentiality agreement between
celebrity and their employee(s) on an economic/propriet
interest foundation is, it seems, the only effective way t
achieve the privacy the celebrity desires.

It is not difficult to make the economic/proprietary inforn
characterization. All information about celebrities is valu
the more famous a celebrity, the more valuable informat
about him becomes. This is especially true for the kinds
embarrassing, salacious, negative (i.e., 'bad') informati
that celebrities want to suppress (Boylan, 2005). The
argument that flows naturally from such an economic
characterization is that, when the employee reveals bad
information, it not only harms the celebrity economically
tarnishing the image that is the means by which they ea
money, but it also misappropriates information that they
could sell to media for potentially huge amounts of mon
For example, Victoria Beckham was offered £5 million for
information pertaining to alleged affairs between David
Beckham and his three supposed mistresses. This show
potential economic value of salacious information. As
discussed above, courts are more likely to protect
economic/proprietary interests than privacy interests.

Additional Protective Mechanisms

An effective celebrity/employee confidentiality agreemer
does not end with an economic/proprietary characteriza
of the interest intended to be protected by the agreeme
Although it is true that emphasizing the confidential nat
the employee's responsibility and focusing on an
economic/proprietary interest characterization can maxi
the chances that a judge will enforce the confidentiality
agreement should the issue ever come before a judge, i
important to remember that this is not the only aim of
confidentiality agreements between celebrities and thei

employees.

The confidentiality agreement drafter has to fully unders that, in order to enforce a confidentiality agreement, it i necessary to disclose the terms of the confidentiality agreement now breached. This alone can reveal embarrassing and possibly damaging information. As illustrated by the confidentiality agreements discussed a analyzed in this essay, once a confidentiality breach dis between a celebrity and an employee gets into the civil systems, it is virtually impossible to seal the files to prev the breach from becoming part of the public record.

The best example of embarrassment resulting from the disclosure of a confidentiality agreement during civil litig is *Rowe v. Jackson*. Even though the file does not contai copy of the confidentiality agreement, Rowe's attorney - declaration - revealed that the agreement specifically de 'confidential information' as 'information related to pater Michael's mental or physical condition, purported drug u [and] sexual behavior.' Each of these specific examples loaded with implied salacious meaning, from questions c paternity of his children to allegations that he is a drug- usingpaedophile.

Jackson most certainly would have preferred that these remain private. However, the moment the dispute enter the civil justice system, the odds were strong that this information would enter the public domain. The handling the Jackson-Rowe dispute bristles with irony, but perha most ironic fact is that Jackson himself prompted the civi action that resulted in the release of this information – a will inevitably result in the release of the entire confiden agreement. Another term of the confidentiality agreeme between Jackson and Rowe was the arrangement that, exchange for Rowe's agreement to cooperate with Jack desire to remove her from her children's lives and for Ro say nice things about Jackson, Jackson would pay Rowe $5,000,000, give her a Beverly Hills mansion and pay he $900,000 each year for an undisclosed number of years Jackson stopped paying this money and claimed that he stopped paying because Rowe breached the confidentia agreement and would not continue to pay until there w 'judicial determination of the issue'.

At the very least, the lesson learned here is that the pr drafter of a celebrity/employee confidentiality agreemen anticipates what would happen if the terms of the agre became public, and consider using general definitions in of specific examples – especially if those specific exampl paint the celebrity client as a drug abusing sexual devia The goal of any drafter is to maximize the odds that the agreement will never be breached at all, and if breach is threatened, that all efforts to enforce the agreement to prevent the breach will not become public. Effective celebrity/employee confidentiality agreements provide, therefore, mechanisms to discourage breaches and also additional mechanisms to contain breaches should they

Mechanisms to Discourage Breach

The key to discouraging breach is to maximize the cost

potential to anyone contemplating violation of a confidentiality agreement. Mechanisms that increase co discourage breach include, but are not limited to, liquida damage clauses, attorney fee clauses and defense finar clauses (Boylan, 2005). The drafter is reminded that, if t agreement contains the right to seek injunctive relief – is the ultimate goal of any celebrity facing a breach of confidentiality – then a liquidated damages clause in the same agreement may be unenforceable, depending on jurisdiction, because many jurisdictions will not enforce liquidated damage clause if the agreement contains an 'election of remedies'. However, it doesn't matter. A liqu damages clause serves as a warning and as a deterren as a damage recovery mechanism. This should be expla to the client so as to avoid future misunderstandings.

The drafter must also keep in mind that, as the Beckhan painfully illustrates, a third party, such as a newspaper, attempt to entice a celebrity's employee to breach their confidentiality agreement. Therefore, provisions should added to the agreement that discourage third party involvement by notifying those third parties of the liabili costs they are likely to incur should they conspire to ent the employee to breach their contract with the celebrity otherwise interfere with the celebrity's expected econon advantage in selling the information themselves.

The drafter should add provisions that will increase non monetary costs. The true value of information is often dependent on its immediacy. The fresher the informatio more valuable the information is to a publisher. Convers the older information gets, the less value it has to a publisher. Therefore, adding provisions that slow down eventual release of the information will discourage brea because the longer it takes to publish information the le valuable it becomes. There are many mechanisms that s down the process, including but not limited to choice of clauses, forum selection clauses and clauses containing agreements that, if disputes arise between the parties, matters related to such disputes shall remain private ar files sealed.

Mechanisms to Contain Breaches Should Th Occur

Despite all of the mechanisms available to discourage br it is always possible that breaches will occur anyway. Th drafter must include language that prevents breaches fr entering the public record in order to adequately protec privacy the celebrity desires.

As discussed above, once a dispute transitions from negotiation to litigation, it is unlikely that a celebrity will able to prevent disclosures. This is especially true for civ proceedings before judges. This is not true when using alternate dispute resolution mechanisms such as arbitra Arbitrators are more likely than judges to uphold and er the written agreement between the parties because th arbitrator gets his or her authority from the contract itse (*Milton School Directors v. Milton Staff Assn.* (1994) 163 V 656 A.2d 993 (observing that an 'arbitrator's authority i

broader than the power granted by contract'); Niblett, 1
(observing ' the arbitration agreement is the source of t
arbitrator's authority and of the parties' rights in the
arbitration')). Therefore, every confidentiality agreemen
between a celebrity and the celebrity's employee shoul
only properly characterize the interest to be protected a
monetary/proprietary and include mechanisms to discou
disclosure, an effective celebrity/employee confidentialit
agreement should also contain an agreement that any
dispute between the parties shall be subject to arbitrat
where the proceedings themselves are sealed and
confidential.

The reader should note that none of the confidentiality
agreements discussed in this essay included an arbitrat
clause – a serious drafting error. There are many advan
to arbitration, including but not limited to the opportunit
the parties to dictate how the arbitrator(s) will decide th
dispute and what kinds of evidence they will consider. A
minimum, a confidentiality agreement should specify the
following:

> any dispute regarding or in any way connected to the confidentiality agreement will be arbitrated;
>
> the arbitrator has no authority to alter the terms of the agreement;
>
> the rules by which the arbitrator(s) will decide the dispute, including a generous time-line for the arbitration;
>
> the forum, the rules of evidence and law that the arbitrator(s) will follow to resolve the dispute;
>
> the parties agree that whatever information is the gravamen of the dispute shall remain confidential until the arbitrator(s) rule otherwise, and will only be released according to guidelines the arbitrator(s) specify;
>
> all proceedings, communications, etc. pertaining to the arbitration will remain confidential;
>
> the final adjudication will remain confidential at the discretion of the prevailing party; and any disagreement pertaining to the application or legality of the arbitration clause shall itself be arbitrated with all proceedings remaining confidential.

Caveat: Unconscionability Risk

It should be apparent to the reader that an effective
celebrity/employee confidentiality agreement is going to
more complex document than the one page original
agreement between Tom Cruise and Judita Gomez. The
person drafting the agreement will inevitably work for th
celebrity. The employee is most likely to be unrepresent
and willing to sign anything just for the thrill and opport
of working for a celebrity. This situation creates the poss

that the employee will eventually challenge the agreem
the grounds that it is an unconscionable adhesion contr

To avoid this possible defence, it is strongly recommend
that the celebrity insist that the employee consult with
independent counsel prior to signing the agreement – a
even pay the prospective employee's attorney's fees ne
to get independent advice.

CONCLUSION

There is never any guarantee that a celebrity's employe
be faithful to their promise to keep confidential all matte
they learn during their employment – especially the sala
details about the celebrity's private life. However, those
drafting confidentiality agreements need to recognize th
the conventional wisdom and practices pertaining to cel
confidentiality agreements aren't helping to protect cele
privacy. In order to better serve celebrity clients, those
drafting confidentiality agreements must realize that su
agreements are currently being drafted so as to actually
preclude enforcement if and when a breach is threatene
occurs. Finally, the drafter needs to focus on the goal of
confidentiality agreements – i.e., to prevent information
entering the pubic record.

Once these points are understood, then a drafter will ut
readily available, standard drafting tools to write better
effective confidentiality agreements. Properly characteri
the interest protected as economic/proprietary, avoiding
including privacy concerns in the agreement, and
incorporating mechanisms to both discourage and conta
breaches will better serve celebrity clients – who only w
hire people to work for them without worrying that their
employees will violate privacy considerations the celebri
rightfully expects.

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