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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 great responsibility. In the world of sports and entertainment law, it is equally accepted that with great celebrity comes the likelihood of great scandal. Sport and entertainment are businesses, and business solutions have been applied to prevent the release of scandalous or potentially damaging information. Confidentiality and non-competition agreements are standard in virtually every business transaction. They are particularly effective as between businesses and their employees (Radack, 1994; Pollick, 2006) 1

However, unlike other business transactions, confidentiality clauses have not been effective vis-à-vis celebrities and their employees. Footballer David Beckham's nanny signed four confidentiality agreements, but still revealed – with a judge's blessing – salacious details of the Beckhams' private life to a notorious English tabloid, *The News of the World*. The late Hollywood producer Aaron Spelling's personal aide attempted to sue him for sexual harassment, and the Spellings then countersued her for violating a confidentiality agreement – the details of which have now become public record (*Richards v. Spelling* (2006) Los Angeles County Superior Court, Case No. BC 346 448; (2005) Los Angeles County Superior Court, Case No. BC 343 518). 2

Even the secretive and thoroughly lawyered Michael Jackson could not rely on a confidentiality agreement to prevent his former wife, Deborah Rowe, from revealing details about his private life (*Jackson v. Jackson*, (1999) Los Angeles Superior Court Case No. BD 310 267). Rowe was less Jackson's wife than she was his employee. She was essentially hired to provide Jackson with children and, once her work was done, her employment was terminated and any details of Jackson's life she might have learned while in close proximity with the King of Pop were subject to a confidentiality agreement. 3

Why is this happening? Why are confidentiality agreements seemingly breached at will and with court approval? Is there any way to protect celebrities from employees who attempt to profit at their expense? 4

The answer to the final question is yes, there is a solution. But to understand the solution, it is necessary to first understand the subtle nature of the problem. It is important to realize that confidentiality agreements used within the sports and entertainment industries can be, and have been, successfully breached because those responsible for drafting confidentiality agreements make fundamental *conceptual* 5

errors that lead to potentially devastating *drafting* errors. This essay outlines a conceptual framework for confidentiality agreements and applies it to actual celebrity confidentiality agreements. In light of the offered analysis, this essay makes some suggestions for the development of effective drafting techniques.

## CONCEPTUAL FRAMEWORK

Before an attorney, an agent or anyone *hubristic* enough to 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 agreements are effective and others fail. This knowledge is achieved by understanding the nature of the relationship between, on the one hand, the characterization of the interests the agreement is *meant* to protect, and on the other, recognizing the kinds of interests courts are *likely* to protect versus those that courts are *not* likely to protect. 6

Contracts are the natural product and fundamentally necessary building blocks of any endeavours concerned with business and commerce. It is fair to observe that the world is increasingly business oriented, and business relations are 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 6<sup>th</sup> Century A.D. - show that the Romans had a long familiarity with contract law. Present day Anglo-American contract law – which is spreading across the globe through such institutions as the World Trade Organization and world-spanning treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (aka TRIPs) has its roots in 12<sup>th</sup> Century England (*Vynior's Case* (1609) 77 Eng. Rep. 597 (K.B)). 7

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 employee 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 prevent the minor party from misappropriating something of immediate or ultimate value that the major party wants to keep for itself (Finch, n.d). 8

Unlike contract law, privacy law is comparatively new. Privacy as a right is a modern idea, often implied from other rights and, at least in the United States, created by judicial activism. The very notion that people have a right of privacy is credited as beginning with a law review article written by Samuel D. Warren and Supreme Court Justice Louis D. Brandeis more than 100 years ago (Warren and Brandeis, 1890). The concept has been hotly debated in common law jurisdictions ever since. In *Wainright v. Home Office* [2003] 4 All ER 969 Lord Hoffman extensively analyzes the convolutions of modern privacy law. 9

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 to abortion by implying a constitutional right to privacy between a woman and her doctor by examining the 'penumbra of the Bill of Rights' - despite a frank acknowledgment that the U.S. Constitution does not mention privacy as a right (*Roe v. Wade* (1973) 410 U.S. 113). *Roe* depended in part on a dissenting opinion by Brandeis in *Olmstead v. United States* (1928) 277 U.S. 438, 478. Ironically, *Roe*'s 'penumbra' conceptualization was borrowed from Justice Holmes' majority opinion - which disagreed with Brandeis' analysis. 10

The state of privacy law in England is even more recent and 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* [2005] All ER (D) 280. Both case struggle with English privacy law in relation to privacy claims made by different internationally recognized celebrities. Although the law applied is the same, the results are quite different. 11

### CAMPBELL V. MGN

On 1 February 2001, *The Mirror* – a newspaper owned by 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 and 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 court discharged the trial judge's order on the grounds that the publication was within the public interest (*Campbell v. MGN, Ltd* [2002] EWCA Civ 1373, [2003] QB 633). Campbell appealed to the House of Lords (*Campbell v. MGN Ltd* [2004] UKHL 22). 12

The House of Lords agreed with the appellate court's reasoning and held for the newspaper. Delivering the court's opinion, Lord Nicholls of Birkenhead first noted that, unlike American law, English law does not recognize 'an all-embracing' tort for invasion of privacy, but English law has 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 right to a 13

private personal life, but also noted that ‘...the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.’ The Court went on to hold that Ms. Campbell did not have a reasonable expectation of privacy because she affirmatively sought out press coverage on the issue of her alleged drug use, and therefore did not have a viable cause of action for breach of confidence. The court essentially pointed out that Campbell lost her reasonable expectation of privacy – and therefore whatever privacy rights she had, if any – when she voluntarily thrust herself into ‘the vortex of public opinion (Boylan, 2005).

### **DOUGLAS V. HELLO!**

On 18 November 2000, Michael Douglas and Catherine Zeta-Jones married at the Plaza Hotel in New York City. OK! Magazine licensed the exclusive right to all wedding photos, with the Douglasses maintaining control over which photos were published. Security for the wedding was extraordinarily tight – to the point of being described as ‘paranoid’ - but an unauthorized photographer gained unauthorized entry into the wedding location. He took photos and sold them to OK!’s rival, Hello! Magazine. The Douglasses obtained an injunction preventing publication pending a trial on the issues, claiming both privacy and economic interests that required injunctive protection. 14

On appeal, the court independently applied the same reasoning used by the *Campbell* court, first stating that there was no concrete privacy right under English law but recognizing that English equitable principles have combined with the Human Rights Act 1998 to create a ‘breach of confidence’ cause of action to ‘fill the gap’ in English law which is filled by privacy law in other developed countries. Similar to *Campbell*, the *Douglas* court opined that privacy is due where it can be reasonably expected. 15

But the Douglasses did something that Naomi Campbell did not do: in addition to alleging the violation of their privacy interests, the Douglasses claimed that their economic interests were at risk – which the appellate court acknowledged by noting that the ‘intrusion was by uncontrolled photography for profit of a wedding which was to be the subject of controlled photography for profit’ and that ‘the major part of the claimants’ privacy rights have become the subject of a commercial transaction.’ The court discharged the injunction on the grounds that the Douglasses could be compensated for their primarily monetary injuries through monetary damages. 16

The case tried in 2003. The trial judge, Mr. Justice Lindsay - attempting to reconcile English tort law, contract law and the ECHR- entered judgment in favor of the Douglasses and granted a perpetual injunction on their breach of confidence claim; but he ruled against the Douglasses on their breach of privacy claim (*Douglas v Hello! Ltd* [2003] 3 All ER 996). Justice Lindsay repeated that even though there is no English right of privacy, privacy is nevertheless granted where it is reasonably expected. 17

Hello! appealed the trial court’s judgment. Citing *Campbell v. MGN Ltd*, the appellate court, in a *per curiam* decision, repeated Justice Lindsay’s observation that the controlling principle was ‘whether there is a reasonable or legitimate expectation of confidentiality or privacy,’ then dismissed the appeal and reinstated the injunction against Hello! on the grounds that ‘[o]nly by the grant of an interlocutory injunction could [the Douglasses] rights have been satisfactorily protected’ (*Douglas v. Hello! Ltd* [2006] QB 125). The court of appeal also specifically recognized that the Douglasses had taken steps that amounted to creating a ‘trade secret’ that Hello! had violated. 18

It is instructive to note that the steps the Douglasses took to protect their privacy essentially created a trade secret as defined by TRIPs because their wedding pictures 1) were not ‘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 Douglasses to keep them secret (TRIPs, Section Seven, Article 39, Protection of Undisclosed Information [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm)). 19

Comparing *Douglas v. Hello!* and *Campbell v. MGN, Ltd.* shows the confused state of English privacy law. Due in large measure to the impact of Convention rights on English law, ‘privacy law’ mixes tort, contract, equity and regulatory law, thus boot-strapping a privacy tort out of breach of confidence theory and seemingly indicating that contract rights can take precedent over rights to freedom of expression. However, for the purposes of this essay, the *Douglas* decisions vis-à-vis *Campbell* are important because they show that i) English courts are uncomfortable when dealing with privacy issues; ii) the outcome of a case can depend on whether the interest being protected is privacy or money; and iii) that even within the jumbled state of English privacy law, it is universally recognized that the level of privacy afforded is proportionally related to a celebrity’s reasonable expectation of privacy. 20

As shown earlier in this essay, American privacy law is more settled than English privacy law. This is especially true in the various state jurisdictions within the United States, where – unlike the United States Federal Constitution - privacy is often, but not always, expressly enumerated as a state constitutional right, For example, California Constitution, Art I, s. 1 guarantees the constitutional right to privacy 21

<http://www.leginfo.ca.gov/.const> whereas the New York State Constitution does not include privacy as an enumerated right <http://www.senate.state.ny.us/lbdcinfo/senconstitution.html>. However, the differences between American and English privacy law, for purposes of drafting confidentiality agreements, are distinctions without any practical differences. Regardless of how privacy law has developed in any particular Anglo-American legal jurisdiction, one universal rule stands out: non-'public figures' have a higher expectation of privacy – and therefore more rights to privacy – than public figures (Boylan, 2005). In pragmatic terms, this means that the more famous someone is – i.e., the more they thrust themselves into the vortex of public opinion - the less likely it is that a judge will protect their privacy because the more famous a celebrity, the lower his or her reasonable expectation of privacy. Consequently, confidentiality agreements that focus on protecting a celebrity's privacy 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 confidentiality agreements drafted on behalf of celebrities are rarely worth the paper they are written on. An analysis of celebrity confidentiality agreements shows that the failure to properly characterize the interest protected is a common mistake. 22

### BECKHAM V. GIBSON

In August 2003, international footballer David Beckham and his former Spice Girl wife, Victoria, hired Abbie Gibson as nanny for their children. During her employment, Gibson executed four confidentiality agreements promising to keep secret the Beckhams' private lives. In April 2005, Gibson left her employment with the Beckhams 'after an argument'. Despite her four confidentiality agreements, Gibson told the *News of the World* – a tabloid publication – that the Beckhams fought often about David's infidelities and that the couple were close to divorce; the *News of the World* paid Gibson £300,000 for this information. The Beckhams attempted, but failed, to enjoin the *News of The World* and to enforce the confidentiality agreement. 23

The confidentiality agreements between David Beckham and his former nanny, Abbie Gibson, are not yet part of the public 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 necessary to protect the Beckham family's privacy. Comparing the *Beckham v. Gibson* results with the *Douglas v. Hello!* results places the pragmatic differences between privacy and economic interests into sharp relief: the Beckhams' request for injunctive relief to protect privacy interests was denied; the Douglasses' request for injunctive relief to protect contractual monetary interests was granted. *The News of the World* argued that disclosure of the information was within the public interest because the Beckhams intentionally sought publicity and 'made millions' projecting the image of a perfect, happily married couple, when that was not the truth, *Naomi Campbell v. Mirror Group Newspapers* [2003] EMLR 2 holding in part that, when a public figure lies, a newspaper may publish private information about the celebrity 'to put the record straight'. 24

### ROWE V. JACKSON

In 1999, Michael Jackson and his wife, Deborah Rowe, entered into a stipulated divorce agreement wherein Rowe 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* (2006) 136 Cal.App.4th 980, 984-985. In 2001, Rowe gave up all parental rights. As part of the stipulated divorce agreement, Jackson and Rowe also executed a confidentiality agreement designed to prevent Rowe from disclosing damaging details about Michael Jackson. Afterwards, when Michael Jackson was prosecuted criminally for child abuse, Rowe petitioned 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 and was at risk of leaving the country with the children (*Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267). 25

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 and 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 Record,* 26



*Jackson v. Jackson* (1999) Los Angeles Superior Court Case No. BD 310 267), it remains the case that despite records 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. 27

### **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. 28

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 interests and includes a liquidated damages clause. The second agreement nevertheless muddies the conceptual waters by also focusing on protecting privacy interests, specifically stating on the first page that '[e]mployee shall at all times, during and after the Employment, respect and preserve the privacy of each member of the Cruise Family'. Including a privacy emphasis in the confidentiality agreement only serves to tempt an attorney to argue privacy as the basis for enforcement at a hearing or trial. It also opens the door to the court's *sua sponte* application of privacy law to resolve the dispute against the celebrity's interests. The better practice is to refrain from mentioning privacy in a confidentiality agreement and thereby avoid opening the door to those possibilities. 29

### **SPELLING V. RICHARDS**

Aaron Spelling was a well-known television and film producer. 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 firm sent letters to hundreds of women – including numerous publicists and talent managers – asking them if Spelling had sexually harassed them as well. On November 30, 2005, Spelling filed a lawsuit for defamation and breach of contract/ breach of the confidentiality agreement (*see Spelling v. Richards* (2005) Los Angeles County Superior Court, Case No. BC 343 518). Per the requirements of California law, a copy of the confidentiality agreement was filed along with the complaint. The agreement between Spelling and Richards is one of the finer examples of a celebrity confidentiality agreement. It attempts to characterize the interest to be protected as monetary and proprietary. Even so, the drafter could not resist the temptation to include privacy as one of the interests protected by the agreement. 30

### **EXPLANATION: CONFUSION AND THE ATTORNEY-CLIENT RELATIONSHIP**

One would expect that rich and famous celebrities such as Beckham, Cruise, Jackson and Spelling could and would hire attorneys who know better than to draft confidentiality agreements that focus on their clients' interests in protecting privacy. One would expect that such attorneys would know that it is virtually impossible to successfully argue that ultra-famous celebrities have any expectation of privacy and that they have a better chance of prevailing on monetary claims. So what is going on? 31

There are two apparent answers to this question. First, even the very best attorneys and experts inexplicably do not understand the problem. After the *Beckham* ruling allowing the *News of The World* to publish Gibson's allegations, David Hooper – one of Britain's leading authorities on privacy and defamation – proclaimed the *Beckham* ruling 'a dramatic change in the law' (BBC News, 2005). In light of the analysis and discussion contained in this essay, Mr. Hooper's observation is clearly incorrect. At the time of the *Beckham* ruling, the *Douglas* and *Campbell* decisions had already been rendered. The *Beckham* ruling created nothing new; it merely reflected the easily recognized and long standing judicial 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. 32

The second reason for attorney failure to specify a celebrity's monetary interests as the key interest to be protected by confidentiality agreements is based in the natural relationship between an attorney and his client. Attorneys are hired to 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 true interests. It is then a natural jump to reflect those interests in whatever document the attorney has been hired to draft. 33

But, as we have seen, when the confidentiality agreement is breached and the celebrity attempts to enforce the agreement, this turns out to be a fatal mistake if document focuses on protecting the celebrity's privacy interests. And, as we have seen, even the best attorneys can fall into this relational trap. The better practice is to educate a celebrity client that the best way to protect their privacy is to characterize their interest as *economic*. Privacy is still the goal, but basing the confidentiality agreement between the celebrity and their employee(s) on an economic/proprietary interest foundation is, it seems, the only effective way to achieve the privacy the celebrity desires. 34

It is not difficult to make the economic/proprietary information characterization. All information about celebrities is valuable – the more famous a celebrity, the more valuable information about him becomes. This is especially true for the kinds of embarrassing, salacious, negative (i.e., 'bad') information 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 by tarnishing the image that is the means by which they earn money, but it also misappropriates information that they could sell to media for potentially huge amounts of money. For example, Victoria Beckham was offered £5 million for information pertaining to alleged affairs between David Beckham and his three supposed mistresses. This shows the potential economic value of salacious information. As discussed above, courts are more likely to protect economic/proprietary interests than privacy interests. 35

### ADDITIONAL PROTECTIVE MECHANISMS

An effective celebrity/employee confidentiality agreement does not end with an economic/proprietary characterization of the interest intended to be protected by the agreement. Although it is true that emphasizing the confidential nature of the employee's responsibility and focusing on an economic/proprietary interest characterization can maximize the chances that a judge will enforce the confidentiality agreement should the issue ever come before a judge, it is important to remember that this is not the only aim of confidentiality agreements between celebrities and their employees. 36

The confidentiality agreement drafter has to fully understand that, in order to enforce a confidentiality agreement, it is 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 and analyzed in this essay, once a confidentiality breach dispute between a celebrity and an employee gets into the civil court systems, it is virtually impossible to seal the files to prevent the breach from becoming part of the public record. 37

The best example of embarrassment resulting from the disclosure of a confidentiality agreement during civil litigation is *Rowe v. Jackson*. Even though the file does not contain a copy of the confidentiality agreement, Rowe's attorney – in a declaration – revealed that the agreement specifically defined 'confidential information' as 'information related to paternity, Michael's mental or physical condition, purported drug use [and] sexual behavior.' Each of these specific examples is loaded with implied salacious meaning, from questions of the paternity of his children to allegations that he is a drug-using paedophile. 38

Jackson most certainly would have preferred that these terms remain private. However, the moment the dispute entered the civil justice system, the odds were strong that this information would enter the public domain. The handling of the Jackson-Rowe dispute bristles with irony, but perhaps the most ironic fact is that Jackson himself prompted the civil action that resulted in the release of this information – and will inevitably result in the release of the entire confidentiality agreement. Another term of the confidentiality agreement between Jackson and Rowe was the arrangement that, in exchange for Rowe's agreement to cooperate with Jackson's desire to remove her from her children's lives and for Rowe to say nice things about Jackson, Jackson would pay Rowe \$5,000,000, give her a Beverly Hills mansion and pay her \$900,000 each year for an undisclosed number of years. But Jackson stopped paying this money and claimed that he stopped paying because Rowe breached the confidentiality agreement and would not continue to pay until there was a 'judicial determination of the issue'. 39

At the very least, the lesson learned here is that the prudent drafter of a celebrity/employee confidentiality agreement anticipates what would happen if the terms of the agreement became public, and consider using general definitions instead of specific examples – especially if those specific examples 40

paint the celebrity client as a drug abusing sexual deviant. 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 occur.

### 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 cost and discourage breach include, but are not limited to, liquidated damage clauses, attorney fee clauses and defense financing clauses (Boylan, 2005). The drafter is reminded that, if the agreement contains the right to seek injunctive relief – which 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 the jurisdiction, because many jurisdictions will not enforce a liquidated damage clause if the agreement contains an ‘election of remedies’. However, it doesn’t matter. A liquidated damages clause serves as a warning and as a deterrent, not as a damage recovery mechanism. This should be explained to the client so as to avoid future misunderstandings. 41

The drafter must also keep in mind that, as the Beckham case painfully illustrates, a third party, such as a newspaper, may attempt to entice a celebrity’s employee to breach their confidentiality agreement. Therefore, provisions should be added to the agreement that discourage third party involvement by notifying those third parties of the liability and costs they are likely to incur should they conspire to entice the employee to breach their contract with the celebrity and otherwise interfere with the celebrity’s expected economic advantage in selling the information themselves. 42

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 information, the more valuable the information is to a publisher. Conversely, the older information gets, the less value it has to a publisher. Therefore, adding provisions that slow down the eventual release of the information will discourage breach because the longer it takes to publish information the less valuable it becomes. There are many mechanisms that slow down the process, including but not limited to choice of law clauses, forum selection clauses and clauses containing agreements that, if disputes arise between the parties, all matters related to such disputes shall remain private and the files sealed. 43

### MECHANISMS TO CONTAIN BREACHES SHOULD THEY OCCUR

Despite all of the mechanisms available to discourage breach, it is always possible that breaches will occur anyway. The drafter must include language that prevents breaches from entering the public record in order to adequately protect the privacy the celebrity desires. 44

As discussed above, once a dispute transitions from negotiation to litigation, it is unlikely that a celebrity will be able to prevent disclosures. This is especially true for civil proceedings before judges. This is not true when using alternate dispute resolution mechanisms such as arbitration. Arbitrators are more likely than judges to uphold and enforce the written agreement between the parties because the arbitrator gets his or her authority from the contract itself (*Milton School Directors v. Milton Staff Assn.* (1994) 163 Vt 240; 656 A.2d 993 (observing that an ‘arbitrator’s authority is no broader than the power granted by contract’); Niblett, 1994 (observing ‘the arbitration agreement is the source of the arbitrator’s authority and of the parties’ rights in the arbitration’)). Therefore, every confidentiality agreement between a celebrity and the celebrity’s employee should not only properly characterize the interest to be protected as monetary/proprietary and include mechanisms to discourage disclosure, an effective celebrity/employee confidentiality agreement should also contain an agreement that any dispute between the parties shall be subject to arbitration where the proceedings themselves are sealed and confidential. 45

The reader should note that none of the confidentiality agreements discussed in this essay included an arbitration clause – a serious drafting error. There are many advantages to arbitration, including but not limited to the opportunity of the parties to dictate how the arbitrator(s) will decide the dispute and what kinds of evidence they will consider. At a minimum, a confidentiality agreement should specify the following: 46

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 be a more complex document than the one page original agreement between Tom Cruise and Judita Gomez. The person drafting the agreement will inevitably work for the celebrity. The employee is most likely to be unrepresented and willing to sign anything just for the thrill and opportunity of working for a celebrity. This situation creates the possibility that the employee will eventually challenge the agreement on the grounds that it is an unconscionable adhesion contract. 47

To avoid this possible defence, it is strongly recommended that the celebrity insist that the employee consult with independent counsel prior to signing the agreement – and even pay the prospective employee's attorney's fees needed to get independent advice. 48

### CONCLUSION

There is never any guarantee that a celebrity's employee will be faithful to their promise to keep confidential all matters they learn during their employment – especially the salacious details about the celebrity's private life. However, those drafting confidentiality agreements need to recognize that the conventional wisdom and practices pertaining to celebrity confidentiality agreements aren't helping to protect celebrity privacy. In order to better serve celebrity clients, those drafting confidentiality agreements must realize that such agreements are currently being drafted so as to actually preclude enforcement if and when a breach is threatened or occurs. Finally, the drafter needs to focus on the goal of all confidentiality agreements – i.e., to prevent information from entering the public record. 49

Once these points are understood, then a drafter will utilize readily available, standard drafting tools to write better, more effective confidentiality agreements. Properly characterizing the interest protected as economic/proprietary, avoiding including privacy concerns in the agreement, and incorporating mechanisms to both discourage and contain breaches will better serve celebrity clients – who only want to hire people to work for them without worrying that their employees will violate privacy considerations the celebrity rightfully expects. 50

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