Swifties, Shifties, and That E-Biz Jazz: The Ethical Roles of Attorney/Literary Agents

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Swifties, Shifties, and That E-Biz Jazz: 
The Ethical Roles of Attorney/ Literary Agents

by

BRUCE S. STUART*

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Introduction: The Scenario

You are the newly appointed managing literary agent for a literary agency run within your 125 attorney law firm. Your first day in the position, you receive an unsolicited submission for a novel entitled The Gossip Shop about the exploits and dilemmas of a third year law student trying to land the job and love of his life while simultaneously attempting to complete his third year law school requirements. The proposed novel focuses on the struggles of this student as he deals with a "tough-as-nails" job market, the escalating demands imposed by ever-increasing tuition payments, and the void created by devoting one's life to the pursuit of learning without fully grasping the realities of everyday life. The proposed novel is narrated through student gossip. You find the idea gripping and poignant.

This Article will return to this scenario, with numerous variations, to analyze the potential problems facing attorney/literary agents (ALAs). One scenario includes what happens when an attorney, acting in the same literary agency, believes to have two similar projects which could potentially cause a conflict of interest. Additionally, I will examine cases in which the ALA succeeds in finding an offer for the client author's (CA's) work, but because of the code of legal ethics, finds herself "hamstrung" during negotiations. Unless she has made prior contractual arrangements in the ALA-CA agreement, she would be in a no-win situation. But, before discussing the ethical problems faced by ALAs, this Article will examine why some lawyers choose to become literary agents.

I

When Lawyers Became Literary Agents, or Why Editor Maxwell Perkins Is Rotating in His Grave like an Airborne Propeller

Publishing was once considered an occupation for gentlemen and gentlewomen engaged in the pursuit of higher learning and literary expression of that erudition. For some, this remains the case. For the vast majority of individuals working in commercial publishing, however, there is little if any room for esoterica at the expense of the

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1. See infra Part II.A.
2. See infra Part II.B.
Commercial publishing is driven by an ever-increasing number of large publishers, products of huge entertainment conglomerates that are swallowing up publishing companies. The powerful sales forces of these houses use their “power of the pencil”: booksellers give their sales representatives the authority to write orders without consulting the publishing house, pumping books into the public’s collective consciousness through local B. Dalton, Barnes & Noble, and Waldenbooks chainstores.

To combat what was perceived as an unfair monopoly developing among these few powerhouse publishers, power agents, led by lawyers-turned-literary agents, have cropped up throughout the literary landscape. Morton Janklow, one of the most successful members of this new breed, has been so successful in leveraging top literary talent against the publishing giants that he recently landed a twenty-five million dollar advance for Sidney Sheldon’s latest book deal. In 1981, that same amount purchased Avon Books, an entire publishing house, for its current parent-publisher, William Morrow. Janklow appears indefatigable after his recent orchestration of the sale of the Pope’s tome, Crossing the Threshold of Hope, to Alfred A. Knopf for the worldly sum of $10 million. Because the Pope’s last book was considered a commercial failure, the sale was deemed quite a success.

Janklow is not alone: In Boston, Palmer & Dodge, a powerful 145 attorney law firm, recently opened its own in-house literary agency. Due to the perceived strength of the Boston-based law firm/literary agency, Boston’s literary agents actually welcomed the move as an inroad into the exceptionally tight New York publishing market. The action produced legal ethics complications, however, especially in the conflicts of interest area. Currently, Palmer & Dodge also serves as house counsel for publisher Little, Brown & Co. and has thus agreed not to submit its clients’ books to this publisher. Despite this action,

5. Id.
8. Id.
9. Id.
11. Id.
12. Model Rule 1.7 states: “(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.” MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULE(s)] Rule 1.7 (1983).
13. See Wolfensberger, supra note 10.
establishment of the in-house literary agency could be perceived as a conflict of loyalty, as the law firm/literary agency may in the future represent authors in competition with the clients of Little, Brown & Co. As yet, however, Palmer & Dodge has not found this to be the case, and the law firm/literary agency is enjoying the opportunity to not only review authors’ contracts, but to have some input in determining their content as well.

The movement of lawyers into the agents’ field began neither with Morton Janklow nor Palmer & Dodge. In fact, the legendary literary and talent agent Irving “Swifty” Lazar started out in the 1930s as an entertainment attorney. He then joined MCA and decided to become an agent, after discovering that an agent’s “cut” was ten percent, as opposed to an attorney’s one percent. Swifty Lazar often sold the works of individuals he did not represent and many times represented both the buyer and seller of the same work. Furthermore, he had no written contracts with his clients, harboring the belief that “just a handshake is enough.”

Considered by many to be the most powerful talent agent in the entertainment industry, Michael Ovitz also attended law school, but never completed his legal education. In developing one of the megawatt talent agencies of the nineties, Creative Artists Agency (CAA), Ovitz observed that young, agentless actors were employing “entertainment lawyers of the new activist breed, who not only scrutinized their client’s [sic] contracts but, like agents, increasingly brokered deals.” He lured these lawyers into working for and dealing with CAA by advertising his agency as a “literary and talent agency.” CAA’s credo was that material came first, and, because they could find the best scripts at Ovitz’s agency, the stars followed. Interestingly, representing writers as a means to gain power in the Hollywood community was also the approach adopted by Ziffren,

14. The Comment to Model Rule 1.7 espouses the view that “[l]oyalty is an essential element in the lawyer’s relationship to a client.”
15. See Wolfensberger, supra note 10.
17. Id.
18. Id.
21. Id.
22. Id.
23. Id.
Brittenham, & Brancaan, the exceptionally successful entertainment law firm. In fact, "Ziffren and Brittenham first set their sights on what was at the time the least glamorous area of the business: TV writer-producers."25

Presumably, this new breed of lawyers acting as literary agents must encounter certain legal ethics dilemmas. It follows that there should be a breadth of legal articles exploring such a topic. However, though attorney representation in other portions of the entertainment industry has been addressed, particularly in the fields of sports and music, attorney representation for authors is an area which is greatly lacking in attention.

There are a number of contractual roles that attorney representatives can perform throughout the entertainment industry. For example, in the music industry, there may be artist-agent, artist-personal manager, songwriter-publisher, and artist-record company relationships. The differences among these arrangements often turn on the amount of involvement that the representative has in the artist's career and the percentage of the artist's profits that the representative receives.29 Personal managers frequently have the greatest involvement in the artist's career, possibly assisting the artist with such personal matters as income management. For their services, personal managers may take as much as one third of the artist's profits.30

Similar relationships exist in the publishing industry, though literary agents' fees currently range only between ten to fifteen percent of the client's payment.31 Literary agents are the most popular form of author representation. However, many authors also seek representa-

25. Id. at 64.
28. Id.
29. Id.; see also Kenneth L. Shropshire, Agents of Opportunity: Sports Agents and Corruption in Collegiate Sports 11 (1990) (discussing "full service firms" which differ from agents in that they are heavily involved in managing the athlete's finances).
30. Shropshire, supra note 29. Additionally, although personal managers are not common to the literary realm, attorneys acting as personal managers would be able to argue that the 30% fees charged are not unethical based on Model Rule 1.5 regarding Fees. Arguably, these fees are similar in nature to the one-third contingency fees charged by attorneys in personal injury cases. In both instances, it is impossible to determine whether the client will succeed, and thus the large expenditure of time invested by the attorney warrants a larger fee.
tion from others, including publicists, for promotional purposes. Unlike literary agents, publicists are not directly involved in the sale of the author’s works. Given that the more visible an author is to the public, the greater the likelihood that the author’s books will sell, publicists earn their livelihood by marketing the author to savvy publishers.

With few exceptions, most notably John Grisham and Stephen King, authors rarely attain the degree of public recognition afforded actors and actresses. Nevertheless, writing and publishing books has formed the bedrock of the entertainment industry. Novels, also referred to as “properties,” that prove commercially successful are often the basis of motion pictures. As more attorneys seek to represent authors in deals and to broker projects, it becomes imperative to consider and contrast the ethical responsibilities of the ALAs and their nonattorney counterparts.

ALAs may encounter significant pitfalls when representing their CAs. Examining these, while bearing in mind the similarities and differences between the ALAs and their nonattorney counterparts, raises several questions: (1) What are the ethical guidelines which govern attorney conduct in the context of representing authors? (2) Are nonlawyer literary agents at a disadvantage when dealing with attorneys? (3) What standard safeguards should be contained in boilerplate contracts between the ALA and the clients they represent? (4) How does the Association of Authors’ Representatives (AAR) ethical code parallel or diverge from the Lawyer’s Code of Ethics? Finally, certain states have passed legislation to police talent agents. This Article will examine one such piece: the 1978 California Talent Agency Act, which governs talent agents conducting business in California, and will analyze the statute’s impact on attorneys who represent authors.

Part II of this article will focus on lawyers’ ethical responsibilities in their role as literary representatives. Part III will propose several safeguards for ALAs and their CAs by recommending the inclusion of key contract clauses. Part IV will juxtapose the roles and responsibilities of lawyer and nonlawyer literary agents. Finally, Part V will ex-

32. Id.
33. Id.
34. See, e.g., Potter, supra note 4.
36. The AAR is the trade organization for literary agents. See Herman, supra note 31.
plore the mechanisms for policing each group primarily through the Association of Authors' Representatives Code of Ethics and the 1978 California Talent Agency Act.

II

Potential Ethical Pitfalls for Attorneys Acting as Authors' Agents

A. Conflict of Interest

Scenario One: What if THE GOSSIP SHOP was similar to another project being considered by your literary agency? The other project has not been signed, but it has been discussed at a round table discussion with other literary agents where you work. Further complicating matters, the other project is by a best-selling author over whom your firm has been salivating for years and desperately wants to land as a client. You would like to represent THE GOSSIP SHOP, but you fear a conflict of interest. What should you do?

Manuscripts are termed "properties"37 and are routinely exploited for their derivative rights, including foreign translation, motion picture, television, and video rights. Despite the "properties" classification, there are vast differences between a real estate agent who represents sellers of real property and a literary agent who brokers authors' works. Because it is highly unlikely that real property can be changed to resemble other property, a real estate agent can represent numerous clients with similar properties without a conflict of interest.

Suppose that instead of our fictional ALA, we are dealing with a real estate agent who is representing two homes in an area where buyers are known to prefer centrally-located brick houses. Based on this criteria, one of these homes is very marketable because of its brick facade, hard wood floors, and accessible location while the other home, a wood-frame dwelling in a secluded area, is not as marketable. The real estate agent's only method of making the second property more marketable is to build on the strengths of what it already has going for it. The agent can advertise the home as a perfect "getaway" because of its secluded nature, but cannot practically move the house to make it as centrally-located as the first.

By contrast, in the area of intellectual property, the advent of computers has allowed a manuscript to be significantly altered to resemble another "property." Plagiarism and outright theft are rampant

37. See Levin, supra note 35.
problems for authors. Proof becomes an important factor in attempting to show that an author or author's agent did not copy another work to which they had previously been exposed. Due to the limited marketplace of publishers, even if two works are not exactly alike, one project may occupy another project's niche. Thus, although there is room for many houses in the market, the literary market will often accommodate only one work.

Let us add to our scenario the fact that The Gossip Shop proposal was not precisely similar to the other proposal that the law firm-literary agency acquired. The firm-agency determined, however, that portions of this new proposal would make the already-signed work more marketable. Even if the changes would only consist of adopting ideas, which are not protected under copyright law, as opposed to the actual expression of these ideas, such as lifting passages from the work itself, the attorney considering The Gossip Shop would be hard-pressed to represent this work. There may be a conflict of interest in the "literary firm" based upon the similarity between the markets for the first project and The Gossip Shop.

ABA Model Rule 1.7 states:
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

In the above situation, a nonattorney literary agent might be tempted to risk a potential copyright infringement claim because of the difficulty an author would have proving that the copied material was the expression of ideas and not the ideas themselves. However, ALAs constrained by the Model Rules must also consider the legal ethics ramifications of their actions that might cause a conflict of interest. These potential conflict of interest problems are greatest in large literary firms where, as in a large law firm, there is a great number of lawyer agents representing competitors for the same buyers. It is critical for these ALAs to consult one another frequently and to communicate CA project lists to avoid potential conflicts of interest.

39. Sharb, supra note 38, at 908.
40. See BUNNIN & BEREN, supra note 6.
41. See Stearns, supra note 38.
42. MODEL RULE 1.7 (1983) (providing guidance on conflict avoidance).
43. See Stearns, supra note 38.
In short, the Model Rules dictate that our ALA should tell The Gossip Shop author to seek representation elsewhere. This is an outcome which might not have occurred had the literary agent been a lay person or nonlawyer.

B. Scope of Representation: Hamstringing Attorney/Literary Agents During Negotiations

Scenario two: After consulting with your fellow ALAs, you realize that The Gossip Shop is actually a vastly different project than anything the agency currently represents. You therefore agree to represent the author. After “shopping the project” to several publishers, you receive a $5,000 offer from one publishing house. From your experience as a seasoned literary agent, you realize that this is only the first offer and that you should press for a better deal for your client. However, you are also a lawyer who is bound by the Model Rules. What should you do? The Restatement (Second) of Agency states:

Unless otherwise agreed, an agent employed to buy or to sell is subject to a duty to the principal, within the limits set by the principal’s directions, to be loyal to the principal’s interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal.⁴⁴

Assuming that an agency relationship has developed between the CA and ALA,⁴⁵ it is imperative that the agent be given the latitude to negotiate the best possible deal for the client. If this is not provided for in an Agency Agreement between the author and the ALA, the ALA will be obligated to consult her client at every juncture of the negotiations,⁴⁶ which slows down the process and can sabotage the agent’s efforts to strike a more favorable bargain for the client.

To avoid problems in this area, the CA-ALA contract should address this issue, providing the ALA with the latitude to negotiate on behalf of the client.⁴⁷ It is critical that the ALA and the client contractually agree as to exactly what powers the attorney will have in negotiating so that both parties fully understand how much latitude the agent will be allowed.

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⁴⁵. Agency is defined as the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Id. § 1.
⁴⁶. Model Rule 1.2 states in pertinent part: “(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are pursued.” Model Rule 1.2 (1983).
⁴⁷. See infra Part IV.
C. Competency of Attorney/Agents Representing Authors: What Consideration Should Be Paid to Qualifications?

What does it take to be a literary agent: an agency name? Some stationary with that name on it? A phone with a message machine? Conceivably, one could conduct all business through a post office box, avoiding even the need for office space. In fact, nonattorneys have no obligation to gain a mastery of the publishing industry and publishing contracts before they begin representing authors before publishing houses, unless they voluntarily decide to join trade organizations, such as the Association of Author's Representatives. But is this same standard applicable to the attorney who also wears the hat of "literary agent?"

Is every law school graduate qualified to represent authors in the sale of their work based on his or her preparation in first year contracts? Yes and no. ALAs, unlike their nonlawyer counterparts, have an ethical duty under Model Rule 1.1 to competently represent their clients: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." As the Comment to this Rule provides:

Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

ALAs are not precluded from taking on work with which they are unfamiliar, such as publishing contracts and other transactions in the complex publishing industry. These ALAs have, however, an affirmative duty to educate themselves about this area of the law, just as they would about insurance or products liability. Often, the ALA will be expected to function not only as a salesperson, but also as a contractual consultant. When acting in such a capacity, the Model Rules dictate that these ALAs educate themselves about the nuances of this species of contract.

48. See Herman, supra note 31; see also infra Part V.
50. Id. cmt.
D. Confidentiality in the Context of Attorney/Agent - Client/Author Break-Ups

Scenario three: Assuming that the author of THE GOSSIP SHOP decides to terminate his relationship with the agent, what information may be brought out by the ALA to establish breach of contract and what information is protected by the attorney-client privilege?

Model Rule 1.6 states:
(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation . . . .
(b) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary: . . . (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . .

Based on this rule of legal conduct, an ALA would be well within her rights to reveal information normally protected under the attorney-client privilege, in order to protect herself, if the CA breached his contract with her. Nonlawyer literary agents can also be held liable for revealing confidences because they have a fiduciary duty to their clients based on their role as agents in an agent-principal relationship. Additionally, nonlawyer literary agents may be liable for breach of contract if the agent-author agreement contains a provision that the agent is not to reveal confidential information learned during the course of representing the author.

III
Designing a System of Protection for Both Attorney/Agents and the Authors They Represent

As discussed earlier, Swifty Lazar did not use written contracts with his clients. However, given the nature of this relationship and the possible pitfalls which could befall the ALA, it is important to memorialize in writing the parameters of the agent-client relationship prior to proceeding with negotiations on behalf of the author. But what are the most important clauses in this contract which will protect both the author and the ALA?

51. MODEL RULE 1.6 (1983).
52. See, e.g., Anderson, infra note 76; see also Croce v. Kurnit, 565 F. Supp. 884, 890-95 (S.D.N.Y. 1982), aff'd 737 F.2d 229 (2d Cir. 1984) (an attorney who was not even representing the artist, but was involved in explaining the contracts to him, still had a fiduciary duty toward both the artist and his wife).
53. See infra Part IV.
A. Concerns Regarding the Attorney/Literary Agent - Client/Author Agreement

By examining agency agreements, it is possible to target those clauses that should be highlighted and stressed for purposes of protecting the ALAs and the authors whom they represent. More importantly, an attorney should phrase this agreement in the most basic language so that it is both clear and understandable to the lay person author. This agreement may be accomplished by two means: (1) as an agreement "letter" between the author and the ALA (which is a contract expressed in the form of a letter between the contracting parties), or (2) through a more formal means: an actual contract. For purposes of protecting both the CA and his ALA, a formal agreement, although more time consuming to draft, is preferable because it lays out with greater specificity the areas of greatest concern to both parties in the event of a dispute.

B. What is Being Represented?

The first concern when drafting the author-agent agreement is the manuscript itself. What exactly is the author promising to deliver to the agent for representation? The more clearly this "property" can be described, the less difficulty will arise in the event of a dispute. If possible, the property should be described with regard to its subject area, its approximate or estimated length in words, and any specific details which can be used to define this work as unique. Additionally, if the author submits a "partial" manuscript and does not yet have a completed one, which is often the case, the ALA should have a contractual "out" in the event the author does not deliver a completed manuscript within a set period of time. This period should be of reasonable duration and should be extended for explicit reasons set forth in the contract, such as author illness. Nonattorney agents should also include this clause in their author-literary agent agreement for protection against claims of copyright infringement.

54. See Bunnin & Beren, supra note 6.
56. Id.
58. Id.
59. See Levin, supra note 35, at 412.
61. Id.
C. Ownership of the Work

The author must explicitly warrant in the author-literary agent contract that he or she reserves the legal rights to the work in question and where necessary, this individual may be asked to produce copyright forms for unpublished works copyrighted in the author's name.\(^6\) This will be particularly important when the ALA is dealing with third parties.

Although the nonattorney agent can be liable for fraudulent misrepresentation, the ALA is bound by legal ethical standards.\(^6\) In the event that an ALA learns that her client does not have the rights to the work, she cannot allow the buyer to harbor the incorrect assumption that the seller has rights to the work. Model Rule 4.1 provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a . . . fraudulent act by a client . . ."\(^6\)

Nonattorney agents may be subject to expulsion from the voluntary trade organization, the Association of Author's Representatives (AAR), based on the AAR's code of ethics.\(^6\)

D. Scope of Agency

As discussed above, because the principal-agent relationship may in some also situations be characterized as an author-attorney relationship, it is critical that both parties elaborate upon the scope and extent of authority the author vests in the agent. These provisions should include whether the attorney has the right to sell the property to publishers, motion picture studios, television production companies, and foreign entities. Model Rule 1.2 states: "(a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are pursued . . . . (c) A lawyer may limit the objectives of representation if the client consents after consultation."\(^6\) The ALA has a duty to represent her client zealously in attempting to sell the work. It is important to remember, however, that for the attorney to work effec-

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62. Id. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").
64. Id.
65. See Herman, supra note 31.
tively, the client author should give him in writing the latitude to ne-
gotiate effectively on the author's behalf.

Also, the ALA should limit her relationship with the client au-
thor to representing the work. Although the nonattorney agent is lim-
ited to representing the client's creative property, the ALA has the
opportunity to represent the client author in other legal contexts, in-
cluding the drafting of a will, representation in a criminal matter, or
settling a marital dispute. The ALA should refrain from engaging in
such types of work for his or her client who is also an author for whom
he or she acts as an agent.

E. Period of Agency

Limiting the length of the relationship between literary agent and
author in the ALA-CA agreement is a particularly tricky problem be-
cause the duration will vary based on the parties and the project(s)
involved. Additionally, if a manuscript meets with little initial success,
many agents (lawyer and nonlawyer alike) representing new or un-
proven authors may be inclined to stop vigorously trying to sell the
work because they may question its commercial value.\(^6^7\)

For practical purposes, a finite term should be set out in the con-
tract.\(^6^8\) The contract should also state that if the work marketed by
the current agent is later sold, in similar form, the former agent has
the right to a commission. An agent should not be given the right to a
commission on future works commenced after the agreement has
ended. Again, pursuant to Model Rule 1.2, it is important to define
the length of the relationship so that both the ALA and the client
author know where they stand.\(^6^9\)

F. Report of Agent's Activities

The author-literary agent agreement should contain a provision
providing for regular status reports to the client author. An ALA has
a greater duty than her nonattorney counterpart to keep the client
informed. This is based on Model Rule 1.4, which states: “(a) A law-
yer shall keep a client reasonably informed about the status of a mat-
ter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary

\(^6^7\) See, e.g., Potter, *supra* note 4.

\(^6^8\) For example, one year. However, certain publishing agreement scholars en-
courage literary agent contracts to have open-ended period clauses. See, e.g., Winnick,
*supra* note 55. The problem with this arrangement is that neither party has a firm sense of
the duration of the agency representation.

to permit the client to make informed decisions regarding the representation.⁷⁰ Because of this ethical rule, and as a service to the client, the ALA should provide regular status reports to the client as frequently as four times per year. A nonattorney agent who belongs to the AAR is required by its rules to promptly provide a CA with a status report, but only after the author requests one.⁷¹

G. Commission on the Sale of Work

The ALA-CA contract should include a clause that clearly states the ALA’s fees for representing the author’s work. This provision helps to avoid disputes about the amount the ALA is entitled to receive. It is interesting to note that although Model Rule 1.5 enumerates “time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly”⁷² as factors in determining whether legal fees are reasonable, ALAs have not run into trouble for reaping enormous commissions while investing relatively small amounts of time and labor.⁷³

H. Breach of Contract

In the interest of the client author, the literary agent-author contract should include provisions for Alternative Dispute Resolution (ADR) to resolve disputes between the author and ALA. ADR is not only more cost-effective than traditional litigation, it is also much faster than waiting to get onto overcrowded court dockets.⁷⁴ Pursuant to Model Rule 1.16, “[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services.”⁷⁵ Therefore, the client will be held liable for the amount of work already performed by the ALA. The nonattorney agent may petition the courts for specific performance in the form of reinstatement as their former client’s agent. However, based on ethical considerations and the client’s ability to dismiss an attorney at will, the ALA can only recover monetary damages flowing from the breach of contract.

⁷¹. See infra note 87.
⁷³. See, e.g., Lennon, supra note 7.
IV
The Differences and Similarities Between Nonattorney and Attorney/Agents and Mechanisms for Policing Each

Both ALAs and nonattorney literary agents act as fiduciaries for their clients. Both serve in an agency capacity for their principal, and as such, maintain both actual and apparent authority to bind their clients in negotiations with third parties with whom they are doing business. Literary agents, attorney and nonattorney alike, have no institutionalized trade associations regulating who can or cannot act as a literary agent.

Until recently, two major organizations existed to which literary agents could voluntarily apply. The Society of Author's Representatives (SAR) was the older and more established organization. Its members, such as the William Morris Agency, tended to be more established and often more influential agencies. The Independent Literary Agents Association (ILAA) was a newer group whose member agencies were often more recently formed.

In 1992, however, these organizations merged to become the Association of Authors’ Representatives (AAR). Although this organization does not have the power to police literary agents, it has formulated criteria for membership and promulgated an ethical code.

Members of the AAR must agree in writing to uphold the Code of Ethics (AAR Code). Several clauses in the AAR Code parallel standards set forth in the Legal Code of Ethics, including a requirement that AAR members refrain from defrauding their clients and members of the general public.

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77. Id.
79. See POTTER, supra note 4.
80. The 1978 Act, supra note 78.
81. Id.
82. See HERMAN, supra note 31.
83. Id.
84. Id. AAR Canon of Ethics, Clause 1, states:

They [members of the AAR] pledge their support to the Association itself and to the principles of honorable coexistence, directness, and honesty in their relationships with their co-members. They undertake to never mislead, deceive, dupe, defraud, or victimize their clients, other members of the association, the general public, or any other person with whom they do business as a member of the association.
Paragraph Two of the AAR Code requires that members keep their clients' money in separate bank accounts to prevent commingling of assets,\textsuperscript{85} paralleling Model Rule 1.15.\textsuperscript{86} Paragraph Four instructs members to regularly inform their clients about their dealings concerning the client,\textsuperscript{87} quite similar to Model Rule 1.4.\textsuperscript{88} Paragraph Five, similar to Model Rule 1.7,\textsuperscript{89} addresses conflict of interest dilemmas and cautions against representing buyers and sellers in the same literary transaction unless both parties agree and are offered the opportunity to seek outside representation.\textsuperscript{90}

Still, the codes contain significant differences. The AAR Code, Clause Seven, requires that member agents keep their clients' financial affairs private and confidential, except as required by law.\textsuperscript{91} This diverges somewhat from the legal ethical canon which requires, with some exceptions, that all communications made within the context of the attorney-client relationship are privileged. Unlike the AAR Code, the ABA ethical canons do not limit the duty of confidentiality for attorneys solely to financial matters.\textsuperscript{92} The AAR Code, Clause

\textit{Id.} Model Rule 4.1, requiring truthfulness in dealings with others on the client's behalf, is similar.

\textsuperscript{85} Clause Two reads in pertinent part:

Members shall take responsible measures to protect the security and integrity of clients' funds. Members must maintain separate bank accounts for money due their clients so that there is no commingling of clients' and members' funds. Members shall deposit funds received on behalf of clients promptly upon receipt, and shall make payments of domestic earnings due clients promptly, but in no event later than ten business days after clearance.

\textit{Herman, supra note 31.}

\textsuperscript{86} Model Rule 1.5(a) (1983) (directing lawyers to keep their clients' funds separate from their own).

\textsuperscript{87} \textit{Herman, supra note 31.} AAR Code, Clause Four, states that "[a] member shall keep each client apprised of matters entrusted to the member and shall promptly furnish such information as the client may reasonably request." \textit{Id.}

\textsuperscript{88} Model Rule 1.4(a) (1983) (stating that "a lawyer shall keep a client reasonably informed about the status of a matter").

\textsuperscript{89} Model Rule 1.7 provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by lawyers' responsibilities to another client" unless the clients consent after an "explanation of the implications of the common representation and the advantages and risks involved." \textit{Model Rule 1.7} (1983).

\textsuperscript{90} \textit{Herman, supra note 31.} AAR Code, Clause Five addresses conflict of interest issues:

"Members shall not represent both buyer and seller in the same literary transaction except in special instances wherein the member notifies both parties before any negotiations proceed and offers the opportunity to either party to arrange for other representation in that transaction." \textit{Id.}

\textsuperscript{91} \textit{Id.} The AAR Code, Clause Seven provides: "Members shall treat their clients' financial affairs as private and confidential, except for information customarily disclosed to interested parties as part of the process of placing rights as required by law, or, if agreed with the client, for other purposes." \textit{Id.}

\textsuperscript{92} Model Rule 1.6(a) (1983).
Eight, states that reading fees, charged by agents when considering a potential client's work for representation, are subject to abuse and are therefore discouraged by the AAR. They are, however, chargeable by members who before October 30, 1991 registered their intent to charge such fees.\footnote{HERMAN, supra note 31. The AAR Code, Clause Eight provides:}

\begin{quote}

The AAR believes that the practice of literary agents charging clients or potential clients fees for reading and evaluating literary work (including outlines, proposals, and partial or complete manuscripts) is subject to serious abuse that reflects adversely on our profession. For this reason the AAR discourages that practice. New members and members who had not, before October 30, 1991, registered their intent to continue to charge reading fees shall not charge such fees.

\end{quote}

\footnote{HERMAN, supra note 31.}

\footnote{\textsc{CAL. LAB. CODE} § 1700.4(b) (West 1989 & Supp. 1991).}

\footnote{See James B. O'Brien III, Comment, Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists, 80 \textsc{Cal. L. Rev.} 471 (1992).}

\footnote{\textit{Id.}}

\section{Statutory Policing of Attorney Talent Agents}

As evidenced by the previous sections, ALAs have more ethical obligations constraining their actions than nonattorney agents. ALAs, however, have the added advantage of credibility because of the policing standards of their profession. ALAs possess the enhanced ability to scrutinize contracts and perform negotiations, armed with the expertise unique to a legal education.

In 1978, California adopted the Talent Agencies Act, designed to "prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public."\footnote{\textit{Id.}} Writers are expressly included within the parameters of this act under section 1700.4(b).\footnote{\textsc{CAL. LAB. CODE} § 1700.4(b) (West 1989 & Supp. 1991).} The California Labor Commissioner has taken the position that California lawyers acting as talent agents, though also regulated by the California State Bar, are not exempt from the Talent Agencies Act.\footnote{See James B. O'Brien III, Comment, Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists, 80 \textsc{Cal. L. Rev.} 471 (1992).} California courts, however, have not decided the issue. The courts have determined that a lawyer not licensed in California who acts to procure employment for a client in California is subject to the Act. In one case, because a lawyer did not obtain a license under the Act, he was deemed an "unlicensed talent agent" and ordered to refund commissions.\footnote{\textit{Id.}}

Under the California Talent Agencies Act, an individual running a talent agency or representing talent must apply for a license from
the Labor Commissioner. To receive this license, the applicant must submit two sets of fingerprints and affidavits by at least two reputable residents of the city or county in which the talent agency will operate. These affidavits should attest to the good moral character of the individual seeking to run a talent agency.

Interestingly, this Act requires all talent agencies to submit contract forms used by the talent agency and a fee schedule to the Labor Commissioner when entering into written contracts with artists. The Talent Agencies Act also requires agents to include in their contracts a provision referring any controversies relating to the contract, either to arbitration or the Labor Commission for adjustment.

It has been argued that the 1978 Talent Agencies Act is unfair and duplicative for ALAs and was never designed to police these individuals. Despite this criticism, the Talent Agencies Act provides much needed protection for artists easily susceptible to unscrupulous agents. Despite the fact that attorneys have their own set of ethical rules, this Act is not unduly duplicative. The Act simply ensures that ALAs fulfill the same stringent standards required of their nonattorney counterparts, and the need to safeguard clients outweighs any burden imposed by the duplicative nature of the Act.

VI

Conclusion

Over the past decade, lawyers have emerged as a dominant force in the entertainment industry. ALAs possess the ability to negotiate on behalf of their CAs and to draft their contracts with legal acumen. There are numerous differences between ALAs and nonattorney agents in terms of their latitude in negotiations, ability to represent potentially conflicting projects, and ability to interpret and draft legal documents on behalf of clients. Lawyers acting in the capacity of a writer's agent must be acquainted with several provisions of the Model Rules, including conflicts of interest, fees, communication with the CA, and competence to practice as an ALA.

Unquestionably, both nonattorney agents and ALAs need to be policed to protect artists from those agents who may take advantage of unestablished clients' relatively poor bargaining strength. How-

99. Id. § 1700.6.
100. Id. §§ 1700.23-1700.24.
101. Id. § 1700.45.
102. Id. § 1700.23.
103. See generally O'Brien, supra note 96.
ever, ALAs must also protect their own interests by insisting upon unambiguous written contracts with their clients. These contracts should enumerate in detail the scope and particulars of the relationship, including a detailed description of the project(s) being represented, fees, period and scope of the agency, and provisions for dispute resolution in the event of a breach of contract.