The Texas Lawbook

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Are Handshake Deals in the Entertainment Biz on Shaky Ground?

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(Oct. 25) – People in the film and television industry truly do things in their own way. Traditionally, movers and shakers in this industry have risked millions of dollars relying on handshake deals or "soft contracts" – documents that most law students wouldn't believe could constitute legally binding agreements. These soft contracts can range from cocktail napkins or email exchanges to unsigned deal memos or long-form agreements without a single signature.

There are several reasons why the entertainment industry takes this approach. At different times in the lifecycle of a film, the absence of a written agreement can create negotiating leverage, depending on which side of the deal you or your client is on. Further, lawsuits in Hollywood can be viewed as negative publicity that may affect a studio's or an actor's reputation. If a studio or actor doesn't intend to file a formal lawsuit, then having a contract with all of the i's dotted and t's crossed is not a priority and can potentially harm a party's bargaining position at a later time.

Although this industry custom may not seem like a best practice, it has been widely accepted in the past. For example, Charlton Heston starred in over 60 films without ever having a signed agreement before production commenced. But despite the business advantages implicit in this type of "agreement," the tide has turned when it comes to courts' views on this practice.

When there's no signed contract, parties may be vulnerable.

Sometimes professionals in the entertainment industry don't have a physical document that could constitute an agreement. Not surprisingly, this approach can quickly lead to a "he said, she said" situation.

For example, entertainment attorneys regularly receive a percentage – generally five percent – of their clients' income. While an entertainment attorney may instead agree to an hourly fee relationship, taking a percentage is not uncommon. Some veteran entertainment attorneys have informally reached these agreements, knowing that an actor client can choose to leave and change attorneys at any time.

However, entertainment attorneys subscribing to this approach could be in trouble after a ruling that was issued earlier this summer. In August, a California judge's opinion sent chills down entertainment attorneys' spines when he ruled that the oral agreement between Johnny Depp and his longtime entertainment attorney was voidable at Depp's discretion. This was a standard five percent agreement, following industry custom. But the court found that the agreement between entertainment attorney Jake Bloom and Depp was essentially a contingent-fee relationship between an attorney and a client, which must be in writing under California law. This is the case in Texas as well, according to Texas Disciplinary Rules of Professional Conduct Rule 1.04(d) and Texas Government Code Section 82.065(a).

In the nearly twenty years that Jake Bloom represented Depp, Bloom estimates that his five percent cut of Depp's revenue is approximately $30 million. As a result of the court's recent ruling, Bloom is not entitled to receive his benefit of the bargain. However, Bloom isn't completely out in the cold. He has the opportunity to prove quantum meruit damages representing the reasonable fee for the services he provided since 1999.

Some oral agreements are enforceable in Texas.

That being said, there are situations where oral agreements can be enforceable. In order to form a valid contract, whether written or oral, there must be (1) an offer, (2) an acceptance of the offer, (3) a "meeting of the minds" – a mutual understanding of the parties' specific obligations and intent to be mutual and binding, and (4) consideration – each party receives some benefit from performing the contract, such as payment rendered in exchanges for products or services.

For oral agreements, the difficulty is in proving that each of these elements existed at the time of the agreement.

In some cases, oral agreements have been deemed enforceable under the theory of promissory estoppel – when there is (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial detrimental reliance by the promisee.

A party may also recover the reasonable value of goods or services provided to another when no contract covered the transaction under the theory of quantum meruit. According to the Texas Court of Appeals in Houston, "To recover in quantum meruit, a claimant must prove that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) and were accepted by the person sought to be charged; (4) under circumstances that reasonably notified the person sought to be charged that the plaintiff, in performing the services or furnishing the materials, expected to be paid by the person sought to be charged."

Of course, these options may not be available if the agreement is barred by the Statute of Frauds, which requires that certain agreements be in writing. However, even the Statute of Frauds has certain exceptions, such as the doctrine of partial performance, which is based on the equitable principle that a failure to enforce an oral agreement would amount to fraud. Regardless of potential theories and loopholes, reliance on an oral agreement is a roll of the dice when it comes to enforcement.

Soft contracts can have benefits, but they also create uncertainty.

The nature of the film and television industry encourages its players to gravitate toward soft contracts. While this practice may seem sloppy, it's intentional because it creates benefits that traditional contracting cannot provide.

For example, soft contracts allow a party to have a relationship with high-value talent while, at the same time, creating enough wiggle room to "go in a different direction" if either party decides to pursue a different project. Moreover, soft contracts can keep the pre-production phase moving forward quickly to meet tight deadlines.

While most attorneys generally prefer clearly defined deal points, at times it can be advantageous to make terms in the soft contracts strategically ambiguous. Even large studios that produce blockbuster features, including Universal, Twentieth Century Fox and Warner Brothers, have relied on unsigned documents for multimillion dollar investments.

But the lack of a formal, signed agreement can lead to uncertainty. For example, in the early 1990s, Main Line Pictures sued Kim Basinger over one such soft contract. Basinger and Main Line initially reached an oral agreement for her to star in the film Boxing Helena. The parties had conversations regarding terms, exchanged an unsigned deal memo, and the attorneys for both sides prepared five drafts of a long-form agreement, none of which were ever signed. Before filming began, Basinger changed her mind and no longer wanted to star in the film.

At trial, the jury found that Basinger entered a binding personal services contract with Main Line to act in the film. Although Basinger believed there was no legally-binding agreement because she didn't sign the draft long-form agreement, the jury found that she – or her loan out company – entered into both oral and written contracts with Main Line. The evidence that the jury relied on in making that finding included evidence regarding oral communications, the deal memo, unsigned draft agreements, Basinger's agreements for prior films – she had signed only two written agreements in all of her previous film roles – and Main Line's reliance on the oral agreement to its detriment – after Basinger backed out of the film, foreign presales for the film dropped over $4 million.

The Basinger opinion, however, is in the minority. Since World War II, almost three quarters of the entertainment decisions analyzing soft contracts ended with a finding that the agreement was unenforceable. Those cases involved individuals like Robin Williams, Pamela Anderson and Francis Ford Coppola. In those cases, the courts refused to enforce the purported agreements for several reasons, including a state's Statute of Frauds, the federal prohibition against orally transferring a copyright interest, indefiniteness and a lack of intent to be bound.

While that statistic doesn't account for disputes that settled before trial, the fact that almost 75 percent of the cases that go to trial reach that conclusion should scare those who intend to rely on soft contracts. Even more, statements from U.S. Court of Appeals justices like "[c]ommon sense tells us that agreements should routinely be put in writing" emphasize the unescapable

fact that soft contracts – and handshake deals – leave a lot to chance and the decision of a future jury.

Where do we go from here?

What can we learn from these examples? If a party goes to a court for relief, that party should know that the courts are forcing the entertainment industry to play by the same rules as those in other industries. Although it was traditionally acceptable to make Hollywood deals in an informal fashion, that approach should be taken today only at one's peril. The main problem is that one party doesn't know ahead of time whether it will be facing off against the other party it's currently negotiating against in court in the future. If this was possible, then litigators would be out of a job.

There are several things to keep in mind in determining what an agreement should look like if you want to enforce it at a later date. As some deals in the entertainment industry may be barred by the Statute of Frauds in Texas, entities in the entertainment space should ensure that all major agreements are in writing and signed to help ensure that they are enforceable.

Moreover, this type of agreement should include the elements required under Texas law: (1) an offer, (2) acceptance, (3) a meeting of the minds, and (4) consideration.

Further, in order to ensure that there is a legitimate meeting of the minds, the parties should include all material deal points in the agreement. This does not mean that parties have to do away with traditional deal memos or short-form agreements, but they need to confirm that the final long-form agreement has all material terms before production commences if they want to increase their odds of success in any future litigation.

The best practice is to get major agreements in writing and signed if you want to enforce them later. But if a party you represent wishes to continue making soft contracts, you can take steps to mitigate risk like clarifying any potentially unclear deal points and documenting oral communications with the other party in writing to commemorate – and reiterate – previous discussions and agreements.

Although it hasn't always been the case, courts are more and more frequently telling plaintiffs and defendants in the entertainment industry "if it's not on paper (and signed), it's just vapor." The safest course is always to get it in writing – and autographed.

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