May 24, 2021
Chief Justice Tani Cantil-Sakauve
And the Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Bacall v. Shumay, S269407/B302787

If it may please the Court,

My name is Rick Siegel; a personal manager and owner of Marathon Entertainment (*Marathon. v. Blasi* (2008) 42 Cal.4th 974). I am respectfully submitting this amicus curiae letter pursuant to CA Rule of Court 8.500(g) in support of Appellant's petition for review.

Should *Bacall* not be reviewed and overturned, its holding would leave the activities of "corresponding with attorneys, redlining agreements, and making comments on proposed contracts," irrespective of the sophistication or complication of the transaction, reserved only for those with bar licenses. The broad implications of such a holding raises multiple questions worthy of this court's consideration:

1) Does the Court wish to reserve the "corresponding with attorneys, redlining agreements, and making comments on proposed contracts" activities only licensed attorneys can lawfully engage?
2) Does *Bacall* create conflicting precedents?
3) If *Bacall* stands, what are the repercussions of a precedent holding that it is unlawful for all but licensed attorneys to negotiate a contract; is this legal issue so important that they require definitive answers from the highest court in the state?

If *Bacall* stands, most likely sooner versus later, general contractors and architects will successfully complete a project, but instead of receiving the balance due will face a lawsuit, based on claims that by negotiating written contracts without a law license as the homeowner's representative with the electricians, landscape architect, pool construction engineers, plumbers, and carpenters, they engaged in the unlicensed practice of law.

Further, as the unlicensed practice of law is a misdemeanor, the contractor will be at risk not just of losing of owed monies, but potential jailtime. Before another litigant has the financial wherewithal and determination to litigate through the Court of Appeals, many will walk away or settle for fractions of what was originally owed.

Ironically, while negotiating employment contracts is the occupation's main defined activity, if *Bacall* stands and only licensed attorneys are allowed to negotiate contracts, talent agents will be similarly vulnerable when their clients make like claims.

This enforcement will not just compromise those unaware or choosing not to follow it; it will compromise those who do follow it. For example, every person who appears on screen, from a star to an extra, must sign written contracts. If a scene needs 400 extras, production will be delayed until attorneys can facilitate the execution of 400 contracts. Conversely, it will be almost impossible to find people willing to take on 'extra' work. Extras make about $100 per day plus 10% for the agency commission; it will cost the actors more than they make to pay for a lawyer to negotiate the deal.

Should this Court accept and affirm *Bacall*, so be it; but certainly these issues are large enough that they deserve your consideration and deliberation.

1. Does California law restrict the activity of negotiation to licensed attorneys?

Attorneys negotiate. But is negotiation a defined activity of the profession that does not require licensure, or a regulated activity reserved for licensees? The plain language is of no service, as there is no statute expressly prohibiting non-licensees from such activities. Nor is there any legislative history showing the legislature has ever wanted to reserve the elements of a commercial negotiation, regardless of the nature of the transaction, to licensed lawyers.

"The legislature adopted the State Bar Act in 1927 and used the term `practice law' without defining it." *Baron v. City of Los Angeles*, 2 Cal 535, 542. Without creating a statute to expressly reserve the action for attorneys in the 94 years of the Bar Act's existence, it defies logic to conclude the Legislature sees negotiating contracts for others as a concern.

A secondary methodology for statutory interpretation is to compare a statute to other like laws; are the defining activities of other regulated occupations automatically reserved for

licensees? The clear answer is no: for example, there are no express provisions requiring one to first obtain a psychologist's license before applying psychological principles to influence another's behavior. Among others, life and athletic coaches, teachers, religious practitioners and business consultants all use those principles; and unless they also falsely identify as psychologists, they can lawfully engage in those activities.

Similarly, non-licensees can engage in the defining activities of a nurse, geologist, or landscape architect, but without also wrongly claiming to have obtained a license, they are acting lawfully. Conversely, many of the defining activities of regulated occupations bar non-licensees are barred from engaging them by codified statute, like those in Business & Professions Code ("BPC") §§ 7027 – 7029 of the State Contractors Act, or the Clinical Laboratory Technology Act.

Two licensing schemes are particularly illuminative. The Accountancy Act expressly states that non-licensee reserves the first five of the regulated occupation's defined activities to licensees, but anyone can engage in subdivisions (f) to (i) of § 5051, the statute that defines the practice of public accountancy, if the person engaging in the activity "does not hold himself or herself out, solicit or advertise for clients using the certified public accountant or public accountant designation."

The Pharmacy Act reserves distributing regulated drugs and medical devices to licensed pharmacists (Business and Professions Code Section 4170), but it does not make distribution exclusive. The Legislature expressly identified and codified specific circumstances as to when licensed prescribers (i.e., doctors, dentists, osteopaths; see Section 4170(c)) are permitted to dispense drugs. Other licensing schemes, like the Locksmith Act, similarly prohibit all defined activities of the regulated occupation (see BPC § 6980.10) but also have codified exemptions for when others can engage in the defined activity (see BPC § 6980.12).

With *Bacall*, negotiating will now be an activity reserved for licensees in the same the way doing electrical or plumbing work is for contractors, without having, as all other schemes that enforce defined activities with the notable exception of the Talent Agencies Act, statutes that clearly reserve certain activities for licensees.

Absent legislative or statutory guidance, this Court, has primarily relied on *People v. Merchants Protective Corp.*, 189 Cal. 531, 535 (1922) to define the practice of law:

> "`[A]s the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." *Baron* Supra.

Baron continues (at 543)…

> "…it is not the whole spectrum of professional services of lawyers with which the State Bar Act is most concerned, but rather it is the smaller area of activities defined as the "practice of law." It must be conceded that ascertaining whether a particular activity falls within this general definition may be a formidable endeavor. [Citation omitted.] In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law "if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind."

Though these paragraphs are often cited, and can serve as a guide, as all judges know, case law is not to be part of an analysis of statutory construction and intent.

Quoting the District Attorney for the County of Los Angeles's *Unlicensed Practice of Law Manual for Prosecutor*s (2015 edition), there is a rationale why the…

> "definition of law practice is broad and non-specific … 'Given the complexity of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law. To restrict or limit its applicability to situations in the interest of specificity would also limit applicability to situations in wish the public requires protection." *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609.

It is hard to think the facts in *Bacall,* a personal manager collaborating with a talent agent to secure two screenwriting assignments, fits anywhere near the "broad standard" needed to "protect" Californians "from wrongs arising from the practice – or counterfeited practice of law." (*Manual for Prosecutors* at 7) Rather than a situation that the public needs protection from, is an opportunity most Californians only dream of.

Not all contracts require the sophistication of a specialist. Even when they do, it is possible a practitioner in the specific industry has more knowledge than any attorney. This acknowledgement has resulted with consumers not only using laypeople to negotiate for them, but even represent them in arbitrations.

> "Access to justice and the high cost of lawyers are two reasons courts offer to justify permitting non-lawyers to represent parties. For example, a real estate broker who can find a house and help draft a purchase offer provides economies of scale to the consumer that might outweigh concerns about unauthorized practice of law." Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties In Arbitrations Involving Statutory Claims Practicing Law?* Univ. of CA Davis Law Review, Vol. 48:921, 932. (2015).

While many lawyers are certain that only attorneys can lawfully negotiate contracts (the arbitrator in this case was a lawyer, not a judge), most laypeople would be just as certain that anyone can negotiate. They understand that only an attorney can represent someone else in court, but they often utilize interior designers to negotiate better prices for their furniture or utilize car brokers or insurance agents to get better deals than they can get on their own.

The *Unlicensed Practice of Law Manual for Prosecutors* (at 20-21) lists several examples of the different activities California courts have found to be inside the practice of law: providing legal advice and counsel before there a court case is initiated, preparing a deed trust, operating an eviction service, providing bankruptcy legal services, preparing marital dissolution documents, selling estate planning services, operating a phony 'legal aid' business, and holding oneself out as a licensed attorney. The entire manual only mentions the term 'negotiating' once: noting that negotiating a tax settlement was inside the purview of an accountant. *Id.* at 21.

Searching for a case adjudicated anywhere in the country even where negotiating contracts without any other claim of unlicensed practice of law is a near-impossible task. In Oklahoma, the reinstatement of an attorney was challenged because while inactive, the applicant had "acted as a 'senior contract negotiator' and "her job duties required her to draft and negotiate complex agreements … negotiate contract terms and details with contract administrators, negotiators, and managers of other companies.

As found in *Reinstatement of Montgomery,* 242 P.3d 528, 528, 529 (Okla. 2010), her actions "is not what is considered the practice of law in Oklahoma. It was business oriented and many nonlawyers conducted these contract negotiations as well."

The *Manual for Prosecutors* does memorialize how California does prohibit non-licensees from negotiating wills, marital dissolution contracts and deeds, but like Oklahoma, has never found that business negotiations can only be facilitated by a licensed attorney.

"[W]hatever is necessarily implied in a statute is as much a part of it as that which is expressed." *Johnston v. Baker* (1914) 167 Cal. 260, 264. "But an intention to legislate by implication is not to be presumed." *First M. E. Church v. Los Angeles Co*. (1928) 204 Cal. 201, 204."Although in years past it may have been necessary for courts to read into a statute provisions not specifically expressed by the Legislature, the modern rule of construction disfavors such practice." *Woodland Joint Unified School Dist. v. Comm. on Professional Competence,* 2 Cal.App.4th 1429, 1451 (1992), quoting *San Diego Service Auth. for Freeway Emergencies v. Superior Court* (1988) 198 Cal.App.3d 1466, 1472.

Without a published case of an unlicensed person who had negotiated a contract for others ever found to have been engaging in the practice of law, and as so many people negotiate for others without a thought they could be acting unlawfully (the lack of notice making such enforcement arguably unconstitutionally vague), it is at least worthy of the Court's deliberation versus just letting *Bacall* stand.

2. Does *Bacall* conflict with existing precedents?

As interpreted by the State Labor Commissioner ("Commissioner"), "whose views are entitled to substantial weight if not clearly erroneous," the regulations of a licensing scheme apply to all Californians save for those statutorily exempted from those prohibitions. See *Solis v. Blancarte*, TAC-27089 (2013), *Doughty v. Hess*, TAC 39547 (2017)).

The Commissioner and courts have uniformly found that agents can legally negotiate contracts. "Generally speaking, an agent's focus is on the deal: on negotiating numerous short-term, project-specific engagements between buyers and sellers." *Marathon v. Blasi*, 42 Cal 4th.974 (2008).

The Talent Agencies Act itself speaks to agents' lawfully negotiating, first by definition in § 1700.4 (a), and then again in § 1700.44 (d) when it exempts non-licensees from the prohibition of negotiating if it is done under the umbrella of a licensed agent.

As stated in *Bacall* at Pg. 10, the plain meaning of the "Safe Harbor" provision based on the language of *CA Lab. Code* 1700.44 (d) is to exempt individuals and corporations from [needing to first obtain] a talent agency license when a licensed talent agent requests assistance in the negotiation of an employment contract, not to permit the practice of law without a license."

In *Solis* and *Doughty,* attorneys were found to have violated the TAA by negotiating deals without working inside the safe harbor. The Commissioner explains why in *Jewel v Vainshtein*, (TAC 02-99, pgs 24-25): "An attorney is not specified in 1700.44 (d), or for that matter anywhere else within the Act that could be construed to extend the exemption to licensed California attorneys."

Just as the TAA does not exempt does not exempt licensed attorneys, the State Bar Act does not specify talent agents in CA Business & Professions Code ("BPC") §§ 6125 and 6126 or "anywhere else that could be construed to extend the exemption to licensed talent agents." Thus, licensed talent agents, like all other Californians, must follow the tenets and prohibitions of the State Bar Act.

If "corresponding with attorneys, redlining agreements, and making comments on proposed contracts" is "providing unlicensed legal services," then *Marathon* and the uniform interpretation of the TAA directly conflicts with *Bacall.*

Bacall, if the holding is affirmed or the review is denied, changes the question from, "Can only talent agents procure," to "Can agents procure?" As such, the Court's voice is needed for entertainment representatives, be they talent agents, publicists who sometimes help clients get on talk shows or create endorsement opportunities, personal managers, or producers making a life rights or script deal, on how to proceed without putting themselves at legal risk.

3. What are the potential ramifications of *Bacall* becoming precedent?

At its core, the foundational purpose of commercial litigation is to give an opportunity to damaged parties to ask a court for an affirmation of their claims to allow them to get closer to whole. It is to be a shield.

Michael Bacall is a screenwriter. He did not claim that any of Shumway's actions damaged him. Instead, the goal of this litigation is to avoid compensating a representative who has contributed to his success. He is using the law as a sword.

The purpose of the State Bar Act is to protect citizens from a non-lawyer engaging in activities they are ill-equipped to handle and thus damage their client. Bacall had the benefit of someone who in fact does have the legal education and experience that, especially because as a personal manager he most likely has a good idea of the marketplace, has a greater idea of how to maximize his clients' earnings than most transactional attorneys.

When this was a private arbitration, whatever the ruling, it would have only affected the parties. Now, however, if *Bacall v. Shumway* is not accepted for review, it will leave open a Pandora's Box of litigation. It will give notice to the ninety-plus percent of the working actors, writers, art directors and other artists who, as they did not use an attorney to close their deals, of a legal loophole allowing them to avoid their otherwise-owed financial obligations by filing suit against their talent agents.

If this has a familiar ring, it should; artists have used a similar loophole in the Talent Agencies Act to over the last five decades of Labor Commission determinations and settlements for cents on the dollar, allow artists to keep some $500,000,000 in otherwise-owed compensation from their personal managers.

Most artists, because of the time and costs involved, will urge their agents to ignore *Bacall.* Until, as the history of TAA litigation against managers has proven, some – often at the suggestion of an attorney explaining how the agent acted unlawfully and for a percentage of the savings – will utilize the holding for their financial benefit. That is exactly how many TAA controversies have started.

CONCLUSION

As detailed above, should *Bacall* be upheld or the matter not be reviewed, it could compromise the operations of architects, general contractors, general contractors, architects, insurance, travel and real estate agencies, car brokers… anyone who as part of their business represents others and negotiates contracts.

"Statutes, regardless whether criminal or civil in nature, must be sufficiently clear as to provide adequate notice of the prohibited conduct as well as to establish a standard of conduct which can be uniformly interpreted by the judiciary and administrative agencies." *Hall v. Bureau of Employment Agencies* (1976) 64 Cal.App.3d 482, 491.

It is arguable that if review is not granted or the Appellate ruling is upheld, this non-codified and thus non-statutory authorized barrier to commercial transactions would be the historically largest change to how business should be conducted in California without legislative voice. If at least four jurists believe that this change is warranted; so be it, but it is undeniably a legal issue so important that requires definitive answers from the highest court in the state.

With all respect,

Rick Siegel
Marathon Entertainment

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 22971 Darien St., Woodland Hills CA 91364.

On May 24, 2021, I served the foregoing document described as: AMICUS LETTER on the interested parties in this action as follows:

Petitioner/Appellant Jeffrey Shumway's Counsel
James E. Fitzgerald, Fitzgerald Legal Consult P.C.
16350 Ventura Blvd., Suite D802, Encino CA 91436
via email: jimfitz@fitzlegalconsult.com

Respondent/Plaintiff's Michael Bacall's Counsel:
Bryan J. Freedman, Esq. and Sean M. Hardy, Esq.
FREEDMAN + TAITELMAN, LLP
1901 Avenue of the Stars, Suite 500
Los Angeles, CA 90067
via email: bfreedman@ftllp.com; smhardy@ftllp.com

Service by Regular Mail
Clerk of the Court
Court of Appeal, Second Appellate
District, Division Eight
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, CA 90013

The Honorable Ruth Ann Kwan
Department 72, Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. May 24, 2021, Los Angeles, California.

____/s/Rick Siegel_____
Rick Siegel