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COMMENTS

PERSONAL MANAGERS AND THE CALIFORNIA TALENT AGENCIES ACT: FOR WHOM THE BILL TOILS

I. INTRODUCTION

In August of 1982, the lingering controversy over the role of personal managers in the entertainment industry was rekindled due to the amendment of the Talent Agencies Act by the California Legislature.¹ This controversy stems from the issue of whether personal managers should be allowed to solicit employment for artist entertainers without first obtaining a state license.² Prior to the 1982 amendment, any individual or corporation engaged in job "procurement" in any field of entertainment was deemed to be acting as a talent agent and was required to be licensed as such under the Talent Agencies Act.³ In effect, those personal managers who wished to act as talent agents were required to be licensed as talent agents. Although personal managers, particularly in the music industry, are known to procure employment,⁴ few are licensed to do so under the Act, primarily because licensees are subject

1. Act of August 31, 1982, CAL. LAB. CODE ch. 682, §§ 1700.4, 1700.44, 1701-1704. For the impact of Assembly Bill 997 see, e.g., *The Daily Variety*, Aug. 30, 1982, at 1 Col. 1 and *The Hollywood Reporter*, Aug. 11, 1982, at 1 Col. 2. See generally CAL. LAB. CODE §§ 1700-1700.46 (West 1971 & Cum. Supp. 1983). For the purposes of this article, the term "entertainment industry" includes the music, motion picture and television industries.

2. "Artists" are defined in the California Labor Code as: "... actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises." CAL. LAB. CODE § 1700.4 (West Cum. Supp. 1983).

3. *Id.* § 1700.5. Talent agencies are defined in section 1700.4 of the Labor Code as follows:

A talent agency is hereby defined to be a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

4. Hurewitz, *Personal Managers*, U.S.C. ENTERTAINMENT LAW INSTITUTE, SYLLABUS ON REPRESENTING MUSICAL ARTISTS: LEGAL, BUSINESS AND PRACTICAL ASPECTS 51, 55 (1975); Johnson and Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 376, 382 (1979). Procuring employment for artists has been characterized as common, even vital to the manager-artist relationship. See Johnson and Lang, *id.*

to various guild and union regulations, some of which interfere with the standard business practices of many personal managers.⁵

Severe sanctions have been imposed upon personal managers who procured employment without a talent agent's license. Typically, the agreement between the artist and manager was found void and *all* commissions received thereunder by the manager, including commissions received for lawful personal management services, were subject to refund to the artist.⁶ The Talent Agencies Act had thus become a powerful weapon in the hands of some artists wishing to terminate their management agreement and receive free management services since they could do so merely by proving "unlawful procurement".⁷

The 1982 amendment addresses this situation. The new law in effect says that persons or corporations shall not be subject to licensing and regulation under the Talent Agencies Act if their job solicitation activities are limited to the procurement of recording contracts and the negotiation of other contracts in conjunction with a licensed talent agent.⁸ This benefits unlicensed personal managers who can now lawfully procure employment albeit, if only to a limited degree. But the victory for personal managers is temporary and limited. Pursuant to a sunset clause, the enactment will be repealed in January of 1985 unless a new statute deletes or extends that date.⁹ In addition, the unlicensed solicitation, or "booking" of engagements other than recording agreements in the music industry, is not sanctioned by the amendment and finally, the amendment is not a comprehensive resolution of the myriad of issues that face personal managers and the entertainment industry in general.

This article examines these and other potential problems with the Talent Agencies Act as amended. As most of the original Act remains

Most personal management agreements, however, state that the manager is not licensed and cannot act as a talent agent. See Hurewitz, *supra*.

5. Consideration of guilds and unions is limited to the Screen Actors Guild (SAG), The American Federation of Musicians (AFofM), and the American Federation of Television and Radio Artists (AFTRA). For a complete discussion of guild and union regulations see *infra* notes 61-65 and accompanying text.

6. See *infra* notes 30-54 and accompanying text. Because artists are of the class for whose benefit the Act was passed, they are not usually considered as being *in pari delicto* with the unlicensed artists' manager when a contract is voided. *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 351, 62 Cal. Rptr. 364 (1967).

7. For an exhaustive list of cases filed by artists against their personal managers, see *Johnson and Lang, supra* note 4 at 389-90 n.94. It should be noted here that artists may have a valid reason for wanting to terminate their management agreements other than the simple fact that their manager has unlawfully procured.

8. CAL. LAB. CODE §§ 1700.4, 1700.44 (West Cum. Supp. 1983).

9. *Id.*

intact, and since the amendment deals with concepts, such as "negotiation" and "procurement", which were applied under the original Act, the workings of the Act prior to the 1982 amendment will first be examined. Various cases arising under the Act, with an emphasis on those in which penalties have been imposed on personal managers, will be analyzed followed by a discussion and analysis of the 1982 amendment itself.

II. TALENT AGENTS AND PERSONAL MANAGERS¹⁰

Personal managers and talent agents perform different services for their artist-clients but their functions and activities sometimes overlap. As defined in the Talent Agencies Act, a talent agent primarily procures employment for artists.¹¹ This is particularly true in the fields of television and motion pictures where talent agents originated.¹² The Talent Agencies Act also permits agents to "advise" and "counsel" their clients,¹³ but their primary function and duty is to find jobs.

In contrast to talent agents, the primary function of a personal manager is to advise and counsel artists and to coordinate and supervise all business aspects of their careers.¹⁴ Personal managers usually have smaller client rosters than most agents and therefore often can give more attention to all the needs of their clients.¹⁵ Managers give advice on a variety of matters including publicity, public relations, and the selection of an artists' material. They may also take part in the selection and supervision of the artist's agent, attorney and business

10. See generally Hurewitz, *supra* note 4, at 53-60; Johnson and Lang, *supra* note 4, at 376-382; *The Licensing and Regulation of Artists Managers, Personal Managers and Musicians Booking Agencies Before the Cal. Senate Comm. on Industrial Relations* 60 (Nov. 20, 1975). (Hereafter cited as *Hearings*). Statements of Marvin Faris, The Artists Managers Guild, Roger Davis, The William Morris Agency, Claude McCue, The American Federation of Television and Radio Artists, Howard Thaler, esq. and Arnold Mills, The Conference of Personal Managers; and Joe Smith, Warner Bros. Records.

11. See *supra* note 3.

12. Historically, talent agents have been the dominating force of procurement activity in the motion picture and television industries, whereas personal managers have essentially fulfilled this role in the music industry. See Johnson and Lang, *supra* note 4, at 377-380; Hurewitz, *supra* note 4, at 55.

13. See *supra* note 3.

14. See Johnson and Lang, *supra* note 4, at 380-81. For a more detailed discussion of the various services performed by a personal manager, see Hurewitz, *supra* note 4, at 56-58. See also, Kronfeld, Margolis and Silfen, *Personal Management, Agency, Legal Representation and Business Management Problems* in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 14, 21-2 (1982).

15. Hurewitz, *supra* note 4 at 54; Shemel and Krasilovsky, *This Business of Music* at 71-72 (4th Ed. 3rd Printing 1981). Telephone interview with Pat McQueeney, Conference of Personal Managers, October 14, 1982.

manager. Managers are sometimes involved in production and promotional activities concerning the artist and, in the music field, sign musicians to recording or publishing companies owned by the manager. They may even lend financial support to new artists in order to help them get started in their careers.¹⁶

Similar to talent agents, some personal managers, procure jobs for their clients, though they are not licensed to do so and are thus in violation of California law.¹⁷ This is particularly true in the music industry where talent agents have not traditionally procured recording agreements with record companies.¹⁸ Nevertheless unlike talent agents, procuring employment is secondary or "incidental" to the personal manager's primary duty of coordinating and supervising career activities.¹⁹ It may be argued, however, that ultimately, both personal managers and talent agents procure employment and therefore the only real distinction between these professions, in terms of the Talent Agencies Act, is that talent agents procure employment lawfully.

III. PROVISIONS AND PROCEDURES UNDER THE ARTISTS' MANAGERS AND TALENT AGENCIES ACT

The Talent Agencies Act is essentially a 1978 recodification of the Artists' Managers Act of 1959.²⁰ The statutory provisions in the two acts are almost identical, the only significant difference being the substitution of the term "talent agent" or "agency" for "artists' manager."²¹ Therefore, an analysis of the provisions and case history of the original law is vital in understanding the 1978 and 1982 amendments.²²

16. Hurewitz, *supra* note 4, at 56, 86.

17. *See supra* note 4.

18. Johnson and Lang, *supra* note 4 at 382. Talent agents are reluctant to enter into agreements, with musicians who do not have a recording contract where as personal managers are more willing to take a chance on new talent by investing time and money.

19. *See infra* note 86 and accompanying text.

20. CAL. LAB. CODE §§ 1700-1700.45 (West 1971 & Cum. Supp. 1983) For the legislative history of The Artists' Managers Act, *see* Charles, *The Personal Manager in California: Riding The Horns of the Licensing Dilemma*, 1 COMM/ENT 347, 357-58 (1978), *see also* Johnson and Lang, *supra* note 4, at 386-408.

21. As both Acts are nearly identical, references to "the Act" are to both the Artists' Managers Act and the Talent Agencies Act.

22. It is important to note that cases are still heard under the Artists' Managers Act if the petition to determine controversy was filed before the statute was amended in 1978. *See, e.g.*, Pryor v. Franklin, No. TAC 17 MP 114 at 9 n.5 (Cal. Lab. Comm'r. Aug. 12, 1982); Bank of America v. Fleming, No. 1098 ASC MP-432 at 6 n.2 (Cal. Lab. Comm'r Jan. 14, 1982); Mahan v. Kutash, No. AM 8-78 MP-452 at 4 n.1 (Cal. Lab. Comm'r Jun. 18, 1981). In *Pryor*, the respondent was found to have acted as both an artists' manager and talent agent because he had negotiated contracts between 1975 and 1980. *Pryor, supra* at 14-15.

The Artists' Managers Act was designed to protect artists seeking employment by licensing and regulating artists' managers.²³ Article One of the Act deals generally with scope and definitions; Article Two pertains to licensing procedures including matters relating to applications, renewals, filing fees, the posting of bonds and license revocation.²⁴ Article Three, entitled "Operation and Management", generally pertains to such matters as the approval of artists' managers contracts by the Labor Commissioner, fee schedules, the keeping of books and records, and the regulation of employment practices.²⁵

Proceedings under the Act are commenced by filing a "Petition to Determine Controversy" with the California Labor Commissioner's office.²⁶ A copy of the petition is served on the opposing party, who must then serve and file an answer within 10 days.²⁷ Section 1700.44 of Article Three gives the Labor Commissioner original and exclusive jurisdiction to decide cases arising under the Act.²⁸ This section specifically provides that controversies are to be heard and determined by the Labor Commissioner subject to appeal *de novo* in superior court.²⁹ Notwithstanding section 1700.44, section 1700.45 states that the artists' manager's contract may contain provisions for the arbitration of disputes arising out of that contract.

IV. DECISIONAL LAW CONSTRUING THE ARTISTS' MANAGERS AND TALENT AGENCIES ACT

The most celebrated case arising under the Artists' Managers Act

23. *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 350, 62 Cal. Rptr. 364 (1967). For a full discussion of the history of this case see *supra* notes 30-49 and accompanying text.

24. CAL. LAB. CODE §§ 1700.5-1700.22 (West 1971); *See also* CAL. ADMIN. CODE tit. 8, R.70 §§ 12000.1 - 12000.9, 12005 (1970).

25. CAL. LAB. CODE §§ 1700.23-1700.46; *See also* CAL. ADMIN. CODE tit. 8, R.70 § 12001 - 12004 (1970).

26. CAL. ADMIN. CODE tit. 8, R.70 § 12022 (1970). For the proper form of the petition as well as required documents for filing, *See id.* §§ 12022.1, 12023.

27. CAL. ADMIN. CODE tit. 8, R.70 §§ 12024, 12025, 12032 (1970).

28. *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 359, 62 Cal. Rptr. 364 (1967). The hearing officers in the Labor Commissioner's office make the initial determination of whether they have jurisdiction to hear a case. *See, e.g.*, *McFadden v. Ripp*, No. SFMP 71 TAC 7-80 at 5 (Cal. Lab. Comm'r Apr. 17, 1981). This determination is based on whether the petitioner is an "artist" and whether the respondent acted as an "artists' manager" or "talent agent" as those terms are defined in Section 1700.4 of the Act. *See, e.g.*, *Fischer v. Shepard*, No. AMC 7-78 MP 453 at 2 (Cal. Lab. Comm'r Jan. 23, 1981).

29. *See also*, *Buchwald v. Katz*, 8 Cal. 3d 493, 502, 503 P.2d 1376, 105 Cal. Rptr. 368 (1972). The Labor Commissioner's determinations, such as those cited in *supra* note 28, are unpublished and can only be obtained by request from the Department of Industrial Relations, Division of Labor Standards Enforcement.

is *Buchwald v. Superior Court*,³⁰ a dispute involving the then named rock group The Jefferson Airplane ("The Airplane") and their manager Matthew Katz. This case examined important questions concerning the jurisdiction and scope of the Act. In *Buchwald*, Katz entered into identical contracts with each member of The Airplane in which he agreed to act as the group's "personal representative, advisor and manager in the entertainment field."³¹ The contracts also contained a provision stating that Katz had not offered to obtain employment or engagements for the group and that he was not authorized to act in such a manner. In essence this disclaimer constituted an admission that Katz was not licensed as an artists' manager and therefore could not procure employment.³²

In 1966 a dispute arose between the parties, and Katz commenced proceedings with the American Arbitration Association as provided in the management agreements.³³ The Airplane filed a Petition to Determine Controversy with the Labor Commissioner essentially alleging that Katz had acted as an unlicensed artists' manager by procuring engagements or "bookings".³⁴ They then brought an action against Katz in Superior Court seeking to enjoin the arbitration on the grounds that the Labor Commissioner had jurisdiction.³⁵ The motion to restrain arbitration was denied but this order was later annulled on appeal.³⁶

At the appellate level, Katz objected to the jurisdiction of the Labor Commissioner by contending that he did not come under the scope of the Artists' Managers Act since he was not a licensed artists' manager as was stated in the management agreements.³⁷ The court held that the Artists' Managers Act applied not only to licensed artists' managers but also to unlicensed persons acting as artists' managers, as that term is defined in section 1700.4 of the Act.³⁸ The court went on to hold that the Artists' Managers Act could not be circumvented by a provision in the management agreement stating the personal manager did not intend to act as an artists' manager, if in fact he later acted in

30. 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (1967).

31. *Id.* at 351.

32. Such disclaimer provisions are standard in most personal management agreements. See Hurewitz, *supra* note 4, at 58-62; Johnson and Lang, *supra* note 4, at 419 n.220; Kronfeld, Margolis and Silfen, *supra* note 15, at 15, 23-24.

33. *Buchwald*, 254 Cal. App. 2d at 352 (1967).

34. *Id.*

35. *Id.* at 353.

36. *Id.* at 349, 353.

37. *Id.* at 354.

38. *Id.* at 355.

that capacity.³⁹

As one of many affirmative defenses, Katz asserted that arbitration of the dispute was proper because the contracts called for arbitration as permitted under section 1700.45.⁴⁰ The decision held that if the agreement with Katz was invalid because of non-compliance with the Act, then no rights, including the right to arbitration, could be derived from it.⁴¹ Thus, the holding established that Katz was subject to the Act, and that the Labor Commissioner's initial jurisdiction over controversies arising under the Act meant, as a practical matter, that personal managers could anticipate the forum of a Labor Commissioner's hearing when attempting to collect unpaid commissions from artist-clients.⁴²

This decision was followed by hearings before the Labor Commissioner in June, July and October of 1969. Having determined that Katz acted as an unlicensed artists' manager in violation of the Act, the Labor Commissioner voided his management and publishing agreements with The Airplane.⁴³ Katz was then ordered to return *all* commissions received (nearly \$50,000) and was denied reimbursement for money spent "in furtherance of the petitioners' musical careers".⁴⁴

Pursuant to section 1700.44 of the Act, Katz appealed directly to the superior court.⁴⁵ The court set a bond to stay execution of the Labor Commissioner's monetary award but Katz failed to file the bond and, as a result, his appeal was dismissed.⁴⁶ The California Supreme Court reversed stating that section 1700.44 of the Act did not empower the superior court to dismiss the appeal for failure to file a bond.⁴⁷ It held that Buchwald, *et al.*, was free to enforce the Labor Commis-

39. *Id.* See also CAL. ADMIN. CODE tit. 8, R.70 § 1200(b) (1970).

40. *Buchwald*, 254 Cal. App. 2d at 360 (1967).

41. *Id.*

42. Generally, such disputes between an artist and manager arise when the personal manager attempts to collect commissions owed by the artist. See, e.g., *Raden v. Laurie*, 120 Cal. App. 2d 778, 780, 262 P.2d 61 (1953); *Hearings, supra* note 10, Statement of Roger Davis, Esq.

43. *Buchwald v. Katz*, 8 Cal. 3d 493, 497, 503 P.2d 1376, 105 Cal. Rptr. 368 (1972); *Buchwald v. Katz*, No. AMSF 00017 at 2-3 (Cal. Lab. Comm'r Feb. 17, 1970). The termination of all agreements along with all rights thereunder finds its source not in the Act itself but in the *Buchwald v. Superior Court* case 254 Cal. App. 2d at 351, 360 and thereafter in the Labor Commissioner's determinations. Cf. CAL. LAB. CODE § 1700.46 wherein a very different remedy is provided.

44. *Buchwald v. Katz*, 8 Cal. 3d 493, 497, 503 P.2d 1376, 105 Cal. Rptr. 368 (1972); *Buchwald v. Katz*, No. AMSF 00017 at 2-3 (Cal. Lab. Comm'r Feb. 17, 1970). For a similar holding under the Artists' Managers Act, see, e.g., *St. Louis v. Wolf*, No. SFMP 57 TAC 29-79 (Cal. Lab. Comm'r Apr. 27, 1981).

45. *Buchwald v. Katz*, 8 Cal. 3d 493, 497, 503 P.2d 1376, 105 Cal. Rptr. 368 (1972).

46. *Id.*

47. *Id.* at 498.

sioner's award but that Katz's right to appeal remained unaffected.⁴⁸

The trial *de novo* of this case took place in January and February of 1977. Interestingly enough, two of the five management agreements and a 1966 publishing agreement between Katz and The Airplane were voided not because the Act had been violated, but because Katz had committed fraud and had breached a fiduciary duty owing to The Airplane.⁴⁹

When deciding cases arising under the Talent Agencies Act, the Labor Commissioner's office has consistently followed the reasoning and remedy of its own *Buchwald* opinion. In *McFadden v. Ripp*,⁵⁰ for example, Ripp was deemed to have acted unlawfully as an unlicensed talent agent having secured a recording contract and live engagements for McFadden. As a result, the management agreement was declared void, no reimbursement was allowed for out-of-pocket expenses totaling \$24,000.00, and all monies, commissions and royalties received were ordered returned to the artist.⁵¹

The same result occurred in the 1981 determination of *Sinmon v. McKay*.⁵² As a result of McKay's unlawful procurement of a recording contract and live engagements for the petitioner, all agreements were declared null and void, and McKay and his production companies were ordered to pay Sinmon "all monies secured directly or indirectly from the sale or marketing of petitioner's artistic endeavors."⁵³ Furthermore, the Commissioner's Office determined that the respondent had "no rights whatsoever" with respect to *any* claims against the petitioner which involved business dealings with her as an artist.⁵⁴

It should be noted that not all of the Commissioner's determinations have been so severe. In *Bank of America v. Fleming*,⁵⁵ a 1982 determination involving the estate of Groucho Marx, the hearing officer followed a *quantum meruit* approach by ordering the respondent to return only those commissions which resulted from services unlawfully performed as an unlicensed artists' manager *i.e.*, she was allowed to retain monies for services lawfully performed.⁵⁶ Out of more than

48. *Id.*

49. *Buchwald v. Katz*, No. 614 027 (S.F. Super. Ct. May 11, 1977).

50. No. SFMP 71 TAC 7-80 at 6 (Cal. Lab. Comm'r. Dec. 18, 1980).

51. *Id.* at 8.

52. No. SFMP 73/TAC 9-80 (Cal. Lab. Comm'r. May 8, 1981).

53. *Id.* at 9.

54. *Id.*

55. No. 1098 ASC MP-432 (Cal. Lab. Comm'r. Jan. 14, 1982).

56. *Id.* at 16. For a similar result in the context of contractors who are not licensed as

\$400,000.00 received, Fleming was ordered to return only \$80,000.00.⁵⁷

During this period, however, there was no guarantee that hearing officers in the Labor Commissioner's office would consistently use this *quantum meruit* approach when dealing with unlicensed personal managers. As can be readily seen from the above determinations, hearing officers in the Commissioner's office are empowered with broad discretion in formulating remedies under the Act.⁵⁸ Additionally, officers were not bound by the holdings of previous determinations, as such determinations were unpublished and hence of no precedential value.⁵⁹ Thus, as cases were heard on an *ad hoc* basis, certainty in the carrying out of personal management activities became impossible.

V. MAKESHIFT SOLUTIONS AND UNAVAILING LEGAL ARGUMENTS⁶⁰

Prior to the 1982 amendment of the Talent Agencies Act, the most obvious way a personal manager could avoid the severe penalties for unlawful job procurement was simply to become licensed as a talent agent. The difficulty with this solution is that licensed talent agents are also subject to union and guild franchise regulations, many of which restrict the business practices of personal managers.⁶¹

Personal managers generally receive commissions ranging from 10% to 25% of an artist's gross income.⁶² The maximum commission a franchised agent may receive, however, is usually 10% depending on the guild.⁶³ In addition, the Screen Actors Guild (SAG) and the Amer-

required under the California Business and Professions Code, see *Comet Theatre Enterprises v. Cartwright*, 195 F.2d 80 (9th Cir. 1952).

57. *Fleming*, No. 1098 ASC MP-432, at 16.

58. *Garson v. Division of Labor Law Enforcement*, 33 Cal. 2d 861, 864, 206 P.2d 363 (1949). *Fleming* No. 1098 ASC MP-432 at 15-16. Furthermore, although officers in the Commissioner's office may be the finders of fact, they are not bound by the rules of evidence nor the rules of judicial procedure. CAL. ADMIN. CODE tit. 8, R.70 §§ 12031 - 12032 (1970).

59. See generally Notes, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977).

60. For the discussion which follows, see generally Hurewitz, *supra* note 4, at 112-120.

61. Guilds and unions are able to regulate agents by expressly prohibiting members from conducting business with agents who are not franchised. See, e.g., Screen Actor's Guild, Agency Regulations, Amended Rule 16(F) (hereafter SAG Rule) §§ II, IV cl G; AFTRA Regulations Governing Agents Rule 12(b) (hereafter AFTRA Regulations) § 1 cl A; Constitution, By-Laws and Policy of the American Federation of Musicians of the United States and Canada (Rev'd Sept. 15, 1981) (hereafter AFofM Const.) art. 23, § 5.

62. Shemel and Krasilovsky, *supra* note 16, at 72. Telephone interview with Pat McQueeney, the Conference of Personal Managers (Nov. 5, 1982). See also Hurewitz, *supra* note 4, at 83.

63. SAG and AFTRA limit the amount of commissions an agent may receive to 10%. AFTRA Regulations § XX cl B, C; SAG Rule § XI, cl A, B. The AFofM figure, however, is 15% if the duration of the engagement is two or more consecutive days a week or 20% for a

ican Federation of Television and Radio Artists (AFTRA) specifically prohibit franchised agents from acting as producers or from being financially involved with production companies—both of which are activities in which some personal managers engage.⁶⁴ In addition, all three guilds permit an artist (or agent) to terminate the agency agreement if the artist fails to obtain employment within a specified period.⁶⁵ This requirement seems overly burdensome if one accepts the premise that procuring employment is incidental to other services performed by personal managers. Because the guild regulations made licensing under the Act so undesirable, various strategies and legal arguments were attempted by personal managers to avoid the Act and the guild regulations altogether.

A. Contractual Provisions

Two such strategies are found in *Buchwald*, *supra* the first being the disclaimer provision, found in most management agreements, stating that Katz was not an artists' manager and would not act as such.⁶⁶ The *Buchwald* court held that such a contractual provision will not shield a personal manager from the penalties of the Act if s/he acts as an unlicensed artists' manager by unlawfully procuring employment.⁶⁷ The second strategy found in *Buchwald* was the provision in Katz' management contracts which called for the private arbitration of disputes. Based on this provision, it was argued that the Labor Commissioner had no jurisdiction to make a determination. Having held that the management agreement was void due to noncompliance with the Act, the court ruled that no rights, including the right of arbitration, could be derived from it.⁶⁸

Another considered approach to avoid the jurisdiction of the Labor Commissioner was to place a choice of law provision in the per-

single engagement of one day duration. AFofM Const. art. 23, § 8, cl. (a)(i)(ii); AFofM Exclusive Agent-Musician Agreement, § 4(a); AFofM Booking Agent Agreement (A)(i)(ii) at 10. The AFofM also allows agent franchisees to receive an additional commission of 5% for engagements if the agent signs a Personal Management Agreement with a Federation member. AFofM Const. art. 23, § 8, cl(a)(ii); AFofM Booking Agent Agreement (A)(iii) at 10.

64. SAG Rule § XVI B at 28; AFTRA § VI. Johnson and Lang, *supra* note 4, at 418; Hurewitz, *supra* note 4, at 86.

65. AFofM Const. art. 23, § 9, cl C (i-v); SAG Agency Contract Paragraph 6, AFTRA Agency Contract Paragraph 6. See also, CAL. ADMIN. CODE tit 8, R.70 § 12001(e).

66. *Buchwald*, 254 Cal. App. 2d at 354.

67. *Id.*

68. *Id.* at 360.

sonal management agreement.⁶⁹ Yet even this solution was not foolproof. In determining whether a choice of law provision will be honored, California courts generally consider whether the agreement in question has a substantial connection with the state whose law the parties have chosen to be controlling. Absent a significant relation, it is uncertain whether the law of that state would apply.⁷⁰ In making this determination, the courts would examine such facts as where the contract was made and the place of principal performance.⁷¹ Consideration has also been given as to whether the parties conduct business and maintain an office in California.⁷² A last factor that a court might inquire into is whether enforcement of an agreement would violate public policy in California. Absent the existence of the above elements, the effectiveness of a choice of law provision seems tenuous.

Another stop-gap strategy used by personal managers was to refrain from taking a commission. The Commissioner's office has consistently held, however, that this would not constitute a mitigating factor in determining whether the personal manager had acted as an unlicensed talent agent by unlawfully procuring employment. "The fact that respondents may not have actually received any moneys, in connection with their unlawful conduct, does not render that conduct any more laudatory or less offending."⁷³ Similarly, the fact that the personal manager only negotiated the terms while others actually prepared the contract did not relieve the manager of liability.⁷⁴

B. Exclusive Agreements and Use of the Corporate Form

Other, more complex strategems were unsuccessfully used to circumvent the taint of unlawful procurement. In *Sinamon v. McKay*,⁷⁵ for example, the petitioner entered into an exclusive recording contract and a publishing agreement with McKay Productions, Inc. rather than

69. Hurewitz, *supra* note 4 at 119.

70. See generally *Ury v. Jewelers Acceptance Corp.*, 227 Cal. App. 2d 11, 16, 38 Cal. Rptr. 376 (1964). In *Ury*, a loan agreement, which was usurious under California law, was upheld because of a provision in the agreement which stated that the loan would be construed pursuant to New York law under which it was not usurious. This choice of law provision was upheld only after a careful analysis of choice of law issues discussed in the text below. See also *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 721 (1978).

71. *Ury*, 227 Cal. App. 2d at 16-17.

72. *Id.* at 17.

73. *McFadden*, No. SFMP 71 TAC 7-80 at 7: see also *Sinamon*, No. SFMP 73/TAC 9-80 at 6.

74. *Fleming*, No. 1098 ASC MP-432 at 13-14.

75. *Sinamon*, No. SFMP 73/TAC 9-80.

a management agreement.⁷⁶ McKay was not going to produce Sinnamon's records himself but instead promised to "get her a deal with a major company."⁷⁷ McKay contended that this promise as well as the subsequent procurement of engagements for Sinnamon did not constitute unlawful procurement because Sinnamon was a salaried employee of McKay, Inc.⁷⁸ Although Sinnamon was in fact paid \$1,000.00 per month pursuant to the two agreements, this "salary" was deducted from the income paid to McKay Productions, Inc. by third party record companies.⁷⁹

Upholding substance over form, the Commissioner's office determined there was no evidence to support a finding that McKay intended to treat Sinnamon as an employee. The record indicated that no deductions were made from the petitioner's monthly income, she had no regular hours or supervision and there was no unbridled right to fire her.⁸⁰ McKay and his production companies were thus found to have acted as unlicensed talent agents; accordingly, agreements between the parties were declared void and monies, profits, royalties and commissions received were ordered returned.⁸¹ It should be noted that even if Sinnamon had been an actual employee of McKay's, there is no certainty this situation would have been lawful as no determination on this point was made.

Another unsuccessful attempt to avoid the mandates of the Talent Agencies Act is found in *St. Louis v. Wolf*.⁸² In that case, Wolf tried to cloak his procurement activity by creating a corporation to do the procuring for him. Having determined that the sole purpose of Wolfhead Productions, Inc., was to sell petitioner's recordings, the hearing officer found the corporation in violation of the Act because it did not have an artists' managers license.⁸³ The corporate veil was then pierced and Wolf was held personally liable on a theory of *alter ego*; his personal accounts and records being indistinguishable from those of the

76. *Id.* at 2-3.

77. *Id.* at 2.

78. *Id.* at 2-6.

79. *Id.* at 4.

80. *Id.* at 4, 6; *But see* *Edwards v. City of Chico*, 28 Cal. App. 3d 148, 153; 104 Cal. Rptr. 481 (1972) in which it was held that the primary test for determining whether an employment relationship exists is "whether the employer has the right to control and direct the activities of the alleged employee or the manner or method in which the work is performed."

81. *Sinnamon*, No. SFMP 73/TAC 9-80 at 8-9.

82. No. SFMP 57 TAC 29-79 (Cal. Lab. Comm'r Apr. 27, 1981).

83. *Id.* at 10-11. Corporations are specifically included in the term "talent agency" as defined in the CAL. LAB. CODE § 1700.4.

corporation.⁸⁴

C. *The Scope of the Act and the Meaning of Procurement*

Next to the makeshift strategies stands the fundamental argument that the Talent Agencies Act does not apply to personal managers simply because personal managers are not talent agents. Talent agents are defined in section 1700.4 of the Act as “. . . a person or corporation who engages in the occupation of procuring . . . employment.”⁸⁵ If one accepts the distinction that personal managers do not procure employment to the same degree as talent agents, then it may be argued that personal managers do not procure employment within the meaning of the Act.⁸⁶ The determinations which address this issue are unclear, but they seem to suggest that certain acts of job solicitation by unlicensed personal managers will not constitute unlawful job procurement. Perhaps the best evidence of this is found in the determination of *Kearney v. Singer*.⁸⁷

There the Labor Commissioner terminated the management agreement based on an analysis of the contract itself. As in *Buchwald*, the Kearney agreement contained a disclaimer stating that the manager was not licensed to “seek or obtain employment.”⁸⁸ The Commissioner held that this provision turned the contract into a sham when the actual intent of the parties was considered.⁸⁹ Intent was ascertained by reference to riders attached to the agreement. One rider contained a provision stating that the artist was to refer employment offers to the manager so that the latter could “further” such offers.⁹⁰ “Furthering an offer” as well as “negotiated terms” were deemed to be unlawful procurement whereas “initial overtures” or “preliminary discussions” were not.⁹¹ Aside from this singular example, nowhere in this determination

84. *St. Louis*, No. SFMP 57 TAC 29-79 at 9.

85. *See supra* note 3.

86. *See* Hearings, *supra* note 10, Statement of Howard Thaler. The argument that personal managers should be exempt from the Act because they only procure incidentally resembles New York's approach to the situation. Under the New York Employment Agencies Act, a personal manager does not need a license to seek employment if this is only incidental to the business of managing. N.Y. GEN. BUS. LAW § 171(8) (McKinney 1968). In construing this statute, the New York Supreme Court, Appellate Division has undermined its value by holding that the procurement of a single recording contract will take the personal manager out of the exemption. *Pine v. Laine*, 321 N.Y.S.2d 303, 36 A.D.2d 924 (1971).

87. No. MP 429 AM-211MC (Cal. Lab. Comm'r Feb. 9, 1978).

88. *Id.* at 4, *see also supra* note 32 and accompanying text.

89. *Id.* at 3.

90. *Id.* at 5.

91. *Id.* at 6, 9; *see also* Pryor v. Franklin, No. TAC 17 MP 114 at 14-15 (Cal. Lab. Comm'r Aug. 12, 1982).

were the above phrases defined or distinguished. Consequently, the determination did little to dispel uncertainty as to what constituted lawful, though unlicensed, procurement.

The determination made in *Fischer v. Shepard*⁹² is not much more helpful on this question. In that matter, the personal manager introduced the artist-petitioner to a casting director who offered the artist a job.⁹³ The Commissioner, however, determined that the manager did not act as an artists' manager and therefore the Commissioner lacked jurisdiction to hear the dispute.⁹⁴ The rationale for this holding was that although the manager opened the door to the meeting, "it was petitioner and *not* respondent who seized on the opening to arrange for an audition and who negotiated the terms of the employment."⁹⁵ This determination should be compared with the more recent determination in *Pryor v. Franklin*⁹⁶ wherein it was held that "initiating" contacts that were intended to market Pryor's talents as an artist *did* constitute unlawful procurement.

Finally, in *Narramore v. McGuffin*,⁹⁷ the respondent secured one engagement for the petitioner. The Commissioner's office found that there was no evidence that other artists were booked by the respondent and that this isolated instance was a "transitory violation" which did not constitute procuring employment.⁹⁸

In contrast to what *does not* constitute unlawful procurement by an unlicensed personal manager, what *does* constitute unlawful procurement is fairly clear and includes such activities as offers, promises and attempts to secure employment contracts or "deals" as well as live engagements or "bookings."⁹⁹ Even negotiations and initiating or demanding changes in existing employment agreements have been included within this pervasive definition.¹⁰⁰ Yet, no well-defined (and accessible) parameters have been established for the concepts of unli-

92. No. AMC 7-78 MP 453 (Cal. Lab. Comm'r Jan. 23, 1981).

93. *Id.* at 5.

94. *Id.* at 2; *see supra* note 27.

95. *Id.* at 5.

96. No. TAC 17 MP 114 at 16 (Cal. Lab. Comm'r Aug. 12, 1982). *See also*, *St. Louis*, SFMP 57 TAC 29-79 at 12 where it was held that "showcasing" i.e., having a musician perform free to invited guests in the industry, was an act of unlawful procurement because it was considered an "attempt" to obtain employment in that the end result was to secure a job.

97. No. SFMP 95 TAC 31/81 at 4. (Cal. Lab. Comm'r. Aug. 17, 1981).

98. *Id.* at 3-4.

99. *Sinamon*, No. SFMP 73/TAC 9-80 at 2-3, 5; *St. Louis*, No. SFMP 57 TAC 29-79 at 2, 5-6; *McFadden*, No. SFMP 71 TAC 7-80 at 2-4, 6.

100. *Pryor*, No. TAC 17 MP 114 at 14-16; *Kearney*, No. MP 429 AM-211 MC.

censed, lawful and unlawful procurement as cases are decided on an *ad hoc* basis. And, the boundary being so vague, it seems arguable that almost any act of solicitation can be construed as an "attempt" to procure employment thereby falling within the statutory definition and scope of the Act. Finally, even if absolute definitional guidelines were forthcoming, an enforcement problem remains. For it is simply impractical to police a personal manager's activities so as to determine when he or she has acted as a talent agent by stepping over a definitional boundary and into the realm of unlawful procurement.¹⁰¹

VI. THE 1982 AMENDMENT

The inability of personal managers to comply with the Act or protect themselves from its penalties, the uncertain manner in which the Act has been applied to personal managers and the resultant uncertainty in the profession compelled a search for relief at the legislative level. Consequently in March of 1982, Assembly Bill 997 was introduced and an amended version was signed into law on August 31st as Chapter 682 of the California Labor Code to be effective January 1, 1983.¹⁰²

The new law essentially reiterates the language of section 1700.4 of the original Act which defines talent agents and then adds: ". . . except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this Chapter."¹⁰³ The amended section 1700.4 also provides that this addition will be repealed on January 1, 1985 and replaced with the original language of section 1700.4 unless a prior statute deletes or extends that date.¹⁰⁴

Permitting unlicensed procurement of recording contracts seems proper, for many of the Labor Commissioner determinations examined by this author involve procurement by managers in the music industry.¹⁰⁵ As a general rule, however, the fact situations underlying these determinations would have also constituted violations of the amended Act because engagements as well as recording contracts were pro-

101. Telephone interview with Roger Davis, Esq., The William Morris Agency (March 20, 1982).

102. CAL. LAB. CODE §§ 1700.4, 1700.44, 1701-1704 (West 1971 and Cum. Supp. 1983); CAL. CONST. art. IV, § 8C (West 1971).

103. CAL. LAB. CODE § 1700.4(a) (West Cum. Supp. 1983).

104. CAL. LAB. CODE § 1700.4 (West Cum. Supp. 1983).

105. *McFadden*, No. SFMP 71 TAC 7-80; *Sinnamon*, No. SFMP 73/TAC 9-80; *St. Louis*, No. SFMP 57 TAC 29-79; *Narramore*, No. SFMP 95 TAC 31/91.

cured.¹⁰⁶ While unlicensed personal managers are permitted to procure recording contracts, the booking of engagements continues to be prohibited even though managers are still involved in this activity.¹⁰⁷ Certain obvious and practical questions arise here. How is a personal manager to draw the line, and is it in the best interests of artists that their managers do so? And, remembering the problems inherent in defining procurement, how does one define a "recording contract"? Is it still a recording contract if it includes provisions relating to video rights? And, is the phrase "recording contract" limited to the basic artists' agreement, or will it include soundtrack album agreements, distribution agreements and independent production agreements? Absent a more precise definition, the meaning of recording contract is likely to be found in *ad hoc*, inconsistent determinations as was the case with the meaning of procurement. Finally, remembering the remedies imposed under the original Act, will commissions lawfully received from procurement of recording contracts be subject to refund to the artist if the personal manager is subsequently found to have unlawfully procured engagements? In short, the relief granted to managers would seem to be more apparent than real in that only one area is rectified—recording agreements—and even here, confusion remains.

The new law also restates the language of section 1700.44 of the original Act pertaining to the determination of controversies by the Labor Commissioner and adds: "No action or proceeding may be prosecuted under this Chapter with respect to any violation occurring or alleged to have occurred more than one year prior to commencement of the action or proceeding."¹⁰⁸ The one year limitation on bringing an action under the Act clearly protects personal managers by preventing artists from blaming them for acts committed years before.

This section further adds, "It shall not be unlawful for a person or corporation who is not licensed under this Chapter to act in conjunction with, and at the request of, a duly licensed and franchised talent agency in the negotiations of an employment contract."¹⁰⁹ This addition is also repealed as of January 1985, unless a prior statute deletes or

106. "Engagement" is defined in California Labor Code § 1700.1 as follows:

(a) 'Theatrical engagement' means any engagement or employment of a person as an actor, performer, or entertainer in a circus, vaudeville, theatrical, or other entertainment, exhibition, or performance.

(b) 'Motion picture engagement' means any engagement or employment of a person as an actor, actress, director, scenario, or continuity writer, camera man, or in any capacity concerned with the making of motion pictures.

107. Interview with Roger Shepherd, Avalon Attractions (Oct. 22, 1982).

108. CAL. LAB. CODE § 1700.44 (West Cum. Supp. 1983).

109. *Id.*

extends that date, and is replaced by the original language of section 1700.44.¹¹⁰ The language permitting personal managers to work with talent agents in negotiating contracts in essence makes legal a practice which has existed for some time.¹¹¹ However, in the event of a controversy, it should be remembered that the personal manager will be obligated to prove that s/he acted at the request of the agent, *not* just the client, and consequently the agent's testimony may be crucial. Furthermore, prior determinations having failed to draw a distinction between "procuring" and "negotiating", there is no reason to feel confident that the distinction will now become apparent under the new Act. The amendment, in other words, appears to have failed to address the most pressing problem under the Act: the uncertainty of its application.

Next, the new amendment repeals section 1700.46 of the Labor Code which made the violation of the Talent Agencies Act a misdemeanor, punishable by fine and/or imprisonment.¹¹²

Finally, the amendment adds a new article to the Talent Agencies Act which provides for the creation of the California Entertainment Commission composed of licensed talent agents, personal managers, artists and the Labor Commissioner. It is curious to note that this section does not call for guild or union representation on the Commission.¹¹³ The Commission is required to study the "laws and practices" of the entertainment capitals in the United States regarding the licensing of agents and "representatives of artists in the entertainment industry in general" so as "to recommend to the Legislature a model bill regarding this licensing." This section is also effective until January 1985, unless that date is deleted or extended.¹¹⁴

Although the 1982 amendment absolves personal managers from liability for certain types of job procurement, the fact remains that the relief is superficial and temporary. The amendment, however, does provide members of the industry with the opportunity to work out a more permanent solution to the situation through the licensing of personal managers. The motivating force which should bring personal managers to the bargaining table of the California Entertainment Commission is the threat of returning to regulation under the original Talent Agencies Act should the sunset clauses take effect when there is

110. *Id.*

111. Telephone interview with Pat McQueeney, The Conference of Personal Managers (Oct. 14, 1982).

112. CAL. LAB. CODE § 1700.44(5) (West Cum. Supp. 1983).

113. CAL. LAB. CODE §§ 1701-1703 (West Cum. Supp. 1983).

114. CAL. LAB. CODE § 1704 (West Cum. Supp. 1983).

no alternative licensing scheme for managers. The agents and the guilds will come to the table because under the amendment, managers can procure and negotiate, albeit to a limited degree, without any of the guild restrictions imposed on talent agents for performing similar functions.

VII. RECOMMENDATIONS: THE LICENSING AND REGULATION OF PERSONAL MANAGERS

Outlining specific proposals for licensing personal managers is difficult because the functions of managers vary depending upon the needs of each artist and the particular field of the entertainment industry one is considering. There are, however, several general considerations to keep in mind when formulating such proposals. First, in the spirit of the Talent Agencies Act, a new licensing statute must be designed to protect the artist. Second, in light of the inability of personal managers to comply with the Talent Agencies Act due to the burdensome guild regulations, the new statute must preclude liability under that Act for personal managers who procure employment. Finally, the licensing scheme for personal managers must not be unfair to talent agents. If a license to procure employment under a "Personal Managers Act" permits business practices prohibited under the Talent Agencies Act and the guild regulations without some sort of counter balance, then it seems possible that talent agents, performing functions similar to those of personal managers, will opt for the personal manager's license. Consequently, the talent agent's license and franchise could conceivably fall into disuse, in which case the traditional restrictions upon the business practices of talent agents would begin to erode.

With these considerations in mind, proposals as to the form and substance of a new licensing statute become somewhat more apparent. First, managers should be licensed by the state after meeting registration requirements similar to those which exist for talent agents under the Talent Agencies Act. Such requirements should be fair and not overly burdensome for managers to comply with. Second, it has also been suggested that a licensing law articulate the existence of a fiduciary duty between the personal manager and the artist-client.¹¹⁵ This would help to prevent overreaching and conflicts of interest in situations where an artist contracts with a publishing or production company in which the personal manager has a financial interest. It may

115. See generally Jossen, *Fiduciary Aspects of the Personal Manager's Relationship with a Performing Artist* 167 Cal. Rptr. 366 (1980).

also be a reasonable requirement that such transactions between the manager and artist client be presumed unlawful unless; (1) the artist obtains informed advice from a third party, and (2) the manager has obtained a waiver signed by the client with respect to any given transaction. Third, the licensing statute should contain a descriptive definition of a personal manager, just as talent agents are defined in the Talent Agencies Act. Along these lines, the Act might also promulgate specific rules and regulations regarding permissible and unlawful business activities.

If a personal manager intends to procure employment in addition to providing management services, then an additional license should be required. This license to procure could be subject either to a client's absolute right of termination or to the client's retention of a licensed talent agent; in either case the personal manager is pre-empted from procuring.¹¹⁶ In addition, there must be no requirement that the personal manager procure, and the artist's right to terminate should not be contingent on the manager's failure to do so. Last, personal managers who procure might also become guild franchisees and, to the extent they procure for clients in any given area, would be totally precluded from conflict relationships in that area.¹¹⁷

Finally, there remains the issue of whether the Labor Commissioner or the Superior Court is to be given original jurisdiction over disputes arising under a new Act. It seems preferable that disputes be resolved directly through the court system rather than through an administrative hearing; this would eliminate the need for a trial *de novo*. If the Labor Commissioner is given jurisdiction over disputes, then the Commissioner's determinations should be published so as to serve as guidelines for the industry as well as to create consistent policies within the Commissioner's office.

VIII. CONCLUSION

The Talent Agencies Act was designed to regulate talent agents so as to protect those artists seeking employment.¹¹⁸ Though intended as

116. For example, the personal manager might be allowed to procure recording agreements and book live appearances whereas the procurement of television and motion picture contracts would be reserved for the talent agent. Those managers who overstep their authority to procure should be denied commissions as to that unlawful procurement only, rather than be subject to total disgorgement.

117. This is only to say that if a manager procures employment in the recording industry, for example, then music publishing agreements between the artist and manager should be prohibited.

118. See *supra* note 23 and accompanying text.

a shield, the Act has become a sword in the hands of some artists who, with or without good reason, were able to terminate their management agreements and receive free management services simply by proving unlawful procurement. The 1982 amendment superficially addresses this problem by permitting personal managers to engage in some of the job solicitation practices which they have been unlawfully engaged in for years.

Nevertheless, the new law does not go far enough; old problems remain and new ones arise. In essence, the amendment is a placebo for serious issues involving the proper role of personal managers in relation to talent agents, and thus a more permanent solution is essential. Obviously there are no ready answers to the complex problems and sensitive issues involved. Ultimately, a resolution must be the product of extensive negotiations and compromises between the chosen few who will sit on the California Entertainment Commission. The opportunity to end the personal manager controversy has arrived; whether or not it bears fruit remains to be seen. For whom the bill toils? With luck, it toils for all.

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