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The Regulation of Artist Representation in the Entertainment Industry

Bradley W. Hertz

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THE REGULATION OF ARTIST REPRESENTATION IN
THE ENTERTAINMENT INDUSTRY

I. INTRODUCTION

The representation of artists\(^1\) is a curious phenomenon. The talent and potential of the actor, singer, dancer and writer attract many individuals who want to play a role in the harnessing and exploiting of that talent for profit and glory. This comment will take an in-depth look at artists' representatives, the roles they play and the laws designed to regulate them.

Special attention will be given to the California Entertainment Commission's findings on artist representation, to the New Talent Agencies Act,\(^2\) and the failure of each to solve the serious problems that confront artist representation in the entertainment industry. The most critical issue is the ongoing conflict between agents\(^3\) and personal managers.\(^4\)

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Commonly, people think of artists as masters of the fine arts and use the specific titles of actor, musician, singer and dancer to describe entertainers. In this comment, as in the Talent Agencies Act, the word "artist" refers to all those personal and professional services that are rendered in the entertainment field and which comport to the Act's definition.


3. "Talent agency" (and the agents who work for it) means:
   [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, 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 . . . [the Talent Agencies Act]. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers. CAL. LAB. CODE § 1700.4(a) (West 1971 & Cum. Supp. 1986).

The Code language that talent agents "may" counsel artists in career development is important because this overlaps with the realm of the personal manager and is one of the points of contention between the two groups.

4. Personal managers have no official definition under law, rather they are self-regulated and do not fall under the jurisdiction of the Labor Department. They do, however, play a large role in the careers of entertainers and in the arena of artist representation.

Personal managers are engaged in the occupation of advising and counseling talent and personalities in the theatrical, entertainment, and literary professions. Areas where advice and counsel to the artist is given by personal managers are:

(1) The selection of literary, artistic, and musical materials;
law in this regard has been and remains inadequate to resolve this conflict.

There is the story about a she-wolf who has many offspring in her litter and only so many "tits" for them to hang on for nourishment. Often the artist must feel like the she-wolf, with many "representatives" hanging on, sucking her milk (and money) without mercy. The artist films a successful movie, writes a best-selling book, sings a hit song. The money rolls in. The agent takes ten per cent. The personal manager takes fifteen percent to twenty-five percent. The attorney takes his fee. The artist pays back any "front money." Only then does the artist get what remains.

Perhaps this view is too pessimistic. Perhaps we too often see the artist as the one who deserves all the credit and reward for "making it big" (if and when he or she finally does), and we piously sit back and

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(2) Any and all matters relating to publicity, public relations and advertising;
(3) The adoption of the proper format for the best presentation of the artist's talents;
(4) The selection of booking agents to procure maximum employment for the artist;
(5) The types of employment which the artists should accept and which would be most beneficial to their careers;
(6) The selection and supervision of accountants and attorneys other than those used by the manager. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 85 (1985). The relationship between the artist and the personal manager is an extremely close one. The manager often has such an important role as adviser, friend, father, or banker to the artist that he becomes the artist's alter ego. "The reliance of some artists on managers for repertoire and creative guidance, as well as for business decisions, is such that there is sometimes as much truth as humor in the statement that the artist is a mere figment of his manager's imagination." Id.

For their services, personal managers often receive 15-25 percent of the artist's earnings. Id. at 86. This percentage is significantly larger than the percentage taken by agents and sometimes draws resentment from agents. Personal managers regulate themselves through the Conference of Personal Managers. While there is a standard form of Personal Manager agreements, it need not be approved by unions or the Labor Commissioner. Managers are often looked down upon by the other players in the artist representation game. They are viewed by lawyers and agents as not doing the substantive work of hammering out contracts or booking employment, but rather of merely fixing the artists hair and being "yes" men.

6. Id. at 86.
7. Entertainment attorneys have been defined in various ways. Entire essays have been written on the question, "What is an entertainment lawyer?" Simensky, Defining Entertainment Law. A Merger of Business and Legal Considerations, N.Y.L.J. 5, Sept. 29, 1985. Generally, an entertainment lawyer is a lawyer who represents clients in the entertainment industry. Some entertainment lawyers walk the thin lines between lawyer, agent and personal manager. In so doing they may breach their professional responsibility as members of the bar.

8. "Front money" is the capital expended at the outset by the production company to finance an initial project. In the case of recording artists, the production company pays all expenses for the record master to be recorded, advertised and distributed. Once the record is released and profits are generated, the production company is reimbursed itself for its initial expenditures. The percentages for the profit participants are then calculated.
view as impure the representatives without whom the artist never would have made it.

The relationships between the characters in the field of artist representation have developed as a result of years of history and experience. The methods devised to regulate and monitor the treatment of artists by their representatives will comprise the majority of this comment. This comment will examine the "game" of artist representation—its players, rules, highlights, low points, successes and failures. Throughout, one should be mindful of the human beings involved, their trials and tribulations, the costs and benefits which befall the actual individuals involved as a result of legislation, administrative and judicial decisions and other factors.

If the game is artist representation, then the rule book is the Talent Agencies Act ("the Act") of the California Labor Code ("the Code"), which serves as a model act for the regulation of employment agents in the entertainment industry throughout the nation. Given the many entertainment industry transactions which occur in California, and California's stated goal of serving as the leader in the field, definitions in this comment are from the Labor Code, and sections of the Code will be cited accordingly.

II. THE LAW REGARDING THE REGULATION OF ARTIST REPRESENTATION: THE ARTISTS' MANAGERS ACT AND THE TALENT AGENCIES ACT

The body of law within the California Labor Code which governs the representation of artists is the Talent Agencies Act. The Talent Agencies Act, enacted in 1978, was largely a recodification of the Artists' Managers Act. In the now famous Jefferson Airplane case, the Artists' Managers Act was held to be a remedial statute enacted to protect those seeking employment and was found to be a constitutional exercise of the state's police power.

While there were amendments to the Act in 1982 and 1986, a look at the original statutory and case law is required before the current law can be fully understood. Article One of the Artists' Managers Act provided the scope and definitions, such as "artist manager" (now talent

10. Id.
13. See supra note 3.
Other important definitions, especially "procuring employment," were left out. Had the definition of "procuring employment" been included, subsequent confusion and litigation may have been minimized.

Article Two, "Licenses," included the laws regarding application for licenses, conduct of business, filing fee, bond requirements, hearings, and powers of the Labor Commissioner. The requirements of this Article were many, and included affidavits of character, the possibility of a Labor Commission investigation, license and filing fees and the posting of a fee schedule.

Article Three, "Operations and Management," required approval of form contracts and the keeping of detailed records open to inspection by the Labor Commissioner.

Because of employment practices that have occurred in the past, the Artists' Managers Act contained provisions against sending women or minors to disorderly houses as employees, sending minors to saloons, permitting persons of bad character to frequent the artist manager's place of business and conducting business in a room where persons sleep.

A. Defining the Procuring of Employment

As comprehensive and clear as the Talent Agencies Act attempts to be, a major problem was written into the Act when the legislators failed to provide a definition for procuring employment. Without this definition, it is extremely difficult to determine whether a person is violating the Act.

A prima facie showing that an unlicensed person procured employment for an artist invokes the jurisdiction of the Labor Commissioner.

16. Id. § 1700.6.
17. Id. § 1700.7.
18. Id. § 1700.13.
19. Id. § 1700.24.
20. Id. §§ 1700.23-1700.46.
21. Id. § 1700.23.
22. Id. § 1700.26.
23. Id. § 1700.27.
24. Id. § 1700.33.
25. Id. § 1700.34.
26. Id. § 1700.35.
27. Id. § 1700.9(d).
28. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC at 360.
If the Labor Commissioner finds that a personal manager procured employment for an artist, then the contracts between the artist and manager are void. "Since the clear object of the Act is to prevent improper persons from becoming artists' managers [agents] and to regulate such activity for the protection of the public, a contract between an unlicensed artist manager and an artist is void."29

In Buchwald v. Superior Court,30 the issue of employment procurement was paramount, and it mirrored arguments in prior and subsequent litigation. The personal manager, Katz, argued that as long as he did not initiate the negotiations, his discussions of employment for his client did not constitute procurement.31 Jefferson Airplane argued that, regardless of who made the initial overtures, negotiations equalled procurement.32

Nearly every case that comes before the Labor Commissioner involves an initial determination of whether or not a person who is not licensed as a talent agent has unlawfully procured employment. Even with all the cases that have been resolved,33 no single definition has been accepted. Cases are decided on an ad hoc basis, and Labor Commission decisions remain very fact specific.

With such a vague definition of procuring employment, personal managers must proceed very carefully. Since any negotiation or solicitation can be construed as procuring employment, the personal manager is severely limited in serving his client. This lack of a clear definition is harmful to the artist, the manager and the entertainment industry as a whole.

B. Setting the Talent Agencies Act Into Motion: Filing a Petition to Determine Controversy

To put into effect the provisions of the Act, a party files a "Petition

29. Id. at 351.
31. Post-Trial Memorandum for Plaintiff at 2 (Jan. 27, 1977). In his answer to plaintiff's interrogatory, defendant Katz said, "As the group's personal manager, it was my principal responsibility to advise them in the development and enhancement of their professional careers, including giving them advice on which job offer to accept, and which to reject and for what reasons." Plaintiff's Interrogatory of Matthew Katz at 5 (June 21, 1976).
33. "Between December 1977 and September 1983, thirty-one petitions to determine controversies were filed with the Labor Commissioner. Of the thirty-one cases, the Labor Commissioner determined in favor of the artists' representatives only three times." Julian, Personal Manager or Talent Agent? A Summary of Recent California Labor Commission Findings in Regulation of Entertainers' Representatives, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK, 315 (1984).
to Determine Controversy" with the office of the Labor Commissioner. The Labor Commission has original and exclusive jurisdiction over cases arising under the Act. After an administrative hearing, appeals may be made to the superior court and be heard de novo. Amendments have changed certain aspects of the Act, and will be discussed and evaluated in light of the California Entertainment Commission's report later in this comment.

C. Cases and Labor Commission Rulings Under the Acts

A survey of case rulings under the Acts is necessary for an analysis of the current Talent Agencies Act and for an accurate and informed coverage of whether the Act meets the needs of the industry which it seeks to serve.

1. Buchwald v. Superior Court ("The Jefferson Airplane Case")

The most well known case in the area of artist representation is the Buchwald case. The court in Buchwald ruled on important issues dealing with the jurisdiction and scope of the Artists' Managers Act. The facts that gave rise to Buchwald are not unique in the entertainment business. Matthew Katz served as personal manager of the rock group Jefferson Airplane ("the Airplane") pursuant to individual contracts with each band member.

Two aspects of these contracts highlight the Act and its application. First, the contracts provided that Katz serve as "personal representative, adviser and manager in the entertainment field" and that Katz was not authorized and would not obtain employment for the group. In actuality, however, Katz did procure employment with the approval and gratitude of the Airplane. Second, the agreements stated that any disputes between the parties would be brought to arbitration before the American Arbitration Association.

As often happens between powerful and power-hungry people—those in the entertainment industry are no exception—a dispute arose between Katz and members of the Airplane. Pursuant to the contractual language, Katz brought the dispute to arbitration. Wanting to break its contract with Katz, however, the Airplane filed a Petition to Determine

35. Id.
36. See infra notes 30-31 and accompanying text.
38. Id. at 352.
39. Id.
Controversy with the Labor Commissioner, pursuant to Section 1700.44 of the Act. The Airplane accused Katz of acting as a talent agent without a license, and sued in superior court to enjoin any arbitration.\footnote{40}

Katz objected to the Labor Commissioner's jurisdiction on two grounds. Katz' first objection was that because the contract expressed that he was not a licensed talent agent, the Act did not apply to him. To this argument, the court held that the Act applied to artist managers and to unlicensed persons who act as artist managers, even if the contract states that they are not acting as such. This de facto, substance-over-form approach showed that the court meant business with regard to the regulation of agents and the prevention of unlicensed employment procurement.

Katz' second argument was that arbitration was proper because the contract called for it, and that arbitration was permitted in Section 1700.45 of the Talent Agencies Act. The court held that if Katz did not comply with the Act, his contracts with the members of the Airplane were invalid, and therefore no rights could be derived from the agreements.\footnote{41}

The Katz-Airplane dispute was heard before the Labor Commissioner in 1969. Having been found to violate the Act, Katz' contracts with the Airplane were voided. Katz was ordered to return all commissions received from his work done for the Airplane. Further, Katz was denied any reimbursement for money spent to assist the musicians in their career.\footnote{42} Part of the penalty incurred in this instance was due to fraud and a breach of fiduciary duty owed by Katz to the Airplane, but the remedy would most likely have been as severe with only the Code violation. The \textit{Buchwald} case was heard by the California Supreme Court in \textit{Buchwald v. Katz}.\footnote{43} The supreme court, however, ruled primarily on the procedural issues of jurisdiction and the right to appeal. The substantive findings of \textit{Buchwald v. Superior Court} remain valid. Several subsequent cases have continued to impose the severe penalties handed down by the California Labor Commissioner in \textit{Buchwald}. \textit{McFadden v. Ripp}\footnote{44} and \textit{Sinnamon v. McKay}\footnote{45} followed \textit{Buchwald}'s lead by imposing

\begin{itemize}
\item \footnote{40}{Id. at 353.}
\item \footnote{41}{Id. at 360.}
\item \footnote{42}{In this case, Katz had to return over $50,000 to the members of the Airplane. In subsequent cases, managers acting as unlicensed agents have been ordered to return far more substantial sums to their clients.}
\item \footnote{43}{8 Cal. 3d 493 (1972).}
\item \footnote{44}{No. SFMP 71 TAC 7-78 at 6 (Cal. Lab. Comm'r. Dec. 18, 1980).}
\item \footnote{45}{No. SFMP 73 TAC 9-80 at 6 (Cal. Lab. Comm'r. May 8, 1981).}
\end{itemize}
the same three stringent remedies: voiding the contracts, returning the commissions and disallowing reimbursement of expenses.

2. Pryor v. Franklin

Another case that exemplifies the severity of the Labor Commissioner's determinations is Pryor v. Franklin. Richard Pryor filed a Petition to Determine Controversy and claimed that his personal manager David Franklin acted as an unlicensed agent. Pryor sought to void Franklin's contract and to confiscate all Franklin's commissions. The Labor Commissioner ordered Franklin to return to Pryor $3,110,918 "representing all monies and things of value which Respondent received for services performed as an unlicensed artists' manager and talent agent ($753,217) and all monies and things of value which Respondent willfully misappropriated from Petitioner through his role as Petitioner's artist's manager and talent agent ($2,357,701)."

3. A Less Stringent Alternative: Fleming and the Quantum Meruit Approach

While most of the Labor Commissioner's decisions have been severe and have allowed no compensation to managers for actual legitimate managerial services performed, at least one has taken a less severe approach. In Bank of America v. Fleming, the Labor Commission Hearing Officer used quantum meruit in ordering the respondent to return only the commissions received while acting as an unlicensed artist's manager. The manager earned more than $400,000 in commissions. She was ordered to return $80,000 to her client. The hearing officer determined that only twenty percent of the manager's time was spent on illegal employment procurement and therefore $80,000, or twenty percent of $400,000, had to be returned.

While there must be penalties for violations of the Labor Code, and some artists are justified in filing petitions to determine controversy with the Labor Commissioner, the Fleming decision seems a much fairer approach than the others. To void all contracts and order the return of all monies earned often spells disaster for the manager, even after years of hard work and investment on behalf of his client. The Labor Commissioner's consistent rulings have become a sword in the hands of selfish and greedy artists who, after benefiting from years of the manager's serv-

47. Id. at 2-3.
ices and openly welcoming employment procured by the manager, turn the manager in for reward money.

III. PERSONAL MANAGERS ATTEMPTS TO AVOID THE TALENT AGENCIES ACT AND THE UNIONS

Under the current scheme, personal managers are clearly stuck between a rock and a hard place. If they register to become agents, they may lawfully procure employment. However, they become subject to union rules, ceilings on commissions and strict government regulation. If they procure employment while only acting as a personal manager, they face the loss of their commissions and the voiding of their contracts.

One solution is for managers to simply not procure employment. This, however, is easier said than done. First, the term “procuring employment” is necessarily vague. Second, agents generally do not take on unknown artists, and therefore managers are the only ones who get the artists on their feet, loan them money, and of course, book their acts in the hopes of getting a substantial return on their investment. Third, when someone is responsible for another person’s career and professional development, it is difficult for them not to be involved in the arrangement of employment which furthers that career.

Not wanting to fall prey to either of the two extreme options of registering as an agent or being destroyed by the Labor Commissioner, personal managers have attempted to maneuver around the California laws. The foremost method managers have used to escape the reach of

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49. In addition to the state restrictions, unions and guilds also impose strict regulations on agents. Unions, such as the American Federation of Musicians (AF of M), the American Federation of Television and Radio Artists (AFTRA) and the American Guild of Variety Artists (AGVA) dictate the maximum percentage that agents receive, the language of contracts that agents use and many other aspects of agent-artist relations. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 89 (1985). AFTRA and The Screen Actors Guild (SAG) have set limits on the amount of commissions an agent may receive at 10 per cent. AFTRA Regulations § XX cl. B, C; SAG Rule § XI, cl. A, B. See SHEMEL & KRASILOVSKY, at 629. In some circumstances, however, AF of M allows 15 per cent or 20 per cent. AF of M Const. art. 23, § 8, cl. (a)(i)(ii). See, Standard AF of M Exclusive Agent-Musician Agreement. See SHEMEL & KRASILOVSKY at 835-36.

As a rule, unions do not regulate personal managers. The independence of managers and dependence of agents upon the unions fuels the fire between agents and personal managers. One reason why personal managers do not simply register as agents, thereby escaping liability for procuring employment, is that they do not want to come under the strict regulation of the unions. An exception to the rule that most personal managers are not regulated by unions is that the AF of M does have regulations regarding personal managers. See SHEMEL & KRASILOVSKY at 89.

the Labor Commissioner and the unions have been by manipulating con-
tractual wording to meet their needs. In Buchwald, two techniques were
attempted, but were unsuccessful.

The first contractual provision, used by the Airplane's manager
Katz to avoid the Talent Agencies Act, was a disclaimer stating that the
personal manager was not an artist’s manager or agent, and was not au-
thorized to procure employment for the artist. This language is still
found in the standard personal management agreement, but it does not
protect the personal manager. The Labor Commissioner looks beyond
the four corners of the document to see what the manager has actually
done. If the manager is unlawfully procuring employment, then it does
not matter what the contract says or the parties agreed to. The Labor
Commissioner may and probably will impose penalties.

The second contractual technique is an attempt to remove any dis-
pute between parties from the exclusive jurisdiction of the Labor Com-
missioner by agreeing to binding arbitration. Even though personal
managers argue that an arbitration provision removes the case from the
Labor Commissioner’s jurisdiction, the court, as was done in Buchwald,
will rule the contract void and remove all force and effect from the arbi-
tration provision. The Talent Agencies Act allows arbitration clauses in
contracts, but insures that the contracts are with licensed agents.51

IV. 1982 Amendments

Relief was sought at the legislative level in 1982 because of the con-
fusion surrounding the Talent Agencies Act and its applicability. As-
sembly Bill 997, signed into law as Chapter 682 of the California Labor
Code, became effective on January 1, 1983.52

It is interesting to note that much of the political maneuvering re-

[a] provision in a contract providing for the decision by arbitration of any contro-
versy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:
(a) If the provision is contained in a contract between a talent agency and a person
for whom the talent agency under the contract undertakes to endeavor to secure
employment, or
(b) If the provision is inserted in the contract pursuant to any rule, regulation, or
contract of a bona fide labor union regulating the relations of its members to a talent
agency, and
(c) If the contract provides for reasonable notice to the Labor Commissioner of the
time and place of all arbitration hearings, and
(d) If the contract provides that the Labor Commissioner or his or her authorized
representative has the right to attend all arbitration hearings . . . .

Id.

garding the regulation of agents occurred while Jerry Brown was Governor of California. It was widely known throughout the state that Governor Brown had been dating recording star Linda Ronstadt. Ronstadt had a very good relationship with her personal manager, as implied in a favorable review “which stated that one of the obvious reasons for (Linda Ronstadt’s) becoming one of the most popular woman singers in the world is ‘the symbiosis between her evolving artistic gifts and her manager and record producer, Peter Asher, who has guided her career for four years.’ ”

It is certainly possible that Governor Brown came to realize the need for something to be done about the personal managers’ situation through Linda Ronstadt.

Various changes were made to the 1978 law in 1982. Section 1700.4 created an exemption for the procuring of employment for artists’ ‘recording contracts.’ This amendment, however, seems more significant than it actually is, because most managers who procure recording contracts also procure engagements for the artist. An unlicensed engagement procurement violates the law. A second change adds a one year statute of limitations provision to the law. This serves to protect managers from claims against them for activities in which they allegedly engaged years before.

A third amendment allows for managers and agents to work in conjunction, thereby relieving some managers from liability under the Act. This encourages cooperation between agents and managers, although whether they will cooperate and extend themselves professionally for each other is still questionable.

The 1982 Amendments also repealed Section 1700.46 of the Act, which provided for criminal sanctions against a violator. Most importantly, however, the 1982 Amendments created the California Entertainment Commission.

A. The California Entertainment Commission

The California Entertainment Commission (“the Commission”) was “mandated to recommend to the Governor and the Legislature any changes deemed appropriate to California’s Talent Agencies Act which might serve to make the Act a model bill regarding the licensing of agents and other representatives of artists in the entertainment industry.” Composed of three artists, three agents, three personal managers,

55. Id.
and the Labor Commissioner, the Commission has carried out its mission and filed its report with the Governor. The rest of this comment will be chiefly devoted to the findings of the Commission, the resultant amendments to the Talent Agencies Act in 1986, and an analysis of the current state of the law of artist representation.

The Commission, after analyzing the California Talent Agencies Act and studying the relevant laws and practices of other states' entertainment centers throughout the nation, concluded that "the Talent Agencies Act of California is a sound and workable statute and the recommendations contained in this report will, if enacted by the California Legislature, make that Act a model statute of its kind in the United States."

Except for minor alterations in language, all of the recommendations in the Commission's report were adopted by the California Legislature and signed into law. Therefore, analysis of the Commission's report and the current law must go hand-in-hand. Criticism of the Commission's report is also criticism of the California Legislature for codifying the report in the New Talent Agencies Act. The Commission framed six issues which needed resolution.

Issue One: Who May Procure Employment?

Of the six issues considered by the Commission, the most important was whether personal managers or anyone other than a licensed talent agent should be allowed to procure employment for an artist. This was the true issue that the Commission was formed to resolve, as it has been the main point of contention between talent agents and personal managers throughout their history.

On this point, the Commission sided with the agents and recommended that the current state of the law be maintained. This allows only licensed talent agents to lawfully procure employment for artists. The Commission characterized the positions of agents and managers as follows.

57. The Commission's members were:
Artists - Ed Asner, John Forsythe, Cicely Tyson.
Agents - Jeffrey Berg, Roger Davis, Richard Rosenberg.
Managers - Bob Finkelstein, Patricia McQueeney, Larry Thompson.
Labor Commissioner - C. Robert Simpson, Jr.


59. CALIFORNIA STATUTES of 1986, Chapter 488. Effective January 1, 1987. Most of the amendments to the Talent Agencies Act were effective on January 1, 1987. However, three major provisions similar to the 1982 amendments, but deleted in 1985 because of the sunset provision, were deemed operative as of January 1, 1986. Id.

The talent agents hold the view that anyone who procures employment for an artist should be subject to the same regulations that restrict all agents. Agents see it as an issue of fair play in that managers should not be allowed an unfair advantage, especially in light of the fact that managers already receive a greater percentage of the artist's profits.\(^6\)

Personal managers argue that in the ordinary course of their business, managers have no choice but to engage in certain activities which could be construed as employment procurement. Managers feel unfairly restricted in performing their profession. When counseling the artist in his career, the manager must be very careful not to do anything which might appear to be employment procurement.\(^6\)\(^2\) The extreme care which managers are forced to take has a chilling effect on their services to their clients.

The Commission attempted to find a compromise between these two positions. Its members considered various proposals, but were unable to achieve a common ground. Some of the alternative proposals included allowing personal managers to engage in casual conversations about an artist's employment, allowing artists to call their managers into existing employment negotiations and allowing personal managers to work together with agents. None of these alternatives met with the Commissioner's approval.

In finding a solution to the issue of who may lawfully procure employment for artists, the Commission stated the following.

In searching for the permissible limits to activities in which an unlicensed personal manager, or anyone, could engage in procuring employment for an artist without being licensed as a talent agent, [we] conclude that there is no such activity, that there are not such permissible limits, and that the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are intended to be, total. Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent, and if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the services which a talent agent is licensed to render.\(^6\)\(^3\)

\(^6\)\(^1\) Id. at 8-9.
\(^6\)\(^2\) Id. at 9.
\(^6\)\(^3\) Id. at 11.
This hard-line approach will surely lead to more of the same severe decisions that have already been handed down by the Labor Commission. It seems that the California Entertainment Commission abdicated its responsibility on the very issue that it was charged to resolve. The problem will not go away simply because the Commission has reaffirmed the current law. The law as it stands does not work. This is exemplified by the rulings of the Labor Commissioner, the continuing inability of personal managers to carry on their profession without violating the law, and the need for the Commission in the first place.

By not allowing for at least some leniency to enable personal managers to practice their profession, the Entertainment Commission defaulted. The smooth functioning of the entertainment industry and the health of its members' relationships is a common goal, which the Commission was supposed to further. In approving the status quo, the Commission passed up a prime opportunity to recommend some real changes which would have facilitated the resolution of this continually thorny issue between agents and managers.

Other authors on this subject have espoused ideas which, although not perfect, may substantially improve the situation. These ideas range from complete deregulation of the field, to a uniform act which would govern all artists' representatives.64

The best suggestion to date is the incidental booking exemption. This exemption allows personal managers to procure employment without a license, to the extent that the procurement is incidental to the managers' main service to their clients. There are obvious problems of degree here, but this is an approach that the Commission may have attempted with some success.

New York has an incidental booking exemption in its Employment Agency Act.65 There, personal managers of theatrical artists need not be licensed if their employment procurement is incidental to their management services. A California exemption such as this might alleviate some of the difficulty that personal managers now face, without infringing too much upon the agents' domain.

Issue Two: Exemption for Procurement of Recording Contracts

As absolute as the Commission makes its restriction out to be, an exemption does exist for anyone procuring a recording contract for an

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artist. The Commission, in recommending that the Section 1700.4 exemption be retained, wrote that "a recording contract is an employment contract of a different nature from those in common usage in the industry involving personal services."\(^{66}\)

The Commission mentions the efforts of the personal manager on behalf of the artist, explaining why the personal manager should be allowed to procure employment when it comes to recording contracts. Personal managers "contribute financial support for the living and business expenses of entertainers, . . . act as a conduit between the artist and the recording company, . . . accompany the artist" in his travels, and most importantly, conduct negotiations.\(^{67}\)

It seems quite arbitrary that the Commission chose to recognize the role of the manager in the context of recording contracts and to grant him an exemption, but not to acknowledge the manager in other contexts. Perhaps the industry standards are so clear that they dictate this specific exemption in lieu of others. It should be almost equally as clear, however, that the manager's role in other representative contexts should allow him some kind of exemption of limited negotiating capacity. The recording contract exemption makes even less sense in light of the Commission's finding that "one either is or is not, licensed as a talent agent, and if not so licensed, one cannot expect to engage . . . [in employment procurement]."\(^{68}\) The Commission first purports to make the issue air-tight. Then, the Commission proceeds to punch holes in its finding, creating large leaks of logic and reason.

**Issue Three: Criminal Sanctions**

The third issue considered by the Commission was whether to restore criminal sanctions which had been removed from the Act by California Assembly Bill 997\(^{69}\) to the revised Act. The Commission determined that criminal liability should not be imposed on violators of the Talent Agencies Act. The Commission begins to hammer nails into its own coffin with its reasoning for this decision. The Commission states that "there is an inherent inequity—and some question of constitutional due process—in subjecting one to criminal sanctions for the violation of a law which is so unclear and ambiguous as to leave reasonable persons in doubt about the meaning of the language or whether a viola-

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67. *Id.* at 14.
68. *Id.* at 11.
tion has occurred.” The Commission then writes that “the uncertainty of knowing when such [unlawful] activity may or may not have occurred at pain of criminal sanctions has left the personal manager uncertain and highly apprehensive about the permissible parameters of their daily activity.”

There is no less uncertainty because of criminal sanctions than there is with the strict civil and monetary penalties that currently exist. Personal managers are still highly apprehensive about the parameters of their daily activities, and removing the criminal penalties is of dubious consequence.

The confusion that the Commission admits exists has not been lessened by the Commission’s report and subsequent legislation. The Commission, instead of inconsequentially removing the criminal penalties because of the chilling effect upon managers, could have made a real difference by removing the confusion instead.

Issue Four: Deletion of the Sunset Provisions

The 1982 amendments to the Talent Agencies Act contained a sunset provision which would end the 1982 amendments unless acted upon by the Legislature. The Commission voted to delete the sunset provisions of the Act and thereby retain the amendments.

The reasoning of the Commission was that the Act should be made part of the permanent laws of the state of California and that the prior changes were beneficial. It made sense for the Commission to delete the sunset clauses and thereby incorporate the previous amendments into the new Act. The 1982 amendments did modernize the Act, but the 1986 amendment failed to handle the Act’s existing problems.

Issue Five: Repealing the Talent Agencies Act and the Separate Licensing of Personal Managers

The Commission’s fifth issue was whether the entire Talent Agencies Act should be repealed. This was answered in the negative, as the Commission viewed the Act, with the Commission’s proposals, as an exemplary one. The Commission also saw no need for personal managers to be regulated by a separate body of law. The Commission stressed that “it is not a person who is being licensed by the Talent Agencies Act: rather, it is the activity of procuring employment. Whoever performs

71. Id. at 16.
that activity is legally defined as a talent agent and is licensed, as such.\textsuperscript{72} Therefore, the Commission sees no need to license personal managers. If managers procure employment, they fall under the Act; if they do not procure employment, then the Act does not apply.

This is a sensible response from the Commission, especially because the personal managers regulate themselves through the Conference of Personal Managers. Like attorneys in a state bar, personal managers set their own standards and procedures. To require them to be licensed and regulated would not serve to protect artists any more than they are already protected.

**Issue Six: Additional Language Changes**

The Commission, in reviewing the Act, saw various language changes as being necessary to fine-tune the statute. One change was to add "models" within the list of entertainers who qualify as "artists."\textsuperscript{73} Another change was to amend Section 1700.9. Instead of an itemized restriction on an agent conducting business "where meals are served" or "where persons sleep," more general language was inserted to prohibit an agent from conducting business "in a place that would endanger the health, safety, or welfare of the artist."\textsuperscript{74}

A third amendment increased the bond required for license issuance from $1,000 to $10,000, because the increased price "serves as a truer test of the financial credibility of the applicant and will provide more meaningful protection to the artist who may have to have recourse to the bond."\textsuperscript{75} Section 1700.25 was substantially changed to provide procedures for the maintenance of a trust fund by the agent for the artist. Payment is required to be made within 15 days of receipt, and separate records must be maintained of all financial transactions.\textsuperscript{76}

An arbitration provision may be written into the contract pursuant to Section 1700.45 if certain requirements are met by the union. These requirements include notice to the Labor Commissioner and approval by the union.\textsuperscript{77} Finally, a civil rights provision was added as Section 1700.47. This makes it "unlawful for any licensee under this Act to refuse to represent any artist on account of that artist's race, color, creed,

\begin{itemize}
    \item \textsuperscript{72} Id. at 20.
    \item \textsuperscript{73} Id. at 23. \textsc{Cal. Lab. Code} \textsection{} 1700.4 (West 1971 & Cum. Supp. 1988).
    \item \textsuperscript{77} Id. at 32.
\end{itemize}
sex, national origin, religion, or handicap."\textsuperscript{78}

While the Commission gave some recommendations which led to beneficial changes to the Act, it neglected to resolve the fundamental issue dividing agents and managers. As a result, the conflicts between the two parties will continue. Artists will be harmed in the long run because of the uncertainty, confusion and conflict between managers and agents who should be working together to assist the artist.

Responses to the Commission’s report have been lukewarm. Attorney Richard Feller believes that “the work of the Commission in no way resolved the inherent philosophical differences between personal managers, talent agents, and artists on the subject of regulation.”\textsuperscript{79} The Amendments, therefore, represent a state-of-the-art political compromise (to the extent possible) among the interests of the various parties.

In Feller’s article, “California’s Revised Talent Agencies Act: Fine-Tuning the Regulation of Employment Procurement in the Entertainment Industry,” he concludes that “the Act in California hopefully will allow all of the parties in most circumstances to play a continued role in the employment procurement process on a lawful basis.”\textsuperscript{80} Feller’s hope is exactly that—a hope. With the Commission’s report and the revised Talent Agencies Act, personal managers will still have a difficult time doing their job of guiding artists’ careers without breaking the law.

\section*{V. CONCLUSION}

While the goal and the attempt of the California Entertainment Commission was noble, the Commission fell far short of success in resolving the controversies and conflicts prevalent in the field of artist representation. California’s Act is indeed the most highly developed in the artist representation arena, but the state and its people in the entertainment industry must not become complacent with an Act that still breeds discontent.

The future is sure to bring new accounts of personal managers being ordered to return their commissions to dissatisfied artists for breaking a vague and incomprehensible law. The test of California and its entertainment industry’s flexibility and responsiveness is far from over. Only time will tell how the Legislature, Labor Commissioner, artists, agents, man-

\textsuperscript{78} Id. at 34.
\textsuperscript{80} Id. at 28.
agers and lawyers will respond to future occurrences in the continuing game of artist representation in the entertainment industry.

Bradley W. Hertz*

* Bradley W. Hertz, B.A., Brown University, 1985; J.D. Candidate Georgetown University Law Center, 1988; currently a visiting student at Loyola Law School, Los Angeles.