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AGENTS AND MANAGERS: CALIFORNIA'S SPLIT PERSONALITY

Bruce C. Fishelman, Esq. †

INTRODUCTION

In 1924, French poet and writer Paul Valéry combined the insight of a social scientist with obvious humor when he wrote, "A man alone is in bad company."¹ In 1991, a California commentator might as easily remark that, "An entertainer alone is in the unemployment line."

Success in the contemporary entertainment industry requires the efforts of a combination of specialized cohorts. The successful artist's career must include a talent agent. A personal manager is likely to be involved, especially if the artist is a musician. Attorneys frequently provide the services of a personal manager in addition to providing typical legal services. Most successful Hollywood careers will also involve a business manager, an accountant and a publicist.²

California law has failed so far in its efforts to adequately define, distinguish between, and differentially regulate the specific roles of the two most critical associations that a creative artist makes: the talent agent and the personal manager. Given the practical and economic importance of these two professions, and given California's prominent role in the international entertainment industry, its regulation of these professions should be a model for the country. Unfortunately, despite its contrary claim,³ current California law is totally deficient in regulating personal managers and others who periodically may be within the techni-

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1. D. BOORSTIN, *THE DISCOVERERS* 477 (1983).

2. Johnson & Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 380-82 (1979).

3. See CALIFORNIA ENTERTAINMENT COMMISSION, REPORT TO THE GOVERNOR AND LEGISLATURE OF 1985, Executive Summary, at 3 (1985) [hereinafter COMMISSION REPORT] claiming, "[t]he Commission believes that if the amendments to the Talent Agencies Act recommended in the report are made a part of the Act by statute, the Talent Agencies Act of California will, in pursuance to the legislative mandate to the Commission, become a model statute of its kind in the United States." *Id.*

cal application of the Talent Agencies Act, as amended.⁴

California's current flawed regulation of talent agents and personal managers has evolved from a series of legislative acts and revisions over the last seventy-five years, which stem from the regulation of employment agencies in general. However, neither talent agents nor personal managers have ever played a role that is adequately described as an "employment agency." Under present California law and current industry regulations, personal managers are like film characters caught in a time warp; they must be confused about the applicable law. This confusion is compounded by the risk of having the manager's valuable investments of time and money wiped out by unpredictable and ambivalent administrative decisions, most of which are not published or widely distributed except in limited and incomplete materials distributed at seminars held for and by lawyers.

California has created a "split personality" in its regulation of agents and managers. The potential for unfair and inequitable results is manifest. Its laws must be rewritten, particularly as they apply to personal managers, in order to create an integrated regulation of these unsung artificers of the vast success experienced by the performers, entertainers, writers, musicians and other creative artists.

An integrated and more equitable regulation of talent agents and personal managers has been prevented by, *inter alia*, the talent agents' desire to prevent unfair competition; the personal managers' efforts to avoid statutory or union limitations on commissions and other activities; and legislative and committee difficulties in finding satisfactory and practical definitions for critical phrases, such as managers' "incidental" efforts to secure employment for entertainers or their "casual conversations" concerning the suitability of particular roles for entertainers.⁵ These difficulties, although daunting, must be resolved if California is to fulfill its mandate to provide a model statute for the regulation of talent agents and personal managers.

THE HISTORY OF THE REGULATION OF AGENTS AND MANAGERS IN CALIFORNIA

A quick search through California's statutes might lead one to conclude that the talent agent is the only professional whose activities on

4. CAL. LAB. CODE §§ 1700-1700.47 (West 1990).

5. See COMMISSION REPORT, *supra* note 3, at 8-12. See also Lane, *Fees or Famine: Could California's Personal Managers Survive Regulation?*, 19 J. OF ARTS MGMT. & L. (1990); N. Y. GEN. BUS. LAW §§ 170-174 (McKinney 1990); N.Y. ARTS & CULT. AFF. LAW § 37.01(3) (McKinney 1990).

behalf of entertainers is regulated. It would seem that the personal management profession is unregulated except for the application of general law. Although a professional category known as "Artists' Manager" did exist, and was explicitly regulated, that category was merged with the category "Talent Agent" in 1978.⁶ Despite the obviously significant differences between talent agents and personal managers, no other references to personal managers are made in California's regulations of persons involved in providing employment for, or advice and counsel of, entertainers.

Personal managers play an extraordinary role in California's entertainment business. The fact that personal managers are not explicitly referred to in the regulatory statutes does not mean that the profession is totally unregulated. To the contrary, it is clear that the Talent Agencies Act has provided an effective framework by which the California Labor Commissioner has, following hearing, voided commission arrangements between performers and others (usually personal managers) who failed to obtain a talent agency license.⁷ In many of these cases, the managers have even been denied the right to reimbursement for out-of-pocket expenses. Los Angeles is the headquarters of the Conference of Personal Managers, Inc., an industry organization concerned with the regulatory power of the California Labor Commissioner.⁸

The absence of explicit references to personal managers in current California law is the result of a series of political, legislative, and committee compromises that continued throughout the 1970's and 1980's. How and why these compromises were reached is best explained by a brief review of the history of the Talent Agencies Act.

The history of regulating talent agents in California stems from the beginning of the twentieth century. At that time, there were concerns about improprieties in booking and presenting vaudeville and live performances. Entertainment booking agents had institutionalized unscrupulous relationships in formal fee-sharing (kickback) arrangements with theatre owners and operators.⁹ The agents thereby diverted the fees ac-

6. 1978 CAL. STAT. 1382.

7. Copies of many of the decisions issued by the California Labor Commissioner are in the possession of the Association of Talent Agents ("ATA"). The ATA, headquartered in Los Angeles, is a trade association consisting of approximately 150 companies engaged in the talent agency business. The materials at the ATA library and other essential information were made available for the preparation of this article through the courtesy of the ATA and its executive director, Chester L. Migden.

8. Telephone interview with Milton B. Suchin, President of the Conference of Personal Managers, Inc. (Dec. 19, 1990).

9. Johnson & Lang, *supra* note 2, at 376-77 n.13.

tually paid for the performers. Other employment practices in the entertainment field also caused concern. Of particular concern were prostitution and the protection of minors in the industry. These problems, combined with general concern for the welfare of minors and the improvement of working conditions, led to the legislative enactment of a law applicable to all "Employment Agencies" operating in the State. Included within the scope of the law were people who obtained work for entertainers and vaudeville performers. A separate category of employment providers, denominated "Theatrical Employment Agencies," was defined and regulated for the first time.¹⁰ All employment agencies, including the newly recognized theatrical employment agencies, were licensed and regulated in the same manner.

In 1913, disputes involving all employment agencies — not just Theatrical Employment Agencies — came under the administrative authority of the Bureau of Labor Statistics.¹¹ In 1923, jurisdiction of disputes involving agents was given to the California Labor Commission.¹² This law provided that dissatisfied parties had a right to demand a trial *de novo* upon a hearing's conclusion.¹³

In 1937, California enacted its comprehensive Labor Code.¹⁴ In the three decades between the first regulation of talent agents in 1913 and the enactment of the Labor Code, very little innovation in the regulation of talent agencies was evident. The 1937 Code refined the definition of a theatrical agent somewhat and, reflecting the emergence of a new technology, added the category of "Motion Picture Employment Agency."¹⁵ In all other substantial respects, the new law was mere recodification of existing regulations.

At the time the Labor Code was enacted, the personal manager was not yet a potent force in the entertainment industry. Even the talent agency business was a much weaker force in the entertainment industry than it has since become. The popularity of films had begun to displace live theater and vaudeville as a primary source of industry income. The so-called "studio system" had developed throughout the 1920's and 1930's, with its hallmark multi-year contracts (often seven years, including options) for all important creative talent, from cameramen to stars.¹⁶ The studio system had made the talent agents' job somewhat perfunc-

10. 1913 CAL. STAT. 282.

11. *Id.*

12. *See Lane, supra* note 5, at 6-7.

13. *Id.*

14. 1937 CAL. STAT. 90.

15. *Id.*

16. Johnson & Lang, *supra* note 2, at 377 n.15.

tory, since the studios controlled the talent and, once the deal was made, the agent collected a commission for a lengthy period of time.

By the end of the 1930's, the studio system waned. The power of the studios particularly declined following the second World War, due to the widespread exploitation of radio and the development of television.¹⁷ The increasing unavailability of long-term studio contracts changed the talent agents' role and challenged their income base.¹⁸ Short-term employment contracts became more prevalent with the studios. Independent and alternative production companies began to appear as competitive employers of creative talent. Under these circumstances, talent agents had to successfully negotiate many more deals in order to maintain their income base. As the industry complexion changed and career choices increased, talent agents became increasingly active in providing advice and counsel to performers. Consequently, the provision of "advice and counsel" has become the essence of the personal manager's contribution to the entertainment industry.

Arbitration clauses in contracts between agents and performers were first upheld in 1939.¹⁹ This method of handling disputes has taken on increased importance, particularly since union and franchise agreements often require such arbitration. In addition, the latest revisions to the Talent Agencies Act have specifically provided for the elimination of the Labor Commissioner's hearings, as long as the Commissioner is provided proper notice.²⁰

In 1943, the term Artists' Manager appeared in the California statutes for the first time.²¹ Under the 1943 Act, an Artists' Manager was a person who engaged in "the occupation of advising, counseling, or directing artists . . . and who procures . . . or attempts to procure employment."²² The term Artists' Manager, with its conjunctive definition, differentiated these agents from others in the regulation of Employment Agencies. The 1943 Act contained four recognized and regulated categories: the Artists' Manager; the Theatrical Employment Agent; the Motion Picture Employment Agent; and the general Employment Agent. Only the Artists' Manager advised, counseled, and directed artists.²³

The legislature passed the Artists' Managers Act in 1959, but the renaming of the regulatory legislation did not change much of the sub-

17. *Id.*

18. *Id.*

19. See Lane, *supra* note 5, at 7.

20. 1986 CAL. STAT. 488.

21. 1943 CAL. STAT. 329.

22. *Id.* (emphasis added).

23. See Johnson & Lang, *supra* note 2, at 385.

stance of the law. The 1959 Act preserved the substance of the regulations promulgated in the 1913 Act, and reflected few of the practical changes in the entertainment industry.²⁴

In 1967, much of California's Labor Code was repealed. Distinctions between the people who earned their living procuring employment generally and those who concentrated on the entertainment industry were more clearly recognized. The regulation of general Employment Agencies was transferred from the Labor Code into the Business and Professions Code. Subsequently, the regulation of general Employment Agencies was removed to the Civil Code.²⁵

Under the 1967 Labor Code revisions, the categories of Theatrical Employment Agencies and Motion Picture Employment Agencies were deleted. The Artists' Manager category was the sole regulated party, and the substance of the prior regulations was continued.²⁶ Thus, the Artists' Manager became the catch-all category that included anyone engaged in the occupation of procuring employment for creative artists.

The 1967 law still did not recognize differences between the job of the talent agent and that of the personal manager. To members of the public and to those involved in the entertainment industry, the differences between those two roles were becoming more obvious. Agents concentrated on booking, while managers focused on investments of time and money in the process of long-term career building. Although these distinctions emerged in the 1940's, it was the advent of rock 'n' roll and the accompanying revolution in the music industry that made the distinctions crystal clear. Rock musicians often had a hard time getting work through normal booking channels. These artists were frequently backed by business supporters or non-band members who helped engineer or "manage" their success.

In addition to revisions to the California Labor Code, 1967 also brought a judicial landmark that furthered the involvement of the Labor Commissioner in disputes involving personal managers and artists. As a result of this decision, the two professions were brought into closer regulatory proximity, regardless of industry distinctions and realities. *Buchwald v. Superior Court*²⁷ was the outgrowth of a dispute between members of a rock band and their manager.²⁸ The manager commenced

24. See Lane, *supra* note 5, at 7.

25. See 1967 CAL. STAT. 1505 (regarding former sections of the BUS. & PROF. CODE).

26. See Johnson & Lang, *supra* note 2, at 385.

27. 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (1967).

28. *Id.* at 351, 62 Cal. Rptr. at 367.

contractual arbitration to resolve the dispute.²⁹ The band filed a petition with the Labor Commissioner disclaiming their contracts, and claiming that their manager was actually procuring employment without the required state license.³⁰ The Court of Appeal for California's First District decided that the Labor Commissioner had original jurisdiction since the band members presented a *prima facie* case that the manager's activities were governed by the employment act.³¹ After the *Buchwald* decision, the Labor Commissioner unquestionably had original jurisdiction to decide whether the Division of Labor Standards Enforcement could determine controversies between artists who used standard claims of employment procurement activities in order to disclaim a manager's contractual entitlements.

By 1975, the California Legislature again grappled with revising regulations for people involved in procuring employment for creative artists. The Musician Booking Agency Act ("1975 Act") was created by the legislature in order to regulate the new breed of managers associated primarily with musicians.³² The 1975 Act applied both to persons who advised musical artists in their professional careers and those who engaged in activities related to procuring employment for musicians.

The Musician Booking Agency Act was unpopular with all segments of the California entertainment industry. The bill was criticized for having "vague and ambiguous" definitions. Critics found its terms sufficiently broad as to apply to many other unintended parties who worked on behalf of musicians. The 1975 Act required, for the first time, the licensing of personal managers, and prevented them from engaging in activities that conflicted with the interests of their clients. Since many personal managers are deeply involved in the career development of their artists, they are also frequently involved as principals in many of the correlative contracts, such as independent production, recording, and publishing agreements. These aspects of the 1975 Act were, therefore, anathema to managers.

Legislative hearings were commenced in recognition of the widespread industry opposition to the 1975 Act. As a result of this opposition, the 1975 Act was repealed without ever becoming effective.³³

Three years later, still trying to grapple with the pleas of the competing political and economic forces, the California Legislature passed

29. *Id.* at 352, 62 Cal. Rptr. at 368.

30. *Id.*

31. *Id.* at 360, 62 Cal. Rptr. at 373.

32. Whetmore Musician Booking Agency Act, 1975 CAL. STAT. 1236.

33. See Johnson & Lang, *supra* note 2, at 385-86. See also Lane, *supra* note 5, at 8.

the Talent Agencies Act of 1978 ("1978 Act" or "Talent Agencies Act").³⁴ This act formally repealed the 1975 Act but failed to answer the fundamental challenge presented by the dilemma that the 1975 Act had at least attempted to address. The essential problem was that the entertainment industry had naturally developed a well-defined role — and, in the music business, a dominant role — for the personal manager. The manager was not a talent agent, who handled dozens, hundreds or thousands of clients, as the larger talent agencies did. Nonetheless, the manager was intimately involved in booking work for the relatively few artists with whom the manager had agreements. Therefore, depending upon how the language of the statutory regulation was construed, the manager was continually acting in jeopardy. The 1978 legislation eventually avoided this problem.

In its original form, the 1978 Act required the separate licensing of personal managers without regard to the employment solicitation issue. However, the ensuing political fight and the agitation that surrounded the 1975 Act led to the elimination of this portion of the proposed law. Instead, the legislature eliminated the title "Artists' Manager" and replaced it with the title "Talent Agent." Otherwise, little of the substance of the prior act — which, it should be recalled, had basically originated sixty-five years earlier in 1913 — was changed. In so doing, the legislature gave further comfort to the confusion created by commingled regulation.

With a vote of the legislature, the term "manager" disappeared from the regulatory scheme. This legislative hocus-pocus only further obfuscated the underlying problem. The bold, if somewhat misdirected, 1975 and 1978 efforts to regulate managers were swept under the statutory rug. Managers, among others, may have believed this was a victory, since restrictive regulation and licensing were nominally avoided.

This was a Pyrrhic victory: a legal "twilight zone" was created at excessive cost to many managers. Continuing challenges by artists to their agreements with personal managers frequently resulted in a total loss before the Labor Commissioner's hearing officers. With the titular reformation of Artists' Managers into Talent Agents, but no further significant expression of legislative intent or definitional advice to the administrative executives, the legislature *de facto* encouraged the Labor Commissioner and his designees to boldly exercise aggressive jurisdiction over these disputes. During this period, many of the Commissioner's decisions voided commission agreements *ab initio* between artists and man-

34. 1978 CAL. STAT. 1382.

agers. These decisions often required detailed accountings and disallowed counterclaims, even for reimbursement of substantial out-of-pocket expenses. Such decisions ordered the managers, who routinely were found to be acting as "unlicensed talent agents," to return "all monies, commissions, royalties or things of value received . . . directly or indirectly" from the artist's activities.³⁵

Despite the twilight zone regulation that continually presented a risk of running afoul of the Talent Agencies Act, personal managers continued to gain prominence and importance in the entertainment industry. It became more common for managers to assist performers' careers outside the music field. This challenge to the historical province dominated by talent agents created greater tension between personal managers and talent agents.

In 1982, the legislature once again undertook the effort of revising the Talent Agencies Act. One of the historical provisions of the various employment agency acts still surviving in 1982 was the potential for misdemeanor punishment, in addition to civil liability, for violations of the law. The peril created by exposure to criminal liability was abhorrent to managers, and the 1982 amendments tentatively eliminated criminal penalties.³⁶ The 1982 revisions also specifically authorized unlicensed persons to work in conjunction with licensed talent agents in efforts to procure employment for artists.³⁷ At the same time, the statutes impanelled a blue-ribbon entertainment commission which, by 1985, was to make recommendations to the Governor and the legislature regarding all changes necessary to make the Talent Agencies Act a model bill.³⁸

The 1982 changes had "sunset" provisions, declaring expiration of the revisions by their own terms in 1985.³⁹ Eventually, the sunset provisions applicable to both the Commission and the temporary revisions to the Talent Agencies Act were extended until 1986.⁴⁰

Significantly, the Commission was placed under the chair of the then-serving Labor Commissioner. In addition to the Labor Commissioner, the California Entertainment Commission was composed of nine political appointees. Three talent agent representatives, three personal manager representatives, and three artist representatives were selected.

35. See, e.g., *McFadden v. Ripp*, No. SF MP 71, TAC 7-80, determination and award filed Dec. 18, 1980; *St. Louis v. Wolfhead Productions, Inc.*, No. SF MP 57, TAC 29-79, determination and award filed April 27, 1981.

36. CAL. LAB. CODE § 1700.44(b) (West 1990).

37. CAL. LAB. CODE § 1700.44(d) (West 1990).

38. CAL. LAB. CODE §§ 1701-1704 (West 1990).

39. CAL. LAB. CODE § 1700.44 (West 1990).

40. 1984 CAL. STAT. 553.

Pursuant to its enabling statute, the Commission studied the laws and practices of California, New York, and other entertainment capitals of the United States.

In December of 1985, the Commission issued recommendations on a number of critical issues. The first issue addressed was whether a personal manager, or any other person, should be allowed, under any circumstances, to procure employment without a talent agency license. The Commission considered this the "principal, and philosophically the most difficult" issue before it.⁴¹ Regarding this issue, the Commission declared it could find no clear legislative intent controlling the matter.⁴² Its review of the 1978 Act revealed the original proposal to require a separate license for all personal managers, regardless of whether they procured employment. As previously mentioned, that portion of the 1978 Act was deleted before final passage. The Commission would not conclude from this history that the legislature intended to exempt managers from the talent agency regulation.

The Commission was informed that talent agencies increasingly found themselves "in competition with personal managers and others in seeking employment for clients."⁴³ On the other hand, the Commission was advised that personal managers, in the normal course of their profession, must engage in limited and incidental efforts to procure employment. The Commission considered, but ultimately rejected, various alternatives that would have permitted incidental employment activities similar to those permitted by New York.⁴⁴

Regarding the manager/agent conundrum, the Commission stated that it had "attempted over many hours, and by diligent exploration and analysis of alternatives, to find a common ground of compromise on which an answer to this long-standing industry controversy could be formulated, but without success."⁴⁵ With this admission, and despite its simultaneous declarations of having succeeded in formulating a model act, the California Entertainment Commission acknowledged failure in its most important mandate. The extent of this failure is revealed by the Commission's finding on this issue, when compared with its finding on a similar issue involving the limited recording contract exemption for musicians' personal managers who procure employment.⁴⁶

41. COMMISSION REPORT, *supra* note 3, at 7.

42. *Id.*

43. *Id.* at 9.

44. *Id.* at 10-11.

45. *Id.* at 10.

46. COMMISSION REPORT, *supra* note 3, at 13-14.

On the general exemption issue, the divided Commission declared: [O]ne 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. There can be no “sometimes” talent agent, just as there can be no “sometimes” professional in any other licensed field of endeavor.⁴⁷

However, on the issue of whether personal managers in the music business should be exempt from talent agency licensing requirements, the divided Commission feebly attempted to reason that “[a] recording contract is an employment contract of a different nature from those in common usage in the industry involving personal services. The purpose of the contract is to produce a permanent and repayable [sic] showcase of the talents of the artist.”⁴⁸ How can such a “permanent and replayable showcase” of the musician’s talents be differentiated from, for example, the “permanent and replayable showcase” of a film star’s talents? Or of a writer’s talents? Or of an editor’s talents? Or of a composer’s talents?

Endorsing the limited musician’s exemption, the Commission found persuasive the very considerations it rejected on the general exemption question:

Personal managers frequently contribute financial support for the living and business expenses of entertainers. They may act as a conduit between the artist and the recording company The personal manager may become involved in travel arrangements [T]he problems of attempting to license or otherwise regulate this activity arise from the ambiguities, intangibles and imprecisions of the activity.⁴⁹

This reasoning was logical nonsense. Precisely the same arguments relate to the personal managers’ efforts on behalf of artists in every other field of endeavor in the entertainment industry. The primary difference, if the truth is acknowledged, was that managers were already entrenched in the music recording industry, while talent agents were involved primarily in booking their live performances. A decision was thus reached whereby “typical” contracts, *i.e.*, performance bookings, were not exempt, but recording deals — in which agents were not usually involved — were exempt.⁵⁰ Compromises in logic of this sort were no basis upon which to support a purported multi-state model.

47. *Id.* at 11-12.

48. *Id.* at 13-14.

49. *Id.* at 14.

50. *Id.*

Aside from these two logically inconsistent decisions by the Entertainment Commission, the report decided that "the industry would be best served without the imposition of civil or criminal sanctions for violations of the Act."⁵¹ In so doing, the Commission made many enforcement rights under the revised act quite questionable.⁵² In addition, the recommendations of the Commission included a diminution of time in which unlicensed talent agents could have their commission agreements disgorged. Whereas the prior law permitted the disgorgement *ab initio*, the new law imposed a one-year statute of limitations for disgorgement.⁵³

In shaping this so-called model law, the Entertainment Commission made a statement in its report that may ultimately help to undermine the constitutionality of the essential elements of the Talent Agencies Act. The divided Commission was obviously searching for a compromise that would preserve adequate regulation but, as discussed, carve out specified exceptions and diminished exposure for violations. In rejecting the continuation of criminal penalties, the Commission stated:

There is, however, 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 violation has occurred. "Procure employment" is just such a phrase.⁵⁴

The Commission further reported:

The majority of the Commission believes that the existing civil remedies, which are available by legal action in the civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the Act

51. COMMISSION REPORT, *supra* note 3, at 15.

52. Eventually, it took a test case and novel usage of "unfair competition" provisions of the California Business and Professions Code in order to demonstrate continued vitality to the enforcement aspects of the Talent Agencies Act. In the test case, the District Attorney for the County of Los Angeles was enlisted to claim a violation of section 17200 of the Business and Professions Code against a management firm which allegedly was engaged in procuring employment. The District Attorney sought a judicial injunction pursuant to sections 17202, 17203, 17204, 17535 and 17536 of the Business and Professions Code. This matter never proceeded to trial or appeal, thus making its usage of the "unfair competition" statutes of limited significance. In this case, a Stipulated Final Judgment issued an injunction from violating the Talent Agencies Act. No monetary or other penalties were issued. *See*, *People v. Joseph and Rix Management, Inc.*, No. C747627 (Los Angeles Superior Court, final judgment filed December 19, 1989). It should be borne in mind that these enforcement provisions are separate from those in which the Labor Commissioner may void commission entitlements, which powers still exist but with a one year statute of limitations relating to disgorgement.

53. *See* CAL. LAB. CODE § 1700.44(c) (West 1990).

54. COMMISSION REPORT, *supra* note 3, at 15-16.

and punishing breaches. These remedies include actions for breach of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation, infliction of emotional distress and the like Perhaps the most effective weapon . . . is the power of the Labor Commissioner . . . to . . . declare any contract . . . void . . . and order . . . restitution.⁵⁵

The Entertainment Commission rejected the proposal that personal managers should be separately licensed and regulated.⁵⁶ It reasoned that the law does not license "a person" but the "activity of procuring employment."⁵⁷ Yet the historical record makes it clear that the original purpose of the employment agency acts was to regulate rampant wrongdoing. The regulation was intended to curtail improper activities, not to punish innocent persons working in good faith. In California, however, technical license violations may defeat contractual entitlements, and the current rules permit the Labor Commissioner to abrogate otherwise perfectly proper agreements between artists and managers merely because of failure to register for licensing.

It is important to remember that the California talent agency licensing procedure is perfunctory: there is no test of competence, as may exist for attorneys, accountants, realtors, doctors, teachers and the like. Anyone without a significant criminal history, having good references, a local address and an ability to provide a small bond is eligible for the license. Is this an adequate and rational methodology by which to regulate an industry that generates billions of dollars? Should such regulation be applicable without differentiation between managers and agents?

The blue-ribbon Entertainment Commission's own admission is that the term "procuring employment" is inherently vague and ambiguous, and therefore cannot support criminal penalties without violating due process. Can such a regulatory scheme premised upon such an ambiguous phrase therefore be sufficient to disenfranchise significant property and contract rights, as is currently assumed by the Labor Commissioner?

The Commission supported a change in the law by which contracts that met certain requirements and contained arbitration provisions would not be subject to the Labor Commissioner's hearing process, as long as the Commissioner was advised of all arbitration proceedings and had a right to attend. This revision was part of a continued move away from the Labor Commissioner's actual jurisdiction over talent agency

55. *Id.* at 17.

56. *Id.* at 20.

57. *Id.*

disputes, since those contracts now generally include boiler-plate arbitration language that meets the relevant criteria. Thus, the Labor Commissioner's current jurisdiction predictably will focus more on the unlicensed dispute areas — disputes between artists and personal managers — which may often lead to the avoidance of the management contracts.

Are personal managers, as a class, so pernicious as to require this type of treatment as a matter of policy, even if the law survives due process and equal protection challenges? The entertainment industry contains many examples of managers who have invested in their clients in terms of their costumes, travel expenses, living expenses, showcases, equipment, headshots, publicity expenses and so on. These investments fuel the entertainment industry just as effectively as the agents' efforts to obtain live performances or film roles. The manager's return on these capital and time investments is much less certain than the return on the efforts of large talent agencies that handle established talent. Also caught in the regulatory crunch are the smaller talent agencies, which are effectively "capped" at the ten percent commissions set by the large unions, but which also act, in effect, as the old "Artists' Managers" by providing advice and counsel to the limited number of their less established clients.

The entertainment industry labor unions have enormous power to ensure the proper conduct of people who deal with their members. At the same time, these unions often place contractual limitations on the maximum commissions talent agents may charge their members and on the length of contractual terms. Union concern for membership is another complication in the adequate effectiveness of the revision in the Talent Agencies Act. The current law which theoretically permits agents to work in conjunction with managers in procuring employment is practically limited by union arrangements. Since the union commission caps may be non-waivable, an agent and manager working together could arguably be limited to an aggregate ten percent commission.⁵⁸

The issue of regulated compensation highlights differences between New York and California laws, which eventually should be reconciled. While New York permits "incidental employment procurement activities," it also statutorily regulates the commissions which may be charged to artists.⁵⁹ In California, the legislature has left the commission limitations almost entirely to unions. Although the Talent Agencies Act re-

58. See e.g. SAG Rule 16(g).

59. See N.Y. GEN. BUS. LAW §§ 171.8 & 185.8; Lane, *supra* note 5, at 21.

quires contracts to be approved by the Labor Commissioner, the Commissioner has not attempted to limit commissions within the range of the New York statutory limitations.⁶⁰

Over the last two decades, the giant talent agencies have become the inheritors of the demised studio system. These agencies have emerged as a dominant force in the film industry, in part by packaging productions for their client lists, which include stars, directors, screenwriters and other creative talent. In respect to the creative talent, the power of these agencies has now surpassed that of the studios themselves. Although the financing, production and distribution power of the studios is unsurpassed, the current environment includes the use of agency heads to advise multinational conglomerates seeking to purchase film studios and film libraries.⁶¹ Surely the power of the talent agencies and the unions is sufficient to ensure that managers are required to adhere to acceptable limitations, while at the same time enabling them to receive their legitimate entitlements.

Any ultimate solution to the agent/manager regulatory problem and any truly model multi-state regulatory code will eventually require the cooperation of lawmakers in California and New York, as well as the reasonable cooperation of the leaders of the Screen Actors' Guild ("SAG"), the American Guild of Variety Artists ("AGVA"), the American Federation of Television and Radio Artists ("AFTRA"), the Actors' Equity Association ("Equity"), the American Federation of Musicians ("AF of M"), and other unions. It will also require the reasonableness of the giant talent agencies, such as William Morris, CAA and ICM, and leading personal managers and entertainment lawyers. This kind of cooperation may be more than a realist can expect. However, enlightened self-interest should motivate all involved. As for the California legislature, it has repeatedly tried to solve this problem and it may be assumed that it will enact a model bill if the principal combatants permit them to do the right thing.

THE CURRENT CALIFORNIA CHALLENGE

The essential findings of the California Entertainment Commission were adopted by the legislature in 1986.⁶² While one cannot fault the

60. See Johnson & Lang, *supra* note 2, at 419; CAL. LAB. CODE §§ 1700.23 and 1700.24.

61. See Honan, *4 Agents Switch Allegiance To Rival*, L.A. Times, Jan. 30, 1991, at B-1, particularly including the discussion of the role played by Creative Artists Agency head Michael S. Ovitz in the \$6.13 billion acquisition of MCA, Inc. by Matsushita Electrical Industrial Company.

62. 1986 CAL. STAT. 488.

sincerity of its efforts in reaching conclusions to difficult questions of enormous economic consequence (and subject to enormous lobbying efforts), the revised law simply did not accomplish the assigned task. Although the revisions are less than five years old, the recent changes in the regulatory scheme have not solved its antecedent problems. Arguably, the changes themselves have revealed the defects more clearly, and created new defects. This law has been ripe for challenge for some time.

A formidable legal challenge often occurs only if a dispute involving a significant amount of money arises. Only if substantial interests are involved are the stakes high enough to make trial and appeal a realistic course. Many managers fear the pursuit of claims against artists for commissions, due to technical violations of the Talent Agencies Act, even if those violations have little to do with the success of the parties and do not involve notions of *malum in se*.

Two recently filed companion cases resulting from the relationship between entertainer Arsenio Hall and his former manager, Robert Wachs, may cause talent agents, managers and entertainment unions to reconsider their parochial positions, if only to avoid potential judicial invalidation of principal portions of the current Talent Agencies Act.⁶³ Both lawsuits were filed by noted lawyer Howard Weitzman on behalf of New York attorney Robert Wachs and his California management company, X Management, Inc.⁶⁴

In his actions, Wachs has sued James Curry, the Acting California Labor Commissioner; Ron Rinaldi, California's Director of Industrial Relations; and the California Department of Industrial Relations. Wachs has used these complaints to attack Arsenio Hall's 1990 Petition to Determine Controversy,⁶⁵ in which Hall has sought to determine that X Management acted as an unlicensed talent agency by procuring and attempting to procure employment for Hall. Hall's Petition to the Labor Commissioner therefore sought to obtain a disgorgement of all monies received by X Management related to Hall's entertainment industry activities.

The *Wachs* complaints focus on two critical elements of the Talent Agencies Act. The first is the definition of a Talent Agency in Labor Code section 1700.4(a), which uses the Entertainment Commission's

63. See *Wachs v. Curry*, No. BC018803 (Los Angeles Superior Court, filed January 10, 1991); see federal companion case, *Wachs v. Curry*, No. 91 0148 JGD(Sx) (C.D. Cal., filed January 10, 1991).

64. Wachs is a California resident, President of X Management, Inc., and, according to the complaints, owns half of the stock of X Management, Inc.

65. *Hall v. X Management, Inc.*, No. TAC 19-90 (filed August 8, 1990).

questioned term "procure employment."⁶⁶ The second is the licensing requirement for agencies that "engage in or carry on the occupation of a talent agency," as set forth in Labor Code section 1700.5.⁶⁷ These ambiguities have long been the subject of criticism by concerned commentators.⁶⁸

The *Wachs* suits are seeking respective declarations by the state and federal courts to the effect that the cited Labor Code sections, both on their face and as applied, violate constitutional due process and equal protection rights, guaranteed by the fourteenth amendment to the United States Constitution and by article I, section 7 of the California Constitution.

Wachs contends that the statutory language is unconstitutionally vague in that, *inter alia*, it does not sufficiently provide fair warning of the type of conduct constituting procurement of employment, and it does not provide an adequate standard for the Labor Commissioner to apply in determining whether a personal manager has complied with the licensing requirement. Wachs specifically argues that the terms "procuring, offering, promising, or attempting to procure employment or engagements for an artist" are so vague that one must guess at their meaning and suspected application. Wachs also claims there is no rational basis for a statute that exempts persons who procure "recording contracts" but that restricts persons who procure employment for artists in other media. In the federal case, Wachs also utilizes 42 U.S.C. §§ 1981-1988 to claim a deprivation of his civil rights.⁶⁹ Both cases seek temporary and permanent injunctions against the enforcement of California Labor Code sections 1700.4(a) and 1700.5.⁷⁰

Whether or not these suits prevail in obtaining the permanent injunction of the enforcement of the critical regulatory and licensing elements of the Talent Agencies Act, a complete overhaul of the Act is long overdue.

SUGGESTIONS FOR CHANGES IN THE LAW

1. Despite the obvious and continuing problems in the Revised

66. See *Wachs v. Curry*, State Complaint, at 7-8, paragraphs 23 and 28; see Federal Complaint, at 7-8, paragraphs 21 and 26.

67. See *Wachs v. Curry*, State Complaint, at 6, paragraphs 17 and 18; see Federal Complaint, at 5-6, paragraphs 15 and 16.

68. See Johnson & Lang, *supra* note 2, at 386-89; see also COMMISSION REPORT, *supra* note 3, at 15-16.

69. *Wachs v. Curry*, Federal Complaint, at 2, paragraph 1.

70. See *Wachs v. Curry*, State Complaint, at 7-9, paragraphs 21, 26 and 30; see Federal Complaint, at 7-9, paragraphs 19, 24 and 29.

Talent Agencies Act, regulation of talent agents should clearly be continued. However, this regulation should be more meaningful. The entertainment industry is one in which a talent agent's "deal memos" may incur commitments of millions of dollars. Entire studios may be bought and sold by multi-national corporations relying on a talent agent's advice. A profession of such stature and significance should be subject to meaningful regulation and licensing, including more telling background checks and the inception of practical skills testing. Since the true purpose of regulation is to insure that artists are not disadvantaged by improper behavior, talent agents should adopt, be familiar with, and be tested on codes of ethical conduct. Particular care should be given to the compromises inherent in the packaging of creative projects and talent, as well as in the representation of clients with competing interests. Since agents are regularly required to review proposed contracts, independent counsel should be used to review agreements which deviate from industry approved forms.

2. Personal managers also should be subject to licensing and regulations that impose certain limitations on commissions, review of legal documents and conflicts of interest. An adequate ethics code must be adopted so that industry standards are codified and understood, and can thus be properly applied. Given the nature of managers' selective efforts and business, provisions must be made permitting some projects with clients in which managers wish to act as principals, producers, promoters and the like. In such cases, the ethics and regulatory codes should be clear in requiring that unfair, overreaching and oppressive agreements be avoided. At the same time, agreements with fair and reasonable terms, in accordance with the standards to be adopted, should be encouraged. To the extent that incidental employment procurement occurs, a practical statutory definition must be achieved that differentiates between the occupation of booking talent and the occupation of managing talent. This definition should be drawn, to the extent possible, in conjunction with New York lawmakers and, if possible, it should be uniform between the two key states.

3. Management companies and major labor unions should attempt to negotiate overall agreements and franchise arrangements that reflect the particular contributions and needs of personal managers, while insuring that union members are not subject to overreaching management contracts. The unions must be cognizant of the liberal needs of personal managers to engage in more flexible business relations with members, but still recognize boundaries that prevent betrayal of loyalties. Managers

should not be precluded from flexible business relations, as long as the terms are fair and equitable.

4. The Labor Commissioner should be removed from the typical dispute resolutions relating to talent agents and personal managers. The regulation of these professions should be moved into the Business and Professions Code or the Civil Code. Resolution of disputes should be encouraged within the framework of that Code, arbitration agreements, and laws of general application.

5. Arbitration proceedings should be favored for all disputes involving artists in their agreements with agents and managers. Unlike the Labor Commissioner's rulings, arbitration proceedings are not generally subject to *de novo* review, thus serving the purposes of judicial economy and economy to the parties. Another advantage of arbitration proceedings is that, unlike the Labor Commissioner's decisions which are not published in an accessible codified form for easy public scrutiny, they would begin to develop a body of law upon which artists, agents, managers, unions and attorneys could rely. The current procedures provide little precedential value or professional guidance. Arbitration proceedings would periodically result in confirmation challenges in the superior court, while non-arbitrable matters would be litigated there. Skills testing of agents and managers could specifically require familiarity with the reported body of law. This proposal would be particularly helpful if legislation established a publication and reporting system for all industry arbitration decisions.

CONCLUSION

California's Talent Agencies Act does not adequately regulate the realities of the contemporary entertainment industry. The present laws woefully fail to meet the legislative goal of a model, multi-jurisdictional statute. The most obvious problem involves the murky regulation of personal managers and others involved in incidental activities intended to assist in procuring employment for artists.

Personal managers are valued professionals involved in all aspects of the entertainment industry. The profession deserves a legal status, definition, and recognition that guarantee the fair fruits of the personal manager's labors. In turn, personal managers must be willing to accept statutory regulation, certain commission caps, specific codes of conduct and union franchise agreements as a reasonable price for the ability to enter into fair and enforceable business relations with their clients. Until such changes are made, California's personal managers will remain alone, which does not leave them in good company.

