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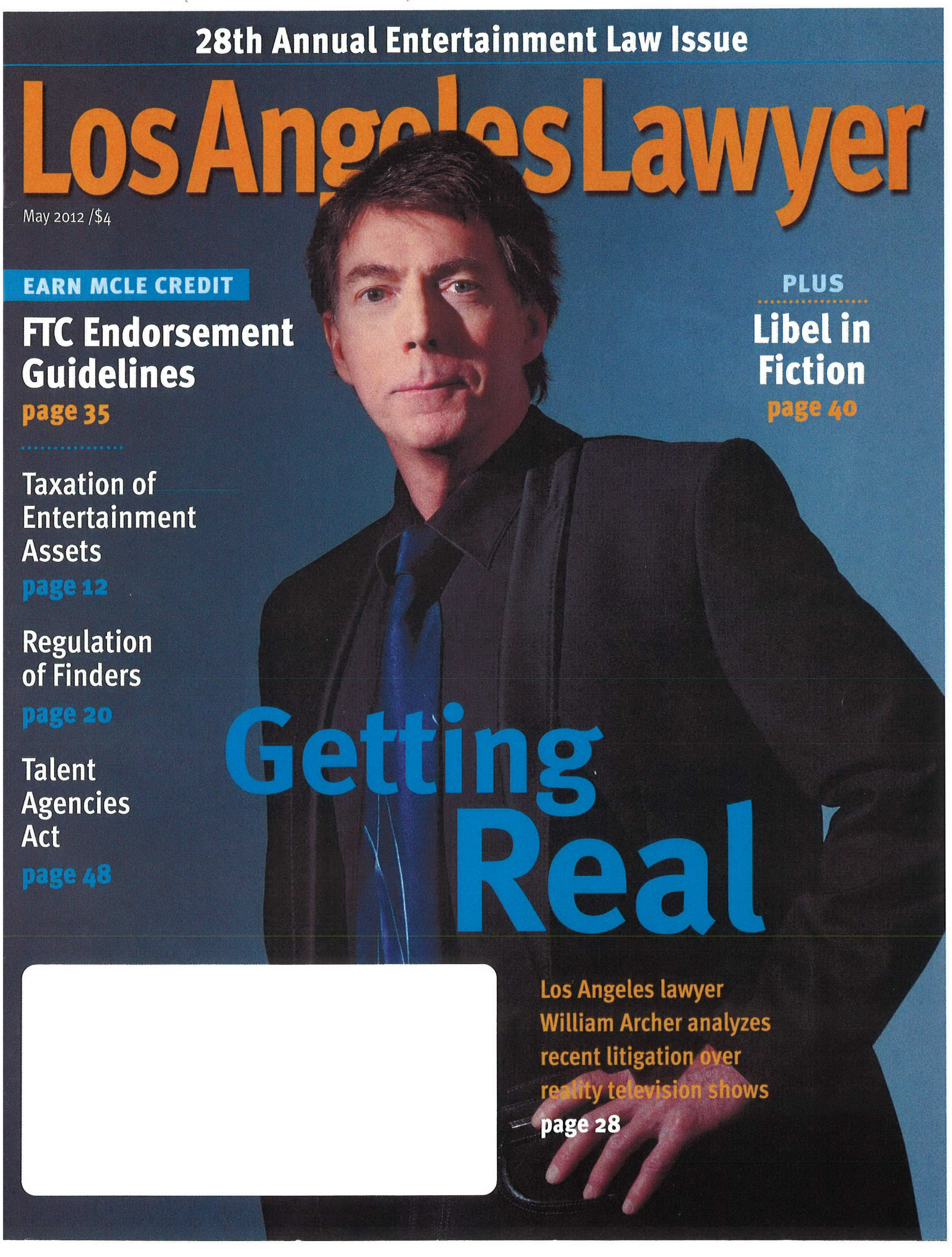

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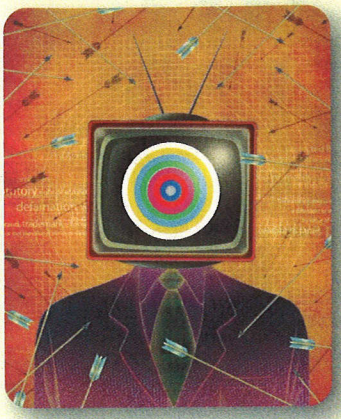

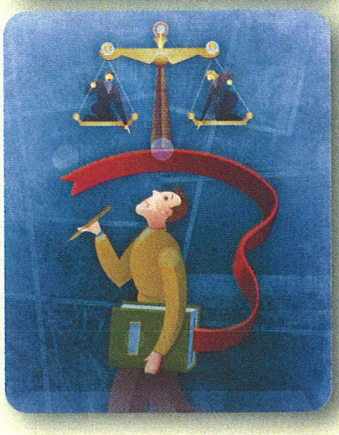

FEATURES

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BY EDWIN F. MCPHERSON

Is the California Legislature Listening?

FOR 30 YEARS, CALIFORNIA'S TALENT AGENCIES ACT has been a hotbed of litigation. The act prohibits anyone who is not a licensed talent agent from procuring employment for artists, which include actors, directors, recording artists, songwriters, models, and a vast number of other types of entertainers.

Over the years, the labor commissioner and the courts have grossly expanded the term "procuring," as used in the act, to include any form of negotiation whatsoever, which of course is not consistent with anyone else's definition of "procuring." In theory, if a talent agreement already has been negotiated, but an actor wants an extra pillow for the trailer, the actor's manager cannot ask for that pillow without violating the act—unless the manager is asked to do so by a licensed talent agent. I have written numerous articles on the act, and almost every one of them criticizes it on the same theme: The act is completely out of touch with the reality of the entertainment industry and must be amended. Courts finally seem to be getting the message.

In 2008, the U.S. Supreme Court decided *Preston v. Ferrer*, determining that an arbitration clause in a management agreement, like every other agreement, is binding. In the past, the labor commissioner had taken the bootstrap position that, if the commissioner found a violation of the act, and the management agreement was therefore unenforceable, so too were any arbitration provisions. Now, if there is an arbitration clause in a management agreement, it is up to the arbitrator, and not the labor commissioner (notwithstanding *Styne v. Stevens*), to determine whether or not the act was violated, and the labor commissioner never gets to review the matter.

Also in 2008, the California Supreme Court decided *Marathon v. Blasi*, holding that management agreements, like all other agreements, are severable. In the context of the act, that means that one violation of the act by a personal manager will most likely no longer result in the loss of a lifetime of commissions. Each violation now will be reviewed as a single instance that may be viewed in conjunction with lawful activities by the manager, and only if the unlawful activities pervade the entire relationship will a manager lose all of his or her commissions.

Although the U.S. Supreme Court and the California Supreme Court finally have listened, the California Legislature has not listened to anyone since 1986. In the *Marathon* decision, the California Supreme Court suggested that, because the act leads to unfair results that are incompatible with the realities of today's entertainment industry, the California Legislature could consider revisiting the act. However, the legislature has made no review and no statutory changes.

More disturbing than the legislature's failure to listen, however, is that artists never have listened either. It is not difficult to understand why the Association of Talent Agents (ATA) is so vocal about maintaining the act in its present form—the act should be renamed the Full Employment Act for Agents. The ATA even challenged an amendment proposed by the Beverly Hills Bar Association a few years ago to exempt lawyers from the act. Clearly, talent agents love the act as it stands.

However, it is difficult to imagine why the Screen Actors Guild consistently would support the act. There is no question that the act does not protect artists, as it was intended to do. When an artist decides that he or she wants to fire his or her manager, the act is a very convenient sword to use in exit negotiations (which was certainly not its intended use). But the act's general impact on artists is fairly devastating.

It is very difficult to dispute that the Talent Agencies Act is terrific for agents and absolutely horrible for artists.

Many A-list artists feel that having a manager is much more important to them than having an agent, and they understandably do not want to pay two commissions. However, the act essentially mandates that they pay an agent whether they want to or not.

Granted, nobody is going to feel too much sympathy for the superstars, but what about the novice artist? There are fledgling actors all over the city that no agent will touch, but they often are able to find ethical, experienced managers who are willing to invest time and money to create some momentum in the actors' careers. Is it likely that managers will invest time and money developing an artist while knowing that they will never be paid for it?

Similarly, more than ever, bands need to tour to develop a significant following in order to attract record label interest. Without a solid record deal or at least a large following, it is highly unlikely that a band will ever secure an agent. How is a band going to survive if its manager cannot help book a tour?

It is very difficult to dispute that the Talent Agencies Act is terrific for agents and absolutely horrible for artists. It is beyond comprehension that union leadership has never figured that out. As the late Gerry Margolis, a fellow outspoken opponent of the act, once asked, In an industry in which many actors cannot even get into the Screen Actors Guild, and 95 percent of SAG members are unemployed, how is it conceivable that a law that actually reduces the number of people who are allowed to find work for those actors can actually be good for actors? ■

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