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THE TALENT AGENCIES ACT

A personal manager's nightmare

For years people in and out of the entertainment industry have been asking the same question but not necessarily getting the same answer. The age-old question is: "What does a personal manager do for an artist/actor?" The answer to that question can be anything from career advisor to baby sitter, from spokesman to travel agent.

A more accurate answer to the question might be that the personal manager, particularly in the music industry, does just about everything for the artist. A personal manager chooses songs; sometimes co-writes or arranges songs; retains lawyers, agents and business managers; selects band members, clothing, backup singers, sound equipment, sound engineers, lighting technicians, tour managers, bus companies, video directors, record producers, singles, publicists, record companies, scripts, "the right part," makeup personnel, personal assistants, acting instructors, vocal coaches and everything else in the artist's life.

Managers may get a limo for the premiere of a movie or scotch for the party afterward, but what they cannot get for their actor is a part and what they cannot get for their recording artist is a gig—because that is illegal. Legalities aside, does it happen? All the time. Does anyone care? Yes: the state Labor Commissioner.

Face it, often an artist or actor will hire a manager solely because the manager has the contacts and/or the clout to get that artist or actor a show or a part, and will be ecstatic when the manager books the band in club after club (particularly when the band is unsigned and/or does not have enough of a following to get an agent) or when the manager gets the actor reading after reading and part after part . . . that is, until the artist or actor decides that he or she does not want the manager around anymore. Perhaps the artist has become so big (often due to the manager's efforts) that he needs more of a "heavy hitter" to manage him, or perhaps the actress just plain does not want to pay that 15 percent anymore or, for that matter, does not want to pay the commissions that are long past due.[1]

That is when the artist or actor decides that it might make more sense to take the matter to the Labor Commissioner. More common, however, is when the manager has been let go and decides to sue the artist for past due commissions and the artist then asserts the Labor Code, specifically the Talent Agencies Act,[2] as a defense to the action. The artist would then seek (and in California almost invariably obtain) a stay of the litigation, pending review by the Labor Commission where the results can be harsh and there is nothing that a court will (or generally can) do about it. The theory is that talent agencies perform a much more specific function than do personal managers and therefore must be severely regulated. If a personal manager (or anyone else, for that matter) can circumvent this regulation by performing the function of a talent agent,[3] then the statute would be rendered useless.

Licensing Requirements

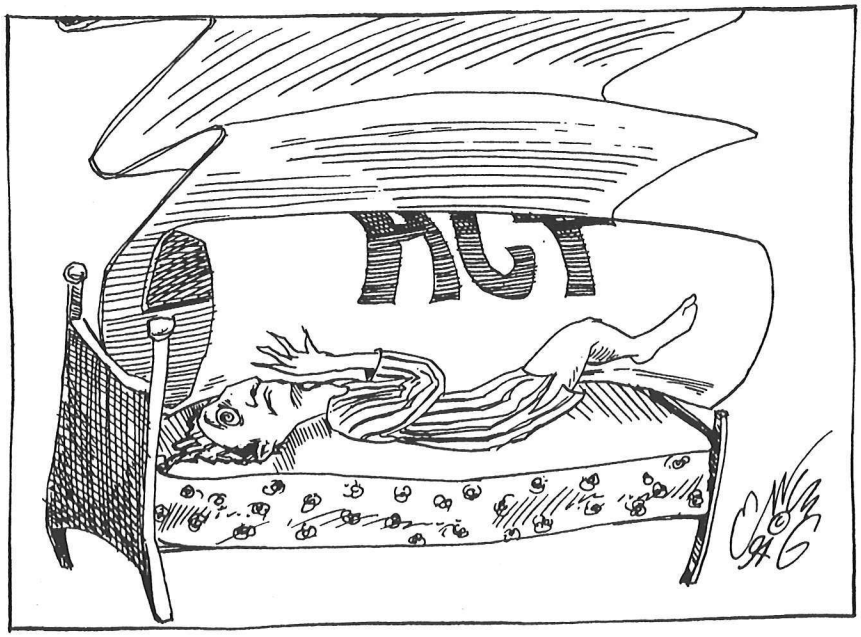
The first question that most novices in the entertainment industry ask is, "if it is illegal for anyone other than a licensed talent agent to 'book', and if a personal manager may have to give up potentially hundreds of thousands of dollars if he engages in any 'booking' whatsoever, and if it is not that difficult to get an agency license,[4] then why don't all personal managers just avoid the whole problem by getting an agency license?" The easy answer, and probably the most accurate one, is that a talent agent's commissions are regulated by the various labor guilds and are limited to 10 percent of an artist's gross earnings, whereas a personal manager (who generally charges 15 to 20 percent of the artist's gross earnings) can charge literally any amount that can be negotiated with the artist.[5]

The Talent Agencies Act is often applied quite harshly and it is quite definitive. Section 1700.4 of the California Labor Code defines a talent agency as:

> *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.*

Artists are defined as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures . . . and other artists and persons rendering professional services in motion pictures, theatrical, radio, television and other entertainment enterprises."[6]

The purpose of the Talent Agencies Act, and the licensing requirement in particular, is to "prevent improper persons from becoming [agents] and to regulate such activity for the protection of the public" and artists.[7] When a licensing statute has such a purpose, it is well established that "a contract made by an unlicensed person in violation of the statute . . . is void."[8] Moreover, it has specifically been held that "a contract between an unli-



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By Edwin F. McPherson

censed [agent] and an artist is void."[9]

The Labor Commissioner has consistently defined the term "procuring," within the meaning of this section, broadly, and has specifically held that the mere negotiating of the terms of a contract for the engagement of an artist constitutes procurement. For example, in *Kearney* v. *Singer*[10] (decided October 11, 1977),[11] the commissioner recognized that "furthering an offer by negotiating the terms of an engagement" is an "essential element" of procurement within the meaning of Section 1700.4. Specifically, the commissioner noted:

> *We do not believe that an engagement is procured by opening or preliminary discussion alone. Procurement implies an arrangement including the determination of the specifics pertaining to the particular request for an artist's service. The intention of the respondent to* actively negotiate terms of specific proposed engagements . . . *colors the intentions with regard to the entire agreement.*[12]

Thus, it was held that the mere negotiation of an employment agreement, even absent any actual, direct "solicitation," was demonstrative evidence that the respondent had unlawfully contracted to act as a talent agent. The contract was accordingly declared void (and no commissions payable thereunder).

Similarly, in *Richard Pryor* v. *Franklin*[13] (decided August 1982), the commissioner refused to apply a narrow interpretation of "procurement," and specifically ruled that:

> *[T]he furthering of an offer constitutes a significant aspect of procurement prohibited by law since* procurement includes the entire process of reaching an agreement on negotiated terms *where the intended purpose is to market an artist's talents.*[14]

Restitution Orders

Although the Labor Commissioner will routinely declare a management agreement null and void because it violates the Talent Agencies Act, therefore allowing the artist to avoid paying the fees that would otherwise be owed to the manager, it is much more difficult for an artist to obtain a "restitution" order, whereby all monies previously paid to the manager would be disgorged and returned to the artist.

Nevertheless, in some cases, the commissioner will disgorge from the manager at least those commissions that were specifically attributable to the work that the manager actually procured or negotiated for the artist. In other words, sometimes the commissioner will not award restitution of all amounts paid to the manager for all of his or her services, but will order the return of commissions received for the particular deal or booking that is determined to be unlawful.

In *Pryor* v. *Franklin*, for example, the commissioner ordered comedian Richard Pryor's former personal manager to return all compensation he received from Pryor for his "services in procuring and attempting to procure employment." Although such an award, on its face, does not appear to be that onerous, such restitution can be a significant amount. In fact, in the *Pryor* case, the amount the manager was ordered to repay was $753, 217.

In some cases, the commissioner will order the return of all commissions, whether or not they are specifically attributable to the unlawful acts. The rationale for this return of money is that, where the Labor Commissioner has declared a contract void for noncompliance with the Talent Agencies Act, it is self-evident that "no rights . . . can be derived from it."[15] The commissioner has held that the monies paid by an artist to an unlicensed talent agent are, and remain, "the sole property of [the artist] and . . . not subject to any claim [by the unlicensed talent agent] for services, fees or other remunerations."[16]

Thus, in *Rogers* v. *Portnoy*, full restitution of monies paid by the artist to the unlicensed talent agent was ordered. In fact, in *Rogers,* the commissioner went as far as ordering that even expenses incurred by the manager and other monies paid out by the manager on the artist's behalf may not be recovered by the manager or otherwise used as an offset ("no monies expended by respondent during the . . . year . . . in which he acted as an unlicensed [talent agent] and pursuant to a void [talent agent's] contract, shall be recovered by him from petitioner"). [17]

As the quoted language implies, the Talent Agencies Act carries with it a very strict one-year statute of limitations. There can be no recovery whatsoever based on infringing acts that occurred more than one year prior to the filing of a petition with the Labor Commission. It is not clear whether an artist may recover commissions that were paid or incurred more than one year prior to filing if the violation was within the year. However, the artist would argue that, if the management agreement is void because of a violation within the year, no commissions should be paid pursuant to a void contract, irrespective of when they were otherwise incurred.

Casual or Incidental Agenting

A manager's attempts to classify his procurement activities as casual or a minor or incidental part of his management agreement with his artist (and concomitant duties) are equally unfounded. Both the legislature and the Labor Commissioner have soundly and repeatedly rejected the argument that one ought to be permitted to engage in some minimal amount of procurement activity without a license.

Proposals to exempt from the licensing requirement those individuals whose employment-seeking function is only incidental to other obligations were made by Senator Alfred H. Song in 1971 and 1972,[18] and by Senator George N. Zenovich in 1978.[19] None of these measures was adopted. The issue was raised again in 1985 by the California Entertainment Commission (the recommendations of which the legislature adopted in large part in 1986), which concluded that:

> *Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted.*[20]

The commission also considered and rejected an alternative to the strict licensing requirement that would have allowed a personal manager to "engage in 'casual conversations' concerning the suitability of an artist for a role or part."[21]

Much of this legislative history was cited by the Labor Commissioner in *Damon* v. *Emler*,[22] and *Bo Derek* v. *Callan*,[23] wherein respondents unsuccessfully argued that a talent agency license was not required for minor or incidental procurement activity. In *Damon,* the petitioner sought to have her contract with her personal manager declared invalid because the personal manager had engaged in procurement activities without a license.

The only evidence of the respondent's procurement activities was that he 1) renegotiated the petitioner's salary with regard to an existing contract; and 2) informed at least one agent and/or casting director that the petitioner, an actress, had recently undergone cosmetic surgery to make her look younger. The respondent argued that he had not procured employment to the extent necessary to require a license. The commissioner disagreed with the respondent, finding that the agreement between petitioner and respondent was illegal and void, in that:

> *A talent agency license is necessary even where procurement activities are only "incidental" to the agent's duties and obligations.*[24]

Similarly, in *Derek*, the respondent argued that she was not required to be licensed as a talent agency because "the [l]egislature meant to regulate only those whose primary purpose was the securing of employment for artists and not personal managers who might be involved in 'incidental' procurement of employment."[25] To this argument, the commissioner responded:

> *That is like saying you can sell one*

house without a real estate license or one bottle of liquor without an off-sale license.[26]

Working with an Attorney

Typically, a personal manager will argue that he was merely working in conjunction with an attorney, and therefore should be exempt from the licensing requirements of the Talent Agencies Act. However, there is no exception in the act for anyone working with, for, in conjunction with, or even at the specific request of, an attorney. The only exception to the licensing requirements of the act is when a manager (or someone else) works with an agent. Section 1700.44(d) of the act provides that:

It is not unlawful for a person or a corporation which is not licensed pursuant to this [c]hapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract.

It is clear that this exception to the licensing requirements is a narrow one. It is also clear that working with an attorney is not enough to exempt a personal manager from liability under the Talent Agencies Act. Moreover, it is not even enough to "work with" an agent; the manager must be working with a licensed agent, and at that agent's specific request.

Subsection (d) was originally added to Section 1700.44 of the Talent Agencies Act by Assembly Bill No. 997, Chapter 682. In the same bill, the California legislature also created the California Entertainment Commission, which was designed specifically "to study the laws and practices of [California], the State of New York and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry . . . so as to enable the commission to recommend to the legislature a model bill regarding this licensing."[27]

In 1986, as a result of the recommendations made by the commission, and pursuant to Assembly Bill No. 3649, the legislature re-adopted subsection (d), which had been "sunset" on January 1, 1986 by its own terms.[28]

Thus, the report that was prepared by the California Entertainment Commission is germane to an understanding of the proper interpretation of Labor Code Section 1700.44(d). The report makes it clear that subsection (d) was to be read narrowly. In the report, the commission specifically considered and discussed the issue of:

Under what conditions or circumstances, if any, should personal managers or anyone other than a licensed talent agent be allowed to procure employment for an artist without

being licensed as a talent agent.[29]

The committee ultimately determined that:

> *It is the majority view of the [c]ommission that personal managers or anyone not licensed as a talent agent should not, under any conditions or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent, except in accordance with the present provisions of the [Talent Agencies] Act.*[30]

The commission therefore recommended that no substantive change be made to subsection (d).[31] The commission also noted in the report that several alternatives that would have broadened the meaning of subsection (d) were considered and rejected. Among the alternatives rejected were 1) "[allowing] the artist, with or without the consent of the licensed talent agent to call a personal manager into negotiations of an employment contract"; and 2) "[allowing] the personal manager to act in conjunction with the talent agent in the negotiation of an employment contract whether or not requested to do so by the talent agent."[32]

The commission rejected these and other proposed amendments to the exception, reasoning that:

> *The prohibitions of the [Talent Agencies] 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. . . . [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 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."*[33]

It is apparent, therefore, that current law does not allow unlicensed individuals to perform even the most remote procurement functions whether or not those functions are performed in conjunction with an attorney or any other individual who is not a licensed talent agent and there will be no appreciable changes in that law for the foreseeable future.

While these principles, in their application, are often harsh, liability under the Talent Agencies Act can be avoided, with proper advance counsel. However, it should be pointed out that the boilerplate contained in virtually all written personal management agreements to the effect that the manager is not a "talent agent" or "booking agent" and therefore will not perform the functions of such, is essentially as useless to avoid liability as a written business management agreement that provides "I will not steal from you." While it is certainly preferable to have such a

provision (in the personal management agreement), it will not shield a manager who is, boilerplate notwithstanding, procuring employment from liability under the Talent Agencies Act. ◆

[1] This is not intended to imply that more legitimate reasons do not exist; in many instances, the manager simply is not interested in the artist any more, but refuses to release her because he likes the 15 percent that she still brings him.

[2] CAL. LAB. CODE §§1700, *et seq.*

[3] The CAL. LAB. CODE, commencing at § 1700, ironically enough, used to refer to talent agents as "artists' managers"; however, this should not be confused with "personal managers."

[4] Although it is certainly not easy to obtain such a license, it is not that difficult with a lengthy background check.

[5] Elvis Presley's personal manager, Colonel Parker, reputedly got 50 percent of Elvis's gross earnings, which, of course, means that he got more than Elvis since Elvis would have only received a net amount.

[6] CAL. LAB. CODE § 1700.4(b)

[7] Buchwald v. Sup. Ct., 254 Cal. App. 2d 347, 351, 62 Cal. Rptr. 364, 367 (1967).

[8] *See, e.g.*, Wood v. Krepps, 168 Cal. 382, 386, 143 P. 691, 692 (1914).

[9] Buchwald, *supra,* at 351, 62 Cal. Rptr. at 367.

[10] Lab. Comm'r Case No. MP-429 AM-211-MC.

[11] Kearney was decided under a prior (but similar) version of § 1700.4, which defined "artist's manager" as "a person who engages in the occupation of advising, counseling or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

[12] *Id.* at 6 (emphasis added).

[13] Lab. Comm'r Case No. TAC17 MP-114.

[14] *Id.* at 15 (emphasis added).

[15] Buchwald, *supra,* at 360, 362 Cal. Rptr. at 364.

[16] Rogers v. Portnoy, Lab. Comm'r Case No. SF MP 40 (decided Mar. 8, 1978), at 10.

[17] *Id.*at 10-11); *see also* Entner v. Maiman, Lab. Comm'r Case No. MP-281 (decided Aug. 18, 1971) (petitioner entitled to the return of all sums received by respondent as a result of petitioner's services).

[18] SB 1464, as amended Oct. 13, 1971, and SB 686, as amended May 15, 1972, respectively.

[19] SB 1764.

[20] REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION, Dec. 2, 1985, at 11.

[21] *Id.* at 10.

[22] Lab. Comm'r Case No. TAC 36-79 SF MP 63.

[23] Lab. Comm'r Case No. 08116 TAC 18-80 SF MP 82-80.

[24] *Id.* at 4.

[25] *Id.* at 6.

[26] *Id.*

[27] CAL. LAB. CODE § 1702; Legislative Council's Digest, Assembly Bill No. 997, Ch. 682.

[28] Statement on AB 3649, May 15, 1986, from the bill folder of the Senate Comm. on Industrial Relations.

[29] California Entertainment Commission Report at 6.

[30] *Id.*

[31] The only change the commission recommended was to delete the word "franchise" as a modifier of "talent agency"; there was no reason given for this recommended change.

[32] *Id.* at 10.

[33] *Id.* at 10, 11.