

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 7 *Volume VII*
Number 2 *Volume VII Book 2*

Article 12

1997

The California Controversy over Procuring Employment: A Case for the Personal Managers Act

Heath B. Zarin
Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Heath B. Zarin, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 Fordham Intell. Prop. Media & Ent. L.J. 927 (1997).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol7/iss2/12>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The California Controversy Over Procuring Employment: A Case for the Personal Managers Act

Heath B. Zarin*

INTRODUCTION

Imagine the following scenario: Annie Artist¹ has spent her entire life dreaming about becoming a movie actor. Spending the last of her money, Annie moves to Los Angeles hoping to break into California's entertainment industry.² Amidst the glitz and glamour of Hollywood, she believes that nothing can stop her. Annie, however, soon learns an unfortunate truth: dreams do not easily come true.³

* J.D. Candidate, 1998, Fordham University School of Law. I would like to thank Professor Andrew B. Sims for his invaluable comments and criticism. Additionally, I extend my deepest gratitude to Kenneth C. Oh, Mark D. Salzberg, and H. Peter Nesvold for their insight and encouragement, and to the remaining editors of the *Fordham Intellectual Property, Media & Entertainment Law Journal* for their tireless efforts. This Comment is dedicated to my parents for their constant love and support.

1. All names used in this scenario are fictional.

2. For the purposes of this Comment, the term "entertainment industry" refers to the predominant forms of the entertainment businesses, including music, video, television, motion pictures, live theater, and radio.

The state of California is a dominant force in the entertainment industry with motion pictures, television, music, and other arts constituting a significant part of its economy. See Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 485, 487 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 359, 1993); James M. O'Brien III, *Regulation of Attorneys Under California's Talent Agencies Act: Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 472 (1992). The states of Florida and New York, as well as the city of Nashville, are also significant bases of entertainment-industry activity. *Id.* According to some commentators, upper east Tennessee is developing into a mini-Hollywood. Kara Carden, *The Region Gets a Slice of Hollywood*, BUS. J. UPPER E. TENN. & SOUTHWEST VA., Nov. 1995, at 40.

3. Many aspiring artists arrive in Los Angeles with dreams of stardom that

Annie spends her first few weeks in Los Angeles trying to “get her foot in the door,” but her efforts are an exercise in futility. She therefore decides to change her game plan, and spends the next several weeks trying to find a talent agent⁴ willing to represent her.⁵ Unfortunately, every talent agency⁶ recites the same line in response to her request for representation: “Sorry, we don’t represent unestablished artists.” Persistent, Annie continues the struggle to find work, but without a talent agent, she continues to encounter only closed doors.

Distressed by her string of failures, Annie contemplates returning home to her parents. She is, however, unable to scrounge up enough money to buy a bus ticket home, so she drops seventy cents into an opened suitcase and begins to perform a scene from *Romeo and Juliet* on Santa Monica’s Third Street Promenade.

As Manny Jerre, a personal manager,⁷ ambles along the

are never fulfilled. O’Brien, *supra* note 2, at 481. These artists are in desperate need of help from representatives in the industry. *Id.* Some artists, however, have been able to achieve overnight success. *See, e.g.*, Michael Owen, *Catherine, So Far Beyond the Fringe*, EVENING STANDARD, Oct. 4, 1996, at 29 (describing actress Catherine McCormack’s apparent overnight success).

4. Talent agents seek employment for their artist-clients. Greenberg, *supra* note 2, at 488; *see* discussion *infra* part I.A.1 (describing the talent agent’s role in the entertainment industry).

5. Unestablished artists have great difficulty finding agents willing to represent them. *See, e.g.*, Robert Simonson, *How to Contact Agents Effectively by Mail; Postal Tips for Actors Trying to Find Agents*, BACK STAGE, Nov. 29, 1996, at 24 (explaining that Penny Luedke, an agent with the Gilchrist Talent Group, believes that an inexperienced artist’s attempts to obtain an agent are futile).

6. Talent agencies organize the efforts of many talent agents to better serve the interests of their artist-clients. *See* discussion *infra* part I.A.1 (explaining why talent agencies rarely represent aspiring artists).

7. Personal managers advise, counsel, direct, and coordinate the development of their artist-clients’ careers. *See* HOWARD SIEGEL, ENTERTAINMENT LAW 485, 491 (2d ed. 1996) [hereinafter SIEGEL I]; Howard Siegel, *Personal Management, in* COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1989, at 137, 144 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 268, 1989) [hereinafter Siegel II]; Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501, 509 (1991); O’Brien, *supra* note 2, at 482; David A. Steinberg & Yakub Hazzard, “Employment Services” May Trigger Act, NAT’L L.J., Nov. 25, 1996, at B7; *Personal Man-*

promenade, Annie's performance catches his eye. Captivated by Annie's raw acting abilities, Manny introduces himself to the aspiring actress and explains how he can help her become a star. He tells her, "With my help, you could be the next Julia Roberts. But, you will need formal training."

Hearing this, Annie begins to worry. She can barely support herself, let alone afford acting lessons. Manny, however, quickly assuages her anxiety with soothing words: "Don't worry kid. I'll pay for your lessons, and I'll lend you money to live on until we hit the big time." Annie smiles with relief, thinking that her "break" finally, after several long weeks, had come.

Soon thereafter, Annie and Manny enter into a personal management agreement.⁸ The agreement provides that Manny will advise, counsel, and direct Annie in the development of her acting career. In return for Manny's services, Annie agrees to pay him twenty percent of her income for five years. Both Manny and Annie enter into the agreement with the mutual hope that Annie will be successful.

For the next six months, Manny pays for Annie's acting lessons and living expenses as he tries, without success, to find a talent agent willing to represent the promising actress. Manny also helps Annie to regain her self-esteem, telling her, "I've changed my mind. You're not going to be the next Julia Roberts; you're going to be bigger!"

One day, Manny calls Annie with great news: "Last night, I had dinner with a movie-producer who is looking for a fresh face for his next project. I told him about you, showed him your picture, and he agreed to let you audition

agers Must Be Licensed as Talent Agents in California if They Seek Employment for Their Clients, Even if Seeking Employment Is Only an "Incidental" Activity, California Court of Appeal Rules; Earlier, Contrary Ruling by Another Panel of the Same Court is Rejected as "Incorrect Dicta," ENT. L. REP., July 1996 [hereinafter *Licensing Personal Managers*].

8. See discussion *infra* part I.A.2 (discussing personal management agreements).

for the starring role.” The following week, Annie auditions and receives the lead role.

The movie is a tremendous success and Annie begins the ascent to stardom. Suddenly, talent agents are begging her to accept their services. No longer needing Manny’s assistance, Annie wants to escape the management agreement to avoid paying him twenty percent of her income. Upon the advice of her more-established actor friends, she files a complaint with California’s Labor Commission,⁹ requesting that it declare her agreement with Manny void. In her complaint, Annie alleges that Manny acted as an unlicensed talent agent when he arranged her audition,¹⁰ because under California law, only licensed talent agents may perform such services.¹¹ The Labor Commissioner¹² agrees with Annie’s complaint and rules that Manny unlawfully procured employment for Annie by securing her an audition.

As the above scenario demonstrates, if a personal manager procures employment for an artist-client without first obtaining an agency license, the Labor Commissioner has the authority to declare the management agreement void.¹³

9. See discussion *infra* part I.C.1 (discussing California Labor Commissioner).

10. Talent agent services include negotiating deals and procuring employment for artists. SIEGEL I, *supra* note 7, at 486; Gilenson, *supra* note 7, at 507; see discussion *infra* part I.A.1 (describing services provided by talent agents). Under certain circumstances, personal managers will perform talent agent services for artist-clients. Fred Jelin, *The Personal Manager Controversy: Carving the Turf*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 471, 473 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 359, 1993); Greenberg, *supra* note 2, at 490; Gilenson, *supra* note 7, at 507; O’Brien, *supra* note 2, at 483-84.

11. See Greenberg, *supra* note 2, at 488; Jelin, *supra* note 10, at 477; O’Brien, *supra* note 2, at 471; Gilenson, *supra* note 7, at 510. As one commentator notes, California law distinguishes the licensing requirements of talent agents from personal managers: an agent must obtain a license, while a manager need not. *Licensing Personal Managers*, *supra* note 7; see discussion *infra* part I.A (describing talent agents and personal managers).

12. See discussion *infra* part I.C.1 (discussing California Labor Commissioner).

13. See discussion *infra* part I.C.2.c (describing Labor Commissioner’s power

Consequently, acting as an unlicensed talent agent can have disastrous results;¹⁴ anyone who crosses the line of procurement and engages in regulated agency activities may face harsh penalties.¹⁵ In Annie's case, the Labor Commissioner would likely declare the contract void, order Manny to return all commissions that he received from Annie, and relieve Annie's liability to Manny for her loans.

This scenario is a personal manager's nightmare. To protect artists, California's Talent Agencies Act ("TAA")¹⁶ prohibits unlicensed individuals from procuring employment for artists.¹⁷ Most personal managers, however, need to engage in employment procurement activities when representing their clients.¹⁸ Personal managers perform an indispensable role in developing artists' careers,¹⁹ and this prohibition deters individuals from functioning as personal managers because of the potentially disastrous consequences.²⁰ Because personal managers must engage in procurement activities to provide effective service to their clients, the prohibition against such conduct should be removed.²¹ The legislature should alter California law to protect artists and to encourage people to enter the personal

to fashion remedies under the Talent Agencies Act.

14. SIEGEL I, *supra* note 7, at 486-87; Jelin, *supra* 10, at 473; Greenberg, *supra* note 2, at 503.

15. The penalties for engaging in agency activities without a license include forfeiture of commissions, repayment of past fees, loss of future earnings, and invalidation of management and collateral agreements. SIEGEL I, *supra* note 7, at 486-87; Greenberg, *supra* note 2, at 503; O'Brien, *supra* note 2, at 474; *see* discussion *infra* part I.C.2.c (describing the penalties administered for violations of California's talent agency laws).

16. CAL. LAB. CODE § 1700 (West 1989 & Supp. 1997).

17. *See* discussion *infra* part I.C.2.a (describing purposes behind the TAA).

18. *See* discussion *infra* part I.A.2 (discussing why most personal managers engage in procurement activities).

19. *See* discussion *infra* part I.A.2 (discussing unique role played by personal manager in developing artist's career).

20. *See* discussion *infra* part I.C.2.c (describing penalties individuals may receive for violating TAA).

21. Jelin, *supra* note 10, at 473; *see* discussion *infra* part III.B (advocating that the California legislature enact a Personal Managers Act).

management profession.²²

In contrast to California law, New York law recognizes that personal managers need to procure employment for their clients.²³ Because New York employs an incidental booking exception,²⁴ Manny would not be penalized for incidental procurement efforts in New York.²⁵ Under that state's law, personal managers may engage in incidental procurement efforts on behalf of their clients without obtaining an agency license.²⁶ Commentators contend that California should take notice of New York's "sensible" approach to regulating personal managers and "follow suit."²⁷

Examining how Annie's dispute would unfold in New York underscores how the unregulated status of personal managers in California continues to present the personal manager with a dilemma.²⁸ Current California legislation regulates individuals who procure employment, which in California is legally limited to talent agents.²⁹ The conflict arises because California law's distinction between personal managers and talent agents ignores reality: the day-to-day activities of many managers may be considered procurement, and thus subject them to harsh penalties for violating the licensing requirement.³⁰ Personal managers often must procure employment when representing an aspiring entertainer, in whose success the manager invests both emotion-

22. See discussion *infra* part II.B (describing possible solutions to this problem, such as an incidental booking exception and a Personal Managers Act).

23. See discussion *infra* part I.D.1 (describing how New York's incidental booking exception permits personal managers to procure employment).

24. N.Y. GEN. BUS. LAW § 171(8) (McKinney 1988 & Supp. 1997).

25. See discussion *infra* part I.D.1 (describing New York's incidental booking exception).

26. N.Y. GEN. BUS. LAW § 171(8).

27. O'Brien, *supra* note 2, at 509.

28. See discussion *infra* part I.C.1 (describing TAA's indirect regulation of personal managers).

29. See discussion *infra* part I.C.1 (discussing TAA's regulation of individuals who procure employment for artists); see discussion *infra* part I.A.1 (discussing talent agent's procurement functions for artists).

30. O'Brien, *supra* note 2, at 484-85.

ally and financially.³¹ The personal manager must obtain an agent's license or act in possible violation of the TAA.³² In light of the important and distinctive role personal managers play in the entertainment industry, legislation is necessary to expressly govern personal managers.

This Comment argues that California should allow personal managers to procure employment for artists when such procurement is incidental to the manager's managerial responsibilities.³³ Part I discusses the various duties and responsibilities of talent agents and personal managers, and describes the regulation of personal representatives in California and New York. Part II outlines the conflict in California law concerning whether or not unlicensed personal managers can procure employment under the TAA. Specifically, Part II discusses two cases decided in the California Court of Appeals that have interpreted the TAA differently, and proposes solutions to the conflict. Part II considers amending the TAA to include an incidental booking exception and analyzes whether California should enact a Personal Managers Act ("PMA") to expressly govern personal managers. Part III argues that the California Legislature should enact a PMA that incorporates an incidental booking exception to the TAA. Drafted in this manner, the PMA would align California law with the entertainment industry reality. The PMA would also provide artists and managers with a definitive statement of their obligations. Accordingly, this Comment concludes that the California Legislature should enact a PMA because such legislation would protect both artists and personal managers, without compromising

31. See discussion *infra* part I.A.2 (setting forth personal manager's engagement in procurement of employment when representing aspiring artists).

32. O'Brien, *supra* note 2, at 484-85. According to one commentator, personal managers must engage in procurement efforts. *Id.* Because procurement activities require licensing as a talent agent, if a personal manager wishes to perform his job, he must obtain an agency license or act as an unlicensed agent. *Id.* at 485.

33. See discussion *infra* part II.B.1 (describing incidental booking exception).

the quality of representation that artists receive.

I. THE ENTERTAINMENT INDUSTRY

Part I presents the background information necessary to understand the conflict regarding whether the TAA requires personal managers to obtain talent agency licenses before procuring employment for artist-clients. First, this part introduces the roles and responsibilities of two key entertainment industry representatives—talent agents and personal managers. Second, this part discusses management agreements. Third, it delineates California's regulation of the entertainment industry. Finally, this part contrasts California law with New York's regulation of its entertainment industry.

A. *Entertainment Industry Representatives*

In the entertainment industry, professional representatives plan most business deals.³⁴ This section examines the roles performed by two of the most important industry players, the talent agent and the personal manager.

1. Talent Agents

A talent agent's primary task is to procure employment for his client by marketing the artist's talents and skills throughout the entertainment industry.³⁵ Talent agents

34. See DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 1 (2d ed. 1992) (stating that most business deals in the entertainment industry are undertaken by intermediaries).

35. *Id.* at 3 (stating that agents actively seek employment for artists in the entertainment industry); Luaine L. Quast, *Musicians, Their Representatives, and the Agreements Between Them*, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 191, 192 (John D. Viera & Robert Thorne eds., 1991); Adam B. Nimoy, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. ENT. L.J. 145, 147 (1982); O'Brien, *supra* note 2, at 478 (citing DAVID BASKERVILLE, MUSIC BUSINESS HANDBOOK & CAREER GUIDE 150 (3d ed. 1982); *Licensing Personal Managers*, *supra* note 7; Kenneth J. Abdo, *Agents, Managers, and Lawyers: A Roadmap for the Entertainment Industry*, 14 ENT. & SPORTS LAW. 3, 3 (1996).

function as brokers between talent-sellers and talent-buyers by finding and negotiating offers³⁶ of employment on behalf of the artist.³⁷ Additionally, an agent may serve as a buyer of talent by securing a client for an appearance in the agent's own productions.³⁸

Although talent agents are compensated for representing artists, they rarely represent aspiring artists.³⁹ In general, this is because talent agents will represent an artist only if a sufficient economic return is likely;⁴⁰ not surprisingly, agents profit more from representing established artists than from representing the "unknowns."⁴¹

36. See BIEDERMAN, *supra* note 35, at 2; BASKERVILLE, *supra* note 35, at 150; Bernard Weinraub, *They Just Want a Little Respect*, N.Y. TIMES, Sept. 24, 1995, at 4-5; *see also* Abdo, *supra* note 35, at 3 (declaring that agents negotiate deals between "producers, directors, writers, and actors"). The talent agent's job is to deliver his artists to talent buyers—producers, record companies, publishers, packagers, promoters, and club owners—and thus find work for his client. *See* BIEDERMAN, *supra* note 35, at 2; Abdo, *supra* note 35, at 3; Weinraub, *supra*, at 5.

37. O'Brien, *supra* note 2, at 478-79; *see also* Abdo, *supra* note 35, at 3; Debbie Hanson, *Connections Pay Off in the Entertainment Business*, CENTRAL PENN BUS. J., Nov. 1, 1996, at 6 (quoting Gary Swartz, an agent, as saying, "[t]he biggest benefit in using an agent . . . is that all of the paperwork, contract signing and details become the agent's problem").

38. O'Brien, *supra* note 2, at 479. Agents, however, must be cautious of possible violations of the Sherman Antitrust Act. *See* Sherman Anti-Trust Act of 1890, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

39. Greenberg, *supra* note 2, at 490. For a list of Hollywood's top talent agencies and their respective client lists, *see* Elaine Dutka, *Hollywood: The Big Four*, L.A. TIMES, June 23, 1996, at 82.

40. Quast, *supra* note 35, at 203; Jim Seavor, *Learn How to Find an Agent to Sell Your Act*, PROVIDENCE J.-BULL., Aug. 28, 1996, at 2E.

41. Quast, *supra* note 35, at 191; O'Brien, *supra* note 2, at 480; *see also* James Bates, *Big Movie Stars Get Big Salaries, Big Executives Whine—Big Deal*, L.A. TIMES, Mar. 8, 1996, at D1 (reporting that records were shattered when motion picture stars Sylvester Stallone, Jim Carrey, John Travolta, and Tom Hanks surpassed the \$20-million-a-film benchmark). Established artists do not necessarily need the services of a talent agent. *See generally* Claudia Eller, *After 15 Years, Schwarzenegger Tells ICM: 'I Won't Be Back'*, L.A. TIMES, Feb. 12, 1997, at D4 (noting that "[t]he financial loss of a star as big as Arnold Schwarzenegger, one of the highest-paid actors in the world, is significant to a talent agency, which normally receives 10% of a client's fee on every project"); Claudia Eller, *Does Kevin Costner Need an Agent? Industry Types Weigh In*, L.A. TIMES, Oct. 24, 1995, at D6 (discussing whether established artists need agent services).

Talent agents engage in an extremely risky practice: they provide services to an artist, and are rewarded only when the artist achieves some degree of success. To compensate for this risk, agreements between artists and talent agents usually include an exclusivity clause.⁴² Furthermore, a talent agent will often seek to extend the representation of an artist to include all forms of entertainment, thereby guaranteeing the agent a percentage of all of the artists' total income.⁴³ Finally, talent agents often charge large fees, typically ranging from ten to twenty percent of an artist's gross earnings.⁴⁴

All talent agents are regulated by state statutes and entertainment unions,⁴⁵ and must obtain agency licenses under California law.⁴⁶ In order to preclude inequitable contracts, California's Labor Commission limits an agent's commission

42. Quast, *supra* note 35, at 202-03 (claiming that exclusivity is essential to every industry relationship). Consequently, agreements between agents and artists typically include an exclusivity clause. O'Brien, *supra* note 2, at 479. Talent agents often want the exclusive right to negotiate engagements for their clients. Stan Soocher, *How to Negotiate Concert Agreements*, N.Y. L.J., Oct. 20, 1995, at 5.

43. O'Brien, *supra* note 2, at 479; *see also* Quast, *supra* note 35, at 203 (stating that agents wish to represent artists in all forms of artistic and commercial endeavors). Through agency agreements, talent agents can guarantee themselves a portion of any compensation received by their clients. O'Brien, *supra* note 2, at 479.

44. JOSEPH TAUBMAN, *IN TUNE WITH THE MUSIC BUSINESS* 84 (1st ed. 1980); *see also* BASKERVILLE, *supra* note 35, at 151; 3 ALEXANDER LINDEY, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 14: A(3) (2d ed. 1990); BIEDERMAN, *supra* note 35, at 2; Abdo, *supra* note 35, at 3; Soocher, *supra* note 42, at 5; Hanson, *supra* note 36, at 6.

45. *See, e.g.*, CAL. LAB. CODE § 1700; N.Y. GEN. BUS. LAW § 172 (McKinney 1988 & Supp. 1997); American Federation of Television and Radio Artists Regulations Governing Agents, Rule 12-B, § XX, at 21-22 (1971); Screen Actors Guild Agency Regulations, Amended Rule 16(g), § XI, at 18-23 (1968); Constitution By-Laws and Policy of the American Federation of Musicians of the United States and Canada, art. XXIII, § 8, at 130 (rev. ed. 1981).

46. CAL. LAB. CODE § 1700.5 (stating that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner"). California law requires that individuals engaging in agency activities have talent agency licenses, Abdo, *supra* note 35, at 3, which are obtained from the state. BIEDERMAN, *supra* note 35, at 4. Consequently, in California, licensed talent agents are the only individuals who may participate in employment procurement activities. Soocher, *supra* note 42, at 5.

generally to twenty-five percent of gross compensation.⁴⁷ It is through such regulations that the entertainment industry effectively denies employment procurement services to those who are in greatest need of such services—the unrepresented aspiring artist.⁴⁸

2. Personal Managers

In contrast to a talent agent, a personal manager's primary responsibilities include advising, counseling, and directing the development of the artist's career.⁴⁹ Personal managers handle both the day-to-day activities and the long-term strategies of an artist's career development.⁵⁰ They arrange the artist's interactions with other personal representatives,⁵¹ and routinely finance, or obtain financing for, com-

47. STAFF OF THE CALIFORNIA SENATE COMM. ON BUSINESS & PROFESSIONS, 1982 REGULAR SESS., STAFF ANALYSIS OF ASSEMBLY BILL 997 1 (1982) [hereinafter STAFF ANALYSIS]; Donna G. Cole-Wallen, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Secondary Occupations*, 8 HASTINGS COMM. & ENT. L.J. 481, 521 n.218 (1986).

48. O'Brien, *supra* note 2, at 480.

49. BIEDERMAN, *supra* note 35, at 2; *see, e.g.*, SIEGEL I, *supra* note 7, at 491; Cole-Wallen, *supra* note 47, at 486-87; Nimoy, *supra* note 35, at 147. According to Ed Morgan of Black Park Management, "[the manager's] ultimate goal is to help create opportunities . . . to make and build a career." Ray Waddell, *Panel: Artist-Manager Relationship Requires Much Careful Consideration*, AMUSEMENT BUS., Apr. 1, 1996, at 8. Furthermore, personal managers serve as career advisors in all business affairs, from daily management to career development. Abdo, *supra* note 35, at 3.

50. Gilenson, *supra* note 7, at 509.

51. Jelin, *supra* note 10, at 475; O'Brien, *supra* note 2, at 482. Most artists have a team of personal representatives working on their behalf. *See Celeb PR is All Business, Says Pros, Who Scoff at Starry Image*, O'DWYER'S PR SERVS. REP., Jan. 1997, at 82 (quoting Thomas Tardio, Chairman of Shandwick's Rogers & Cowan entertainment unit, as saying "[e]veryone has a talent agent, a business manager, and a personal manager, that are part of the team of deciding the next PR move"). The personal manager's role includes helping clients build a professional team consisting of attorneys and accountants. Waddell, *supra* note 49, at 8. Consequently, established artists usually have a team of advisors: an agent, a personal manager, a business manager, and an attorney. BIEDERMAN, *supra* note 35, at 1; *see also* Gary Greenberg, *Crossing the Thin Line Between Manager and Attorney in the Entertainment Industry*, 14 ENT. & SPORTS LAW. 7, 7 (1996) (noting that an artist's team of representatives usually includes a personal manager, a talent agent, a business manager, a publicist, and an attorney). Artists may employ a

pletion of the artist's product.⁵² In addition, personal managers usually handle the artist's finances until the artist has earned sufficient funds to require the services of a separate business manager.⁵³

number of attorneys, such as a transactional attorney, a litigator, a corporate attorney, and an intellectual property attorney. *Id.* at 7 n.1.

52. TAUBMAN, *supra* note 44, at 34; SIEGEL I, *supra* note 7, at 493; Greenberg, *supra* note 2, at 490; Gilenson, *supra* note 7, at 509. Personal managers may own production firms. Lisa Gubernick & Robert La Franco, "We Can Own," FORBES, Sept. 25, 1995, at 156 (stating that because managers do not have talent agent licenses, they are unaffected by the Justice Department ruling that separates talent agencies and production studios).

A manager, who also produces his clients' projects, will serve as "a strategic planner, marketing man, accountant and babysitter." *Id.* at 156. The manager will try not to leave any aspect of his clients' popularity unexploited. *Id.* Managers view their clients as "one-man industries: T shirts, records, videos, endorsements, movie deals and commercial contracts." *Id.* For example, Bernie Brillstein and Brad Grey own Brillstein-Grey, a multimillion-dollar management and production company funded by ABC. *Id.* When management owns a production company, management will seek to produce their clients' projects. Thomas Tyrer, *Talent/Production Firm In Works*, ELEC. MEDIA, Sept. 11, 1995, at 40 (quoting Scott Siegler, former president of Columbia Pictures Television and partner in MediaFour, a talent management and production firm, "[i]t's a logical extension in managing talent to be able to take it all the way through the fruition of the production rather than just lead them to the door"). In addition, artists benefit from management firms that can also produce. *Id.* at 40. Furthermore, agents are frustrated because they are not allowed to produce. Gubernick & La Franco, *supra*, at 156.

53. Cole-Wallen, *supra* note 47, at 490; *see also* BIEDERMAN, *supra* note 35, at 30 (noting that a business manager is not required early in an artist's career). Generally, an accountant or lawyer may serve as the business manager. SIEGEL I, *supra* note 7, at 486; Cole-Wallen, *supra* note 47, at 490; Ted Johnson, VARIETY, Sept. 16, 1996, at 87. Typically, the business manager, however, is a certified public accountant. BIEDERMAN, *supra* note 35, at 2; Abdo, *supra* note 35, at 3; Greenberg, *supra* note 51, at 7.

Celebrity business managers receive as much as five percent of a client's income, while conventional financial advisors perform similar services for commissions of one percent. *See* BIEDERMAN, *supra* note 35, at 2; Johnson, *supra*, at 87. Competition from personal bankers has forced some business managers to lower their rates or even accept hourly payments. *Id.* Nevertheless, business managers feel that higher fees are justified because they provide a more personal level of service. *Id.* Business managers may pay personal bills, help pick out new cars, and advise clients on which schools their children should attend. *Id.*; *see also* BIEDERMAN, *supra* note 35, at 2 (noting that business manager's functions include simple accounting services, paying the client's bills, advising on investments, running tours, and other complicated matters). Furthermore, business managers are very close with clients and their families. Johnson, *supra*, at 87 (quoting busi-

Artists usually employ personal managers in addition to talent agents.⁵⁴ While personal managers do provide aspiring artists with much needed business acumen and industry contacts,⁵⁵ industry newcomers engage personal managers before talent agents only because they are unable to find talent agents willing to represent them.⁵⁶ Additionally, personal managers often suggest that their knowledge and contacts can improve the artist's chances for success,⁵⁷ and might even imply that their guidance will lead the artist to stardom.⁵⁸

The personal manager differs from the talent agent because a personal manager's duties include both business and personal concerns.⁵⁹ Personal managers, speculating on the artists' success, frequently lend their aspiring clients money,⁶⁰ and often become the artists' friends and confi-

ness manager, Barbara Carswell, as saying, "I've been in the hospital room when a client died . . . I went with the family to help pick out the coffin. I don't know how much closer you can get"). Consequently, business managers are privy to the most intimate details of their clients' financial lives. BIEDERMAN, *supra* note 35, at 41; *see generally* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 990 (2d Cir. 1983) (discussing business managers' strong fiduciary obligations to their clients).

54. O'Brien, *supra* note 2, at 481; Greenberg, *supra* note 51, at 7; John Brodie & Kathleen O'Steen, *Antsy Agents Make Mutant Managers*, VARIETY, Mar. 20, 1995, at 1.

55. In the early stages of an artist's career, the manager must educate the artist about the entertainment industry. Waddell, *supra* note 49, at 8. Usually, artists do not understand how their careers are going to develop. *Id.*

56. LINDEY, *supra* note 44, § 14:D(2); Quast, *supra* note 35, at 191 (stating that personal managers are the only representatives that an aspiring musician can afford to hire); O'Brien, *supra* note 2, at 481 (noting that talent agents rarely represent aspiring artists).

57. LINDEY, *supra* note 44, § 14:D(2); O'Brien, *supra* note 2, at 481.

58. LINDEY, *supra* note 44, § 14:D(2); Michael McLeod, *Kid, I'm Gonna Make You a Star; In Some Cases, That Proves To Be True. In Others, It's Just a Line. Take a Peek Behind The Glamour and Glitz*, ORLANDO SENTINEL TRIB., Apr. 7, 1996, at 6.

59. Jelin, *supra* note 10, at 475; Waddell, *supra* note 49, at 8; Gilenson, *supra* note 7, at 508; *see also* BIEDERMAN, *supra* note 35, at 2 (explaining that managers get intimately involved with career development and creating their client's public image); Ann A. Pantoga, *Personal Managers Must Be Licensed if They Procure Employment for Artist*, 6 J. ART & ENT. L. 327 (1996) (stating that personal managers deal with both personal and business matters).

60. Quast, *supra* note 35, at 198. Managers may invest their own money into

dants.⁶¹ In addition, personal managers might nurture the artists' personal relationships,⁶² receive telephone calls at any time,⁶³ or even pick up the artists' laundry.⁶⁴ By organizing their clients' business and personal lives, personal managers free the artists from day-to-day concerns, allowing them to concentrate on creative tasks.⁶⁵ Thus, the personal manager plays a unique role in an artist's development and success.⁶⁶

B. Management Agreements

Management agreements set forth the personal manager's obligations to the artist.⁶⁷ The agreements are usually

an act during the early stages of the client's career. Waddell, *supra* note 49, at 8. Managers may also speculate on an artist's success by "partnering with the personality in making movies, records or TV shows." Gubernick & La Franco, *supra* note 52, at 156.

61. Personal managers may become so close, in fact, that they serve as a client's alter ego. O'Brien, *supra* note 2, at 482 (citing Quast, *supra* note 35, at 198); Waddell, *supra* note 49, at 8 (quoting Paula Sartorious of Side One Management, as stating that "[a] manager is with an artist every single day, almost like a marriage . . . the artist has to ask himself, 'Can I deal with this person every day, can I trust this person?'").

62. O'Brien, *supra* note 2, at 482 (citing Quast, *supra* note 35, at 198).

63. See WAYNE WADHAMS, SOUND ADVICE: THE MUSICIAN'S GUIDE TO THE RECORD INDUSTRY 76 (1990) (relating a manager's story about a phone call from the Georgia State Police after his artist-client was picked up "for throwing firecrackers out the back of [a] van at 6: 00 a.m. while doing 90 mph on Route 95 South"); see also Greenberg, *supra* note 51, at 7 (noting that personal management can be a thankless job occupied by late night phone calls and detail-oriented days).

64. Baskerville, *supra* note 35, at 154.

65. Personal managers give their clients time to be artists. O'Brien, *supra* note 2, at 483.

66. Waddell, *supra* note 49, at 8; see also Greenberg, *supra* note 51, at 8.

67. See Quast, *supra* note 35, at 207. Commonly offered services include:

- (1) advice and counsel in the selection of literary, artistic, and musical material;
- (2) advice and counsel in publicity, public relations, and advertising;
- (3) advice and counsel in choosing a proper format to showcase the artist's talents and in determining mood, style, setting, etc.;
- (4) advice and counsel in selecting artistic collaborative talent;
- (5) advice and counsel with regard to general practices in the entertainment industry as a whole;
- (6) advice and counsel concerning the selection and direction of agents,

for a term of three to five years,⁶⁸ and typically contain exclusivity clauses similar to those found in agency contracts.⁶⁹

Personal managers usually earn a commission of ten to fifty percent of the artist's gross receipts, as compared to the standard ten percent received by talent agents.⁷⁰ They justify their high fees by enduring greater risks than talent agents.⁷¹ Personal managers invest a considerable amount of time and money in the long-term development of an unknown artist's career, and therefore charge higher fees to cover their expenses.⁷²

Neither statutory nor entertainment-union regulations expressly govern the personal manager's activities and compensation.⁷³ By procuring employment, however, personal

business managers, and other management personnel. *Id.*; see also SIEGEL I, *supra* note 7, at 491-93 (stating that personal managers are expected to advise the artist in all facets of the artist's career, including: selecting material, selecting costumes, selecting personnel, selecting the proper vehicle, personal management, representation with third parties, and providing funds); Greenberg, *supra* note 51, at 7 (stating that standard management agreements require the manager to advise and counsel the artist concerning the general practices in the entertainment industry with regard to compensation and privileges, and in connection with negotiating agreements); *Id.* at 7 n.5 (suggesting that other services required by a typical management agreement are to advise and counsel: (1) in the selection of literary, artistic, and musical material; (2) in matters regarding publicity; (3) with respect to adopting a proper format for presenting the artist's talent; (4) in selecting artistic talent to accompany the artist's presentation; (5) with respect to selecting talent agencies and any other representatives engaged to counsel and advise the artist and to seek and procure employment engagements for the artist; and (6) to the extent permitted by law, to obtain employment for the artist as a recording artist).

68. Waddell, *supra* note 49, at 8. However, a recent trend in the recording industry is to base contract length on album cycles. *Id.*

69. O'Brien, *supra* note 2, at 482; see discussion *supra* part I.A.1 (discussing the artist-agent relationship). For examples of management agreements, see LINDEY, *supra* note 44, § 14: D-2.01; SIEGEL I, *supra* note 7, at 505-72. Typically, the management agreement emphasizes the personal manager's interests. LINDEY, *supra* note 44, § 14:D(2); Gilenson, *supra* note 7, at 503-04.

70. STAFF ANALYSIS, *supra* note 47, at 1; see, e.g., Greenberg, *supra* note 51, at 8; Quast, *supra* note 35, at 199; Waddell, *supra* note 49, at 8; Abdo, *supra* note 35, at 3.

71. O'Brien, *supra* note 2, at 483.

72. STAFF ANALYSIS, *supra* note 47, at 1; Quast, *supra* note 35, at 199.

73. Abdo, *supra* note 35, at 4; see also BIEDERMAN, *supra* note 35, at 12 (stating

managers may become subject to the standards that govern talent agents because those rules regulate employment procurement activities.⁷⁴ As a result, to avoid the appearance of acting as an unlicensed talent agent, many personal management contracts include clauses explicitly stating that they will not procure employment.⁷⁵

Personal managers insist that the restriction against their procuring employment for clients ignores an entertainment industry reality: that “any personal manager worth his or her commission partakes in some manner in procuring or attempting to procure employment for his or her clients.”⁷⁶ Thus, personal managers in California face a dilemma: they can continue unlicensed procurement activities and risk being penalized by the Labor Commissioner,⁷⁷ or they can obtain talent-agency licenses and subject themselves to state and union regulation.⁷⁸

C. Entertainment Industry Regulation in California

In California, the entertainment industry constitutes a significant part of the state’s economy.⁷⁹ To protect the interests of those involved in the industry, the California legislature has created a highly detailed regulatory system.⁸⁰ Additionally, the entertainment unions and guilds also regulate the industry to protect their artist-members.⁸¹ This section examines how both California’s TAA and the enter-

that the California statute does not expressly grant jurisdiction over unlicensed agents).

74. See BIEDERMAN, *supra* note 35, at 12 (noting that the Labor Commission has jurisdiction over individuals performing agency functions); Abdo, *supra* note 35, at 4 (stating that unlicensed representatives are subject to regulation).

75. Gilenson, *supra* note 7, at 511.

76. O’Brien, *supra* note 2, at 483-84; *see also* Abdo, *supra* note 35, at 3 (acknowledging that managers must procure employment for clients).

77. See BIEDERMAN, *supra* note 35, at 4 (explaining that acting as an unlicensed agent can lead to severe consequences).

78. O’Brien, *supra* note 2, at 484.

79. *Id.* at 472.

80. BIEDERMAN, *supra* note 34, at 12.

81. *See id.* at 25; Abdo, *supra* note 35, at 4.

tainment guilds and unions regulate the entertainment industry. It concludes with an examination of the California cases that have laid the foundation for the controversy over procuring employment.

1. California's Talent Agencies Act

California regulates the entertainment industry through the TAA, a complex remedial statute.⁸² This sub-section examines the purpose and legislative history of the TAA and describes how the TAA regulates the industry. Additionally, it discusses the remedies that may be administered when a violation occurs. This sub-section concludes with an analysis of the TAA's ambiguous language.

a. Purpose and Legislative History

The California legislature enacted the TAA to protect artists seeking employment in California's entertainment industry from the unscrupulous practices of agents.⁸³ The issue of whether artists need protection arose when the California legislature learned that talent agents were engaging in inappropriate actions, such as sending female artists to houses of prostitution,⁸⁴ sending artists to dangerous locations, arranging for minors to work in bars, and splitting fees with owners or managers of the venues that booked their artists.⁸⁵ These actions prompted remedial legislation, in the

82. See CAL. LAB. CODE §§ 1700.00-.47; see also BIEDERMAN, *supra* note 34, at 12 (suggesting that California has a detailed legislative system of regulation).

83. O'Brien, *supra* note 2, at 493 (citing *Licensing and Regulation of Artists Managers, Personal Managers, and Musicians Booking Agencies: Hearings Before the California Legislature Senate Comm. on Industrial Relations 222* (1975) [hereinafter *Hearings*] (testimony of Albert Reyff, Asst. State Labor Comm'r)); Jelin, *supra* note 10, at 476; see also BIEDERMAN, *supra* note 35, at 4; Miles E. Locker, *Enforcement of the California Talent Agencies Act: The Procedures of the Labor Commissioner*, 14 ENT. & SPORTS LAW. 11, 30 (1996); Pantoga, *supra* note 50, at 327.

84. O'Brien, *supra* note 2, at 493 (citing *Hearings*, *supra* note 83, at 28-29 (testimony of Roger Davis, First Vice Pres. of the Artists' Managers Guild)).

85. Quast, *supra* note 35, at 193; O'Brien, *supra* note 2, at 480. While the rationale for restricting an agent's ability to send artists to dangerous places or to

form of an amendment to the Private Employment Agencies Law of 1913,⁸⁶ that regulated talent agents⁸⁷ and prohibited them from engaging in such activities.⁸⁸

Through this amendment, talent agents were brought under the Labor Commissioner's jurisdiction.⁸⁹ In 1959, the legislature enacted a new chapter of the Labor Code unique to the issues and concerns related to artists' representatives—the Artists' Managers Act.⁹⁰ In 1978, the Artists' Managers Act became the TAA.⁹¹

In 1982, the legislature added three significant amendments to the TAA,⁹² subject to “sunset provisions,”⁹³

send minors to bars is obvious, further explanation of “fee splitting” may be necessary to show the justification for its prohibition. Fee splitting occurs when an agent pays money to an employer of talent in exchange for the employer's promise to hire only artists represented by that agent. *Hearings, supra* note 83, at A-6 (statement of Walter L.M. Lorimer, an attorney who participated in drafting the Artists Managers Bill in 1959). The agent books his artists into the employer's venue, collects a commission from the artist, and turns over part of the commission to the employer. *Id.*

86. 1913 Cal. Stat. 515, amended by 1923 Cal. Stat. 936.

87. The TAA is an example of interest-group politics trumping legislative integrity. O'Brien, *supra* note 2, at 493 n.138. The TAA progressed to its present form in slow stages directed by interested parties, bargained amendments, and industry debate. *Id.*

88. *Id.* at 493.

89. *Id.* at 493-94. The TAA originated with the Artists' Managers Act of 1943, which allowed personal managers to procure employment for artists as part of their duties as an adviser and counselor. Steinberg & Hazzard, *supra* note 7, at B7.

90. O'Brien, *supra* note 2, at 494. Talent agents lobbied for the changes, complaining that they were subject to rules not specifically promulgated to regulate them. *Id.* (citing Letter from John F. Henning, Director of the California Department of Industrial Relation, to Julian Beck, Legislative Secretary, Governor's Office (May 28, 1959)).

91. *Id.* In contrast to the Artists' Managers Act, the TAA “focuses on persons engaged in the occupation of procuring employment or engagements for an artist.” Steinberg & Hazzard, *supra* note 7, at B7.

92. The significant changes benefited personal managers. Jelin, *supra* note 10, at 480.

93. O'Brien, *supra* note 2, at 494; see also Richard L. Feller, *California's Revised Talent Agencies Act: Fine-Tuning the Regulation of Employment Procurement in the Entertainment Industry*, 5 ENT. & SPORTS LAW. 3, 3 (1986) (stating that sunset provisions were supposed to delete the three major modifications made to the TAA). “Sunset provisions” set legislation to terminate on a specified date unless rein-

changed the TAA in three significant ways: (1) allowing unlicensed individuals to act in concert with, and at the request of, licensed talent agents in negotiating employment contracts;⁹⁴ (2) exempting the procurement of recording contracts from regulation;⁹⁵ and (3) establishing a one-year statute of limitations.⁹⁶ The sunset provisions were to terminate on January 1, 1986.⁹⁷

In addition, the amendments created the California Entertainment Commission ("Entertainment Commission")⁹⁸ to study the entertainment industry and recommend a model regulatory bill to the legislature.⁹⁹ After two years of deliberation,¹⁰⁰ the Entertainment Commission recommended the

stated by the legislature. BLACK'S LAW DICTIONARY 1436 (6th ed. 1990).

94. CAL. LAB. CODE § 1700.44(d); *see, e.g.*, BIEDERMAN, *supra* note 35, at 12; Jelin, *supra* note 10, at 481; Gilenson, *supra* note 7, at 514; Feller, *supra* note 92, at 4. This exception recognizes that "personal managers are prevalent in the recording industry." Jelin, *supra* note 10, at 480.

95. CAL. LAB. CODE § 1700.4(a); *see, e.g.*, BIEDERMAN, *supra* note 35, at 12 (noting that, under amendments to the TAA, negotiating a recording contract does not constitute performance of agency functions); Jelin, *supra* note 10, at 480; Gilenson, *supra* note 7, at 513; Feller, *supra* note 92, at 4.

96. CAL. LAB. CODE § 1700.44(c); *see, e.g.*, BIEDERMAN, *supra* note 35, at 12 (noting that amendments to the TAA established a one-year statute of limitations); Jelin, *supra* note 10, at 481; Feller, *supra* note 92, at 4.

97. O'Brien, *supra* note 2, at 494; Jelin, *supra* note 10, at 481; Feller, *supra* note 92, at 3. The legislature did not allow these provisions to terminate. O'Brien, *supra* note 2, at 495.

98. The Entertainment Commission was composed of 10 individuals: artists Ed Asner, John Forsythe, and Cicely Tyson; talent agents Jeffrey Berg, Roger Davis, and Richard Rosenberg; personal managers Bob Finklestein, Patricia McQueeney, and Larry Thompson; and the State Labor Commissioner C. Robert Simpson, Jr. *Id.* at 495 n.148 (citing REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION TO THE GOVERNOR AND LEGISLATURE 2 (1985) [hereinafter ENTERTAINMENT COMMISSION REPORT] (submitted pursuant to Act of Aug. 31, 1982, ch. 682, § 6, 1982 Cal. Stat. 2814, 2816, repealed by Act of July 17, 1984, ch. 553, 1984 Cal. Stat. 2185 (effective Jan. 1, 1986))); *see also* Greenberg, *supra* note 2, at 489; Jelin, *supra* note 10, at 481-82; Feller, *supra* note 92, at 3.

99. O'Brien, *supra* note 2, at 494-95; Jelin, *supra* note 10, at 481; Greenberg, *supra* note 2, at 488; Locker, *supra* note 83, at 29; Feller, *supra* note 92, at 3; Pantoga, *supra* note 50, at 328.

100. The Entertainment Commission examined these issues:

(1) Can unlicensed persons engage in procurement activities for artists?

[No.]

(2) Should any changes be made to the Act's exception for persons pro-

elimination of the sunset provisions and the permanent adoption of all three amendments.¹⁰¹ The Entertainment Commission interpreted the TAA as prohibiting personal managers from seeking or procuring employment for artists without a talent-agent license.¹⁰² Furthermore, the Entertainment Commission determined that the TAA applies to any person who engages in procurement activity for an artist.¹⁰³ According to the Entertainment Commission's Report, anyone who solicits or procures employment for an artist is subject to dispute resolution by the Labor Commissioner.¹⁰⁴ In 1986, the legislature adopted the Entertainment Commission's recommendations.¹⁰⁵ No major changes to the TAA

curing recording contracts for artists? [No.]

(3) Should the Act contain criminal sanctions? [No.]

(4) Should the Act's sunset provisions be removed? [Yes.]

(5) Should the Act be repealed and/or should there be a separate act for personal managers? [No.]

(6) Should any other changes be made to the Act? [The Commission recommended several "administrative" changes.]

O'Brien, *supra* note 2 at 495 n.149 (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 5); Jelin, *supra* note 10, at 482-83.

101. O'Brien, *supra* note 2, at 495; Jelin, *supra* note 10, at 483.

102. ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 6; Cole-Wallen, *supra* note 47, at 488; Pantoga, *supra* note 50, at 328.

103. The Entertainment Commission stated:

[T]hat 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 [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.

O'Brien, *supra* note 2, at 495 (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 20); *see also* Feller, *supra* note 92, at 3 (stating that the Entertainment Commission declared that unlicensed individuals cannot procure employment); Pantoga, *supra* note 50, at 328 (reporting that the Entertainment Commission concluded that an agency license is required to perform any procurement activity).

104. O'Brien, *supra* note 2, at 495-96. The Labor Commissioner's determinations espouse similar views. *Id.*

105. *Id.* at 495; *see also* BIEDERMAN, *supra* note 35, at 12 (acknowledging that, in 1986, the California legislature amended the TAA to provide: (1) the recording contract exception; (2) the exception for working in concert with licensed talent agents; and (3) the one-year statute of limitations); Feller, *supra* note 92, at 3 (noting that in 1986, the legislature adopted all of the Entertainment Commis-

have been adopted since then.¹⁰⁶

Two commentators, Neville Johnson and Daniel Lang, argue that, because personal managers do not primarily procure employment, the TAA was not intended to regulate such individuals.¹⁰⁷ They rely on statutory definitions and syntactical uses to infer the legislative intent of the TAA.¹⁰⁸ They contend that the California legislature intended to “regulate only those whose primary purpose and function is the procuring of employment for artists.”¹⁰⁹ The Labor Commissioner, however, has interpreted the TAA to include any attempt to procure employment.¹¹⁰

b. Regulatory Scheme

The TAA defines the role of talent agents in the entertainment industry,¹¹¹ and provides for the comprehensive regulation of talent agents who procure employment for artists.¹¹² Specifically, section 1700.4(a) of the TAA defines a

sion’s recommendations).

106. O’Brien, *supra* note 2, at 495.

107. Neville L. Johnson & Daniel W. Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 388 (1979).

108. *Id.*

109. *Id.*

110. Greenberg, *supra* note 2, at 510; O’Brien, *supra* note 2, at 495-96.

111. CAL. LAB. CODE § 1700.4(a); BIEDERMAN, *supra* note 35, at 13. The TAA defines the necessary terms. See CAL. LAB. CODE §§ 1700.0-4. Article 1 of the TAA defines the following terms: person, engagements, fee, license, licensee, talent agency, and artist. *Id.*

112. According to one commentator:

Sections 1700 to 1700.4 are the definitional provisions. Section 1700.5 compels all individuals or organizations who engage in procurement activities to obtain a license from the Labor Commissioner. Sections 1700.6 through 1700.22 set forth particular licensing procedures, from the completion of an application to a surety bond requirement. Sections 1700.23 to 1700.41 govern the business affairs of talent agents, mandating Labor Commission approval of form agreements between agents and artists and prohibiting certain types of conduct. Section 1700.44(a) gives the Labor Commissioner original Jurisdiction over disputes arising under the Act; he or she may hear all such controversies subject to a one-year statute of limitations and the right to appeal de novo to the superior court.

O’Brien, *supra* note 2, at 487; see also BIEDERMAN, *supra* note 35, at 12 (noting that

talent agent as a person engaged in the occupation of procuring employment for artists.¹¹³ Furthermore, Article 2 of the TAA describes the licensing procedures,¹¹⁴ and expressly re-

California's legislative regulatory scheme governing talent agents is extremely detailed); Feller, *supra* note 92, at 28 (suggesting that California is the state with the most developed system of regulating employment procurement in the entertainment industry).

113. Section 1700.4(a) of the TAA provides:

Talent agency 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 this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

CAL. LAB. CODE § 1700.4(a).

114. *Id.* §§ 1700.6-.22. Anyone seeking a new license or the renewal of an existing license must file a written application, and license renewal is required every year. *Id.* §§ 1700.6, 1700.10. While processing an application, the Labor Commissioner has discretion to issue a temporary license valid for up to ninety days. Locker, *supra* note 83, at 11. The Labor Commissioner has the power to revoke a temporary license. CAL. LAB. CODE § 1700.14.

Under Labor Code section 1700.8, the Labor Commissioner must give notice of the grounds for denying an application and must provide an opportunity for a hearing. *Id.* § 1700.8. The Labor Commissioner initiates the denial proceedings by serving the applicant with a statement of issues, providing the factual and legal basis for the denial. Locker, *supra* note 83, at 11. Applicants request a hearing to contest a denial by filing a notice of defense within fifteen days after receiving the statement of issues. *Id.* Although the Labor Commissioner presents its case first, the burden of proof is on the applicant to establish, by a preponderance of the evidence, that he meets the qualifications for receiving a license. *Id.* An administrative law judge conducts the hearing and issues a proposed decision. CAL. LAB. CODE §§ 11517, 11518. The Labor Commissioner has discretion to accept or reject the proposed decision. *Id.* § 11517. By filing a timely petition for writ of administrative mandate, the applicant can obtain judicial review of the Labor Commissioner's final decision. Locker, *supra* note 83, at 12.

Under section 1700.21 of the TAA, the Labor Commissioner has the authority to revoke or suspend a talent agency license on any of the following grounds: (1) violation or failure to comply with the TAA; (2) lacking good moral character; (3) change of circumstances since the license was issued; or (4) a material misrepresentation or false statement in the application. CAL. LAB. CODE § 1700.21. Under section 1700.22 of the TAA, the provisions of the Administrative Hearings Act apply to suspension and revocation proceedings. *Id.* § 1700.22. In contrast to denial proceedings, in revocation or suspension proceedings, the Labor Commissioner has the burden of proof. Locker, *supra* note 83, at 12. There are no other procedural differences between suspension and denial proceedings. *Id.* After having its license revoked, a talent agency is prohibited from applying for an-

quires representatives who procure employment for artists to obtain an agent's license,¹¹⁵ for which they must file a written application.¹¹⁶ After receiving an application, the Labor Commissioner investigates the applicant's character and the nature of the talent agency.¹¹⁷ Article 2 also grants the Labor Commissioner has discretion to deny any application.¹¹⁸

Article 3 regulates talent agents' business activities,¹¹⁹ requiring all talent agents to: (1) obtain the Labor Commissioner's approval of all form contracts; (2) maintain a separate trust fund account for funds belonging to clients; (3) retain records for the client; (4) refrain from making misleading statements concerning an artist's employment; and (5) avoid certain payment practices.¹²⁰ Under section 1700.23, all talent agents must obtain Labor Commissioner approval of form contracts.¹²¹ The Labor Commissioner will withhold approval of any contract form that is unfair, unjust, or op-

other license for three years after the final decision upholding the revocation. CAL. LAB. CODE § 11506.

115. *Id.* § 1700.5. Labor Code section 1700.5 provides: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." *Id.*

116. *Id.* § 1700.6.

117. *Id.* § 1700.7.

118. CAL. LAB. CODE § 1700.8.

119. *Id.* §§ 1700.23-.41. Labor Code section 1700.23 requires every talent agency to obtain the Labor Commissioner's approval for form contracts utilized by the agency. *Id.* § 1700.23. Generally, the Labor Commissioner will disapprove any provision that creates a conflict of interest between the talent agency and the artist, or that diminishes the protection afforded by the TAA. Locker, *supra* note 83, at 12. The Labor Commissioner must approve the proposed contract form before the issuance of a talent agency license. *Id.* Labor Code section 1700.24 requires all agents to file a fee schedule with the Labor Commissioner. CAL. LAB. CODE § 1700.24. Furthermore, the fee schedule must be filed before an agency license is issued. Locker, *supra* note 83, at 12. The Labor Commissioner does not allow any registration fee, defined at Labor Code section 1700.2(b) as any charge for registering or listing an artist for employment in the entertainment industry, letter writing, photographs, film strips, video tapes, or other reproductions of the artist. CAL. LAB. CODE § 1700.2(b).

120. *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 442 n.9 (Cal. Ct. App. 1995) (citing CAL. LAB. CODE §§ 1700.23-.41).

121. CAL. LAB. CODE § 1700.23.

pressive to the artist.¹²² Under section 1700.26, talent agents must maintain records of: (1) the names and addresses of all of their clients; (2) the amount of fees received from each client; (3) the engagements secured on behalf of each client; and (4) the amount of compensation received by each client.¹²³

Finally, the TAA grants the Labor Commissioner the authority to resolve disputes arising under the TAA.¹²⁴ The Labor Commissioner has original and exclusive jurisdiction to hear and determine all controversies regarding potential violations of the TAA.¹²⁵ Because the Commissioner's authority extends to unlicensed individuals,¹²⁶ personal managers cannot escape the Labor Commission's jurisdiction by failing to obtain a license or through any other action.¹²⁷

122. Locker, *supra* note 83, at 12.

123. CAL. LAB. CODE § 1700.26. Under Labor Code section 1700.27, every talent agency must allow the Labor Commissioner to inspect the records and to give the Labor Commissioner copies of these records if requested. *Id.* § 1700.27.

124. *Id.* § 1700.44(a). Under Labor Code section 1700.44, the Labor Commissioner has exclusive jurisdiction to determine controversies that arise under the TAA. *Id.* The Labor Commissioner's jurisdiction is limited by Labor Code section 1700.45, which allows the parties to refer contractual disputes to an arbitrator in limited circumstances. *Id.* § 1700.45.

125. CAL. LAB. CODE § 1700.44; *see, e.g.*, Buchwald v. Superior Court, 62 Cal. Rptr. 364, 372 (Cal. Ct. App. 1967) (holding that in cases arising under the TAA, the Labor Commissioner has original jurisdiction to the exclusion of the superior court); Martin D. Singer, *Regulation of Talent Agents: The Richard Pryor Determination*, in 1983 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 255, 255 (Michael Meyer & John D. Viera eds., 1983); Feller, *supra* note 92, at 27 (citing CAL. LAB. CODE § 1700.44).

126. Section 1700.44(a) applies to all disputes between artists and individuals allegedly performing talent-agency services, regardless of whether the charged party has a license. O'Brien, *supra* note 2, at 487 (citing Singer, *supra* note 125, at 255 (explaining that the Labor Commissioner has jurisdiction over individuals who perform talent agency services whether or not they are licensed). Cases have established that individuals operating in violation of the TAA are exposed to statutory penalties regardless of whether they are licensed or not, Abdo, *supra* note 35, at 4 (citing Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967)), because the TAA regulates both licensed and unlicensed agents. BIEDERMAN, *supra* note 35, at 4; Feller, *supra* note 92, at 27 (citing Buchwald v. Superior Court, 62 Cal. Rptr. 364).

127. O'Brien, *supra* note 2, at 487; *see also* BIEDERMAN, *supra* note 35, at 4 (stating that the TAA applies to any person engaged in seeking employment for an

The TAA contains two exceptions to the licensing requirement.¹²⁸ First, individuals who procure recording contracts for artists need not obtain talent agency licenses.¹²⁹ This exception recognizes that personal managers, rather than talent agents, customarily negotiate recording contracts for their artist-clients.¹³⁰ Second, the TAA provides an exception for negotiating an employment contract when acting in concert with, and at the request of, a licensed talent agency.¹³¹ This exception only applies when licensed talent agents cooperate with unlicensed representatives to negotiate employment contracts.¹³² It “creates the closest thing to a safe harbor” for managers engaged in employment negotiations.¹³³ Although some agents cooperate by giving personal managers letters confirming that the manager is authorized to work on specific deals for mutual clients, most agencies have a policy against issuing such letters.¹³⁴

c. Remedies for Violations of the TAA

In addition to original and exclusive jurisdiction, the La-

artist).

128. CAL. LAB. CODE §§ 1700.4(a), 1700.44(d); BIEDERMAN, *supra* note 35, at 13; Gilenson, *supra* note 7, at 513; Abdo, *supra* note 35, at 4; Feller, *supra* note 92, at 4.

129. CAL. LAB. CODE § 1700.4(a); *see, e.g.*, BIEDERMAN, *supra* note 35, at 12; Siegel II, *supra* note 7, at 143; Jelin, *supra* note 10, at 480; Gilenson, *supra* note 7, at 513; Abdo, *supra* note 35, at 4; Feller, *supra* note 92, at 4.

130. O’Brien, *supra* note 2, at 500; *see, e.g.*, Jelin, *supra* note 10, at 480 (stating that personal managers dominate the recording industry); Gilenson, *supra* note 7, at 513; Feller, *supra* note 92, at 4.

131. CAL. LAB. CODE § 1700.44(d).

132. BIEDERMAN, *supra* note 35, at 12; *see also* Jelin, *supra* note 10, at 481 (stating that this exception creates an uneasy alliance between agents and managers).

133. Jelin, *supra* note 10, at 481; *see also* Gilenson, *supra* note 7, at 514 (acknowledging that this exception recognizes that personal managers often work with talent agents to determine the best opportunities for their clients); Feller, *supra* note 92, at 4 (stating that personal managers are safe when representing a performer who can also afford the services of a licensed talent agent who is willing to cooperate with the manager).

134. Jelin, *supra* note 10, at 481; *see also* O’Brien, *supra* note 2, at 500; Feller, *supra* note 92, at 4 (suggesting that personal managers seeking to come within this exception should obtain documentation of the talent agent’s request for the manager to work in conjunction on the particular project).

bor Commissioner has the authority to enforce the TAA and to fashion remedies for violations.¹³⁵ Upon determining that an unlicensed individual has conducted talent agent services, the Labor Commissioner will invalidate any contract between the unlicensed individual and the artist.¹³⁶ The Labor Commissioner may also decide that the talent agent has surrendered his or her right to further fees or commissions,¹³⁷ that the artist is no longer liable for loans received from the agent to promote the artist's career,¹³⁸ and that the artist is entitled to receive funds already paid to the unlicensed representative.¹³⁹ On rare occasions, the Commissioner may find that the agent has a right to some or all compensation based on *quantum meruit*.¹⁴⁰ If the Commissioner voids the management agreement, the void agreement will serve to invalidate any collateral agreements or contracts entered into by the parties.¹⁴¹ The Labor Commissioner thus has the power to divest unlicensed individuals of both past and future compensation.¹⁴²

The Labor Commissioner's power to remedy violations of the TAA provides artists with significant protection from

135. O'Brien, *supra* note 2, at 491.

136. If the Labor Commissioner determines that an unlicensed individual acted as a talent agent, any agreement between the artists and the unlicensed talent agent will be declared void. ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 17-18; Greenberg, *supra* note 2, at 503; Jelin, *supra* note 10, at 477.

137. Greenberg, *supra* note 2, at 503.

138. *Id.*

139. *Id.*; O'Brien, *supra* note 2, at 491 (citing Singer, *supra* note 125, at 258); see also *Licensing Personal Managers*, *supra* note 7 (stating that managers may be forced to return commissions previously received from the client).

140. O'Brien, *supra* note 2, at 491 (citing Singer, *supra* note 125, at 258); see also Greenberg, *supra* note 2, at 505 (claiming that an unlicensed talent agent, who violated the TAA but did not engage in bad faith dealings, should receive an offset against the TAA's damages for the value of the services rendered). "Quantum meruit" means "as much as deserved." BLACK'S LAW DICTIONARY, *supra* note 93, at 1243. It is an equitable doctrine that implies a promise to pay a reasonable amount for benefits received when unjust enrichment would otherwise occur. *Id.*

141. Greenberg, *supra* note 2, at 503; O'Brien, *supra* note 2, at 491.

142. Greenberg, *supra* note 2, at 503; O'Brien, *supra* note 2, at 491.

individuals who unlawfully function as talent agents.¹⁴³ Most artists do not employ the TAA for protection; rather, they utilize the TAA to reclaim fees paid to personal representatives.¹⁴⁴ The remedies afforded by the TAA, however, are not self-enforcing.¹⁴⁵ To initiate an action with the Labor Commission, an artist must file a complaint¹⁴⁶—a procedure which commentators have strongly criticized.¹⁴⁷ Notwithstanding this criticism, the TAA has become both a powerful tool for artists seeking to void agreements, and a source of financial and professional misfortune for unlicensed individuals.¹⁴⁸

d. Ambiguous Language in the TAA

In California, an individual who procures employment for an artist is deemed to be a talent agent.¹⁴⁹ Under the TAA, only talent agents are permitted to procure employ-

143. Greenberg, *supra* note 2, at 507; O'Brien, *supra* note 2, at 492; *see also* Locker, *supra* note 83, at 30 (stating that the TAA provides artists and the Labor Commissioner with a powerful tool for remedying abuses that remain in the entertainment industry).

144. O'Brien, *supra* note 2, at 492. Some artists try to use the TAA to avoid paying their manager past fees; other artists use the TAA to avoid paying their manager a share of future income. Greenberg, *supra* note 2, at 507 (suggesting that the most significant result of invalidating all management agreements for a violation of the TAA is that it eliminates the manager's claim to any share of the artist's future success).

145. *Id.* at 496; O'Brien, *supra* note 2, at 492; Locker, *supra* note 83, at 14.

146. Unless a complaint is filed, the Labor Commission rarely initiates action to enforce the TAA. Greenberg, *supra* note 2, at 496; Cole-Wallen, *supra* note 47, at 516; Locker, *supra* note 83, at 14. There are two types of complaints: (1) artists' alleging unlicensed procurement activities, and (2) talent agents' seeking to recover fees. Greenberg, *supra* note 2, at 496; O'Brien, *supra* note 2, at 492.

147. O'Brien, *supra* note 2, at 492.

148. *Id.*; *see also* Greenberg, *supra* note 2, at 507 (stating that an unlicensed talent agent may expect severe punishment for even inconsequential involvement in procurement activities when brought before the Labor Commissioner); Locker, *supra* note 83, at 30.

149. An individual who performs procurement activities is legally defined as a talent agent. ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 20; *see, e.g.*, Greenberg, *supra* note 2, at 488 (noting that California law defines a talent agent as a person who procures employment for an artist); Jelin, *supra* note 10, at 476; Gilenson, *supra* note 7, at 510.

ment for artists.¹⁵⁰ Therefore, participation in procurement activities will subject an individual to the TAA's restrictions.¹⁵¹ Consequently, to establish a violation of the TAA, an individual must have engaged in unlicensed procurement activities on behalf of an artist.¹⁵²

Some commentators have argued that the TAA contains a significant ambiguity because the legislature neglected to define the term "procurement."¹⁵³ These commentators insist that, because the term procurement is unclear, reasonable people are uncertain whether particular actions violate the TAA.¹⁵⁴ Consequently, commentators contend that unlicensed personal managers are unfairly exposed to potential liability.¹⁵⁵

To determine the meaning of procurement, one must look primarily to the Labor Commissioner determinations¹⁵⁶

150. Under the TAA, a talent agency is defined as a person or corporation who procures employment for an artist. CAL. LAB. CODE § 1700.4(a); Jelin, *supra* note 10, at 476; Greenberg, *supra* note 2, at 488; Gilenson, *supra* note 7, at 510.

151. BIEDERMAN, *supra* note 35, at 4; Greenberg, *supra* note 2, at 502; Jelin, *supra* note 10, at 476; O'Brien, *supra* note 2, at 497; Gilenson, *supra* note 7, at 511.

152. Jelin, *supra* note 10, at 476; Greenberg, *supra* note 7, at 501; O'Brien, *supra* note 2, at 497; Gilenson, *supra* note 7, at 512; Locker, *supra* note 83, at 14.

153. Jelin, *supra* note 10, at 477; Gilenson, *supra* note 7, at 510; O'Brien, *supra* note 2, at 497.

154. Gilenson, *supra* note 7, at 510; O'Brien, *supra* note 2, at 497; Feller, *supra* note 92, at 4.

155. The failure to define the term procurement unfairly subjects unlicensed individuals to the TAA's potentially harsh remedies. Greenberg, *supra* note 2, at 507; *see, e.g.*, O'Brien, *supra* note 2, at 497; Feller, *supra* note 92, at 4.

156. O'Brien, *supra* note 2, at 497. The Labor Commissioner hears TAA controversies in offices throughout California. *Id.* All determinations are returned to the central office in San Francisco, and are available upon request. *Id.* However, the records are not well organized, and there is a considerable period of time between the institution of a controversy and its resolution. *Id.* at 497 n.164 (citing Karen A. Julian, *Personal Manager or Talent Agent? A Summary of Recent California Commission Findings in Regulation of Entertainers' Representatives*, in 1983 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK, *supra* note 125, at 315. Between 1985 and early 1990, 165 TAA controversies appear to have been initiated. *Id.* (citing Julian, *supra*, at 315). This represents over a 500% increase from the period of December 1977 to September 1983. O'Brien, *supra* note 2, at 497 n.164 (citing Julian, *supra*, at 315). For unreported decisions of the California Labor Commissioner, see Richard Feller, *Artist v. Manager v. Agent v. Labor Commis-*

and the California Entertainment Commission's Report.¹⁵⁷ Unfortunately, however, the Labor Commissioner does not report its decisions.¹⁵⁸ Consequently, members of the California entertainment industry often have difficulty understanding the meaning of the term procurement. Although the Commission has identified some specific activities as constituting procurement,¹⁵⁹ hearing officers¹⁶⁰ have failed to provide the public with a consistent definition.¹⁶¹

Both the Labor Commissioner and the courts have broadly interpreted the term "procurement" to include any attempt to solicit employment for an artist.¹⁶² This definition has been interpreted to include introducing artists to producers or directors,¹⁶³ initiating contacts with employers,¹⁶⁴ furthering an offer for a artist-client,¹⁶⁵ or negotiating employment contracts.¹⁶⁶ Despite this attempted clarification,

sioner—Developments in the Regulation of Entertainers' Representatives, Syllabus for the Symposium of the Beverly Hills Bar Association, Nov. 12, 1983; Richard Feller, *Artist v. Manager Revisited—Further Developments in the Regulation of Entertainers' Representatives*, Syllabus for the Symposium of the Beverly Hills Bar Association, June 1, 1985.

157. ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 6-12.

158. O'Brien, *supra* note 2, at 497; *see also* Jelin, *supra* note 10, at 477 (stating that Labor Commissioner decisions have no precedential value because they are unreported).

159. For a list of activities that the Labor Commissioner has recognized as constituting "procurement," *see infra* notes 163-66 and accompanying text.

160. Hearing officers are usually attorneys from the Division of Labor Standards Enforcement. O'Brien, *supra* note 2, at 497 n.164. Hearing officers, otherwise known as administrative law judges, are assigned by the State Office of Administrative Hearings. Locker, *supra* note 83, at 11-12.

161. O'Brien, *supra* note 2, at 497-98; *see also* Jelin, *supra* note 10, at 477 (noting that cases have not established a consistent definition of procurement).

162. O'Brien, *supra* note 2, at 498; *see also* Greenberg, *supra* note 2, at 501 (suggesting that the Labor Commissioner has taken a literal approach to the TAA's definition of a talent agent); Gilenson, *supra* note 7, at 510-11 (stating that personal managers are infringing on the agent's role by promising or attempting to procure employment).

163. *See, e.g.*, *Derek v. Callan*, No. TAC 18-80 (Cal. Labor Comm'r 1982).

164. *See, e.g.*, *Pryor v. Franklin*, No. TAC 17 MP 114 (Cal. Labor Comm'r 1982).

165. *See, e.g.*, *Kearney v. Singer*, No. MP 429, AM 211 MC (Cal. Labor Comm'r 1978).

166. *See, e.g.*, *St. Louis v. Wolf*, No. TAC 29-79 (Cal. Labor Comm'r 1981).

commentators argue that the term is still vague,¹⁶⁷ and urge the legislature to take appropriate steps to remove the ambiguity of the determinative language in the TAA.¹⁶⁸

Larry Thompson, a personal manager and member of the California Entertainment Commission,¹⁶⁹ has advocated a three-tiered approach to defining procurement.¹⁷⁰ Under Thompson's approach, managers would be allowed to engage in casual conversation, solicit employment when working in concert with agents, participate in contract negotiations at an agent's request.¹⁷¹ Thompson contends that his approach to defining procurement is consistent with the en-

167. Both the courts and the Labor Commissioner have attempted to give warning to personal managers by giving substance to the term procurement, however, they have been unable to cultivate a workable criteria for determining whether an individual has engaged in unlicensed procurement. Furthermore, the existing judicial and administrative interpretations fail to clarify the concept, and many individuals still guess at its meaning. Jelin, *supra* note 10, at 477; Gilenson, *supra* note 7, at 510; O'Brien, *supra* note 2, at 499; Feller, *supra* note 92, at 4.

168. O'Brien, *supra* note 2, at 499; *see also* Feller, *supra* note 92, at 4 (stating that the legislature should remove the ambiguity from the TAA).

169. *See* discussion *supra* part I.B.2.a (discussing California's Entertainment Commission).

170. Larry Thompson has advocated the following approach to defining procurement:

[T]he law is supposed to 'shield' artists from abuse, not provide a 'sword' for voiding contracts. Thus, Mr. Thompson suggests a three-tiered approach to the definition of procurement: (1) casual conversation, which a manager should be able to do; (2) solicitation [of] employment, which a manager should be able to do only in conjunction with an agent; and (3) negotiation of contracts which should be done only by an agent, unless the agent requests the manager's participation. Thompson remarked that under the present law, 'You could go to a dinner party, be sitting next to a producer, suggest your client for a role and that would be procuring.'

Jelin, *supra* note 10, at 482. Larry Thompson's views are not indicative of those of the California Entertainment Commission; rather, they reflect his interest as a personal manager. *Id.* Richard Rosenberg, talent agent and member of the Commission, feels differently about personal managers procuring employment: "They are not the victims. They chose to go unregulated . . . [i]f they want to reap the benefits of unlimited commissions . . . then they should run the risk of their contracts being invalid if they violate the law." *Id.*

171. *Id.*

ertainment industry reality that personal managers must engage in procurement activities.¹⁷²

2. Guilds and Unions

In addition to state licensing requirements, various entertainment unions regulate¹⁷³ talent agents.¹⁷⁴ To protect their members from unethical personal representatives,¹⁷⁵ unions limit the types of agreements into which their artist-members can enter.¹⁷⁶ Three of the major talent unions¹⁷⁷ are the American Federation of Musicians (“AFM”),¹⁷⁸ the American Federation of Television and Radio Artists (“AFTRA”),¹⁷⁹ and the Screen Actors Guild (“SAG”).¹⁸⁰ Union regulation of personal representatives is more extensive than California’s statutory regulation.¹⁸¹ The entertainment guilds and unions monitor the relationship between their

172. *Id.*

173. Unions regulate talent agents by limiting fees, requiring the use of form contracts, restricting the term of agreements, and requiring that the agent enter into a franchise agreement with the union. BIEDERMAN, *supra* note 35, at 25; Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O’Brien, *supra* note 2, at 487.

174. See BIEDERMAN, *supra* note 35, at 25 (noting that entertainment labor unions regulate agents who deal with their members); Abdo, *supra* note 35, at 4 (explaining that entertainment unions impose additional restrictions on agents to protect their members).

175. O’Brien, *supra* note 2, at 487; see also BIEDERMAN, *supra* note 35, at 25 (noting that entertainment labor unions regulate agents because of concerns about the “vulnerability of their members due to high unemployment rates”); Abdo, *supra* note 35, at 4 (reporting that unions impose restrictions on personal representatives to protect their members).

176. O’Brien, *supra* note 2, at 487; see, e.g., BIEDERMAN, *supra* note 35, at 25; Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479.

177. The Directors Guild of America and the Writers Guild of America are also significant entertainment guilds. O’Brien, *supra* note 2, at 487.

178. Greenberg, *supra* note 2, at 492; O’Brien, *supra* note 2, at 487.

179. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O’Brien, *supra* note 2, at 487.

180. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O’Brien, *supra* note 2, at 487.

181. Union regulation is more detailed and rigorous than state regulation. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; Cole-Wallen, *supra* note 47, at 512.

artist-members and the personal representatives who procure employment for them.¹⁸² Unions place many regulations on their members, such as limiting the percentage that agents may charge, requiring the use of form contracts, and directing agents to obtain franchise licenses.¹⁸³

The entertainment guilds and unions also impose restrictive conditions on a personal representative's compensation.¹⁸⁴ AFTRA and SAG prohibit talent agents from receiving commissions that exceed ten percent of the artist's gross earnings.¹⁸⁵ Nonetheless, AFTRA and SAG do not authorize their members to pay commissions for the services of a personal manager.¹⁸⁶ In addition, they prohibit the payment of commissions over ten percent to any franchisee.¹⁸⁷ The AFM allows agents to receive commissions of twenty percent for booking one-night engagements and fifteen percent for

182. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O'Brien, *supra* note 2, at 487; Cole-Wallen, *supra* note 47, at 519; Abdo, *supra* note 35, at 4.

183. SIEGEL I, *supra* note 7, at 485; BIEDERMAN, *supra* note 35, at 25; Greenberg, *supra* note 2, at 492-95. Franchise agreements limit commissions, the duration of agency-agreements, and prohibit certain types of business activities that talent agents may concurrently engage in. Greenberg, *supra* note 2, at 492; *see also* Soocher, *supra* note 42, at 5 (stating that the franchise agreement between the talent agent and the American Federation of Musicians determines the terms of any agreement between the agent and an artist who is a member of the federation).

184. STAFF ANALYSIS, *supra* note 47, at 1; Greenberg, *supra* note 2, at 492; Cole-Wallen, *supra* note 47, at 520-21 (explaining that there is no California law limiting talent-agency fees, but that the various entertainment unions impose fee limits on talent agents).

185. Greenberg, *supra* note 2, at 492 (citing American Federation of Television and Radio Artists Regulations Governing Agents, Rule 12-B, § XX, at 21-22 (1971) [hereinafter AFTRA Rule 12-B]; Screen Actors Guild Agency Regulations, Amended Rule 16(g), § XI, at 18-23 (1968) [hereinafter Rule 16(g)]); *see also* Jelin, *supra* note 10, at 479 (stating that both AFTRA and SAG limit an agent's commission to 10% of the artist's gross compensation).

186. Greenberg, *supra* note 2, at 492 (citing AFTRA Rule 12-B, *supra* note 184, § XX, at 21-22; Rule 16(g), *supra* note 184, at § XI, at 18-23); *see also* Jelin, *supra* note 10, at 479-80 (stating that both AFTRA and SAG prohibit "double compensation," meaning that when a talent agent and a personal manager represent the same artist, they have to split the ten percent fee).

187. Greenberg, *supra* note 2, at 492 (citing AFTRA Rule 12-B, *supra* note 184, § XX, at 21-22; Rule 16(g), *supra* note 184, at § XI, at 18-23).

longer engagements.¹⁸⁸ Moreover, the AFM permits franchised talent agents to sign a personal management agreement that allows agents to act both as personal managers and booking agents, and entitles them to receive an additional five percent commission.¹⁸⁹ Because personal managers usually receive fees in excess of those authorized by the unions, union regulation prevents personal managers from receiving their customary fees.¹⁹⁰

The unions also regulate the duration of the artist-representative relationship.¹⁹¹ SAG and AFTRA impose term limits of three years in most circumstances.¹⁹² In other circumstances, SAG by-laws limit the agreement to an initial one-year term.¹⁹³ The AFM allows five-year terms in some instances, and up to seven-year terms in others.¹⁹⁴ In contrast, the TAA does not limit the duration of the relation-

188. *Id.* (citing Constitution By-Laws and Policy of the American Federation of Musicians of the U.S. and Canada, art. XXIII, § 8, at 130 (rev. ed. 1981) [hereinafter AFM By-Laws]). The AFM has a more liberal rule because the union recognizes that personal managers provide important services to their members. Jelin, *supra* note 10, at 480.

189. Greenberg, *supra* note 2, at 492-93 (citing AFM By-Laws, *supra* note 188, art. XXIII, § 8, at 130). The AFM recognizes the purpose served by personal managers in the music industry by authorizing an additional five percent commission for talent agents providing personal manager services. Jelin, *supra* note 10, at 480. Aside from this AFM provision, no guild or union recognizes personal managers. Greenberg, *supra* note 2, at 494.

190. See discussion *supra* part I.A.2 (describing the fees that personal managers usually receive).

191. Greenberg, *supra* note 2, at 493; see also Jelin, *supra* note 10, at 479 (noting that unions limit the duration of representative's contracts).

192. Greenberg, *supra* note 2, at 494 (citing AFTRA Rule 12-B, *supra* note 184, § XIII-B(1), at 15; Rule 16(g), *supra* note 184, § XI-K(2), at 22); Jelin, *supra* note 10, at 480. SAG and AFTRA also provide that artists may terminate their agreements with representatives if the representative does not obtain work for the client within a specified period of time. *Id.* Subjecting personal managers to this provision would encourage them to procure employment. *Id.*

193. Greenberg, *supra* note 2, at 494 (citing Rule 16(g), *supra* note 184, § XI-K(1), at 22); see also Jelin, *supra* note 10, at 480 (stating that in some instances, SAG only allows a one-year agreement).

194. Greenberg, *supra* note 2, at 494 (citing AFM By-Laws, *supra* note 188, art. XXIII, § 9, at 131-33).

ship.¹⁹⁵ However, California Labor Code section 2855 limits the term of contracts for personal services to seven years.¹⁹⁶ Personal managers prefer longer terms, so as to maximize the potential return on investment.¹⁹⁷

Additionally, the unions do not allow talent agents to procure employment for any union member without a franchise license from that union.¹⁹⁸ Franchise agreements limit the commissions that talent agents can charge,¹⁹⁹ restrict the length of exclusive representation agreements,²⁰⁰ and prohibit agents from engaging in certain activities.²⁰¹ The entertainment unions prohibit franchised representatives from obtaining equity interests in an artist's total earnings or products.²⁰² This restriction prevents representatives from contracting for an equity interest in any artist who is a member of a union.²⁰³

The entertainment guilds and unions also prohibit fran-

195. *Id.* at 493.

196. Under section 2855 of the California Labor Code, contracts to render personal services are not enforceable beyond seven years. CAL. LAB. CODE § 2855.

197. Greenberg, *supra* note 2, at 494; *see also* Jelin, *supra* note 10, at 480 (stating that personal managers prefer agreements that last for five years, because of the time necessary to recoup their investment).

198. O'Brien, *supra* note 2, at 481 (citing Cole-Wallen, *supra* note 47, at 519); *see also* Greenberg, *supra* note 2, at 492 (noting that agents representing union artists must be "franchised").

199. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O'Brien, *supra* note 2, at 487 (noting that unions regulate talent agents by limiting fees).

200. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O'Brien, *supra* note 2, at 487.

201. Greenberg, *supra* note 2, at 492; Jelin, *supra* note 10, at 479; O'Brien, *supra* note 2, at 487.

202. Greenberg, *supra* note 2, at 493 (citing AFM By-Laws, *supra* note 188, art. XXIII, § 11, at 133; Rule 16(g), *supra* note 184, § XVI-B, at 28); *see also* Jelin, *supra* note 10, at 480 (stating that unions prohibit agents from obtaining equity interests in their clients).

203. According to one commentator, "[a] logical alternative for the manager" who endures great risk is to "contract for an equity interest in the total earnings of the artist in addition to the commission [the manager] is paid for his services." Greenberg, *supra* note 2, at 493. This type of agreement embodies the business principle that the rate of return on an investment should reflect the level of risk. *Id.*

chised talent agents from engaging in certain activities,²⁰⁴ particularly from conducting specified forms of business.²⁰⁵ For example, guilds and unions do not allow franchised talent agents to create their own productions.²⁰⁶ Despite this prohibition, talent agents are free to “package”²⁰⁷ union-members into projects.²⁰⁸

Moreover, any union member who engages the services of a talent agent without a franchise license will be subject to union discipline.²⁰⁹ Consequently, the union may seek to impose sanctions on both the artist and the artist’s representative for violating union rules.²¹⁰ However, the guilds and unions lack absolute control over the industry, and therefore cannot always enforce their by-laws and regulations against all individuals.²¹¹

3. California Case Law Interpreting the TAA

For many years, personal managers who performed traditional managerial functions, such as advising, counseling, directing, and developing an artist’s career, were not within the scope of the TAA.²¹² As a result, personal managers who only incidentally procured employment for artists did not

204. Jelin, *supra* note 10, at 480; Greenberg, *supra* note 2, at 492; O’Brien, *supra* note 2, at 487.

205. Jelin, *supra* note 10, at 480; Greenberg, *supra* note 2, at 492.

206. Jelin, *supra* note 10, at 480.

207. “Packaging” occurs when a talent agent groups together all of the artists for a particular project. *Id.* The talent agent will chose the screenwriter, the director, the actors, and the musicians; and will bring the completed “package” to a production company. *Id.*

208. *Id.*

209. Greenberg, *supra* note 2, at 494. Union discipline can include a fine, suspension, or expulsion from the union. *Id.* Suspension or expulsion can be an exceptionally harsh punishment to an artist who depends on receiving union work. *Id.*

210. *Id.* The union can proceed against a personal manager who is not licensed as a talent agent. *Id.* Despite the ability to proceed against personal managers, unions rarely enforce their regulations against personal managers. Greenberg, *supra* note 2, at 494.

211. *Id.* at 495.

212. Steinberg & Hazzard, *supra* note 7, at B7.

think that they were required to obtain a license from the Labor Commissioner.²¹³ The following cases have established the foundation for subsequent conflicting interpretations of the TAA.²¹⁴

In *Raden v. Laurie*,²¹⁵ Ted Raden, a personal manager, sued artist Piper Laurie for commissions due under a written contract.²¹⁶ The contract stated that the manager was not authorized to procure employment for the artist.²¹⁷ Laurie sought to void the contract on the ground that, in disregard of the contract, Raden had agreed to procure employment.²¹⁸ Despite Raden's denial of having ever agreeing to seek engagements for the artist,²¹⁹ the trial court granted summary judgment in favor of the artist.²²⁰ On appeal, Raden argued that summary judgment should not have been granted.²²¹ The Labor Commissioner filed an amicus brief contending that the contract was a subterfuge designed to conceal Raden's procurement function.²²² The Court of Appeals reversed the trial court's decision to grant summary judgment because there was conflicting evidence concerning the terms of the parties' agreement.²²³

213. *Id.*

214. See discussion *infra* part II.A (discussing two conflicting interpretations of the TAA).

215. 262 P.2d 61 (1953).

216. *Id.* at 63.

217. *Id.* The contract included the following clause: "nothing herein contained shall be deemed to require [the manager] or authorize [the manager] to seek or obtain employment for the [artist]." *Id.*

218. *Id.* at 63-64. The artist alleged that the unlicensed personal manager had agreed to attempt to procure employment, and had unsuccessfully tried to do so on several occasions. *Raden*, 262 P.2d at 63-64.

219. *Id.* at 64 ("It was denied in the affidavit that [the manager] stated to [the artist] that he could or would obtain employment.")

220. *Id.* at 63. According to the artist, the trial court granted summary judgment in her favor on the grounds that the manager was not licensed. *Id.* at 64.

221. *Raden*, 262 P.2d at 65.

222. *Id.*

223. *Id.*

In *Buchwald v. Superior Court*,²²⁴ the Court of Appeals presided over a dispute between the musical group Jefferson Airplane and personal manager Matthew Katz.²²⁵ The written agreement between the parties stated that the manager had agreed not to obtain employment for the group, and that he was not authorized to do so.²²⁶ Nevertheless, the group alleged that Katz had procured engagements for them.²²⁷ In an attempt to avoid the licensing requirement, Katz argued that the written agreement established that he was not subject to statutory regulation.²²⁸ The court rejected Katz's contention and declared that Katz could not use a written contract to circumvent the TAA.²²⁹ Thus, *Buchwald* has been interpreted as standing for the proposition that the substance of an agreement is controlling.²³⁰

In *Barr v. Rothberg*,²³¹ the Labor Commissioner heard a dispute between actress Roseanne Barr and her personal manager Arlyne Rothberg.²³² Barr argued that Rothberg had

224. 62 Cal. Rptr. 364 (Cal. Ct. App. 1967).

225. *Id.* at 367-68.

226. *Id.* at 367 ("The contract contained a provision reading: 'It is clearly understood that you [Katz] are not an employment agent or theatrical agent, that you have not offered or attempted or promised to obtain employment or engagements for me, and you are not so obligated, authorized or expected to do so.'").

227. *Id.* at 368.

228. *Buchwald*, 62 Cal. Rptr. at 370.

229. *Id.* at 370. The court reasoned that, according to Katz, "[t]he form of the transaction, rather than its substance would control." *Id.* The court stated, "the Act may not be circumvented by allowing language of the written contract to control." *Id.* Additionally, the court declared: "The court, or as here, the Labor Commissioner, is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality." *Id.* (citing *Lewis & Queen v. N. M. Ball Sons*, 308 P.2d 713).

230. *Buchwald*, 62 Cal. Rptr. at 370; see also *Waisbren*, 48 Cal. Rptr. 2d at 445 (stating that, "while *Buchwald* did not address the precise question of whether a license is necessary for incidental procurement activities, it did hold generally that procurement efforts require a license and that the substance of the parties' relationship, not its form, is controlling"); BIEDERMAN, *supra* note 35, at 12 (asserting that the *Buchwald* decision demonstrates how the Labor Commission's jurisdiction is implied from the performance of talent agency services).

231. No. TAC 14-90 (1992).

232. *Id.*

acted as an unlicensed agent by participating in the negotiation of her employment agreements.²³³ The Labor Commissioner found that Rothberg had worked with Barr's agents and that Rothberg had limited her input to creative issues.²³⁴ The Commission examined the totality of the manager's activity and adopted a center-of-gravity test.²³⁵ Under this test, a manager may incidentally participate in negotiations conducted by a licensed talent agent if the manager's primary concern is the client's career direction.²³⁶ The Labor Commissioner concluded that Rothberg's role in the negotiations was directed towards developing Barr's career, rather than procuring the employment agreement.²³⁷ The Labor Commissioner's decision allows managers who are concerned primarily with their artist-client's career direction to participate in agent-conducted negotiations.²³⁸

Thus, after *Barr*, commentators maintain that the Labor Commissioner is more tolerant of personal manager involvement in employment negotiations.²³⁹ Nevertheless, personal managers are not permitted to procure employment for artists.

D. Entertainment Industry Regulation in New York

Like California, New York has a significant entertainment industry.²⁴⁰ In order to regulate the industry, New York has adopted a detailed regulatory scheme.²⁴¹ This section examines how New York regulates the entertainment industry and how the New York courts administer this regulatory system.

233. SIEGEL I, *supra* note 7, at 488.

234. *Id.*

235. *Id.* at 488-89.

236. *Id.* at 488.

237. *Id.* (citing *Barr v. Rothberg*, No. TAC 14-90 (1992)).

238. SIEGEL I, *supra* note 7, at 488.

239. *Id.*

240. O'Brien, *supra* note 2, at 472.

241. BIEDERMAN, *supra* note 34, at 4.

1. Statutory Regulation

Section 172 of New York's General Business Law²⁴² prohibits the operation of an employment agency without a license;²⁴³ unlicensed procurement activities constitute a misdemeanor.²⁴⁴ New York's employment agency statute²⁴⁵ contains an exception to the licensing requirement for persons engaged in "the business of managing such entertainments . . . [and] artists . . . where such business only incidentally involves the seeking of employment"²⁴⁶ The

242. N.Y. GEN. BUS. LAW § 172 (McKinney 1988 & Supp. 1997).

243. *Id.*; see also Paul Karl Lukacs, *How New York and Tennessee Regulate Talent Agencies*, 14 ENT. & SPORTS LAW. 15, 15 (1996) (citing N.Y. GEN. BUS. LAW § 172 (McKinney 1988 & Supp. 1996)) (stating that "every person who operates an 'employment agency' for a fee must be licensed").

244. N.Y. GEN. BUS. LAW § 190; see also Lukacs, *supra* note 242, at 16 (noting that violating the licensing requirement is a misdemeanor). In New York, both the commissioner and artists have the power to initiate criminal proceedings. N.Y. GEN. BUS. LAW §§ 190, 193 (McKinney 1988 & Supp. 1996). In California, unlicensed procurement is specifically excluded from the criminal statutes. CAL. LAB. CODE § 1700.44(b). Nevertheless, the civil penalties in California can be harsh. See discussion *supra* part I.C.2.c (discussing penalties imposed for violation of TAA).

245. N.Y. GEN. BUS. LAW § 171. New York regulates talent agencies as part of the state's overall regulation of employment agencies. Lukacs, *supra* note 242, at 15 (citing N.Y. GEN. BUS. LAW §§ 170-194 (McKinney 1988 & Supp. 1996)). An "employment agency" includes a "theatrical employment agency," defined as a person who "procures or attempts to procure" engagements for "circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances" N.Y. GEN. BUS. LAW §§ 171(2)(d), 171(8) (McKinney 1988 & Supp. 1996)).

246. N.Y. GEN. BUS. LAW § 171(8); see, e.g., Lukacs, *supra* note 242, at 15 (citing N.Y. GEN. BUS. LAW § 171(8)); Soocher, *supra* note 42, at 5. New York's case law does not really flesh out the meaning of the exception. Lukacs, *supra* note 242, at 15. Typically, the court will state that the relationship does or does not satisfy the requirements of the exception. *Id.* (citing *Angileri v. Vivanco*, 137 N.Y.S.2d 662, 663 (N.Y. Sup. Ct. 1954) ("It is hard to believe that the claim [of exemption] is serious"); *Nazarro v. Washington*, 81 N.Y.S.2d 769, 770 (N.Y. Sup. Ct. 1948) ("Clearly, the terms of this contract bring it within the exception"); *Gervis v. Knapp*, 182 Misc. 311, 313 (N.Y. Sup. Ct. 1943) ("The contract establishes that plaintiff was primarily a manager")). Whether the incidental booking exception applies to an individual is a question of fact to be decided "[u]pon proof of all the facts and circumstances, including the conduct of the parties" *Hyde v. Vinolas*, 254 N.Y.S. 687, 689 (App. Div. 1932); see also

incidental booking exception applies only to representatives who function primarily as personal managers for their artist-clients.²⁴⁷

Unlike California law, New York law does not recognize an exception to the licensing requirement for individuals who work with licensed theatrical agents.²⁴⁸ Rather, New York law discourages personal managers from working with agents,²⁴⁹ by subjecting them to the potential loss of the protection of the incidental booking exception if they perform their services in concert with talent agents.²⁵⁰

New York's statutory scheme also lays out the formal steps necessary to obtain a theatrical employment agency license.²⁵¹ All licensed agencies must pay a licensing fee to, and deposit a bond with, either the state or city commis-

Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 682 (N.Y. Civ. Ct. 1977) (stating that determining whether the exception applies is a question of fact); Lukacs, *supra* note 242, at 15 (noting that whether a contract is incidentally one for agency services is a question of fact). For an example of a case in which disputed actions were held to fall within the exception, see *Heyman v. Howell*, 133 N.Y.S.2d 19 (Spec. Sess. 1954).

247. N.Y. GEN. BUS. LAW § 171(8); Jelin, *supra* note 10, at 478; Soocher, *supra* note 42, at 5; Lukacs, *supra* note 242, at 15 (citing N.Y. GEN. BUS. LAW § 171(8)). The exception is not available to all individuals who engage in incidental procurement. Jelin, *supra* note 10, at 478. For New York cases that have upheld the exception in favor of personal managers, see *Pine v. Laine*, 36 A.D.2d 924 (N.Y. App. Term 1971), *aff'd*, 321 N.Y.2d 988 (1973); *Nazarro v. Washington*, 81 N.Y.S.2d 769 (N.Y. Sup. Ct. 1948) (finding that the terms of the contract brought it within the incidental booking exception); *Gervis v. Knapp*, 182 Misc. 311 (N.Y. Sup. Ct. 1948); *Pawlowski v. Woodruff*, 122 Misc. 695 (N.Y. App. Term 1924), *aff'd*, 212 A.D. 891 (N.Y. 1925). For New York cases that have found that the procurement activity brought the relationship outside of the exception because it was more than "incidental," see *Friedkin v. Harry Walker, Inc.*, 90 Misc. 2d 680 (N.Y. Civ. Ct. 1977); *Russell-Stewart, Inc. v. Birkett*, 24 Misc. 2d 528 (N.Y. 1960); *Angileri v. Vivanco*, 137 N.Y.S.2d 662 (Sup. Ct. 1954).

248. See discussion *supra* part I.C.2.b (describing TAA exemption for working in concert with licensed talent agents).

249. Jelin, *supra* note 10, at 478.

250. In New York, working in concert with an agent has been used to prove that the personal manager was engaged in too much procurement of employment. *Id.*

251. N.Y. GEN. BUS. LAW §§ 172-176.

sioner.²⁵² Claims and suits brought against a licensed agency are often satisfied with payment from the agency's bond deposit.²⁵³

In the interest of protecting individuals seeking employment, New York places additional prohibitions on the conduct of employment agencies.²⁵⁴ New York law limits the fees that may be charged by a licensed agency.²⁵⁵ The statute also includes sections on provision enforcement,²⁵⁶ and penalties for violations.²⁵⁷

2. New York Case Law

As discussed above, New York's statutory regulation of talent agents includes an incidental booking exception for personal managers.²⁵⁸ The New York courts have had little difficulty administering the exception.²⁵⁹

In *Mandel v. Liebman*,²⁶⁰ New York's Court of Appeals faced a dispute between personal manager Louis Mandel and artist Max Liebman.²⁶¹ Mandel brought the action against Liebman to collect commissions allegedly due under

252. *Id.* § 177. The agency will pay either the industrial commissioner of the State of New York, or the commissioner of licenses of the City of New York. *Id.* § 171.1.

253. *Id.* § 178.

254. *Id.* § 187. For example, employment agencies are prohibited from sending clients to any place "maintained for immoral or illicit purposes." N.Y. GEN. BUS. LAW § 187.6.

255. *Id.* § 185. Theatrical engagements are classified as Class C. *Id.* § 185.4. As such, the maximum fee allowed is 10% of the artist's gross compensation for a single engagement or 20% for engagements in the opera and concert fields. *Id.* § 185.8.

256. *Id.* § 189.

257. N.Y. GEN. BUS. LAW § 190. Criminal proceedings are authorized for violations of the statute. *Id.*

258. See discussion *supra* part I.D.1 (describing incidental booking exception).

259. See O'Brien, *supra* note 2, at 509 (noting that only a few New York cases have involved disputes over the incidental booking exception).

260. 100 N.E.2d 149 (N.Y. 1951).

261. *Id.* at 150.

a management contract.²⁶² The Supreme Court interpreted the contract as one that is terminable at will, and dismissed the complaint.²⁶³ The Appellate Division affirmed the trial court's decision on the grounds that the contract was void and against public policy because Mandel was not required to perform any services for Liebman.²⁶⁴ On appeal, the Court of Appeals declared that New York's incidental booking exception prevented courts from finding a contract illegal solely on the grounds that an unlicensed personal manager procured employment for an artist.²⁶⁵ Furthermore, the court stated that the issue of whether an unlicensed personal manager violated New York's licensing requirements was a question of fact for the jury.²⁶⁶ Thus, *Mandel* demonstrates how New York's incidental booking exception was designed to work.

In *Friedkin v. Harry Walker, Inc.*,²⁶⁷ the Civil Court of the City of New York addressed the following issue: whether the licensing requirements applied to a booking agent who secured lectures and engagements for a motion picture and theatrical personality.²⁶⁸ William Friedkin brought suit to recover commissions paid to Harry Walker, the booking

262. *Id.* at 151.

263. *Id.*

264. 101 N.Y.S.2d 20 (App. Term 1950). Subsequently, the Appellate Division denied reargument and granted a change in opinion. 102 N.Y.S.2d 563 (App. Term 1951).

265. 100 N.E.2d at 155. The court stated that:

[I]t cannot be said as matter of law that the contract was illegal and void for the reason that plaintiff, in violation of section 172 . . . was conducting a theatrical employment agency without a license therefor. By express exemption in subdivision 4 of section 171 . . . a person engaged in the business of managing 'entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor' is not required to be licensed.

Id.; see discussion *supra* part I.D.1 (describing incidental booking exception).

266. 100 N.E.2d at 155. The court reversed the judgment and granted a new trial. *Id.*

267. 395 N.Y.S.2d 611 (Civ. Ct. 1977).

268. 395 N.Y.S.2d at 611.

agent who secured engagements for him.²⁶⁹ The court held that agents must be licensed if they do not satisfy the requirements of the incidental booking exception.²⁷⁰ The court declared that the incidental booking exception did not apply to Walker because he did not serve as Friedkin's personal manager.²⁷¹ Furthermore, the court ordered Walker to return his commissions to Friedkin.²⁷² Thus, *Friedkin* demonstrates the criteria that must be satisfied in order for the incidental booking exception to apply to an individual.²⁷³

II. THE CALIFORNIA TALENT AGENCIES ACT: JUDICIAL INTERPRETATION AND PROPOSED SOLUTIONS

Part II presents the legal conflict in the California Court of Appeals over whether unlicensed personal managers are permitted to procure employment. First, this part examines the interpretation of the TAA in *Wachs v. Curry*,²⁷⁴ a decision that allows personal managers to procure employment for artists if procurement is not a significant part of the manager's business.²⁷⁵ Second, this part discusses *Waisbren v.*

269. *Id.* at 612.

270. *Id.* at 611. The court stated: agents must be licensed “. . . unless the agent is in the business of managing such a clientele and the seeking of employment is only incidentally involved.” *Id.* There are two requirements to satisfy the incidental booking exception: (1) the representative must serve as personal manager to the client, and (2) the seeking of employment must be incidental to the managerial role. See discussion *supra* part I.D.1 (describing incidental booking exception).

271. *Friedkin*, 395 N.Y.S.2d at 613. The court stated: “[t]he instant contract cannot be characterized as one of management: it is abundantly clear upon a reading that [Friedkin's] obligation is to solicit lecturing engagements for [Walker] . . . [Friedkin] is clearly an unlicensed employment agency within N.Y. GEN. BUS. LAW 171(2)(a) and the exclusionary provision of N.Y. GEN. BUS. LAW 171(8) is clearly inapplicable.” *Id.* at 613-14 (citing *Pine v. Laine*, 36 A.D.2d 924 (N.Y. App. Term 1971), *aff'd*, 293 N.E.2d 824 (N.Y. 1973); *Allen v. Brice*, 165 Misc. 181 (N.Y. 1937); *Farnum v. O'Neill*, 141 Misc. 555 (N.Y. 1931); *Meyers v. Walton*, 76 Misc. 510 (N.Y. 1912).

272. *Friedkin*, 395 N.Y.S.2d at 614.

273. See *supra* note 270 and accompanying text (describing when incidental booking exception applies).

274. 16 Cal. Rptr. 2d 496 (Ct. App. 1993).

275. *Id.* at 503.

Peppercorn Productions, Inc.,²⁷⁶ a Court of Appeals decision that conflicts with *Wachs*, by prohibiting personal managers from procuring employment without obtaining a talent agent's license.²⁷⁷ Finally, this part reviews possible solutions to the dilemma created by these two conflicting decisions.

A. Recent California Decisions

Recently, two courts have reached opposing conclusions in interpreting the TAA.²⁷⁸ In *Wachs*, the Court of Appeals held that unlicensed personal managers can procure employment on an incidental basis.²⁷⁹ However, in *Waisbren*, the Court of Appeals held that only licensed talent agents may engage in procurement activities.²⁸⁰

1. *Wachs v. Curry*

In *Wachs v. Curry*, the California Court of Appeals, Second Appellate District, elaborated on the center-of-gravity test enunciated in *Barr*.²⁸¹ The *Wachs* court held that unlicensed personal managers may procure employment for their clients if such activities do not constitute a "significant part" of the manager's business.²⁸² *Wachs* involved a dispute based on a written contract between the entertainer Arsenio Hall, and *Wachs* and X Management, Inc. for personal management services.²⁸³ Hall filed a petition with the Labor

276. 48 Cal. Rptr. 2d 437 (Ct. App. 1995).

277. *Id.* at 441.

278. SIEGEL I, *supra* note 7, at 490.

279. *Wachs*, 16 Cal. Rptr. 2d at 503.

280. *Waisbren*, 48 Cal. Rptr. 2d at 441.

281. See discussion *supra* part I.C.3 (describing the center-of-gravity test that was adopted by the court in *Barr*).

282. *Wachs*, 16 Cal. Rptr. 2d at 496. The *Wachs* court held that personal managers who incidentally procure employment for their clients are not subject to the TAA. *Id.*; Steinberg, *supra* note 7, at B7.

283. *Wachs*, 16 Cal. Rptr. 2d at 498. Plaintiffs contracted for 15% of Hall's earnings from his entertainment industry activities. *Id.* The contract established that: "You [Hall] have not retained our personal management firm under this

Commissioner when Wachs allegedly acted as an unlicensed talent agent by procuring and attempting to procure employment for the entertainer.²⁸⁴ Hall requested that the Labor Commissioner order Wachs to return all monies received from either Hall or Hall's employers in connection with Hall's entertainment industry activities.²⁸⁵ Wachs filed an answer to Hall's petition denying the allegations.²⁸⁶

Before the Labor Commissioner could resolve the controversy, Wachs and X Management sued the Labor Commissioner in California state court,²⁸⁷ alleging that the TAA's licensing provisions were unconstitutional.²⁸⁸ Wachs argued that the TAA was unconstitutional because no rational basis existed for exempting the procurement of recording contracts from the licensing requirement.²⁸⁹ Furthermore, Wachs contended that the language of the TAA was unconstitutionally vague.²⁹⁰ Wachs sought a judgment declaring the TAA unconstitutional, thereby enjoining the Labor Commissioner from enforcing the licensing requirement.²⁹¹ The trial court, however, granted the state's motion for summary judgment and held that the licensing provisions were constitutional.²⁹²

On appeal, the Court of Appeals faced two issues: (1) whether a rational basis existed for exempting procurement

agreement as an employment agent or a talent agent. This firm has not offered or attempted or promised to obtain employment or engagement for you and this firm is not obligated, authorized or expected to do so." *Id.*

284. *Id.*

285. *Id.*

286. *Wachs*, 16 Cal. Rptr. 2d at 498.

287. *Id.* ("While Hall's petition was pending before the labor commissioner," Wachs and X Management initiated action against the Labor Commissioner "and other state officials charged with enforcing the Act.").

288. *Id.*

289. *Id.*

290. *Wachs*, 16 Cal. Rptr. 2d at 498. Wachs alleged that "it cannot be determined from the language of the Act which activities require licensing as a talent agent." *Id.*

291. *Id.*

292. *Id.*

of recording contracts from the licensing requirements of the TAA,²⁹³ and (2) whether the licensing provisions were unconstitutionally vague.²⁹⁴ In deciding the first issue, the court applied the conventional “rational relationship” test, which requires a rational relationship between the statute’s purpose and the means by which it is accomplished.²⁹⁵ The court noted that the California legislature had created the California Entertainment Commission to study the TAA,²⁹⁶ and that the Entertainment Commission recommended that the legislature exempt the procurement of recording contracts from the licensing requirements of the TAA.²⁹⁷ The court accepted the Commission’s recommendation as constituting a rational basis for the provision.²⁹⁸ Additionally, the court observed that, even within the same business, statutes may classify individuals differently when such persons perform different work.²⁹⁹ The court concluded that a rational basis existed for exempting procurement of record contracts from the licensing requirements.³⁰⁰

Second, the *Wachs* court addressed whether the licensing requirements of the TAA are void for vagueness.³⁰¹ *Wachs*

293. *Id.* at 501-02.

294. *Wachs*, 16 Cal. Rptr. 2d at 502-04.

295. *Id.* at 501 (citing *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 17 (1974)).

296. *Id.*

297. *Id.* at 502. The court noted that the California Entertainment Commission recommended the exemption because recording contracts and other personal-services contracts differ fundamentally. *Id.*; Steinberg, *supra* note 7, at B7 (citing *Wachs*, 13 Cal. App. 4th at 625-26). Additionally, the court acknowledged the personal manager’s role in securing recording contracts for artists. Steinberg, *supra* note 7, at B7 (citing *Wachs*, 13 Cal. App. 4th at 625-26).

298. *Wachs*, 16 Cal. Rptr. 2d at 502. The court stated that the “report from the Legislature’s own commission of experts provide[d] a sufficiently rational basis for the exemption from the licensing requirement.” *Id.*

299. *Id.* The court noted that “[n]umerous decisions” support classifying differently “persons in the same general type of business . . . where their methods of operation are not identical.” *Id.* (citing *Marsh & McLennan of Cal., Inc. v. City of Los Angeles*, 62 Cal. App. 3d 108, 121 (1976)).

300. *Id.* at 501.

301. *Wachs*, 16 Cal. Rptr. 2d at 502-04.

contended that the term “occupation of procuring [employment],” found in section 1700.4(a) of the TAA, did not sufficiently define what type of conduct required a license.³⁰² The court noted that the issue raised due process concerns.³⁰³ The court applied the *Hall v. Bureau of Employment Agencies*³⁰⁴ test to determine whether the statute satisfied due process.³⁰⁵ This test inquires whether words used in a statute can be made “reasonably certain” by referring to “definable sources.”³⁰⁶ The court reasoned that an individual could determine with “reasonable certainty”³⁰⁷ what types of conduct required a license by examining the dictionary definitions of “occupation” and “procurement,”³⁰⁸ and the legislative purpose and history of the TAA.³⁰⁹ Consequently, the

302. *Id.* at 502.

303. *Id.*

304. 64 Cal. App. 3d 482 (1976).

305. *Wachs*, 16 Cal. Rptr. 2d at 502 (citing *Hall*, 64 Cal. App. 3d at 494). The court stated that:

[I]f the words used may be made reasonably certain by reference to the common law, to the legislative history of the statute involved, or to the purpose of that statute, the legislation will be sustained. . . . Reasonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language.

Id. (citing *Hall*, 64 Cal. App. 3d at 494).

306. See *supra* note 305 (discussing the *Hall* test).

307. *Wachs*, 16 Cal. Rptr. 2d at 502.

308. The court defined “occupation” as “the principal business of one’s life: a craft, trade, profession or other means of earning a living.” *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 1560 (3d ed. 1981) [hereinafter WEBSTER’S]). The court stated that the term “procure” meant “to get possession of: obtain, acquire, to cause to happen or be done: bring about.” *Id.* at 503 (citing WEBSTER’S, *supra*, at 1809).

309. The court compared the activities regulated by the Artists’ Managers Act of 1943 and the TAA. *Id.* The court stated that:

Comparison of the activities regulated in the two acts shows a marked change of emphasis from the counseling function to the employment procurement function. Under the Artists’ Managers Act the focus was on persons who engaged in ‘the occupation of advising, counseling or directing artists’ in the ‘development or advancement’ of their careers and who engaged in procuring employment ‘only in connection with and as a part of’ their duties as advisor and counselor. Under the Act, the focus is on persons engaged ‘in the occupation of procur-

court concluded that the statute satisfied due process concerns.³¹⁰

Third, the court examined the TAA's legislative history under the *Hall* test and found that its purpose was the protection of artists.³¹¹ Toward this end, the court applied the *Barr* test to the personal manager's overall business to determine whether an agency license was required.³¹² The *Barr* test determines if an individual is subject to the TAA's licensing requirements by examining the totality of the manager's activities for the client at issue.³¹³ In contrast, the *Wachs* test examines the totality of the manager's activities for all clients.³¹⁴ The *Wachs* test asks if the procurement activities are a "significant portion" or an "incidental part" of an individual's business.³¹⁵ Under this test, individuals be-

ing . . . employment or engagements for an artist. . . . These persons 'may, in addition, counsel or direct artists in the development of their professional careers.'

Id. at 503.

310. *Wachs*, 16 Cal. Rptr. 2d at 503.

311. *Id.*

312. *Id.* at 502; see discussion *supra* part I.C.3 (discussing *Barr* test).

313. *Wachs*, 16 Cal. Rptr. 2d at 503.

314. *Id.* The court stated that:

We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the 'occupation' of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment function compared to the agent's counseling function taken as a whole. If the agent's employment function constitutes a significant portion of the agent's business as a whole then he or she is subject to the licensing requirement of the Act, even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirements of the Act, even if with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties. What constitutes a 'significant part' of the agent's business is an element of degree we need not decide in this case.

Id.

315. *Id.* The California Labor Commissioner was the defendant in the *Wachs* case, and "according to oral statements later made by the Labor Commissioner's lawyer, it was the Commissioner's lawyer himself who had made the 'significant

come subject to the licensing provisions when their procurement function extends beyond an incidental part of their business.³¹⁶ Thus, the court concluded that the licensing requirements of the TAA were not void due to vagueness,³¹⁷ and affirmed the trial court's decision.³¹⁸

After *Wachs*, the Labor Commissioner employed the "significant part" test when determining whether the TAA had been violated.³¹⁹

2. *Waisbren v. Peppercorn Productions, Inc.*

In *Waisbren v. Peppercorn Productions, Inc.*,³²⁰ the California Court of Appeals rejected the "significant part" test adopted in *Wachs* in favor of a rule that requires personal managers who incidentally procure employment for artists to obtain talent agency licenses. From 1982 through 1988, Brad Waisbren served as the personal manager for Peppercorn Productions, Inc., a corporation that specializes in designing puppets for use in the entertainment industry.³²¹ In 1990, Waisbren sued Peppercorn for commissions allegedly due under an oral management agreement.³²² Waisbren admitted to having only occasionally engaged in unlicensed procurement activities for Peppercorn.³²³ Consequently, the Superior Court granted summary judgment in favor of Pep-

part' argument to the appellate court." *Licensing Personal Managers, supra* note 7.

316. *Wachs*, 16 Cal. Rptr. 2d at 503.

317. *Id.* at 502.

318. *Id.* at 504.

319. See, e.g., *Church v. Brown*, No. TAC 52-92 (1994); see also *Licensing Personal Managers, supra* note 7; Steinberg, *supra* note 7, at B7.

320. 48 Cal. Rptr. 2d 437, 437 (Ct. App. 1995); Stan Soocher, *Incidental Determination*, 10 ENT. L. & FINANCE 8 (1996).

321. *Waisbren*, 48 Cal. Rptr. 2d at 439; Soocher, *supra* note 320, at 8; Pantoga, *supra* note 50, at 327; Steinberg, *supra* note 7, at B7.

322. *Waisbren*, 48 Cal. Rptr. 2d at 439; Steinberg, *supra* note 7, at B7; Pantoga, *supra* note 50, at 327; Soocher, *supra* note 320, at 8.

323. *Waisbren*, 48 Cal. Rptr. 2d at 439 n.3; Steinberg, *supra* note 7, at B7; Pantoga, *supra* note 50, at 327. On some occasions, Waisbren procured employment on behalf of Peppercorn, "but his efforts in that regard were incidental to his other responsibilities." *Waisbren*, 48 Cal. Rptr. 2d at 439.

percorn.³²⁴ The court found that the management contract was void because Waisbren had engaged in talent agency services by procuring employment for Peppercorn without having obtained a talent agency license.³²⁵

On appeal, the California Court of Appeal held that an individual must be licensed under the TAA even if the individual occasionally procures employment for artists.³²⁶ In reaching its decision, the court examined: (1) the plain meaning of the TAA;³²⁷ (2) the remedial purpose of the TAA;³²⁸ (3) the Labor Commissioner's interpretation of the TAA;³²⁹ (4) recent legislative action;³³⁰ (5) the TAA's limited exception for unlicensed persons;³³¹ and (6) prior judicial construction of the TAA.³³²

First, the *Waisbren* court analyzed the TAA's plain meaning to determine whether it applied to managers who only incidentally procure employment for artists.³³³ The court rejected Waisbren's argument that he was not required to obtain a license because his principal responsibilities did not involve procuring employment for Peppercorn.³³⁴ The court stated that Waisbren's narrow definition³³⁵ unfairly limited

324. *Id.*

325. *Id.*; Steinberg, *supra* note 7, at B7; Pantoga, *supra* note 50, at 327; Socher, *supra* note 320, at 8.

326. *Waisbren*, 48 Cal. Rptr. 2d at 441. The court had to "decide whether a person needs to be licensed under the Act if he occasionally procures employment for an artist" and "conclude[d] that a license is required." *Id.*

327. *Id.*

328. *Id.* at 441-42.

329. *Id.* at 442.

330. *Waisbren*, 48 Cal. Rptr. 2d at 442-45.

331. *Id.* at 445.

332. *Id.* at 445-46.

333. *Id.* at 441.

334. *Id.* The court disagreed with Waisbren's contention that "because 'occupation' is defined as 'the principal business of one's life,'" a license is only necessary when "a person's principal responsibilities involve procuring employment for an artist." *Waisbren*, 48 Cal. Rptr. 2d at 441.

335. *See supra* note 334 (describing the narrow definition of "occupation" that Brad Waisbren supported).

the term “occupation.”³³⁶ The court further reasoned that a person can engage in an “occupation” even if he does not spend most of his time in that business.³³⁷ The court concluded that a person can be engaged in an “occupation” that is not his principal line of work.³³⁸

Second, the *Waisbren* court reasoned that all persons who procure employment for artists must be licensed because of the purpose behind the TAA.³³⁹ The court declared that the TAA served a remedial purpose,³⁴⁰ and that the *Wachs* test defeated this purpose because it was “unworkable.”³⁴¹ Furthermore, the court reasoned that limiting an unlicensed manager to engaging in only incidental procurement activities would not help the artist who falls “victim to a violation of the [TAA].”³⁴² Therefore, the court concluded that both the “occasional” talent agent and the full-time agent are sub-

336. *Waisbren*, 48 Cal. Rptr. 2d at 441. The court observed that the narrow definition “ignores the possibility that a person can have more than one job.” *Id.*

337. *Id.* The court stated that “‘occupation’ is synonymous with ‘employment,’ which includes ‘temporary or occasional work or service for pay.’” *Id.* (citing WEBSTER’S, *supra* note 306, at 743); *see also* Pantoga, *supra* note 50, at 328 (noting that individuals can engage in part-time occupations, and can have occupations that are not their sole line of work); Steinberg, *supra* note 7, at B7.

338. *Waisbren*, 48 Cal. Rptr. 2d at 441. Additionally, the court reasoned that “the Act is entirely consistent with the concept of dual occupations—for example, being a personal manager and a talent agent.” *Id.* The court declared that their “interpretation of the statutory language d[id] not render the term ‘occupation’ mere surplusage.” *Id.* at 441 n.6. The court proposed that the legislature included the term “occupation” because they “intended to cover those who are compensated for their procurement efforts.” *Id.*

339. *Id.* at 441-42. The legislature enacted the TAA to protect artists. *See* discussion *supra* part I.C.1.a (explaining legislative intent of the TAA).

340. *Waisbren*, 41 Cal. Rptr. 2d at 441. The court noted that “[t]he Act is a remedial statute.” *Id.* (citing *Buchwald v. Superior Court*, 62 Cal. Rptr. 364, 367 (Ct. App. 1967)). The TAA was enacted for the benefit of artists seeking employment. *Id.* (citing *Buchwald*, 62 Cal. Rptr. at 367).

341. *Id.* at 442. The court stated that “[t]he statutory goal of protecting artists would be defeated if the Act applied only” when a personal manager significantly engages in procurement of “employment for artists.” *Id.*; *see also* Steinberg, *supra* note 7, at B7 (stating that the *Waisbren* court noted that the significant part test was unworkable and would undermine the remedial purpose of the TAA).

342. *Waisbren*, 48 Cal. Rptr. 2d at 442.

ject to the TAA's regulations.³⁴³

Third, the *Waisbren* court examined the Labor Commissioner's interpretation of the TAA.³⁴⁴ The court noted that the Labor Commissioner had authority to enforce the TAA.³⁴⁵ The court stated that the Labor Commissioner had interpreted the TAA as requiring all individuals who procure employment for artists to obtain licenses.³⁴⁶ The court observed that an enforcing agency's interpretation of a statute is entitled to great consideration.³⁴⁷ Furthermore, the court noted that courts should defer to an enforcing agency's reasonable interpretation of a statute.³⁴⁸ Finally, the court concluded that the Labor Commissioner's interpretation of

343. *Id.* The court "refuse[d] to believe that the Legislature intended to exempt a personal manager from the Act—thereby allowing violations to go unremedied—unless his procurement efforts cross some nebulous threshold from 'incidental' to 'principal.'" *Id.* The court expanded on its argument, stating:

Perhaps a personal manager's procurement activities should no longer be considered 'incidental' when they exceed 10 percent of his total business. Or perhaps the line should be drawn at 25 or 50 percent. We simply cannot make this determination because the Act provides no rational basis for doing so. Moreover, even if we could somehow justify using a particular figure, it would be virtually impossible to determine accurately whether a personal manager had exceeded it.

Id. at 442 n.10.

344. *Id.* at 442.

345. *Waisbren*, 48 Cal. Rptr. 2d at 442 (citing CAL. LAB. CODE § 1700.44(a)).

346. *Id.* The Labor Commissioner "has long taken the position that a license is required for incidental procurement activities." *Id.*; see also Steinberg, *supra* note 7, at B7. But see *Licensing Personal Managers*, *supra* note 7 (noting that the "significant part" test was urged on the courts by the Labor Commissioner, and that the test has been used by the Labor Commissioner ever since). In *Derek v. Callan*, No. TAC 18-80 (Jan. 14, 1982, Lab. Comr.), a personal manager argued that the TAA allowed incidental procurement of employment. *Id.* at 6. The Labor Commissioner responded, "[t]hat is like saying you can sell one house without a real estate license or one bottle of liquor without an offsale license." *Id.*; *Waisbren*, 48 Cal. Rptr. 2d at 442.

347. *Waisbren*, 48 Cal. Rptr. 2d at 442. The court stated that "[t]he construction of a statute by an agency charged with its administration is entitled to great weight." *Id.* (citing *Henning v. Industrial Welfare Com.*, 46 Cal.3d 1262, 1269 (1988)).

348. *Id.* "If the administrative agency's construction is reasonable," the *Waisbren* court declared that other courts "should defer to it." *Id.* (citing *Henning*, 46 Cal.3d at 1269).

the TAA—that a license is required to engage in any procurement activities on behalf of an artist—was reasonable, and thus, upheld it.³⁴⁹

Fourth, the *Waisbren* court considered the California legislature’s position as requiring a license for the incidental procurement of employment.³⁵⁰ Additionally, the court analyzed the California Entertainment Commission’s report regarding the TAA.³⁵¹ The court observed that the Commission had determined that a license was necessary to perform any procurement activity.³⁵² Furthermore, the court noted that the California Legislature had adopted all of the Commission’s recommendations.³⁵³ Consequently, the court concluded that the legislature had approved the Commission’s view that only licensed talent agents can procure employment for artists.³⁵⁴

Fifth, the *Waisbren* court declared that the TAA’s limited exception to the licensing requirement—namely, working in concert with a licensed talent agent³⁵⁵—required all indi-

349. *Id.* Because the court found “the Labor Commissioner’s interpretation of the Act” to be reasonable, the court “agree[d] with his analysis of the licensing requirement.” *Waisbren*, 48 Cal. Rptr. 2d at 442.

350. *Id.* The court declared that “the Legislature has adopted the view that a license is required for incidental procurement activities.” *Id.*

351. *Id.* at 443; see discussion *supra* part I.C.2.a (describing California’s Entertainment Commission’s report).

352. *Waisbren*, 48 Cal. Rptr. 2d at 443 (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 6). The Report’s first issue was: “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?” *Id.* (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 6). The Report indicated that “[n]o person, including personal managers, should be allowed to procure employment for an artist in any manner without being licensed as a talent agent.” *Id.* (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 1).

353. *Id.* at 444.

354. *Id.* (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 11). The court observed that “[t]his legislative approval extends to the Commission’s finding that the Act imposes a total prohibition on the procurement efforts of unlicensed persons.” *Waisbren*, 48 Cal. Rptr. 2d at 444-45 (citing ENTERTAINMENT COMMISSION REPORT, *supra* note 98, at 11).

355. Pursuant to section 1700.44(d), unlicensed representatives may act “in

viduals who procure employment for artists to obtain agency licenses.³⁵⁶ Under this exception, a personal manager who cooperates with a licensed talent agent can seek employment for an artist.³⁵⁷ The court stated that reading the TAA to allow unlicensed individuals to engage in incidental procurement activities would render this exception “superfluous.”³⁵⁸ Accordingly, the court concluded that the TAA does not allow for unlicensed procurement by managers because it contains the exception regarding managers’ working with licensed agents.³⁵⁹

Finally, the *Waisbren* court analyzed prior judicial construction of the TAA.³⁶⁰ The *Waisbren* court noted that, in *Buchwald*, the court interpreted the TAA to require a license for all procurement activities.³⁶¹ Additionally, the *Waisbren* court examined *Wachs*,³⁶² and acknowledged the *Wachs*

conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract” for an artist. CAL. LAB. CODE § 1700.44(d); see discussion *supra* part I.C.2.b (discussing exception for working in concert with licensed talent agents).

356. *Waisbren*, 48 Cal. Rptr. 2d at 445.

357. *Id.* (citing O’Brien, *supra* note 2, at 500).

358. *Id.* The *Waisbren* court reasoned that “this exception to the licensing scheme would be unnecessary if incidental or occasional procurement efforts did not require a license in the first place.” *Id.*; see also Steinberg, *supra* note 7, at B7 (stating that the *Waisbren* court reasoned that the exception for working with licensed agents would be unnecessary if incidental procurement did not require a license).

359. *Waisbren*, 48 Cal. Rptr. 2d at 445.

360. *Id.* at 445-46.

361. *Waisbren*, 48 Cal. Rptr. 2d at 445 (citing 62 Cal. Rptr. at 364); see also discussion *supra* part I.C.3 (describing the *Buchwald* decision). Although *Buchwald* did not address specifically “whether a license is necessary for incidental procurement activities, it did hold generally that procurement efforts require a license and that the substance of the parties’ relationship, not its form, is controlling.” *Id.*

362. *Waisbren*, 48 Cal. Rptr. 2d at 445-46; see discussion *supra* part II.A.1 (discussing the *Wachs* decision). The *Waisbren* court noted:

[T]hat *Wachs* applied an overly narrow concept of “occupation” and did not consider the remedial purpose of the Act, the decisions of the Labor Commissioner, or the Legislature’s adoption of the view (as expressed in the California Entertainment Commission’s Report) that a license is necessary for incidental procurement activities.

Waisbren, 48 Cal. Rptr. 2d at 446.

court's holding that the licensing requirement does not apply unless an individual's procurement activities constituted a "significant part" of his business.³⁶³ The *Waisbren* court determined that, because *Wachs* declined to define "significant part,"³⁶⁴ the import of its holding was unclear.³⁶⁵ Additionally, the court noted that *Wachs* addressed a limited issue: whether the TAA's use of the term "procure" was unconstitutionally vague.³⁶⁶ The *Waisbren* court held that the TAA did not support the *Wachs* holding, and was therefore wrongly decided.³⁶⁷ Consequently, the court rejected *Waisbren's* argument that the TAA did not require him to have an agent's license because his procurement activities were only occasional.³⁶⁸

Subsequently, the Court of Appeals ruled that the management contract was void due to *Waisbren's* unlicensed procurement efforts.³⁶⁹ To this end, the court affirmed the trial court's decision, granting summary judgment in favor of *Peppercorn*.³⁷⁰

Although *Waisbren* is the latest statement of the law, it does not clarify the confusion in California's entertainment

363. *Waisbren*, 48 Cal. Rptr. 2d at 446 (citing *Wachs*, 16 Cal. Rptr. 2d at 503).

364. *Id.* (citing *Wachs*, 16 Cal. Rptr. 2d at 503).

365. *Id.*

366. *Id.*

367. *Id.* The court stated that:

Given *Wachs's* recognition of the limited nature of the issue before it, we regard as dicta the court's interpretation of the term "occupation" and its statement that the Act does not apply unless a person's procurement function is significant. Because the *Wachs* dicta is contrary to the Act's language and purpose, we decline to follow it. . . . Thus, we conclude that the *Wachs* dicta is incorrect to the extent it indicates that a license is required only where a person's procurement efforts are "significant."

Waisbren, 48 Cal. Rptr. 2d at 446; see also Steinberg, *supra* note 7, at B7 (noting that the *Waisbren* court rejected the "significant part" test as incorrect dicta).

368. *Waisbren*, 48 Cal. Rptr. 2d at 445. The court disagreed with *Waisbren's* argument that the *Wachs* holding compelled "the conclusion that a personal manager need not be licensed if he procures employment for an artist on an occasional basis." *Id.*

369. *Id.* at 437.

370. *Id.*

industry.³⁷¹ The *Waisbren* decision directly contradicts the critical portion of the *Wachs* holding.³⁷² Commentators contend that more litigation is sure to follow due to these two conflicting California Court of Appeal decisions.³⁷³

B. Possible Solutions

Personal managers perform an essential role in the entertainment industry.³⁷⁴ In their normal course of business, however, they risk incurring legal sanctions.³⁷⁵ Commentators have suggested ways for the legislature to remove these risks and thereby encourage individuals to perform personal management services.³⁷⁶ This section examines two potential solutions for resolving the conflict of whether personal managers may ever procure employment for clients. The first proposal suggests that the legislature amend the TAA to include an incidental booking exception. The second recommendation recommends that the legislature enact a statute which explicitly regulates personal managers.

1. The Incidental Booking Exception

Commentators argue that the California Legislature should amend the TAA to include an incidental booking exception.³⁷⁷ They contend that this proposal would be beneficial in two respects: (1) it would encourage individuals to become personal managers, and (2) it would provide benefits to an artist employing the services of a personal man-

371. SIEGEL I, *supra* note 7, at 490.

372. *Id.*

373. *Id.*

374. Greenberg, *supra* note 2, at 508; *see* discussion *supra* part I.A.2 (describing personal manager's role in the entertainment industry).

375. Greenberg, *supra* note 2, at 508; *see* discussion *supra* part I.C.2.c (discussing legal sanctions that may be imposed on individuals who violate the TAA).

376. Greenberg, *supra* note 2, at 508. A solution must encourage persons to become personal managers and protect their interests. *Id.*

377. *Id.* at 509-10; O'Brien, *supra* note 2, at 508-09.

ager.³⁷⁸ Drafted carefully, they assert that an incidental booking exception would be advantageous to both personal managers and artists.³⁷⁹

Commentators suggest enacting an incidental booking exception because it acknowledges an entertainment industry reality—that “any personal manager worth his or her commission”³⁸⁰ procures at least some employment for a client.³⁸¹ Critics also argue that the exception would remove some of the risks that personal managers face while conducting their day-to-day services³⁸²—namely, that an artist will attempt to void an otherwise legitimate contract for management services,³⁸³ and subject the personal manager to harsh penalties from the Labor Commissioner for engaging in any unlicensed procurement activity.³⁸⁴ Accordingly, many commentators contend that an incidental booking exception would encourage individuals to become personal managers.

Commentators also assert that artists would benefit from an incidental booking exception.³⁸⁵ They argue that artists would receive better representation under the exception,³⁸⁶ because an artist who is unhappy with the engagements supplied by their licensed talent agent could secure employment elsewhere.³⁸⁷ Consequently, commentators argue that artists would receive better representation and more

378. Greenberg, *supra* note 2, at 509-10.

379. *Id.* at 509-10.

380. *See supra* note 76 and accompanying text (explaining that personal managers must procure employment).

381. *See supra* notes 49-78 and accompanying text (discussing the role of the personal manager in the entertainment industry).

382. Greenberg, *supra* note 2, at 509-10.

383. *See supra* notes 143-48 and accompanying text (explaining that artist may seek to void management contracts in order to avoid paying for management services).

384. Greenberg, *supra* note 2, at 509-10; *see discussion supra* part I.C.2.c (describing penalties that the Labor Commissioner has authority to administer).

385. Greenberg, *supra* note 2, at 510.

386. *Id.*

387. *Id.*

choice of engagements if the legislature enacted the exception.³⁸⁸

In order to clearly define who can engage in unlicensed procurement, commentators Johnson and Lang have suggested exempting personal managers who do not regularly perform procurement activities.³⁸⁹ A second approach is to exempt personal managers who have made reasonable, but unsuccessful, attempts at securing a licensed talent agent for their clients.³⁹⁰

Critics of the incidental booking exception counter that such a law would be ambiguous because there is no workable test.³⁹¹ Nonetheless, proponents maintain that New York has successfully employed its incidental booking exception in a sensible manner,³⁹² and that the California Legislature should use New York's exception as a model for drafting a similar provision.³⁹³ Accordingly, they propose to amend section 1700.4(a) of the TAA to state the following:

Talent agency 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 (1) that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter; *and* (2) *that a person or corporation shall not be subject to regulation and licensing under this chapter (a) when the person or corporation is acting as personal manager for an artist or artists, and (b) the person's or corporation's services only incidentally involves procur-*

388. *Id.*

389. *Id.* The New York courts have employed this method in administering their incidental booking exception. *See, e.g.,* Friedkin v. Harry Walker Inc., 90 Misc.2d 680 (N.Y. Civ. Ct. 1977).

390. Greenberg, *supra* note 2, at 510.

391. *Id.* (citing *Hearings*, *supra* note 83, at 49-50 (statement of Harry Sloan, National Executive Secretary to the Screen Actors Guild)).

392. O'Brien, *supra* note 2, at 509.

393. *Id.*

*ing, offering, promising, or attempting to procure employment or engagements for an artist or artists.*³⁹⁴

Drafted in this manner, the TAA would include an incidental booking exception that closely parallels New York's exception.³⁹⁵

Understandably, talent agents oppose the exception, claiming that it would harm their business.³⁹⁶ They contend that personal managers would have an advantage over talent agents because managers would be allowed to perform agent functions without being subjected to the TAA's regulations.³⁹⁷ However, proponents of the exception note that personal managers would find it very difficult to perform the functions of both manager and talent agent on a full-time basis, particularly because a great amount of time is required to perform either task by itself.³⁹⁸ Furthermore, proponents of the exception maintain that, if the artist achieves even some degree of success, this time-management issue would soar, prompting most managers to secure a talent agent for the client.³⁹⁹ Additionally, proponents argue that, because of the influence talent agents have in the entertainment industry, enacting the exception would not significantly interfere with their business.⁴⁰⁰

394. See CAL. LAB. CODE § 1700.4 (language in italics denotes proposed change).

395. See discussion *supra* part I.D.1 (describing New York's incidental booking exception).

396. Greenberg, *supra* note 2, at 510.

397. *Id.* at 510-11 (citing *Hearings, supra* note 83, at 49 (statement of Harry Sloan)).

398. *Id.* at 511 (citing *Hearings, supra* note 83, at 230 (statement of R.L. Melcher, President, Association for Talent Representatives)).

399. *Id.* (citing *Hearings, supra* note 83, at 188 (statement of Joe Gottfried, Conference of Personal Managers)).

400. *Id.* Commentators contend that it is unlikely that an incidental booking exception would significantly reduce the amount of business available to talent agents. Greenberg, *supra* note 2, at 511. They reason that talent agents control the most important engagements and have exclusive agreements with most employers. *Id.*

2. A Personal Managers Act

Commentator Gary Greenberg contends that amending the TAA to include an incidental booking exception would not solve the problem.⁴⁰¹ Greenberg argues that the California legislature should provide personal managers with a separate and specific statement concerning their activities.⁴⁰² Accordingly, he suggests that California legislators enact a PMA to expressly regulate personal managers.⁴⁰³

Greenberg contends that the PMA would serve two basic functions: (1) providing personal managers and artists with access to inexpensive dispute resolution; and (2) defining the fiduciary obligations that personal managers owe to their clients.⁴⁰⁴ Additionally, Greenberg maintains that the PMA should define the personal manager's activities.⁴⁰⁵ Furthermore, he asserts that the PMA should include an incidental booking exception, thereby allowing personal managers to engage in incidental procurement activities.⁴⁰⁶ Finally, Greenberg argues that the PMA should avoid imposing restrictive requirements on the activities of personal managers.⁴⁰⁷

First, Greenberg observed that the TAA provides talent agents and artists with an inexpensive form of dispute resolution.⁴⁰⁸ Greenberg contends that the PMA should contain provisions for inexpensive dispute resolution, thereby benefiting both personal managers and artists.⁴⁰⁹

401. *Id.* at 512.

402. *Id.*

403. *Id.*

404. Greenberg, *supra* note 2, at 514.

405. *Id.* at 512.

406. *Id.* at 514.

407. *Id.* at 513-14.

408. See CAL. LAB. CODE § 1700.44 (granting Labor Commissioner exclusive jurisdiction in resolving disputes arising under the TAA).

409. Greenberg, *supra* note 2, at 512. Commentators assert that a similar provision in the PMA would provide the same economic advantage to personal managers and artists. *Id.* Proponents of the PMA maintain that the new statute must specify the method of selecting hearing officers. *Id.* at 512 n.134. They al-

Second, Greenberg suggests that a PMA would provide personal managers with a definitive statement regarding their required conduct.⁴¹⁰ As noted above, personal managers and artists carry on highly personal relationships;⁴¹¹ also, in many cases, an artist is vulnerable to the manager who is controlling the artist's career.⁴¹² As a result, Greenberg contends that the legislature should clearly establish the fiduciary obligations that personal managers owe to their clients.⁴¹³

Third, Greenberg argues that the legislature should not include restrictive requirements in the PMA.⁴¹⁴ He contends that the prohibitions and requirements of the new regulatory statute should be designed to encourage personal management relationships.⁴¹⁵ Greenberg reasons that restrictions should not deter people from becoming personal managers, nor should they heavily regulate personal managers' compensation.⁴¹⁶ Specifically, he maintains that the PMA should be less restrictive than the TAA in the following ways: (1)

lude to the inequities in the enforcement of the TAA as an indication that not all of the Labor Commissioner's administrative law judges are familiar with the realities in the entertainment industry. *Id.* They would avoid this situation by having groups representing artists and personal managers establish a list of hearing officers. *Id.* Alternatively, they would draft a selection process for agreeing upon a hearing officer. Greenberg, *supra* note 2, at 512 n.134.

410. *Id.* at 512.

411. *See supra* notes 59-66 and accompanying text (explaining that personal managers and artists engage in personal relationships).

412. Greenberg, *supra* note 2, at 512.

413. *Id.* In a fiduciary relationship, one party depends upon another to satisfy certain needs, such as in an agency relationship. *See generally* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983). At common law, misrepresentation and misappropriation are actionable fiduciary violations. Greenberg, *supra* note 2, at 512 n.135. Commentators assert that the remedies available at common law would be expanded by including a statutory requirement of utmost good faith in the PMA. *Id.* at 512.

414. *Id.* at 513.

415. *Id.* According to the United States Senate Advisory Committee on Industrial Relations, regulations should develop the roles of creative entrepreneurs and small businesses. *Id.* (quoting U.S. DEP'T OF COMMERCE, FINAL REPORT OF THE SENATE ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION 13 (1979)).

416. Greenberg, *supra* note 2, at 513. Proponents contend that the PMA should impose as few restrictions as possible. *Id.*

eliminate the requirement for a bond;⁴¹⁷ (2) disregard the requirement that managers maintain a place of business separate from their residence;⁴¹⁸ (3) minimize administrative fees and charges;⁴¹⁹ (4) minimize penalties for statute violations (other than breach of fiduciary duty);⁴²⁰ and (5) avoid excessive penalties by delineating the damages available for specific violations.⁴²¹ Greenberg contends that drafting the PMA in this manner would ensure that the cost of complying with the statute would not deter many people from becoming personal managers.⁴²²

Greenberg concedes that, because of the various functions performed by personal managers, it would be difficult to determine an appropriate fee limit.⁴²³ If fees are limited, however, he asserts that the limits should conform to industry standards—at least twenty percent for musicians and fifteen percent for other artists.⁴²⁴ Additionally, Greenberg argues that the PMA should not limit the duration of management agreements; nonetheless, if it does, any limitation should allow terms of at least five years for musicians and three years for other artists.⁴²⁵

To protect artists, Greenberg contends that the PMA should authorize the Labor Commissioner to terminate an agreement when the personal manager is not applying his “best efforts” to his management role.⁴²⁶ Moreover, as an

417. *Id.*

418. *Id.*

419. *Id.*

420. Greenberg, *supra* note 2, at 513.

421. *Id.*

422. *Id.* Commentators do not want compliance costs to deter people from becoming personal managers. *Id.*

423. *Id.*

424. Greenberg, *supra* note 2, at 513. Proponents of the PMA use these figures because they were adopted as maximums by the Conference of Personal Managers. *Id.* at 513 n.137

425. *Id.* at 513. Commentators argue that because personal managers are not rewarded for their efforts until their clients achieve success, limiting their ability to contract for a long term will deprive them of reasonable compensation. *Id.*

426. *Id.* at 513-14. Under this provision, the personal manager should be

advantage to personal managers, Greenberg maintains that managers should be allowed to obtain equity interests in clients.⁴²⁷

Greenberg also argues that the PMA should not require personal managers to be licensed. First, he contends that licensing unnecessarily drives up compliance costs.⁴²⁸ Second, a PMA that establishes the conduct required by both parties would render licensing unnecessary.⁴²⁹

Greenberg asserts that personal managers should be allowed to engage in procurement activities without obtaining a talent agent's license.⁴³⁰ He argues that the incidental booking exception is the best solution,⁴³¹ and that personal managers should not be allowed to engage in unlimited procurement activities that would frustrate the purpose of the TAA.⁴³² Greenberg reasons that, if it is not possible to enact a workable incidental booking exception, the current law must be maintained.⁴³³

III. ENACTING THE PERSONAL MANAGERS ACT WOULD REMOVE THE PROBLEMS CREATED BY THE *WAISBREN* DECISION

The *Waisbren* court's decision to prohibit all unlicensed procurement activities reflects the court's misunderstanding of entertainment industry realities,⁴³⁴ where personal man-

given the benefit of a presumption that he was acting reasonably. Greenberg, *supra* note 2, at 514.

427. *Id.* Allowing equity interests will encourage managers to invest in clients. *Id.* Commentators contend that because the PMA includes a statement of required fiduciary behavior, financial involvement will not create conflicts of interest. *Id.*

428. *Id.*

429. Greenberg, *supra* note 2, at 514.

430. *Id.*

431. *Id.*

432. *Id.* Proponents of the PMA do not advocate allowing personal managers to procure employment on an unlimited basis because that would neutralize the TAA by punishing compliance. *Id.*

433. Greenberg, *supra* note 2, at 514.

434. See discussion *supra* part II.A.2 (describing the *Waisbren* decision).

agers often must procure employment for artists.⁴³⁵ The *Waisbren* decision, however, prohibits personal managers from engaging in procurement activities without obtaining a license.⁴³⁶ By enacting the PMA, the legislature would remove personal managers from the dilemma that they encounter under the *Waisbren* decision.⁴³⁷ The PMA protects the interests of both personal managers and artists.⁴³⁸ Moreover, the PMA is compatible with the TAA and would therefore provide artists with greater protection.⁴³⁹ As detailed below, this Comment argues that the California Legislature should enact the PMA to govern personal managers.⁴⁴⁰

A. *The Waisbren Court Interpreted the TAA Incorrectly*

This Comment maintains that the *Waisbren* court's interpretation of the TAA was flawed. The court should have interpreted the TAA as permitting unlicensed procurement of employment on an incidental basis.

In *Waisbren*,⁴⁴¹ the Court of Appeals held that any individual who procures employment for an artist must obtain a talent agent's license.⁴⁴² The court arrived at this interpretation of the TAA by examining: (1) the plain meaning of the TAA;⁴⁴³ (2) the remedial purpose of the TAA;⁴⁴⁴ (3) the Labor

435. See O'Brien, *supra* note 2, at 483-84 (stating that personal managers procure employment for artists); Abdo, *supra* note 35, at 3 (noting that managers procure employment); see also discussion *supra* part I.A.2 (describing why most personal managers procure employment for artists).

436. *Waisbren*, 48 Cal. Rptr. 2d at 437.

437. See discussion *supra* part I.A.2 (describing the dilemma that personal managers face because they are not allowed to procure employment).

438. See discussion *infra* part III.B (explaining how the PMA protects the interests of both personal managers and artists).

439. See *supra* notes 83-88 (describing the purpose behind the TAA).

440. See *supra* notes 404-07 (describing how the PMA governs personal managers).

441. *Waisbren*, 48 Cal. Rptr. 2d at 437; see discussion *supra* part II.A.2 (discussing the *Waisbren* decision).

442. *Waisbren*, 48 Cal. Rptr. 2d at 437.

443. *Id.* at 441.

444. *Id.* at 441-42.

Commissioner's interpretation of the TAA;⁴⁴⁵ (4) recent legislative action;⁴⁴⁶ (5) the TAA's exception for working in concert with licensed talent agents;⁴⁴⁷ and (6) prior judicial construction of the TAA.⁴⁴⁸ Yet, the court's analysis was flawed in its reasoning and examination of: (1) the TAA's plain meaning;⁴⁴⁹ (2) the TAA's remedial purpose;⁴⁵⁰ (3) the Labor Commissioner's interpretation of the TAA;⁴⁵¹ and (4) the TAA's exception for cooperating with licensed agents.⁴⁵²

First, the court inaccurately characterized the term "occupation" when it examined the TAA's plain meaning.⁴⁵³ The TAA defines a "talent agency" as "a person or corporation who engages in the *occupation* of procuring . . . employment or engagements for an artist or artists."⁴⁵⁴ The legislature included the term "occupation" specifically to regulate talent agents—individuals whose principal line of work is the procurement of employment.⁴⁵⁵ The *Waisbren* court, however, determined that an individual could be engaged in an "occupation" even if it was not his principal line of work.⁴⁵⁶ This definition contravened the

445. *Id.* at 442.

446. *Id.* at 442-45.

447. *Waisbren*, 48 Cal. Rptr. 2d at 445.

448. *Id.* at 445-46.

449. *See supra* notes 333-38 and accompanying text (discussing the *Waisbren* court's analysis of the TAA's plain meaning).

450. *See supra* notes 339-43 and accompanying text (discussing the *Waisbren* court's analysis of the TAA's remedial purpose).

451. *See supra* notes 344-49 and accompanying text (discussing the *Waisbren* court's analysis of the Labor Commissioner's interpretation of the TAA).

452. *See supra* notes 355-59 and accompanying text (discussing the *Waisbren* court's analysis of the TAA's exception for working in concert with licensed talent agents).

453. *See Waisbren*, 48 Cal. Rptr. 2d at 441 (defining "occupation" broadly).

454. *See CAL. LAB. CODE* § 1700.4(a) (emphasis added) (defining "talent agency").

455. *See Wachs*, 16 Cal. Rptr. 2d at 503 (stating that an individual is engaged in the occupation of procuring employment if their procurement efforts constitute a significant part of their business); *see also* discussion *supra* part II.A.1 (discussing *Wachs* decision).

456. *See Waisbren*, 48 Cal. Rptr. 2d at 441 (defining "occupation" broadly).

legislature's intentions.

In similar fashion, the *Waisbren* court reasoned that the legislature had included the term "occupation" in the TAA to regulate individuals who receive compensation for their procurement activities.⁴⁵⁷ Under this broad definition, the TAA would define a "talent agency" as any person or corporation who *is compensated for* procuring employment or engagements for an artist or artists.⁴⁵⁸ But under this broad definition of occupation, the term occupation is unnecessary in defining talent agency⁴⁵⁹ because the TAA's definition of talent agency would be the same even if the word occupation was omitted. Therefore, if defined broadly, the term occupation is rendered superfluous in the TAA's definition of talent agency.⁴⁶⁰

Second, when the court examined the remedial purpose behind the TAA, it erroneously assumed that unlicensed incidental procurement of employment harms artists.⁴⁶¹ The court properly recognized that the legislature enacted the TAA to protect artists;⁴⁶² however, the court also assumed that personal managers abstain from obtaining a talent agency license in order to take advantage of artists.⁴⁶³ The court concluded that allowing unlicensed personal managers to procure employment on an incidental basis would harm artists and frustrate the TAA's purpose.⁴⁶⁴ In doing so, the court failed to acknowledge the indispensable role that personal managers play in the career development of artists.⁴⁶⁵

457. *Id.* at 441 n.6.

458. *See* CAL. LAB. CODE § 1700.4(a) (italics denote changes made to coincide with the *Waisbren* court's definition of occupation).

459. *See id.* (defining "talent agency").

460. *But see Waisbren*, 48 Cal. Rptr. 2d at 441 n.6.

461. *Id.* at 442.

462. *Id.* at 441; *see also* discussion *supra* part I.C.1.a (describing purpose behind the TAA).

463. *Waisbren*, 48 Cal. Rptr. 2d at 442.

464. *Id.*

465. *See* discussion *supra* part I.A.2 (describing unique role played by personal managers); *see* discussion *supra* part I.A.2 (describing why personal man-

In most cases, an unlicensed personal manager procures employment because no talent agent is willing to represent the artist.⁴⁶⁶ Furthermore, the court ignored the entertainment industry reality that personal managers devote at least incidental portions of their time to procuring employment for artists.⁴⁶⁷ Consequently, the court failed to recognize the personal manager's dilemma concerning the procurement of employment.

The court's assumption that the artist is the victim in actions under the TAA was similarly meritless.⁴⁶⁸ Artists initiate most cases to void their management agreements only *after* becoming successful, typically to avoid compensating the personal manager who helped them develop their careers.⁴⁶⁹ These cases often involve TAA violations based on the manager's failure to comply with the licensing requirement.⁴⁷⁰ Such artists seek to void the management agreement on the contention that the personal manager has performed talent agent functions without a license.⁴⁷¹ Thus, the alleged TAA violations involve the procurement of employment without a license—activities that actually help the artist—rather than any action which might harm the artist's career.⁴⁷² Consequently, the courts proceeded under an incorrect assumption.

agers engage in unlicensed procurement of employment).

466. Taubman, *supra* note 44, at 85; Quast, *supra* note 35, at 203; *see also* discussion *supra* part I.A.1 (describing why talent agents do not represent aspiring artists).

467. *See* discussion *supra* part I.A.2 (stating that personal managers engage in unlicensed procurement of employment). The court observed that personal managers may be in situations where they would like to procure employment. *Waisbren*, 48 Cal. Rptr. 2d at 441. The court's observation, however, ignored the fact that most personal managers must procure employment for their clients. *See* O'Brien, *supra* note 2, at 483-84; Abdo, *supra* note 35, at 3.

468. *Id.* at 492; *see* discussion *supra* part I.C.1.c (describing harsh penalties that may be imposed on personal managers for engaging in unlicensed procurement activities).

469. O'Brien, *supra* note 2, at 492.

470. *Id.*

471. *Id.*

472. *Id.*

Additionally, the court incorrectly assumed that the “significant part test”⁴⁷³ included a vague and unworkable standard.⁴⁷⁴ This Comment contends that there is a workable standard behind the “significant part test” and the “incidental booking exception.”⁴⁷⁵ The “significant part test” includes the same standard as the “incidental booking exception: “⁴⁷⁶ unlicensed procurement is permissible if it is incidental to the managerial role.⁴⁷⁷ New York’s regulatory system contains an “incidental booking exception” for personal managers.⁴⁷⁸ Furthermore, the New York courts have administered the exception with ease.⁴⁷⁹ Additionally, after *Wachs*, the California Labor Commissioner employed the “significant part test” when determining whether a talent agency license was necessary for procuring employment.⁴⁸⁰ Therefore, both the “significant part test” and the “incidental booking exception” are based upon the same workable standard.

Third, when examining the Labor Commissioner’s interpretation of the TAA, the court ignored instances in which the Commissioner permitted unlicensed procurement on an incidental basis.⁴⁸¹ Consequently, the court incorrectly

473. See discussion *supra* part II.A.1 (describing the significant part test that was adopted in *Wachs*); see also discussion *supra* part I.B.3 (describing the center-of-gravity test that was adopted in *Barr*).

474. *Waisbren*, 48 Cal. Rptr. 2d at 442.

475. *But see id.*

476. See discussion *supra* part II.B.1 (describing the incidental booking exception); see also discussion *supra* part I.D.1 (describing New York’s incidental booking exception).

477. See discussion *supra* part II.B.1 (describing the incidental booking exception); see also discussion *supra* part I.C.1 (describing New York’s incidental booking exception).

478. See discussion *supra* part I.D.1 (describing New York’s incidental booking exception).

479. See *O’Brien*, *supra* note 2, at 509 (noting that New York courts have had little difficulty administering the exception); see also discussion *supra* part I.D.2 (describing New York cases that have administered the exception).

480. See, e.g., *Church v. Brown*, No. TAC 52-92 (1994); see also *Steinberg*, *supra* note 7, at B7 (stating that the Labor Commissioner employed the significant part test after *Wachs*).

481. *Waisbren*, 48 Cal. Rptr. 2d at 442.

stated the Labor Commissioner's position as requiring a license for any procurement of employment.⁴⁸² Prior to the *Waisbren* decision, the Labor Commissioner allowed unlicensed procurement on an incidental basis.⁴⁸³ In *Barr*, the Labor Commissioner adopted the center-of-gravity test, thereby allowing personal managers to participate in employment negotiations if their primary concern was the artist's career direction.⁴⁸⁴ In *Wachs*, the Labor Commissioner's attorney presented the significant part test to the court to support the constitutionality of the TAA.⁴⁸⁵ Furthermore, after *Wachs*, the Labor Commissioner employed the significant part test to allow unlicensed procurement of employment when it was incidental to the managerial role.⁴⁸⁶ The *Waisbren* court, however, ignored the Labor Commissioner's rulings on the interpretation of the TAA that allowed unlicensed procurement.⁴⁸⁷ Therefore, the *Waisbren* court incorrectly stated the Labor Commissioner's position.⁴⁸⁸

Finally, the court reasoned fallaciously that the TAA did not allow the unlicensed procurement of employment because it specifically included an exception for working in concert with licensed talent agents.⁴⁸⁹ The court assumed that personal managers only incidentally cooperate with li-

482. *Id.*

483. See *supra* note 486 and accompanying text (noting that the Labor Commissioner employed the significant part test after *Wachs*).

484. See discussion *supra* part I.C.3 (describing the center-of-gravity test that was adopted in *Barr*).

485. *Licensing Personal Managers*, *supra* note 7; see discussion *supra* part II.A.1 (describing the significant part test that was adopted in *Wachs*).

486. See, e.g., *Church v. Brown*, No. TAC 52-92 (1994); see also Steinberg, *supra* note 7, at B7 (observing that the Labor Commissioner employed the significant part test after *Wachs*); *Licensing Personal Managers*, *supra* note 7 (stating that after *Wachs*, the Labor Commissioner's office employed the significant part test).

487. *Waisbren*, 48 Cal. Rptr. 2d at 442.

488. *But see id.*

489. See *id.* at 445 (reasoning that the exception for working with licensed agents would be unnecessary if incidental procurement did not require a license).

censed agents,⁴⁹⁰ and reasoned that the exception for cooperating with licensed agents would be unnecessary if the TAA allowed the unlicensed procurement of employment on an incidental basis.⁴⁹¹

The TAA's exception for working with licensed agents, however, is fully compatible with allowing unlicensed procurement on an incidental basis.⁴⁹² This exception and the "incidental booking exception" are not mutually exclusive they can work together. The TAA's exception for working with talent agents allows personal managers to negotiate employment contracts if their efforts are in concert with, and at the request of, a licensed agent.⁴⁹³ The "significant part test" implicitly contains an "incidental booking exception" that allows personal managers to procure employment when it is incidental to their managerial role.⁴⁹⁴ Under the "incidental booking exception," personal managers can engage in procurement activities that are incidental to their managerial role.⁴⁹⁵ Additionally, if a personal manager wants to negotiate employment contracts, and such activities would not fit under the incidental booking exception, the manager can satisfy the requirements for working with a licensed agent.⁴⁹⁶ In other words, the exception for working with agents allows unlicensed personal managers to negotiate employment contracts when such efforts are not allowed under the

490. The court reasoned that allowing unlicensed procurement if it was incidental to the managerial role would render the exception for working with agents unnecessary. *Id.* However, the court assumed that when personal managers avail themselves of the exception for cooperating with agents, their efforts are incidental to their managerial role.

491. *Id.*

492. The TAA could contain both exceptions.

493. CAL. LAB. CODE § 1700.44(d). See discussion *supra* part I.C.1.b (describing the exception for working in concert with a licensed talent agent).

494. See discussion *supra* part II.A.1 (describing the significant part test); see also discussion *supra* part II.B.1 (describing incidental booking exception).

495. See discussion *supra* part II.B.1 (describing incidental booking exception).

496. CAL. LAB. CODE § 1700.44(d).

incidental booking exception.⁴⁹⁷ Thus, the TAA can contain an incidental booking exception without rendering the exception for working with agents superfluous.⁴⁹⁸

B. *Enacting the PMA Would Be Advantageous to Both Personal Managers and Artists*

Personal managers and artists would benefit if the California Legislature enacted the PMA.⁴⁹⁹ By recognizing the practices of the industry, the PMA: (1) encourages individuals to perform personal management services,⁵⁰⁰ and (2) protects the interests of artists employing personal management services.⁵⁰¹ Adoption of the PMA would be favorable to personal managers and artists because it would acknowledge the realities in the entertainment industry.⁵⁰²

1. The PMA Protects the Interests of Personal Managers and Encourages Individuals to Perform Personal Management Services

Enacting the PMA would encourage individuals to provide personal management services because the PMA would recognize certain realities of the entertainment industry.⁵⁰³ The PMA recognizes that: (1) personal managers must procure employment for artists;⁵⁰⁴ (2) personal managers endure

497. *See id.*

498. *But see Waisbren*, 48 Cal. Rptr 2d. at 445.

499. *See* discussion *supra* part II.B.2 (describing how personal managers and artists would benefit from the legislature enacting the PMA).

500. *See* discussion *infra* part III.B.1 (describing how the PMA encourages individuals to provide personal management services).

501. *See* discussion *infra* part III.B.2 (describing how the PMA protects the interests of artists).

502. Not only does the PMA acknowledge the industry realities, but it includes provisions which were drafted to remove specific problems currently found in the industry.

503. *See* discussion *supra* part I.A.2 (describing why personal managers engage in procurement efforts on behalf of their clients).

504. *See supra* note 75 and accompanying text (stating that personal managers do procure employment for clients).

a higher level of risk than talent agents;⁵⁰⁵ (3) personal managers have disputes with artists other than those involving violations of the TAA;⁵⁰⁶ (4) the restrictions contained in the TAA provide a disincentive for personal managers to obtain talent agency licenses;⁵⁰⁷ and (5) under the TAA, the law was ambiguous because it was not consistently enforced.⁵⁰⁸

First, the PMA contains an incidental booking exception because personal managers do procure employment for artists.⁵⁰⁹ In their day-to-day activities, personal managers face situations in which they must procure employment for artists.⁵¹⁰ Under the TAA, personal managers may not procure employment without a license.⁵¹¹ Therefore, personal managers often find themselves in the following dilemma: they could engage in unlicensed procurement and risk receiving severe penalties from the Labor Commissioner,⁵¹² or they could subject themselves to the great expense of complying with the TAA and the entertainment union regulations.⁵¹³ The PMA recognizes that personal managers are called upon to procure employment, and allows them to do so on an incidental basis.⁵¹⁴

505. See *supra* notes 70-72 and accompanying text (explaining why personal managers endure greater risk than talent agents).

506. Personal managers and artists have disputes regarding matters other than whether the personal manager has obtained a talent agency license.

507. See discussion *supra* part I.C.1.b (describing restrictive regulations that must be followed pursuant to the TAA).

508. See discussion *supra* part I.C.1.d (explaining how the TAA is ambiguous); see also discussion *supra* part II.A (demonstrating how the TAA has been enforced inconsistently).

509. See *supra* note 75 and accompanying text (stating that personal managers do procure employment for clients).

510. *Greenberg*, *supra* note 2, at 490.

511. See discussion *supra* part II.A.2 (describing the *Waisbren* holding that precludes unlicensed procurement of employment).

512. See discussion *supra* part I.C.1.c (explaining the Labor Commissioner's authority to penalize unlicensed procurement efforts).

513. See discussion *supra* part I.C.2 (illustrating how entertainment unions regulate licensed talent agents).

514. See discussion *supra* part II.B.1 (describing incidental booking exception); see also discussion *supra* part II.B.2 (explicating the PMA).

Second, the PMA recognizes that personal managers endure a high level of risk; consequently, it does not restrict compensation or the terms of contracts, but rather allows managers to obtain equity interests in their clients.⁵¹⁵ Personal managers face a higher level of risk than talent agents.⁵¹⁶ Because they represent unestablished artists, personal managers need a longer contract term to receive adequate compensation for their services.⁵¹⁷ Furthermore, personal management services include both personal and business concerns.⁵¹⁸ Additionally, when representing unestablished artists, personal managers are often called upon to invest their own money in the artist's projects.⁵¹⁹ The PMA acknowledges these practical matters and protects the personal manager's freedom to contract for favorable provisions.⁵²⁰

Third, the PMA provides access to inexpensive dispute resolution.⁵²¹ This recognizes the reality that disputes between personal managers and artists involve issues other than violations of the TAA.⁵²² Under the TAA, personal managers and artists can employ the Labor Commissioner to resolve disputes that involve potential violations of the TAA.⁵²³ Personal managers and artists, however, often have

515. *See supra* note 427 and accompanying text (stating that the PMA allows personal managers to obtain equity interests in their clients).

516. *See supra* notes 70-72 and accompanying text (explaining why personal managers endure greater risk than talent agents).

517. *See supra* notes 54-58 and accompanying text (discussing why personal managers represent unestablished artists).

518. *See supra* notes 59-66 and accompanying text (describing the personal manager's role in both personal and business concerns).

519. *See supra* note 60 and accompanying text (stating that personal managers frequently invest in their clients' projects).

520. *See supra* notes 423-27 and accompanying text (describing personal manager's freedom to contract under the PMA).

521. *See supra* notes 408-09 and accompanying text (noting that the PMA provides access to inexpensive dispute resolution).

522. *See supra* note 506 (explaining that personal managers and artists have disputes regarding issue other than unlicensed procurement).

523. *See supra* note 408 and accompanying text (stating that the TAA provides dispute resolution for problems arising under the TAA).

disputes that do not involve the TAA. Presently, they do not have access to an inexpensive forum where they can resolve such controversies. The PMA acknowledges this fact and authorizes the Labor Commissioner to resolve disputes that arise under the PMA.⁵²⁴

Fourth, because the PMA would contain fewer compliance costs than the TAA, less people would be deterred from becoming personal managers.⁵²⁵ The significant compliance costs associated with the TAA is one reason why personal managers do not obtain talent agency licenses.⁵²⁶ Instead, the PMA limits the restrictions placed on personal managers and keeps the cost of compliance very low.⁵²⁷ Thus, the PMA does not deter people from providing personal management services.

Finally, the PMA contains a statement describing the personal manager's required conduct.⁵²⁸ This pronouncement helps avoid the ambiguity that surrounded the judiciary's inconsistent enforcement of the TAA.⁵²⁹ The TAA included the ambiguous term, "procurement,"⁵³⁰ which left reasonable people guessing whether they had violated the licensing requirement.⁵³¹ Additionally, the Labor Commissioner and courts did not consistently enforce the TAA.⁵³² In *Barr*, the

524. See *supra* note 409 and accompanying text (noting that the PMA provides access to inexpensive dispute resolution).

525. See *supra* notes 414-22 and accompanying text (describing how the PMA would contain fewer restrictions than the TAA).

526. *Greenberg*, *supra* note 2, at 491.

527. See *supra* note 422 and accompanying text (explaining that the PMA does not deter individuals from becoming personal managers).

528. See *supra* notes 410-13 and accompanying text (noting that the PMA describes the personal manager's required conduct).

529. See *supra* notes 410-13 and accompanying text (explaining the definitive statement provided by the PMA).

530. See discussion *supra* part I.C.1.d (describing the ambiguity that surrounded the term "procurement").

531. O'Brien, *supra* note 2, at 497.

532. See discussion *supra* part II.A (discussing conflicting interpretations of the TAA).

Labor Commissioner employed a center-of-gravity test.⁵³³ In *Wachs*, the court adopted the significant part test.⁵³⁴ In *Waisbren*, the court rejected the significant part test in favor of a rule that prohibited any unlicensed procurement of employment.⁵³⁵ Conversely, the PMA would avoid ambiguity and inconsistency by including a definitive statement of the personal manager's required conduct. This would remove many of the TAA's shortcomings and would encourage individuals to become personal managers.

2. The PMA Protects Artists' Interests and Encourages Artists to Engage the Services of Personal Managers

In addition to helping personal managers, enacting the PMA would also protect artists' interests by recognizing certain entertainment industry realities.⁵³⁶ The PMA acknowledges that: (1) artists need personal managers to procure employment on their behalf;⁵³⁷ (2) artists have disputes with personal managers other than those involving violations of the TAA;⁵³⁸ and (3) the Labor Commissioner should be authorized to terminate management agreements when the manager is not providing his best efforts.⁵³⁹

First, the PMA contains an incidental booking exception because artists need personal managers to engage in the pro-

533. See discussion *supra* part I.C.3 (illustrating the Labor Commissioner's use of the center-of-gravity test).

534. See discussion *supra* part II.A.1 (describing the adoption of the significant part test).

535. See discussion *supra* part II.A.2 (explaining the rejection of the significant part test).

536. If the legislature enacts the PMA, artists will be protected better than under the TAA alone.

537. This is particularly true in the case of an aspiring artist who is unable to gain the representation of a talent agent. Greenberg, *supra* note 2, at 490.

538. See *supra* note 506 and accompanying text (explaining that artists have disputes with personal managers that do not concern the TAA).

539. See *supra* note 426 and accompanying text (noting that the PMA authorizes the Labor Commissioner to terminate a contract when the personal manager has failed to provide his best efforts).

curement of employment.⁵⁴⁰ Aspiring artists employ the services of a personal manager before they can gain the representation of a talent agent.⁵⁴¹ Without an agent, artists are forced to rely on personal managers for procurement of employment.⁵⁴² The PMA acknowledges this fact and allows personal managers to procure employment for artists on an incidental basis.⁵⁴³

Second, the PMA provides artists with access to inexpensive dispute resolution for controversies with personal managers.⁵⁴⁴ Presently, artists and personal managers do not have a forum where they can resolve disputes involving issues other than violations of the TAA. The PMA recognizes the importance of inexpensive dispute resolution and authorizes the Labor Commissioner to provide artists and managers with such a mechanism.⁵⁴⁵

Finally, the PMA authorizes the Labor Commissioner to terminate a management contract when personal managers do not put forth their best efforts, because there is no limit on the terms of management contracts.⁵⁴⁶ Artists may be vulnerable to personal managers who control their careers.⁵⁴⁷ This risk may be increased under the PMA because it provides personal managers with greater freedom to con-

540. *See supra* note 75 and accompanying text (stating that personal managers need to procure employment on behalf of artists).

541. *See supra* notes 55-56 and accompanying text (explaining why aspiring artists employ personal management services before talent agency services).

542. Artists find it difficult to procure employment on their own behalf.

543. *See supra* notes 430-33 and accompanying text (noting that the PMA contains an incidental booking exception).

544. *See supra* notes 403-09 and accompanying text (describing why the PMA provides inexpensive dispute resolution).

545. *See supra* notes 408-09 and accompanying text (noting that the PMA provides access to inexpensive dispute resolution).

546. *See supra* note 426 and accompanying text (stating that the PMA provides the Labor Commissioner with the authority to terminate contracts when the personal manager is not rendering his best efforts).

547. *See supra* notes 411-12 and accompanying text (noting that the personal nature of the relationship might lead an artist to be vulnerable to the personal manager who is controlling the artist's career).

tract.⁵⁴⁸ The PMA, however, alleviates this risk by authorizing the Labor Commissioner to terminate contracts when personal managers do not provide their best efforts to fulfill their managerial obligations.

By realizing how the TAA interferes with their interests, the PMA is able to increase the protection afforded to artists.

CONCLUSION

Personal managers provide invaluable services to the aspiring artist. Unable to obtain representation from talent agents, aspiring artists often turn to personal managers for guidance and career development. Both artists and managers cooperate to increase the artists' chances for success. By procuring employment, personal managers, however, may be subject to the TAA. The California Court of Appeals have disagreed over the TAA's application to personal managers. A personal manager, who does not have a talent agent's license, may receive harsh punishment from the Labor Commissioner for any involvement in procuring employment for an artist. The unique services that a personal manager provides cannot be found elsewhere in the entertainment industry. Enactment of a Personal Managers Act will regulate personal managers. Subjecting personal managers to the TAA places a burdensome obligation on managers. To prevent the problems created by recent judicial decisions, and still protect artists, the California legislature should enact a Personal Managers Act with an incidental booking exception.

548. *See supra* notes 414-22 and accompanying text (explaining how the PMA provides personal managers with greater freedom to contract).