

Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists

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Lawyers increasingly play important and pervasive roles in the California-centered entertainment industry. When they step out of traditional legal roles to engage in agency or managerial ventures with their artist-clients, however, they risk breaching the licensing regulations of California's Talent Agencies Act. The Act, which is called into operation by the activity of "procuring, offering, promising, or attempting to procure employment or engagements for an artist," was designed to protect artists against iniquitous or overreaching conduct by their personal representatives. But unlike talent agents, personal managers, and other players in the industry, lawyers already answer to an ethical and legal code more rigorous than that of the Act. This Comment argues that the Act is at least redundant as applied to attorneys and potentially subjects them to penalties for tasks, made illicit when done for artist-clients, that they customarily perform for clients other than artists. Two alternatives to subjecting lawyers to the Act are proposed: the California legislature should substitute a registration requirement for attorneys in lieu of the Act's full-licensure requirements or, alternatively, reconsider its decision not to include an "incidental booking" exception within the Act. Either would help clarify the ambiguous scope of the Act and eliminate the dilemma that those lawyers who seek employment for their artist-clients might face. Absent such change, attorneys in California's entertainment industry are in an uncertain position—they constantly must beware of a statutory regime without knowing whether it actually applies to their conduct. And they can ignore the Act only at their peril.

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INTRODUCTION

Over the past century, California has become a dominant force in the entertainment industry.¹ California's success in this business is due, in part, to the efforts and interaction of an assortment of artists and artists' representatives including talent agents, personal managers, promoters, business managers, accountants, and attorneys.² Of these representatives, perhaps none plays a more pervasive role than the lawyer.³

Unlike artists' other personal representatives, attorneys participate in all aspects of the entertainment industry, from representing artists and other creative personnel in their personal and business affairs to representing motion picture studios, record companies, and distribution entities in their corporate or commercial endeavors. In representing their artist clients, attorneys may provide purely legal services or may serve in extralegal capacities by functioning as talent agents or personal managers.⁴ Passage of attorneys into these less customary roles can occur intentionally⁵ or, as is more often the case, inadvertently.⁶ The attorney who engages in agency or managerial ventures, however, risks breaching the licensing regulations of California's Talent Agencies Act (the Act),⁷ a

1. For purposes of this Comment, the term "entertainment industry" refers to all species of entertainment and subsidiary businesses, including music, video, television, motion pictures, and radio. Florida, Nashville, and New York are also significant bases of entertainment-industry activity.

2. The artist's advisors and consultants are known collectively as "personal representatives." Luaine L. Quast, *Musicians, Their Representatives, and the Agreements Between Them*, in 1990 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 191, 191 (John D. Viera & Robert Thorne eds.).

3. For a more detailed description of the entertainment attorney's role, see *infra* text accompanying notes 69-84.

4. See Donna G. Cole-Wallen, Comment, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations*, 8 HASTINGS COMM. & ENT. L.J. 481, 482 (1986) ("The popularity of entertainment law has inevitably led many entertainment attorneys to enter into non-legal activities and to perform roles beyond traditional legal representation.").

5. Cole-Wallen states: "The complexity of contract negotiation [in the entertainment industry] may lead the attorney to believe that the talent agent and personal manager are inadequate for the job. Thus, the attorney may expand his role and eliminate the need for other representatives." *Id.* at 492-93.

6. Cole-Wallen states: "The managerial function of advising and counseling artists in their careers . . . [is] inextricably bound with problems of law and contracts. Sometimes attorneys gravitate into the managerial functions because there are gray areas between legal advice (the attorney's function) and career advice (the personal manager's function)." *Id.* at 493 (footnote omitted). In the music business, for instance,

attorneys hold positions of great power . . . Part of this power has come about by default. In the earlier years of the business, most executives, agents and managers lacked the education and background to run big companies and handle the affairs of millionaire clients. Even today, executives lacking strong backgrounds in business management and business law keep their lawyers close at hand to protect them against unwise decisions and flawed contracts.

DAVID BASKERVILLE, *MUSIC BUSINESS HANDBOOK AND CAREER GUIDE* 158 (3d ed. 1982).

7. CAL. LAB. CODE §§ 1700-1700.47 (West 1989 & Supp. 1991); see also Cole-Wallen, *supra*

statute designed to protect artists against iniquitous or overreaching conduct by certain personal representatives.

Specifically, it is the activity of "procuring, offering, promising, or attempting to procure employment or engagements for an artist"⁸ that calls the Act into operation.⁹ Under prevailing interpretations, attorneys who engage in such procurement activities for their artist-clients—whether inadvertently or intentionally—are subject to the Act's requirements and penalties.¹⁰ Unfortunately, few practitioners in the entertainment industry are aware of these expansive interpretations of the Act; and most practitioners fail to recognize that their status as attorneys might not insulate them from the Act's regulations.¹¹

Attorneys who register with the California Labor Commissioner as talent agents expose themselves to the various financial, documentary,

note 4, at 516-17 n.189 ("[S]ince the Labor Commission feels that attorneys are subject to licensing under the Act, attorneys probably are subject to penalties for violating the provisions of the Act.").

8. CAL. LAB. CODE § 1700.4(a) (West 1989).

9. *Id.* §§ 1700.4-.5 (West 1989 & Snpp. 1991) (persons without a license from the Labor Commissioner are prohibited from "procuring, offering, promising, or attempting to procure employment" for artists). The absence of any definition of "procurement" is one of the Act's greatest shortcomings, and generates great confusion among practitioners, artists, and lawmakers. For a more detailed discussion, see *infra* Section III.B.

10. See *supra* note 7; see also *The 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 Marilyn Lazar, Referee, Labor Commission, Los Angeles) ("When attorneys act as an artists' [sic] manager [now called talent agent], they must be licensed . . ."); REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION TO THE GOVERNOR AND LEGISLATURE 6 (1985) [hereinafter ENTERTAINMENT COMMISSION REPORT] (submitted pursuant to Act of Aug. 31, 1982, ch. 682, sec. 6, 1982 Cal. Stat. 2814, 2816, repealed by Act of July 17, 1984, ch. 553, 1984 Cal. Stat. 2185 (effective Jan. 1, 1986)) ("[A]nyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist . . ."); Richard L. Feller, *California's Revised Talent Agencies Act: Fine-Tuning the Regulation of Employment Procurement in the Entertainment Industry*, ENT. & SPORTS LAW., Fall 1986, at 3, 3 ("[T]he Act does not exempt attorneys from its coverage when acting as legal counsel."); 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.) [hereinafter 1983 HANDBOOK] ("[E]ven if an individual claims to act as a personal manager, business manager, attorney, joint venturer, or officer of a loan-out company for an artist, it will not prevent the California Labor Commissioner from resolving claims that are made against that individual by the artist . . ." (emphasis added)); Cole-Wallen, *supra* note 4, at 517 ("[I]t is likely that California attorneys will be subject to the licensing requirements of the Talent Agency [sic] Act if they perform procurement services for an artist."); Interview with H. Thomas Cadell, Chief Counsel, State of California Department of Industrial Relations, Division of Labor Standards Enforcement, in San Francisco, Cal. (Mar. 8, 1991) (stating that if an attorney licensed to practice in the State of California procures or attempts to procure employment for an entertainment client, he would be subject to penalties for acting contrary to the Act). Although there is no specific statutory language in the Act that expressly governs personal managers or attorneys, they seem to be regulated inferentially by virtue of the Act's definition of "talent agent." See CAL. LAB. CODE § 1700.4(a) (West 1989).

11. Cole-Wallen, *supra* note 4, at 512 (citing *Hearings, supra* note 10, at 222). Informal conversations between the author and numerous practitioners in the entertainment industry also sustain this contention.

and bureaucratic burdens the Act imposes. If attorneys remain unlicensed, the Act effectively prohibits them from performing tasks—such as contract negotiations—that are customarily associated with and executed by attorneys; consequently, lawyers not licensed under the Act are potentially vulnerable to the Labor Commissioner's broad authority to grant relief against unlicensed talent agents.

The consequences of acting as an unlicensed talent agent can be disastrous. Anyone who purposely solicits engagements for an artist-client or inadvertently crosses the line into regulated activity faces harsh penalties, including forfeiture of commissions, repayment of past fees, loss of future earnings, and invalidation of management and collateral agreements.¹² In *Pryor v. Franklin*,¹³ for example, comedian/actor Richard Pryor brought an action under the Act against his personal representative, David Franklin. Over a period of years, Franklin had purportedly acted as Pryor's personal manager, attorney, and loan-out corporation officer, and had procured employment for Pryor and conducted his other business affairs.¹⁴ Franklin challenged Pryor's claim, arguing that he had not violated the Act because he procured employment for Pryor in his capacities as attorney and officer of Pryor's loan-out company, not as a talent agent.¹⁵ Franklin challenged the Labor Commissioner's jurisdiction on the same grounds.¹⁶ The Labor Commissioner summarily rejected Franklin's contentions, holding that the Commissioner has the power and duty to "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality."¹⁷ Pursuant to that authority, the Commissioner found that Franklin's characterization of his procurement services as those of a lawyer rather than a talent agent constituted "blatant subterfuge" since Franklin was not licensed to practice law in California.¹⁸ In short, Franklin lost because he procured employment for Pryor without first obtaining a talent agency license. And his attorney defense was rejected because he was not licensed to practice law in California. For these and other reasons, the Labor Commissioner granted Pryor an award exceeding \$3,000,000.¹⁹

12. See *infra* text accompanying notes 123-28.

13. No. TAC 17 MP 114 (Cal. Labor Comm'r 1982), discussed in Singer, *supra* note 10, at 256-57.

14. Singer, *supra* note 10, at 256-57.

15. *Id.* at 257.

16. *Id.* at 256.

17. *Id.* (quoting *Pryor*, No. TAC 17 MP 114, at 17).

18. *Id.*; see *id.* at 261-62 n.7 (citing to evidence at the hearing that Franklin was licensed to practice only in the District of Columbia, not California).

19. DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 491 (1987). While the final resolution in *Pryor* (and the large award against Franklin) rested in large part on Franklin's fraudulent activity and breach of fiduciary duty, *id.* at 491-93

More recently, talk show host Arsenio Hall instituted a Labor Commission proceeding against his former representative, Robert Wachs.²⁰ Hall is seeking to force Wachs, who is also an attorney, personal manager, and owner of a management company, to return all fees and commissions—reportedly totalling almost \$8,000,000²¹—on the grounds that Wachs violated the Act by procuring employment for Hall without a talent-agency license.²² If the Labor Commissioner follows *Pryor* and finds that Wachs performed procurement activities without a talent-agency license, Wachs could be compelled to return those fees and commissions.

Although the question of whether attorneys who partake in procurement activities for artist-clients have violated the Act arose during legislative hearings more than fifteen years ago,²³ the issue has yet to be directly addressed by the Labor Commissioner,²⁴ and the subject has generated considerable confusion among practitioners in the business for years.²⁵ Concededly, neither *Pryor* nor the Arsenio Hall proceeding directly examines the question, and the Labor Commissioner's failure to discuss it invites arguments that the problem is more illusory than real. Nevertheless, the cases do suggest that attorneys who engage in procurement activity for their artist-clients must be wary of the Act's proscriptions and penalties. And although it has not been conclusively established that attorneys who procure employment for artists fall within the scope of the Act, *Pryor* and the Hall proceeding indicate that such a scenario is certainly foreseeable.²⁶ Given current Labor Commissioner interpretations of the Act, which correlate certain functions traditionally

(analyzing *Pryor*, No. TAC 17 MP 114), the case is significant primarily because it acknowledges the issue of whether the Act applies to attorneys, rejects Franklin's attorney defense, and perpetuates the confusion on the issue of the Act's applicability to attorneys licensed to practice law in California.

20. Lauren Blau, *Former Arsenio Hall Manager Challenges Talent Agencies Act*, L.A. DAILY J., Jan. 14, 1991, at 3.

21. *Id.*

22. *Id.*

23. See *Hearings*, *supra* note 10, at 9-10 (testimony of Marvin Faris, then-President of Artists' Managers Guild, stating that while the original intention of the Act may have been only to control talent agents, it is presently unclear who is covered), 43 (testimony of Roger Davis, then-Vice President of Artists' Managers Guild, commenting that attorneys were not meant to be covered because the state bar was too strong and such regulation would be duplicative).

24. Singer, *supra* note 10, at 257 ("One of the issues that has not yet been decided . . . is whether an attorney who is licensed to practice law in California would be in violation of the Talent Agencies Act if he or she were to procure employment for his or her artist/client.").

25. See Cole-Wallen, *supra* note 4, at 514 (confusion exists as to whether personal representatives other than talent agents are subject to the Act's regulations).

26. See *Hearings*, *supra* note 10, at A-25. Walter L.M. Lorimer, an attorney who participated in drafting the Artists' Managers Bill in 1959, asserted that even an opinion by the State's Legislative Counsel that attorneys were not covered by the Act would not prevent an artist from suing his attorney to recover fees paid if the lawyer had, in the course of rendering legal services, also assisted the artist in obtaining employment. *Id.*

performed by attorneys to unlawful procurement activity,²⁷ it is simply a matter of time before an artist seizes on the theory of attorney liability under the Act in order to recover fees and commissions from a lawyer who disregarded or was uninformed about the Act's potentially broad scope.

This Comment explores the Act's applicability to attorneys who procure employment for artist-clients, arguing that the Act should be amended to remedy an important shortcoming: the Act's failure to exempt attorneys from its operation, particularly when they do no more than perform tasks traditionally associated with the practice of law. This Comment is also intended as a tacit admonition to lawyers in the entertainment industry who seek or procure employment for artist-clients to be aware of—and wary of—the Act; any entertainment-industry attorney actively engaged in the representation of artists who is ignorant of the Act and its potential operation risks defending an action initiated by an artist seeking to recover fees and commissions by charging that the lawyer acted as an unlicensed talent agent. Conversely, the artist might attempt to use the Act as a shield against an attorney who has instituted a proceeding against the artist to collect fees or commissions. In such a situation the artist could defend by arguing that the attorney is entitled to no fees because he acted as an unlicensed talent agent.²⁸

Part I of this Comment introduces various entertainment-industry players, delineates their roles, and explains the complicated, interlocking web of relationships that they establish. The discussion reveals the difficulties the legislature and the participants themselves have had in attempting to classify the activities of the various players into bright-line categories for purposes of remedial legislation such as the Talent Agencies Act.

Part II probes the mechanics of the Act. It acknowledges the Labor Commissioner's original jurisdiction, explains the Act's application and bond requirements, and examines its regulation of business practices. This Part also describes procedures before the Labor Commissioner and analyzes the Commissioner's extremely broad authority to enforce the Act and fashion remedies.

Part III advocates an express exemption from the licensure requirements of the Act for attorneys. This Part first examines the Act's purposes and legislative history, arguing that it never purported to apply to the activities of attorneys and that prevailing interpretations have for-

27. See *infra* text accompanying notes 171-77.

28. This scenario, of course, assumes that either the attorney initially brought the action before the Labor Commissioner or the artist successfully argued that the action fell within the Labor Commissioner's original jurisdiction over disputes between artists and talent agents *per* Section 1700.44(a) of the California Labor Code. See *infra* Section II.A.

saken original intent, effectively casting the Act's net too widely. Second, it argues that the Act's ambiguous language—especially its reliance on the term procurement—unfairly subjects attorneys to the Act's proscriptions by equating tasks customarily performed by attorneys to illicit conduct and by giving inadequate warning of what activity constitutes procurement. Third, and perhaps most importantly, this Part contends that the Act is redundant as applied to attorneys, who are already governed by the Rules of Professional Conduct of the State Bar of California²⁹ (hereinafter Professional Rules) and the State Bar Act.³⁰ In light of these regulations, Part III concludes that members of the California Bar should be exempted from the requirements of the Act.

This last argument is predicated on the tautological and occasionally contradictory nature of the Act's requirements in light of California's legal-ethics code. The Professional Rules and State Bar Act, specifically drafted for lawyers, are more rigorous than the requirements of the Act and adequately secure the Act's professed goal: protection of artists from unscrupulous personal representatives. The Act is therefore redundant as applied to lawyers. Even when attorneys don more than one hat and act as attorney-managers or attorney-agents, artists are protected by the requirement that attorneys always conduct themselves according to the ethical and legal constraints imposed on them as attorneys. Moreover, several of the Act's requirements are in direct conflict with the Professional Rules. Simply stated, there is no clearly expressed policy or pragmatic basis for attorney licensure under the Act in light of California's legal-ethics rules.

Part IV proposes two alternatives to express exemption of attorneys. The first alternative invites the California Legislature to substitute a registration requirement for attorneys in lieu of the Act's current full-licensure requirements. The second alternative recommends that the California Legislature reconsider its decision not to include an "incidental booking" exemption in the Act. Such an exception—specifically tailored to exclude lawyers from the Act when procurement activity is not their primary function—would further clarify the intended scope of the Act and would eliminate the dilemma that currently faces those lawyers who only periodically or incidentally seek employment for their artist-clients.

29. CAL. CIV. & CRIM. RULES, RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rules 1-100 to 5-320 (West Supp. 1990) [hereinafter PROFESSIONAL RULES].

30. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1991).

I
PLAYERS IN THE CALIFORNIA ENTERTAINMENT
INDUSTRY³¹

Much of the confusion surrounding the Talent Agencies Act stems from the inherent imprecision with which the roles and diverse activities of the various entertainment-industry participants are delineated.³² The functions of the assorted personal representatives are indistinct, overlapping, and often misunderstood, making bright-line classifications for legislative purposes difficult. In order to dispel some of these misconceptions, unravel the intricate tangle of relationships, and facilitate further discussion of the central issues of this Comment, descriptions of the more important representatives and their roles are set out below.³³

*A. Talent Agents*³⁴

The talent agent's primary function is to market the artist's talent to buyers within the entertainment industry.³⁵ After locating such purchas-

31. Readers well-versed in the activities, purposes, and functions of artists' personal representatives, and conversant in the operation of the entertainment industry, should proceed to Part II.

32. Cf. Cole-Wallen, *supra* note 4, at 528 (stating that one problem confronting personal representatives is the indefinite nature of their functions and the tendency of the services they render artists to overlap).

33. Artists are broadly defined in the Act:

"Artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

CAL. LAB. CODE § 1700.4(b) (West 1989). This definition does not include athletes, who are dealt with separately in another chapter of the Labor Code. See *id.* §§ 1500-1547 (West 1989) (the Athlete Agents Act).

Fortunately, little controversy has surrounded this statutory definition, making artists the most readily identifiable class in the industry. In legal contemplation, artists become the principals in a principal-agent relationship with their intermediaries; the personal representative is the agent (employee) of the artist (employer), and agency law is applicable. 1 JOSEPH TAUBMAN, PERFORMING ARTS MANAGEMENT AND LAW § 2.7, at 45 (1972); Quast, *supra* note 2, at 202.

34. Talent agents are known by many names, including bookers, managers, or artists' managers. BASKERVILLE, *supra* note 6, at 150. Older versions of the Talent Agencies Act used the epithet "artists' manager." In fact, the Act itself, until 1978, was entitled the Artists' Managers Act. For purposes of this Comment, however, and in keeping with the modern phraseology adopted by the Act, the designation "talent agent" will be used.

35. BASKERVILLE, *supra* note 6, at 150; BIEDERMAN, *supra* note 19, at 473; Quast, *supra* note 2, at 192; Adam B. Nimoy, Comment, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. ENT. L.J. 145, 147 (1982); Howard L. Thaler, *Personal Managers—Their Legal Status and Problems* 2 (1979) (paper presented at the Current Legal Trends and Developments in the Entertainment & Sports Industries Forum, Los Angeles, Cal., Mar. 9-10, 1979).

The enterprise of a talent agent or talent agency is described in the Talent Agencies Act. Section 1700.4(a) provides:

ers, talent agents often negotiate the particulars of employment. They might also counsel and advise artists in the development of their careers, although talent agents are under no statutory obligation to do so.³⁶

The service a talent agent renders contemplates two types of clients: sellers and buyers of talent.³⁷ While the mainstay of the talent agent's clientele is his or her roster of artists (the sellers),

[h]is other kind of client is the *buyer* of such talent—producers, record companies, publishers, packagers, promoters and club owners. [The talent agent's] job is to deliver his artists to talent buyers. He serves as the middle man, the negotiator. He knows, or should know, what an artist is worth, and he must know what the buyer is willing and able to pay.³⁸

The talent agent might even act in an entrepreneurial capacity, periodically securing employment for artist-clients in performances or productions of the agency's own design.

Exclusivity is a prominent concept in show-business relationships, and agency agreements between artists and talent agents typically incorporate a clause establishing this aspect of the affiliation.³⁹ Because talent agents often view their representations of artists as risky investments, they may negotiate exclusive rights to represent those artists in the widest geographical territory possible.⁴⁰ In addition, agents endeavor to extend their representation of artists to all modes of entertainment within the industry.⁴¹ By doing so, talent agents effectively lock themselves into a portion of any compensation received by artists, regardless of the media, product, or location.

As remuneration for their efforts, talent agents customarily collect fees in the amount of 10% of an artist's gross earnings—hence the appel-

"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) (West 1989).

Talent agents may operate independently, but generally they practice "within the confines of a large or medium-sized agency." Cole-Wallen, *supra* note 4, at 489. Two well-known agencies are International Creative Management (ICM) and The William Morris Agency, Inc. *See id.* at 489 n.48.

36. *See* CAL. LAB. CODE § 1700.4(a) (West 1989) (talent agents "may . . . counsel or direct artists in the development of their professional careers" (emphasis added)).

37. BASKERVILLE, *supra* note 6, at 150.

38. *Id.*

39. Quast, *supra* note 2, at 202-03 (asserting that "exclusivity is a central part of every industry relationship").

40. *Id.* at 203.

41. *See id.* Quast explains that in agency contracts between talent agents and musicians the talent agent "may wish to represent the musician should the musician do a movie, or write a book, or do a television advertisement for Pepsi-Cola, or engage in artistic endeavors as yet unforeseen and unknown." *Id.*

lation "tenpercentery"—although commissions of 15% or 20% may be negotiated for certain types of engagements.⁴² Although there is no law establishing a ceiling on the fees a talent agent may charge, California Labor Commission policy limits the agent's commission to 25%.⁴³ The rate is usually further limited to 10% or 20% by the various entertainment unions and guilds.⁴⁴

In spite of the importance of talent agents, unproven artists are seldom able to secure the services of a reputable agent. In fact, "many performers have found that the [talent] agency will ordinarily not get involved unless it anticipates possibilities of economic return. The result is that a neophyte often has great difficulty in being signed up by a [talent] agency unless the performer has attained celebrity or near-celebrity status."⁴⁵

Talent agents in the State of California must be licensed.⁴⁶ California's laws governing agents evolved in response to unscrupulous practices of vaudeville agents who occasionally sent artists to dangerous or unhealthy locations, sent minors to places where alcohol was sold and consumed, or split fees with owners or managers of the various venues that booked the artists.⁴⁷

42. JOSEPH TAUBMAN, *IN TUNE WITH THE MUSIC BUSINESS* 84 (1980); *see also* BASKERVILLE, *supra* note 6, at 151 (agencies may charge commissions of ten to twenty percent of gross earnings); 3 ALEXANDER LINDEY, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 14:A(3) (2d ed. 1990) (same).

43. STAFF OF THE CAL. SENATE COMM. ON BUSINESS AND PROFESSIONS, 1982 REGULAR SESS., *STAFF ANALYSIS OF ASSEMBLY BILL 997*, at 1 (1982) [hereinafter *STAFF ANALYSIS*]; *see also* Cole-Wallen, *supra* note 4, at 521 n.218.

44. *STAFF ANALYSIS*, *supra* note 43, at 1; Cole-Wallen, *supra* note 4, at 520-21 (explaining that there is no California law setting a limit on talent-agency fees, but that the various entertainment unions impose "fee ceilings" for talent agents).

45. TAUBMAN, *supra* note 42, at 85; *see also* Quast, *supra* note 2, at 191 (the unestablished artist rarely gets an agent because "[i]t is easier for an agent to sell a big name than to sell many small ones"), 203 (a talent agent "will take the risk of investing in an artist [only] if the artist will help insure his prosperity"). The tendency of talent agents to forgo representing as-yet-unprofitable artists can be explained by the notion that ten percent of nothing is still nothing.

46. CAL. LAB. CODE § 1700.5 (West Supp. 1991) ("No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner.").

47. Quast, *supra* note 2, at 193. While the rationale for restricting an agent's ability to send artists to unhealthy or unsafe locations or to send minors to bars and saloons is relatively self-evident, further explication of "fee splitting" may be essential to expose its iniquitous underpinnings and to justify its prohibition. Fee splitting is a practice whereby an agent or other personal representative agrees to pay one or more employers of talent (for example, nightclub owners) certain sums in exchange for the employer's promise not to hire any artists except those represented by the agent. *Hearings*, *supra* note 10, at A-6 (statement of Walter L.M. Lorimer). The agent then books his artists into the employer's venue, collects a commission from the artists as compensation for the agent's procurement of employment for the artist, and turns over part of the commission to the employer (in this case, the club owner). *Id.*

For example, assume that an artist is to be paid \$1,000 for a performance, that the agent charges a commission of 15%, and that the agent then turns over a portion of that commission (say,

In addition to state licensing requirements, talent agents are subject to regulations promulgated by the various entertainment unions. Unions not only dictate limits on fees; they also require that form contracts be utilized, that fees be surrendered if an artist nets less than a minimum wage from a particular engagement, and that the agent obtain a franchise license.⁴⁸ Without a franchise license from a particular union, a talent agent cannot procure employment for any members of that union.⁴⁹

B. Personal Managers

Artists typically engage personal managers in addition to talent agents. In fact, a personal manager is often the artist's first representative because many unseasoned artists lack business savvy, legal sophistication, and contacts in the business, and because agents of any consequence rarely accommodate fledgling artists.⁵⁰ Managers of such inexperienced artists often suggest that their extensive contacts and expertise in the industry will enhance the artist's opportunity for eventual success; a manager might even imply that with personal guidance an artist will ultimately achieve stardom.⁵¹ Soon after establishing a rapport with the artist, the personal manager will customarily execute a manage-

5%) to the club owner. *See id.* The artist nets only \$850, the agent takes \$100 and the club owner receives \$50. Such arrangements have several detrimental effects on artists. First, the club owner's \$50 share is taken out of the artist's pocket; in effect, it is a double commission. Second, fee splitting has the consequence of monopolizing a segment of the market by blocking out artists who are not represented by or who are unwilling to pay off the agent involved. *Id.* Finally, if an employer wishes to hire an artist who is not represented by the agent who has made fee-splitting arrangements, the employer must inform the artist that he can only be hired through the agent; then the artist must make arrangements to pay the agent a commission even though the artist has had no previous contact with the agent and the agent has rendered no services to the artist. *Id.* at A-6 to A-7.

48. Quast, *supra* note 2, at 197.

49. Cole-Wallen, *supra* note 4, at 519.

50. *See* 3 LINDEY, *supra* note 42, § 14:D(2); *supra* note 45 and accompanying text; *see also* Quast, *supra* note 2, at 191 ("Usually the single person a budding musician hires, if he can afford to hire anyone, is a personal manager.").

51. 3 LINDEY, *supra* note 42, § 14:D(2). This notion of the personal manager as self-styled "starmaker" is clearly depicted in the lyrics of the Pink Floyd song *Have a Cigar*:

Come in here, dear boy, have a cigar. You're gonna go far, fly high,
You're never gonna die, you're gonna make it if you try; they're gonna love you.
Well I've always had a deep respect, and I mean that most sincerely.
The band is just fantastic, that is really what I think. Oh by the way which one's Pink?
And did we tell you the name of the game, boy, we call it Riding the Gravy Train.

We're just knocked out. We heard about the sell out. You gotta get an album out,
You owe it to the people. We're so happy we can hardly count.
Everybody else is just green, have you seen the chart?

It's a helluva start, it could be made into a monster if we all pull together as a team.

And did we tell you the name of the game, boy, we call it Riding the Gravy Train.

ROGER WATERS, *Have a Cigar*, on WISH YOU WERE HERE (Columbia Records 1975). The song alludes to a situation early in the band's career in which a candidate for management, promising the band imminent fame, asked the band members, "Which one is Pink?" KARL DALLAS, BRICKS IN THE WALL 22 (1987).

ment contract with the artist that, not surprisingly, emphasizes the manager's interests.⁵² Such agreements generally contain an exclusivity clause similar to that found in the artist-agent contract.⁵³

The management agreement ordinarily includes an array of provisions equivocally delineating the personal manager's obligations to the artist.⁵⁴ In essence, "the primary function of the personal manager is that of advising, counselling, directing and coordinating the artist in the development of the artist's career."⁵⁵ The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artist's finances,⁵⁶ and they routinely organize the economic elements of the artist's personal and creative life necessary to bring the client's product to fruition.⁵⁷ The personal manager frequently lends money to the neophyte artist, thereby speculating on a return from the artist's anticipated future earnings.⁵⁸ The manager also serves as a liaison between the artist and other personal representatives, arranging their interactions with, and transactions on behalf of, the artist. On a more personal level, the manager often serves as the artist's confidant and alter ego.⁵⁹ The manager might nurture the artist's personal relationships,⁶⁰ mollify the artist's bruised ego, endure telephone

52. 3 LINDEY, *supra* note 42, § 14:D(2).

53. See *supra* text accompanying notes 39-41 (discussing the artist/agent relationship). For examples of personal management agreements, see 3 LINDEY, *supra* note 42, § 14:D-2.01; Thaler, *supra* note 35, app. at 1-5.

54. See Quast, *supra* note 2, 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, business managers, and other management personnel.

Id.

55. Thaler, *supra* note 35, at 2; accord Cole-Wallen, *supra* note 4, at 486-87 ("The personal manager advises, counsels, and directs the entertainer in the development, advancement, and enhancement of his artistic career."); Nimoy, *supra* note 35, at 147 ("[T]he primary function of a personal manager is to advise and counsel artists and to coordinate and supervise all business aspects of their careers.").

56. A business manager—usually an accountant or lawyer—may be hired to handle the artist's finances when the artist has developed sufficient cash flow to warrant such an expense. Cole-Wallen, *supra* note 4, at 490.

57. 1 TAUBMAN, *supra* note 33, § 2.1, at 34.

58. Quast, *supra* note 2, at 198.

59. *Id.*

60. *Id.* ("The [personal manager] will . . . even manag[e] the artist's personal relationships, for the artists are often young, immature, [and] unsophisticated . . .").

calls at all hours,⁶¹ and even pick up the client's laundry.⁶²

By orchestrating and monitoring the many aspects of the artist's personal and business life, the personal manager gives the artist time to be an artist.⁶³ That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic function and to concentrate on their immediate creative task—writing a script, acting in a motion picture, recording a demo tape, or performing in a concert, for example. In this regard, the personal manager is an indispensable element of an artist's career.

As compensation for their services, personal managers generally charge a commission of between 10% and 50% of the artist's gross receipts.⁶⁴ Personal managers claim that their contributions to artists' careers justify this fee, which is typically higher than that charged by talent agents, because personal managers endure greater risk. Managers insist that because they take and build an unknown entertainer's career to full potential, they must have the ability on a long-term contractual basis to charge a sufficient fee to cover the necessary costs of such development.⁶⁵

No California law or entertainment-union regulation expressly governs a personal manager's activities or fees. However, the California Entertainment Commission has interpreted the Talent Agencies Act as prohibiting a personal manager from seeking or procuring employment for a client without a talent-agency license from the Labor Commissioner.⁶⁶ This restriction persists as a major bone of contention between personal managers and the Labor Commissioner because, managers insist, it ignores entertainment-industry reality: any personal man-

61. 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").

62. BASKERVILLE, *supra* note 6, at 154.

63. Thaler, *supra* note 35, at 2.

64. STAFF ANALYSIS, *supra* note 43, at 1 (personal management agreements may establish a fee as high as 40% to 50% of the artist's income); Quast, *supra* note 2, at 199 (personal managers may charge between 10% and 50%, although fees of 10% to 25% are most common).

65. STAFF ANALYSIS, *supra* note 43, at 1 (higher fees justified because managers develop careers of new, unproven artists); Memorandum from California State Assemblyman Vic Fazio on Assembly Bill 2535 (as amended Apr. 24, 1978) Regarding Artists' Managers (Apr. 25, 1978) (summarizing hearing before Assembly Subcommittee on Labor, Employment, and Consumer Affairs on revisions to the Labor Code regarding artists' managers) (on file with author and California State Archives); Quast, *supra* note 2, at 199 (higher fees for personal managers warranted because of greater risk to managers than agents).

66. See ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 11-12 (no one may lawfully procure employment for an artist without first obtaining a license from the California Labor Commissioner); Cole-Wallen, *supra* note 4, at 488 (personal managers are prohibited from seeking or procuring employment for artists without a license).

ager worth his or her commission partakes in some manner in procuring or attempting to procure employment for his or her clients.⁶⁷ The restriction thus presents personal managers with an ineluctable choice: they can either continue their unlicensed procurement activities—and risk having their management agreements invalidated by the Labor Commissioner—or they can obtain talent-agency licenses—thus subjecting themselves to the Act's provisions and alerting the unions that because they have procured or intend to procure employment for artists, union fee ceilings and other regulations should become operative against them.⁶⁸

C. Attorneys (“Entertainment Lawyers”)

Attorneys in the entertainment industry—so-called “entertainment lawyers”—perform essentially the same tasks as those discharged by any other legal practitioner.⁶⁹ In fact, entertainment law is an amalgamation of traditional legal concepts including contract, corporate, labor relations, taxation, real estate, tort, and copyright law.⁷⁰ Attorneys in the industry may be employed to draft management, agency, or other agreements, to supervise or conduct negotiations, to organize the requisite documentation for a foreign artist, or to establish a client's loan-out company, for instance. In essence, “[w]hether or not an individual is considered an entertainment attorney depends greatly upon the purpose for which the characterization is made, the nature of the matters he handles and his overall clientele.”⁷¹ Perhaps what most distinguishes entertainment lawyers from other members of the bar, and hence justifies the special moniker, can be distilled into two critical benefits they bestow on their clients: a thorough knowledge of the internal workings of the entertainment industry and an abundance of contacts in the business.

While advising clients and exploiting contacts within the industry, attorneys, at a client's request, occasionally enter the realm of the per-

67. Paul L. Brindze, *California Assembly Bill 977: The Personal Manager's Relief Act*, in 1983 HANDBOOK, *supra* note 10, at 247, 249 (discussing risks faced by personal manager seeking or procuring employment for an artist/client); *see also* Thaler, *supra* note 35, at 7-8 (stating that it is not uncommon for a personal manager to engage in procurement activities for his clients).

68. David F. Charles, Comment, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 HASTINGS COMM. & ENT. L.J. 347, 356 (1978). Licensure and regulation of personal managers is a controversy unto itself. *See, e.g., id.*

69. Leonard M. Marks, *Ethical Aspects of Entertainment Law Practice*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1990, at 481, 483 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 291) (“The entertainment lawyer performs all of the tasks associated with the legal profession—negotiating and drafting agreements, advising clients with respect to business matters and litigating to protect or defend their clients' rights in their compositions, performances, or persona.”).

70. *See* Cole-Wallen, *supra* note 4, at 490.

71. MICHAEL I. RUDELL, *BEHIND THE SCENES: PRACTICAL ENTERTAINMENT LAW* 115 (1984).

sonal manager or talent agent.⁷² The attorney usually acquiesces at first, emphasizing that this extralegal relationship will continue only until a suitable manager can be found.⁷³ Despite this time qualification, attorneys later often hesitate to relinquish their roles as personal managers because they frequently derive more income from managing their artist-clients than from practicing law alone.⁷⁴

This phenomenon of dual roles or secondary-related occupations (that is, attorney-manager or attorney-agent) often complicates the already-intricate network of relationships that exists within the industry. It becomes difficult to ascertain in which capacity attorneys are acting and even more arduous to determine which set of rules governs their conduct. The entertainment lawyer can encounter three sources of regulation: legal-ethics rules, specialized legislation such as the Talent Agencies Act, and entertainment-union directives.

The first and most obvious regulations the California attorney faces are the Professional Rules⁷⁵ and the State Bar Act.⁷⁶ These ethical rules govern the lawyer's conduct with respect to competence, confidentiality, fiduciary duties and conflicts of interest, advertising and solicitation, fees, and so forth. And although there is no express rule forbidding California attorneys from engaging in related secondary occupations—such as attorney-agent or attorney-manager—they are bound by the state's legal-ethics rules if they do so.⁷⁷ Second, attorneys who provide procurement services for their artist-clients are likely to be subject to the proscriptions of the Act because the Labor Commissioner has established that only a licensed talent agent may procure employment for an artist.⁷⁸ Third,

72. See TAUBMAN, *supra* note 42, at 88 (in the process of giving advice to clients, attorneys sometimes drift into management); 1 TAUBMAN, *supra* note 33, § 2.8, at 47 ("Because the managerial function is inextricably bound with problems of law and contracts, sometimes counsel gravitate into the managerial function and, in fact, become managers side by side with law practice."); Cole-Wallen, *supra* note 4, at 483 ("Faced with an increased demand for services outside the traditional legal role and various market pressures, it is not surprising that many attorneys have entered into secondary occupations within the entertainment industry.").

73. BASKERVILLE, *supra* note 6, at 162.

74. See *id.*

75. PROFESSIONAL RULES, *supra* note 29.

76. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1991). Although California's Professional Rules are not modeled after the *American Bar Association Model Rules of Professional Conduct* or *Model Code of Professional Responsibility*, a California attorney may nonetheless consider the standards and opinions generated by jurisdictions that follow those rules. See PROFESSIONAL RULES, *supra* note 29, Rule 1-100(A) ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.").

77. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972) [hereinafter Formal Op. 328] ("A lawyer who is engaged . . . in the practice of law and in another profession or occupation which is closely related to law must conform to the Code of Professional Responsibility in conducting such activities."); RAYMOND L. WISE, LEGAL ETHICS 185 (2d ed. 1970) ("It is not improper for a lawyer to engage in a separate business or profession provided in doing so he does not violate the canons of legal ethics.").

78. See *supra* note 10.

once it is determined that the attorney has performed the tasks of a talent agent, the regulations of the entertainment unions and guilds may be called into effect as well. For example, Screen Actors Guild regulations provide that attorneys-at-law are not agents unless their services to artist-members include solicitation of employment in motion pictures for members or the lawyers engage generally in the activities of an agent.⁷⁹

The entertainment lawyer's fees can be determined using six alternative methods: (1) hourly billing; (2) monthly or annual retainers; (3) flat fees for particular services; (4) a percentage of the artist's contract; (5) a percentage of the artist's income; or (6) where lawyer and artist enter a partnership, a percentage of all money arising from the partnership.⁸⁰ If fees are not set out in advance, lawyers are entitled to compensation in an amount equal to the reasonable value of their services. Attorneys' fees are limited by a standard of reasonableness and can be reduced if found unconscionable.⁸¹

While the entertainment attorney's practice is not radically different from that of other attorneys, the requirements for success and the coinciding rewards can be notably unique. First, "[t]he intangible attribute on which the success of an entertainment attorney invariably rests . . . [is] an ability to understand and deal with the 'artistic temperament' so often possessed by his clients"⁸² and the capacity to make reasoned legal judgments within an impassioned, creative, and often highly spontaneous setting.⁸³ Second, in addition to potentially high compensation, the entertainment attorney's rewards "include the handling of fascinating subjects which often come to life in productions or performances and the fulfillment of contributing to endeavors which bring pleasure to masses

79. See Neville L. Johnson & Daniel W. Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 414 n.195 (1979) (citing Constitution and By-Laws of Screen Actors Guild, Inc. (SAG) § I-G, at 1). The SAG defines an agent as a

person, copartnership, association, firm or corporation who or which offers to or does represent, act as the representative of, negotiate for, procure employment for, counsel or advise any member of the SAG in and about and in connection with or relating to his employment or professional career as an actor in the production of motion pictures.

Id. at 413 n.195 (quoting Rules and Regulations of SAG, Rule 16(g), § I-C, at 1).

The American Federation of Musicians of the United States (AF of M) By-Laws define an agent as "any person . . . who for a fee procures, offers, promises, or attempts to procure employment or engagements for musicians whether or not, in addition to such activities, he or it performs additional services for musicians as artists' manager or personal manager or otherwise." *Id.* (quoting Constitution By-Laws and Policy of the American Federation of Musicians of the United States and Canada art. 25, § 2, at 144).

It is relatively clear that an attorney who engages in the described conduct falls within the SAG and AF of M definitions of "agent." Consequently, the lawyer would be subject to the same franchising, compensation, and other union regulations as the talent agent.

80. Cole-Wallen, *supra* note 4, at 522.

81. PROFESSIONAL RULES, *supra* note 29, Rule 4-200(A) ("A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.").

82. RUDELL, *supra* note 71, at 117.

83. See Cole-Wallen, *supra* note 4, at 490.

of people.”⁸⁴

D. Guilds and Unions⁸⁵

The powerful entertainment guilds and unions promulgate and enforce complex rules to protect their artist-members from sharp and overreaching practices by personal representatives. They have also been influential in the legislative arena, pressuring the California Legislature to pass and amend the various permutations of the Act. Five major talent unions actively monitor relationships between members and their representatives: the American Federation of Musicians (AF of M), the American Federation of Television and Radio Artists (AFTRA), the Screen Actors Guild (SAG), the Directors Guild of America (DGA), and the Writers Guild of America (WGA).

With respect to regulation of an artist's personal representatives, union and guild restrictions are generally considered to be more comprehensive, far-reaching, and rigorous than state-generated controls.⁸⁶ The unions' vigorous protection of their artist-members focuses on the relationship between artist and talent agent (or those who procure employment for artist-members).⁸⁷ For example, unions regulate individuals who act as talent agents by limiting fees, requiring the use of form contracts or pro-artist provisions, restricting the term of agreements, and demanding that the agent execute a franchise agreement with the union. Talent agents are not the only individuals affected by union and guild restrictions, however—personal managers and attorneys also may be regulated to the extent that they engage in procurement activity.⁸⁸

II

OPERATION AND REGULATIONS OF THE TALENT AGENCIES ACT

The Act's regulatory regime is detailed and comprehensive. 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

84. RUDELL, *supra* note 71, at 118.

85. Entertainment guilds and unions can be broadly categorized into “above-the-line” unions, representing “artistic talent such as directors, writers, and performers,” and “below-the-line” unions, representing “technical and craft employees such as grips, electricians, and film editors.” THE MOTION PICTURE & TELEVISION BUSINESS: CONTRACTS AND PRACTICES § 4.01 (rev. no. 1 1987). “Above-the-line” unions are the focus of this discussion.

86. Cole-Wallen, *supra* note 4, at 512.

87. *Id.* at 519.

88. *Id.* at 520 (“Regardless of whether one is an attorney, personal manager or business manager, if he solicits business for an artist, the unions would seek to regulate the activity.”); *see also* Johnson & Lang, *supra* note 79, at 413 n.195 (discussing AF of M By-Laws and SAG Rules and Regulations with respect to regulation of business managers, personal managers, and attorneys); *supra* note 79 and accompanying text.

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. A more detailed analysis of the Act's principal provisions follows.

A. Labor Commissioner's Original Jurisdiction

Section 1700.44(a) provides: "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same."⁸⁹ This section confers original and exclusive jurisdiction upon the Labor Commissioner to hear and determine all disputes regarding potential violations of the Act.⁹⁰ Section 1700.44(a) is compulsory in disputes between artists and individuals allegedly performing talent-agency services, even when the charged party is unlicensed.⁹¹ Therefore, an individual cannot circumvent the Labor Commissioner's jurisdiction simply by failing to obtain a license or by utilizing some other contrived stratagem or subterfuge.⁹²

B. Applications, Fees, and Bonds

The Act requires prospective licensees to submit an application that includes their name, address, and prior occupation as well as the names, addresses, and prior occupations of their partners and associates. Applicants must attach their fingerprints, at least two affidavits from respectable members of the community vouching for their "good moral character,"⁹³ and a filing fee; they must pay an annual license fee if the license is issued.⁹⁴ Section 1700.15, which compels the applicant to

89. CAL. LAB. CODE § 1700.44(a) (West 1989).

90. See *Buchwald v. Superior Court*, 62 Cal. Rptr. 364, 372 (Ct. App. 1967) (holding that in cases arising under the Act, the Labor Commissioner has original jurisdiction to the exclusion of the superior court); Singer, *supra* note 10, at 255 (stating that Labor Commission has original jurisdiction over unlicensed individuals performing talent agency services).

91. Singer, *supra* note 10, at 255 ("[T]he jurisdiction of the Labor Commissioner is . . . over those individuals who perform services of a talent agent whether they are licensed or unlicensed.")

92. See *id.* at 256-57 (discussing *Pryor v. Franklin*, No. TAC 17 MP 114 (Cal. Labor Comm'r 1982), which found the Labor Commissioner had jurisdiction despite defendant's claim that he was acting as attorney, personal manager, and loan-out corporation officer rather than as talent agent).

93. CAL. LAB. CODE § 1700.6 (West 1989).

94. The "filing fee" is minimal (currently \$25), but the annual license fee is a more significant sum (currently \$225). *Id.* § 1700.12.

deposit a \$10,000 surety bond with the Labor Commissioner,⁹⁵ is perhaps the most disdained requirement of the Act. The bond is intended to ensure compliance with the Act and to guarantee some reimbursement to aggrieved artists when the Commissioner finds that a licensed talent agent has violated the Act's provisions.

C. *Business Practices and Prohibitions*

The Labor Commissioner is empowered to require talent agents to submit their form contracts for approval, but such approval cannot be withheld unless the proposed contract is "unfair, unjust and oppressive to the artist."⁹⁶ Talent agents are required to file a fee schedule describing the charges to be levied in the operation of the agency,⁹⁷ and new fees cannot become effective until seven days after they are filed with the Labor Commissioner and posted in a "conspicuous" place in the talent agent's office.⁹⁸

Talent agents must deposit any funds collected on behalf of the artist in a trust-fund account, disburse such moneys to the artist (less commission) within fifteen days after receipt, and maintain separate records of such funds.⁹⁹ The talent agent must keep additional records of each artist's name and address, each artist's engagements and compensation, and the amount of fees collected.¹⁰⁰ These records must be available to the Labor Commissioner upon reasonable demand.¹⁰¹

The Act also prohibits licensed agents from engaging in certain types of conduct. They cannot publish false, fraudulent, or misleading information or advertisements,¹⁰² dispatch artists to unsafe locations,¹⁰³ split fees with an employer,¹⁰⁴ or charge a "registration fee."¹⁰⁵ Nor may a talent agent send a minor to any place where liquor is sold and consumed,¹⁰⁶ permit persons of bad character to frequent or be employed at

95. *See id.* § 1700.15.

96. *Id.* § 1700.23.

97. *Id.* § 1700.24.

98. *Id.*

99. *Id.* § 1700.25.

100. *Id.* § 1700.26.

101. *Id.* § 1700.27.

102. *Id.* § 1700.32.

103. *Id.* § 1700.33.

104. *Id.* § 1700.39.

105. *See id.* § 1700.40. "Registration fee" is defined as

any charge made, or attempted to be made, to an artist for any of the following purposes:

- (1) Registering or listing an applicant for employment in the entertainment industry.
- (2) Letter writing.
- (3) Photographs, film strips, video tapes, or other reproductions of the applicant.
- (4) Costumes for the applicant.
- (5) Any activity of a like nature.

Id. § 1700.2(b).

106. *Id.* § 1700.34.

the agency,¹⁰⁷ secure employment for an artist in any location where labor trouble exists without first informing the artist of the condition,¹⁰⁸ or issue a contract for employment containing provisions that, if complied with, would be in violation of the law.¹⁰⁹

D. *Proceedings Before the Labor Commissioner*

An administrative proceeding is initiated by filing a "Petition to Determine Controversy" with the Labor Commissioner's office.¹¹⁰ A copy of the petition must be served on the opposing party who then has twenty days to serve and file an answer.¹¹¹ If the Labor Commissioner can establish by investigation that no dispute regarding the amount of fees due exists, however, he or she may certify without a hearing that there is no real controversy.¹¹²

As a rule, "hearing officers," who are usually attorneys within the Division of Labor Standards Enforcement acting pursuant to the authority of the Labor Commissioner, preside over the administrative proceedings.¹¹³ If a hearing is conducted and the dispute is not settled, dismissed, or otherwise disposed of, the hearing officer will issue a "Determination and Award," similar to a judicial opinion, describing the factual situation, applicable rules, reasoning, and award, if any.¹¹⁴

Once a decision is rendered, the aggrieved party is granted two separate rights: the right to appeal¹¹⁵ and the right to stay execution of an award pending appeal by executing a bond approved by the superior court.¹¹⁶ If the appealing party fails to execute the bond, the prevailing party can move to confirm the Labor Commissioner's award and upon confirmation enforce the resulting judgment.¹¹⁷ The aggrieved party's right to appeal, however, remains unaffected because section 1700.44(a) contains no language conditioning the right to appeal upon the filing of a bond.¹¹⁸ The Supreme Court of California has held that section 1700.44(a) entitles the appealing party to a new hearing in the superior court—that is, more than simply a review of the former proceedings¹¹⁹—

107. *Id.* § 1700.35.

108. *Id.* § 1700.38.

109. *Id.* § 1700.31.

110. CAL. CODE REGS. tit. 8, § 12022 (1990).

111. *Id.* §§ 12024-12025 (1990).

112. CAL. LAB. CODE § 1700.44(a) (West 1989).

113. Interview with Fred Duscha, Attorney, State of California Department of Industrial Relations, Division of Labor Standards Enforcement, in San Francisco, Cal. (Mar. 8, 1991).

114. *Id.*

115. CAL. LAB. CODE § 1700.44(a) (West 1989). Appeal to the superior court must be made within ten days of the Labor Commissioner's determination. *Id.*

116. *Id.*

117. *Buchwald v. Katz*, 503 P.2d 1376, 1378-79 (Cal. 1972).

118. *Id.* at 1378.

119. *Id.* at 1381.

although the superior court may call up any documents used by the parties to present their claims and defenses in the Labor Commissioner hearing.¹²⁰ Finally, section 1700.44(c) imposes a one-year statute of limitations.¹²¹ Prior to the addition of this limitation period, artists were permitted to recover past fees and commissions paid over the life of the contractual relationship. This restriction, however, bars old disputes and also effectively limits recovery to fees and commissions earned during the one-year period preceding the filing of the action,¹²² although even that amount can be substantial.

E. Remedies and Enforcement

The Labor Commissioner has extensive authority to fashion a remedy for violation of the Act. First, "[i]f the Labor Commissioner determines that an individual acted as a talent agent without having obtained a license . . . then any agreement entered into between the artist and the unlicensed talent agent pertaining to unlawful procurement activities will be declared void."¹²³ Upon a determination that the artist-agent contract is invalid, the Labor Commissioner may proclaim that the agent is entitled to no further fees or commissions,¹²⁴ that the artist is not liable for any money advanced to him by the agent to promote the artist's career,¹²⁵ that the artist can collect restitution of all funds paid to the unlicensed individual,¹²⁶ and/or that the agent is entitled to keep certain or all compensation on the basis of quantum meruit.¹²⁷ Negation of the agreement between the artist and the unlicensed individual also renders any collateral agreements or contracts executed by the parties invalid.¹²⁸ Such relief thus does more than divest talent agents of past compensation—it can also force them to forfeit prospective interests they may have in the artist's product, such as future royalties.

120. *Id.* at 1382.

121. CAL. LAB. CODE § 1700.44(c) (West 1989) ("No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding.").

122. Fred Jefin, *The Personal Manager Controversy*, L.A. LAW., Jan. 1985, at 23, 24; see also Brindze, *supra* note 67, at 253 ("[T]he one-year statute of limitations eliminates the ultimate horror of representing an act for a number of years and then being required to repay all commissions earned for all those years.").

123. ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 17-18 (Labor Commissioner has power to declare any contract between unlicensed talent agent and artist void); Singer, *supra* note 10, at 258.

124. Singer, *supra* note 10, at 258.

125. Gary A. Greenberg, Comment, *The Plight of the Personal Manager in California: A Legislative Solution*, 6 HASTINGS COMM. & ENT. L.J. 837, 853 (1984).

126. Singer, *supra* note 10, at 258.

127. *Id.*

128. Greenberg, *supra* note 125, at 853 (citing *Derek v. Callan*, No. TAC 18-80 (Cal. Labor Comm'r 1982)).

The Labor Commissioner's authority to fashion remedies and penalties provides the artist with significant protection from an individual who has unlawfully acted as a talent agent. As a result, the Act has been wielded by artists as a sword to reclaim fees from personal representatives. The Act is not self-enforcing, however. It must be activated by complaints, either from artists alleging unlicensed procurement or from agents attempting to recover delinquent fees.¹²⁹ This mechanism has motivated some commentators to insist that the Act is, for all practical purposes, ineffective.¹³⁰ Despite this asserted insufficiency, the Act has become a powerful statute, and the full force of a Labor Commissioner determination and award can inflict serious financial and professional misfortune on the unwary unlicensed individual.¹³¹

III

JUSTIFICATIONS FOR EXPRESS EXEMPTION OF ATTORNEYS FROM THE TALENT AGENCIES ACT

Removing attorneys from the Labor Commissioner's jurisdiction under the Act is essential if the Act is to be a model statute in this country.¹³² Exempting lawyers from the proscriptions of the Act is justified on several grounds. First, attorneys should be exempted because the Act was never intended to apply to their activities. Prevailing interpretations of the Act, to the extent that they regulate the conduct of attorneys engaged in procurement activity, have forsaken original legislative intent.

Second, ambiguous language renders the Act inherently unjust because it does not give fair and adequate warning of the type of activity that constitutes procurement and it does not provide a consistent standard that the Labor Commissioner can apply to determine whether an individual has violated the Act. Moreover, the Labor Commissioner has held that certain conduct—such as contract negotiations—constitutes procurement; such decisions transform customarily permissible legal activity into illicit conduct when engaged in by attorneys who are not licensed as talent agents. These decisions, if applied to attorneys, seem even more unreasonable when one realizes that contract negotiations constitute the “largest portion of work that an attorney will perform for an artist.”¹³³

Third, lawyers should be exempt from the Act's regulations because

129. See Cole-Wallen, *supra* note 4, at 516 (“In the absence of a complaint, the Labor Commission rarely initiates overt action to enforce the Act's provisions.”).

130. See *id.* (noting observations by commentators that the Act “has no substantive impact”).

131. See *supra* text accompanying notes 13-27.

132. The California Entertainment Commission was directed by statute to recommend changes to the Act that would make it a model statute in the United States. ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 3-4.

133. Cole-Wallen, *supra* note 4, at 491.

the Professional Rules and the State Bar Act govern nearly every conceivable activity or impropriety of an attorney practicing within the state. These rules, designed specifically to regulate the conduct of lawyers, provide greater protection to artists than the Act does. Furthermore, many of the Act's regulations are repetitive in light of California's legal-ethics rules and in some instances conflict with those rules. In sum, the Professional Rules and the State Bar Act are sufficient to safeguard artists from any unscrupulous conduct by lawyers, and the California Legislature has failed to express any convincing policy justification for attorney licensure under the Act.¹³⁴

A. Purpose and Legislative History of the Talent Agencies Act as a Basis for Attorney Exemption

The avowed purpose of the Talent Agencies Act is straightforward: to protect artists who are seeking employment or attempting to advance their careers in the California entertainment industry.¹³⁵ Certain improprieties by talent agents were brought to the attention of the California Legislature, thus providing the impetus for the remedial legislation that would eventually become the Talent Agencies Act. There was concern that unlicensed individuals were acting improperly by, for example, sending aspiring female artists to houses of prostitution under the pretense that the job was in furtherance of their artistic careers.¹³⁶ The legislation preceding the Act was directed specifically at regulating such untoward activity.¹³⁷ At no time during the legislative process, however, were attorneys implicated in such wrongdoing.

California's Talent Agencies Act evolved out of the state's Private Employment Agencies Law of 1913.¹³⁸ In 1943 legislation intended to

134. Talent agents often argue that there is no justification for exempting anyone who "procures" employment from the Act's directives on the ground that to grant such exclusions is unfair because such an exemption would allow unlicensed individuals to compete with agents for clients without bearing any of the burdens imposed by the Act. See ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 8-9. While this argument is not without force, it may be challenged in several ways. First, agents have never complained about competition from attorneys, suggesting that such competition is not a problem for agents. Second, one of the realities of practicing law in the entertainment industry is that lawyers involved in their clients' careers must necessarily engage in certain activities which may be construed as procuring employment, such as negotiating employment contracts. See *infra* text accompanying notes 172-77. Finally, the arguments proposed in the text also serve to rebut the agents' contentions.

135. See *Hearings*, *supra* note 10, at 189 (testimony of Albert Reyff, Asst. State Labor Comm'r).

136. *Id.* at 28-29 (testimony of Roger Davis, First Vice Pres. of the Artists' Managers Guild).

137. *Id.*

[T]here was a real need for regulation of employment agencies and particular . . . [talent agents], and that's why the legislature did it. It was no accident. It was done at the request of people who were concerned about the fact that . . . [talent agents] or people operating in that area were acting improperly

Id.

138. Philip R. Green & Beverly R. Green, *Talent Agents and the New California Act*, in 1988

regulate talent agents was incorporated into the regulatory regime applicable to employment agencies in general in order to bring agents under the jurisdiction of the Labor Commissioner.¹³⁹ In 1959, however, talent agents received their own chapter of the Labor Code—the Artists' Managers Act—reflecting the legislature's increased realization that "the business of procuring employment in the entertainment industry . . . is different and in many ways more complex than the business of the normal employment agencies the Labor Commissioner regulates."¹⁴⁰ The changes were made at the insistence of talent agents who complained that they were subject to rules not specifically promulgated to regulate them.¹⁴¹

In 1967 the Labor Code sections concerning employment agencies were repealed and jurisdiction was removed to the Bureau of Employment Agencies,¹⁴² and in 1978 the Artists' Managers Act became the Talent Agencies Act. The Talent Agencies Act clarified that talent agents were under the province of the Labor Commissioner and not the Bureau of Employment Agencies.¹⁴³

In 1982, in order to dispel confusion surrounding the Act and its applicability, relief was again sought in the legislature. Three notable amendments were added to the Act, subject to "sunset" provisions that would terminate the amendments unless reinstated by the legislature. The amendments (1) allowed an unlicensed individual to act in conjunction with and at the request of a licensed talent agent in the negotiation of an employment contract,¹⁴⁴ (2) removed the solicitation and procurement of a recording contract from regulation,¹⁴⁵ and (3) introduced a one-year statute of limitations.¹⁴⁶ These amendments were set to self-destruct on January 1, 1986.¹⁴⁷

The 1982 amendments also created the California Entertainment

ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 357 (John D. Viera & Robert Thorne eds.). The Act is a perfect example of interest-group politics supplanting legislative integrity. The Act progressed from conception to present form in slow stages directed primarily by the forces of interested parties, bargained additions and modifications, and heated industry debate. Interested groups such as the Association of Talent Agents changed sides frequently, opposing in one instance the powerful entertainment unions and in the next joining them against personal managers or other potential procurers.

139. *Id.* (Act of May 2, 1943, ch. 329, 1943 Cal. Stat. 1326).

140. *Id.*

141. Letter from John F. Henning, Director of the California Department of Industrial Relations, to Julian Beck, Legislative Secretary, Governor's Office (May 28, 1959) (on file with author and California State Archives).

142. Act of Aug. 28, 1967, ch. 1505, secs. 2-3, 13-14, 1967 Cal. Stat. 3571, 3572.

143. Talent Agencies Act, ch. 1382, sec. 6, 1978 Cal. Stat. 4575, 4576.

144. Act of Aug. 31, 1982, ch. 682, sec. 3, 1982 Cal. Stat. 2814, 2815-16 (codified as amended at CAL. LAB. CODE § 1700.44(d) (West 1989)).

145. *Id.* at 2814 (codified as amended at CAL. LAB. CODE § 1700.4(a) (West 1989)).

146. *Id.* at 2815 (codified as amended at CAL. LAB. CODE § 1700.44(c) (West 1989)).

147. Act of July 17, 1984, ch. 553, sec. 7, 1984 Cal. Stat. 2185, 2187.

Commission to study the entertainment industry and to recommend a model bill to the legislature.¹⁴⁸ The Entertainment Commission, after two years of deliberation on six issues, voted to remove the sunset provisions and maintain all the 1982 amendments.¹⁴⁹ The legislature adopted the Entertainment Commission's recommendations, with minor language changes, and they were signed into law in 1986.¹⁵⁰ No major changes have occurred since.

In its 1985 report the Entertainment Commission maintained that the Act applied to *any* person who engaged in procurement activity.¹⁵¹ The Entertainment Commission, in its struggle to identify those activities in which unlicensed individuals, including attorneys, could engage when procuring employment for an artist, concluded

that there is no such activity, that there are no such permissible limits, and that the prohibitions of the Act over the activities of *anyone* procuring employment for an artist without being licensed as a talent agent must remain, as they are intended to be, total. . . . [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.¹⁵²

According to the Entertainment Commission, therefore, *anyone* who solicits or procures employment for an entertainer comes under the Labor Commissioner's authority to resolve claims made against that person, even if such a person chooses to classify his or her activities as those of an attorney, personal manager, business manager, officer of a loan-out

148. Act of Aug. 31, 1982, ch. 682, 1982 Cal. Stat. 2814, 2816, *repealed by* Act of July 17, 1984, ch. 553, 1984 Cal. Stat. 2185 (effective Jan. 1, 1986). The Commission was composed of three artists (Ed Asner, John Forsythe, Cicely Tyson), three talent agents (Jeffrey Berg, Roger Davis, Richard Rosenberg), three personal managers (Bob Finklestein, Patricia McQueeney, Larry Thompson) and the State Labor Commissioner (C. Robert Simpson, Jr.). ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 2.

149. The Commission considered the following issues:

(1) Under what conditions or circumstances, if any, should a personal manager or anyone other than a licensed talent agent be allowed to procure, offer, promise or attempt to procure employment or engagements for an artist without being licensed as a talent agent? . . . [None.]

(2) What changes, if any, should be made in the provisions of the Act exempting from the Act a person who procures recording contracts for an artist? [None.]

(3) Should the criminal sanctions of the Act, removed by AB 997, be reinstated and, if so, in what form? [No.]

(4) Should the sunset provisions added to the Act by AB 997 be deleted? [Yes.]

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

(6) What other changes, if any, should be made in the Act? [The Commission recommended several administrative, technical, and housekeeping changes.]

ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 5.

150. Act of July 24, 1986, ch. 488, 1986 Cal. Stat. 1804 (effective Jan. 1, 1986).

151. ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 20.

152. *Id.* at 11 (emphasis added).

company, or joint venturer.¹⁵³ Labor Commissioner determinations espouse similar views.¹⁵⁴

The interpretations of the Act by the Entertainment Commission and the Labor Commissioner, as definitive as they seem, are in clear contradiction to statements by legislators and others involved in the lawmaking process. For example, California State Senator Whetmore emphatically asserted that the Act was not drafted with an intent to include the activities of lawyers.¹⁵⁵ An exchange between the then-vice-president of the William Morris Agency, Roger Davis, and California State Senator Robert Presley during the legislative process also indicated that lawyers were not required to be licensed under the Act (ostensibly because the California Bar had the strength to resist such regulation of its members),¹⁵⁶ and suggested further that regulating the conduct of attorneys under the Act was unnecessary duplication.¹⁵⁷ Finally, an individual involved in drafting the 1959 Artists' Managers Act expressed his belief that attorney conduct was not intended to be covered by the Act because lawyers already had a license; rather, it was unlicensed individuals who were the target of the Act's provisions.¹⁵⁸ What is even more striking about the entire legislative process, however, is the noticeable absence of any substantial discussion concerning the regulation of attorney behavior. This, at the very least, supports by negative implication that attorney conduct was not a target of the Act's regulations.

In sum, this analysis of the Act's history and its acknowledged purpose support the contention that the Act was neither designed nor intended to affect the activities of lawyers. To the extent that the entities charged with the Act's enforcement and interpretation maintain that an attorney's conduct is proscribed, they have unjustifiably expanded the scope of the Act by disregarding the Act's legislative history and the intent of the drafters.

B. Ambiguous Language of the Talent Agencies Act as a Basis for Attorney Exemption

1. Absence of a Definition of Procurement

The Talent Agencies Act defines a talent agent as a person or corporation who procures, offers, promises, or attempts to procure employ-

153. This does not affect the Act's exceptions for an individual who procures, offers, or promises to procure a recording contract, CAL. LAB. CODE § 1700.4(a) (West 1989), or a person who works with and at the request of a licensed talent agent, *id.* § 1700.44(d).

154. See *infra* Section III.B.1.

155. See *Hearings, supra* note 10, at 20.

156. See *id.* at 43 (testimony of Roger Davis).

157. See *id.* at 45.

158. See *id.* at 113, 120-21 (statement of Walter L.M. Loriiner).

ment for an artist.¹⁵⁹ Accordingly, whether or not one is a talent agent subject to the Act's restrictions is determined by participation in procurement activity, for "[i]t is not a person who is being licensed by the Talent Agencies Act: rather, it is the activity of procuring employment. Whoever performs that activity is legally defined as a talent agent."¹⁶⁰ In order to find a violation of the Act, therefore, it must be established that one party is an "artist" and that the other party engaged in procurement activity without first obtaining a license.

A significant ambiguity was drafted into the Act, however, when the California Legislature neglected to define procurement. The term procurement is so unclear and ambiguous that it leaves reasonable people guessing as to its meaning or whether a violation has occurred; consequently, unlicensed representatives (including attorneys) are unfairly exposed to often staggering potential liability.¹⁶¹ More importantly, the liberal construction of procurement advocated by the Labor Commission renders a number of tasks traditionally performed by attorneys unlawful without a talent-agency license.¹⁶² The legislature's failure to define the term procurement, and the judiciary's and Labor Commission's inability to formulate a coherent definition, unfairly subjects attorneys to the Act's potentially severe remedies when they perform traditionally legal functions.

Because the California Labor Commissioner, rather than the judiciary, has original jurisdiction over disputes between artists and alleged talent agents,¹⁶³ most decisions that would aid in deciphering the term procurement are unreported. Therefore, it is necessary to look primarily to Labor Commissioner determinations¹⁶⁴ and the Report of the California Entertainment Commission¹⁶⁵ as sources for determining the meaning of procurement. Unfortunately, while some specific activities

159. See CAL. LAB. CODE § 1700.4(a) (West 1989).

160. ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 20 (emphasis added).

161. See *supra* text accompanying notes 13-21.

162. See *infra* text accompanying notes 167-77.

163. See *supra* text accompanying notes 89-92.

164. The following information is based on my personal observations: Utilizing hearing officers who are often attorneys in the Division of Labor Standards Enforcement, the Labor Commissioner hears Talent Agencies Act controversies in offices throughout the state. All determinations and case files, however, are returned to the central office in San Francisco, where they are available upon request. Unfortunately, these records are disorganized and unindexed; there is also a considerable lag time—more than a year—between institution of a controversy and its resolution. Between 1985 and the early months of 1990, there appear to have been 165 Act controversies initiated before the Labor Commissioner. This number represents more than a 500% increase over a roughly five-and-one-half year period from December 1977 to September 1983. See Karen A. Julian, *Personal Manager or Talent Agent? A Summary of Recent California Labor Commission Findings in Regulation of Entertainers' Representatives*, in 1983 HANDBOOK, *supra* note 10, at 315, 315 (stating that 31 cases were filed before the Labor Commissioner between December 1977 and September 1983).

165. ENTERTAINMENT COMMISSION REPORT, *supra* note 10, at 6-12.

have been identified as constituting procurement,¹⁶⁶ the deciding tribunal rarely provides a satisfying—that is, consistent—rationale and, consequently, no well-defined parameters have been articulated.

The California Labor Commissioner and the few courts scrutinizing Talent Agencies Act controversies have broadly interpreted the notion of procurement and have effectively ignored legislative intent,¹⁶⁷ essentially determining that *any* attempt to solicit employment on behalf of an artist can be construed as procurement activity. For example, the courts and the Labor Commissioner have concluded, in various factual situations, that the following activities by unlicensed representatives constitute unlawful procurement: introducing artists to producers or directors,¹⁶⁸ initiating contacts with employers,¹⁶⁹ furthering an offer for an artist-client,¹⁷⁰ and negotiating employment contracts.¹⁷¹

For attorneys, the most foreboding decisions issued by the Labor Commissioner and the courts are those equating contract negotiations—a function attorneys traditionally perform—with illegal procurement activity. In *Kearney v. Singer*,¹⁷² for example, the Labor Commissioner held that negotiating an offer constituted unlicensed procurement activity.¹⁷³ This was confirmed in *St. Louis v. Wolf*¹⁷⁴ in which the hearing officer declared that “‘procurement’ includes a negotiation whose directed or logically intended purpose is to market an artist’s talent.”¹⁷⁵ In *Pryor v. Franklin*,¹⁷⁶ the Labor Commissioner defined procurement “to include the legal function of contract negotiations.”¹⁷⁷ Although all

166. For a list of some activities the Labor Commissioner has recognized as constituting “procurement,” see *infra* notes 168-71 and accompanying text.

167. See *supra* text accompanying notes 135-58.

168. See Greenberg, *supra* note 125, at 853 (suggesting in discussion of *Derek v. Callan*, No. TAC 18-80 (Cal. Labor Comm’r 1982), that introducing an actress to a motion picture producer constitutes procurement).

169. See *Singer*, *supra* note 10, at 257-58 (suggesting in discussion of *Pryor v. Franklin*, No. TAC 17 MP 114 (Cal. Labor Comm’r 1982) that initiating contacts intended to market artist’s talent constituted procurement).

170. See *Julian*, *supra* note 164, at 319-21 (discussing *Kearney v. Singer*, No. MP 429, AM 211 MC (Cal. Labor Comm’r 1978)).

171. See *Julian*, *supra* note 164, at 319-24 (discussing *Kearney* and *St. Louis v. Wolf*, No. TAC 29-79 (Cal. Labor Comm’r 1981)); *Singer*, *supra* note 10, at 256-61 (discussing *Pryor* and suggesting that procurement includes the legal function of negotiations); see also *Singer*, *supra* note 10, at 258 (stating that under current decisions of the Labor Commissioner, “merely the negotiation of an employment agreement . . . for an artist will constitute ‘procurement’ and the type of activity that will be subject to review by the Labor Commissioner”).

172. No. MP 429, AM 211 MC (Cal. Labor Comm’r 1978), discussed in *Julian*, *supra* note 164, at 319-21.

173. *Julian*, *supra* note 164, at 321.

174. No. TAC 29-79 (Cal. Labor Comm’r 1981), discussed in *Julian*, *supra* note 164, at 322-24.

175. *Id.* at 323 (quoting *Wolf*, No. TAC 29-79, at 11).

176. No. TAC 17 MP 114 (Cal. Labor Comm’r 1982), discussed in *Singer*, *supra* note 160, at 256-57.

177. Adam B. Nimoy & Jackson D. Hamilton, *Attorneys and the California Athlete Agencies*

the cited cases involved personal managers, these decisions articulate a view that could affect many entertainment attorneys. As a consequence of the Labor Commissioner's liberal construction of procurement in these cases, no attorney who negotiates employment contracts on behalf of an artist-client can be entirely confident that such conduct is immune from regulation under the Act. Lawyers can be subject to onerous sanctions for engaging in the seemingly inculpable and traditionally legal act of negotiating an agreement between an artist and a purchaser of talent. These interpretations also discourage zealous representation of clients because certain aspects of the lawyer's traditional role have been proscribed.

While the courts and the Labor Commissioner have attempted to give substance to the term procurement in order to give fair warning to attorneys and personal managers, they have yet to cultivate clear and workable criteria for ascertaining whether an individual has engaged in unlawful procurement. In fact, a precise definition of procurement has proven quite elusive; the existing judicial and administrative interpretations have failed to clarify the concept sufficiently, and many personal representatives still guess at its meaning. Entertainment attorneys, like personal managers, are in an uncertain position under the Act: if they perform some of the tasks customarily associated with their profession, they run the risk of violating the law and being subject to potentially harsh penalties assessed by the Labor Commissioner. Because of this inherent unfairness, an exemption for attorneys is warranted.¹⁷⁸

2. *Ineffective Amendatory Clarification of Procurement*

The legislature attempted to delineate the concept of procurement more explicitly when it amended the Act to exclude two specific procurement activities: "procuring, offering, or promising to procure recording contracts for an artist"¹⁷⁹ and acting "in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract."¹⁸⁰ These modifications, however, do not remedy the ambigu-

Act: The Toll of the Bill, 7 HASTINGS COMM. & ENT. L.J. 551, 563 (1985) (citing *Pryor and Fisher v. Shepard*, No. AMC 7-78 MP 453 (Cal. Labor Comm'r 1981)).

178. This Comment does not advocate overturning the entire Act, or § 1700.4, because of this defect. And although an argument could be made that such a fundamental ambiguity warrants striking down the Act, the ultimate success or failure of such a contention is beyond the scope of this Comment. The essential purpose of this Comment is to alert attorneys in the entertainment industry to the potential hazards generated by the Act's proscriptions on their conduct. Furthermore, this Comment proceeds on the assumption that there is a need for some regulation of personal representatives in the entertainment industry, see *Hearings, supra* note 10, at 14 (comments of Marvin Faris), 28-29 (comments of Roger Davis), but that the Act's inferential regulation of attorney conduct is excessive and unjustified.

179. CAL. LAB. CODE § 1700.4(a) (West 1989).

180. *Id.* § 1700.44(d). The amendments to sections 1700.4(a) and 1700.44(d) were first added in

ity inherent in the Act.

The first exemption is a step in the right direction because it recognizes that personal managers and attorneys, rather than talent agents, customarily negotiate recording contracts for their artist-clients.¹⁸¹ Under this exemption, personal managers and attorneys can negotiate recording deals for their clients without complying with the strict licensure requirements of the Act. The express language of the exception, however, applies only to *recording* contracts; negotiation of contracts for live performances, merchandising, or concert tours, for example, are not exempt.

The second exemption enables attorneys to coordinate employment deals for their artist-clients, provided they work "in conjunction with" and "at the request of" licensed talent agents. Thus, all engagements not exempted by the recording contract exception can be excused under this clause. As one commentator stated, this provision establishes the closest thing to a safe harbor for attorneys and personal managers.¹⁸² Unfortunately, the exclusion is effective only to the extent that licensed talent agents cooperate with unlicensed representatives. While some talent agents will validate the attorney's or manager's lawful participation in a deal by providing a confirmation letter, the policy of many agencies is to refuse to issue such letters.¹⁸³

Although they provide some solace to entertainment attorneys who are deeply involved with their clients' careers and engagement schedules, these exemptions are clearly insufficient. If attorneys represent artist-clients other than musicians or are unable to find talent agents willing to collaborate with them, they face precisely the same plight they confronted before the amendments. The amendments simply shift the focus away from the real shortcoming of the Act—its failure to exempt attorneys from its operation, especially when they do no more than engage in conduct traditionally identified with the practice of law.

C. *An Alternative Mode of Enforcement: California's Legal-Ethics Rules*

Exempting attorneys from regulation under the Talent Agencies Act is warranted in light of an attorney's duties and responsibilities under the

1982 and renewed in 1984. They expired, however, on January 1, 1986, by their own sunset provisions. Green & Green, *supra* note 138, at 359. Then, on July 24, 1986, at the recommendation of the California Entertainment Commission, these exceptions became permanent additions to the Act. *Id.* at 359-60.

181. See Brindze, *supra* note 67, at 251.

182. See Jelin, *supra* note 122, at 24.

183. *Id.*

Professional Rules¹⁸⁴ and the State Bar Act.¹⁸⁵ First, the positive and negative duties imposed by the state's legal-ethics rules are sufficient to protect the interests of artists in the entertainment industry, at least to the extent that those interests are protected by the Act and, in some situations, to an even greater degree. Second, several provisions of the Act are redundant or conflict with the Professional Rules and the State Bar Act. Finally, even when the lawyer acts in a dual capacity (attorney-manager or attorney-agent), the artist is protected by legal-ethics rules that require attorneys to handle themselves in accord with the ethical and legal constraints imposed on them as attorneys. The sufficiency of the state's ethical rules, and the duplicative and contradictory nature of the Act's regulations in light of the those rules, justify exempting attorneys from regulation under the Act.

1. *The Sufficiency of State Ethics Provisions to Police Attorney Procurement Activity*¹⁸⁶

Although one commentator has observed that "[d]iscussing ethical considerations in the entertainment field often invites sarcastic comparisons to 'military intelligence,' 'benign neglect,' 'jumbo shrimp' or other examples of oxymoronic wit,"¹⁸⁷ the state's ethical rules and disciplinary authority constitute an imposing force in guiding attorney conduct. The Professional Rules and the State Bar Act govern almost every conceivable activity of the attorney practicing in California. The principal aim of the Professional Rules is threefold: to regulate the professional conduct of attorneys through discipline; to protect the public; and to foster respect and confidence in the legal profession.¹⁸⁸ Breach of an attorney's duties and responsibilities under these rules can result in temporary suspension from the bar or, in egregious cases, expulsion from the profession.¹⁸⁹ These rules, with their positive and negative duties, undoubtedly

184. See PROFESSIONAL RULES, *supra* note 29, Rules 1-100 to 5-320.

185. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1991).

186. It is important to reiterate that California's legal ethics rules are not modeled after the ABA Model Rules or Model Code. Equally important, however, is the notion that "[e]thics opinions and rules and standards promulgated by other jurisdictions and bar associations may . . . be considered" in interpreting the duties and prohibitions mandated by the California Rules. PROFESSIONAL RULES, *supra* note 29, Rule 1-100(A).

187. Marks, *supra* note 69, at 483.

188. PROFESSIONAL RULES, *supra* note 29, Rule 1-100(A). The rule continues: "The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act and opinions of California courts." *Id.* (citation omitted).

189. The State Bar Act provides:

After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension or other discipline, the board has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproof, public or private, without such recommendation.

CAL. BUS. & PROF. CODE § 6078 (West 1990).

serve to protect artists from overreaching and unscrupulous practices by lawyers.

a. Positive Duties

The state's exhaustive legal-ethics provisions invariably impose greater duties and obligations on attorneys than the Talent Agencies Act. For example, an attorney has a well-established fiduciary duty that an agent or personal manager does not have.¹⁹⁰ The qualification requirements of the California State Bar are also more comprehensive than the Act's. In order to practice law in the State of California, an applicant must satisfy certain educational requisites, satisfy the extensive requirements of a moral-character screening process, and pass a difficult bar examination.¹⁹¹ Under the Act, however, registrants need not fulfill any educational or testing requirement—they need only file an application with the requisite fee and bond, accompanied by affidavits of two reputable residents attesting to the applicant's good moral character.¹⁹²

The Professional Rules and the State Bar Act provide additional express duties that the attorney must observe, most of which have no analogue in the Talent Agencies Act. One of these duties is the attorney's obligation to maintain client confidences. Section 6068(e) of the State Bar Act provides that the attorney is bound "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."¹⁹³

In addition, attorneys must regularly inform clients of actions taken on their behalf and must make timely replies to a client's requests for information.¹⁹⁴ The lawyer is under an affirmative duty to respond to

190. See Cole-Wallen, *supra* note 4, at 491-92 & n.60. The author discusses *Croce v. Kurnit*, 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd in part*, 737 F.2d 229 (2d Cir. 1984), where the court dismissed fiduciary charges against two *personal managers* in the absence of fraud or gross unfairness, but held that an attorney owed a higher fiduciary duty to his clients. See Cole-Wallen, *supra* note 4, at 491 n.60. The court explained:

Even in the absence of an express attorney-client relationship, however, a lawyer may owe a fiduciary obligation to any persons with whom he deals. In particular, a fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe and [sic] rely on him.

Croce, 565 F. Supp. at 890 (citations omitted); see also Lloyd Z. Remick & David S. Eisen, *The Personal Manager in the Entertainment and Sports Industries*, 3 U. MIAMI ENT. & SPORTS L. REV. 57, 84 (1986) (citing as one of the Act's shortcomings its failure to incorporate a fiduciary duty into its scheme); Greenberg, *supra* note 125, at 862 n.135 ("The nature of the fiduciary relationship is one in which one party depends or relies upon another to satisfy certain needs . . ." (citing Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983))).

191. CAL. BUS. & PROF. CODE § 6060 (West 1990) (qualifications for admission to California Bar).

192. CAL. LAB. CODE § 1700.6 (West 1989) (application procedure for licensure under the Act); see *supra* text accompanying notes 93-95.

193. CAL. BUS. & PROF. CODE § 6068(e) (West 1990).

194. CAL. BUS. & PROF. CODE § 6068(m) (West 1990) (attorney bound to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant

such inquiries if they are part and parcel of the services being rendered to an artist-client. Under the Talent Agencies Act, which imposes no such duty on the talent agent, the licensed individual can evade the inquiries of persistent artists wondering where and when their next jobs might be.

b. Negative Duties

The proscriptions the ethical rules place on attorney conduct are perhaps more significant than the positive duties attorneys owe to their artist-clients. First, an attorney must avoid conflicts of interest. The Professional Rules contemplate two types of conflicts: those created by representing interests and parties adverse to the clients',¹⁹⁵ and those created when attorneys enter business transactions with their clients or acquire a financial interest adverse to their clients'.¹⁹⁶

Conflicts of the first type arise frequently in the entertainment industry because the relationships involved in most transactions are complex and because entertainment attorneys often counsel multiple parties who can have antagonistic interests.¹⁹⁷ A lawyer might represent multiple members of a single rock band, for example, or a motion picture producer in one transaction and an artist in a related transaction with that same producer. In either case, the attorney is required before participating in the deal to obtain the informed *written* consent of each affected client and to disclose any actual or reasonably foreseeable adverse effects that might be generated by the conflict.¹⁹⁸ The Talent Agencies Act, by contrast, contains no comparable standard, and the potential for self-dealing by talent agents is enhanced. For example, an opportunity for self-dealing may exist when a talent agent has more than one artist on the roster who qualifies for a particular job. Depending upon the relative earning potential of each artist, the agent may represent the more highly compensated artist with greater enthusiasm, banking on a greater return if that artist is eventually hired. The less profitable artist, in this case, is deprived of fair representation by his agent, and the Act contains no safeguards against such self-dealing.

Second, the Professional Rules prohibit attorneys from entering

developments in matters with regard to which the attorney has agreed to provide legal services"); PROFESSIONAL RULES, *supra* note 29, Rule 3-500 (attorney must "keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information").

195. See PROFESSIONAL RULES, *supra* note 29, Rule 3-310(A) to (D) (prohibiting attorneys from representing clients with conflicting interests or accepting employment adverse to their client).

196. *Id.* Rule 3-300 (establishing guidelines for business transactions between attorneys and clients).

197. See Leonard M. Marks, *Entertainment Law Is Rife with Conflicts of Interest: California Targets Attorneys' Ethics*, BILLBOARD, June 24, 1989, at 9 (discussing various situations which create conflicts of interest for the entertainment lawyer).

198. PROFESSIONAL RULES, *supra* note 29, Rule 3-310(A) to (D).

business relationships with, or acquiring business interests adverse to, their clients' unless the terms are fair, reasonable, and fully disclosed to the clients in a writing that the artist can understand.¹⁹⁹ Attorneys must also advise clients in writing that they may seek independent legal counsel regarding the deal, and clients must consent in writing to the terms of the transaction.²⁰⁰ Examples of business transactions that might fall under this rule include: (1) entering a partnership with the artist; (2) becoming an officer of the artist's loan-out corporation; or (3) agreeing to become the artist's personal manager or agent. No corresponding requirement exists under the Talent Agencies Act.

The Professional Rules also protect artists by prohibiting attorneys from executing their duties and functions incompetently.²⁰¹ This rule suggests that attorneys with no previous experience in the industry who represent artists in complex entertainment negotiations or transactions without consulting a sufficiently knowledgeable attorney can be acting improperly.²⁰² The Act does not offer this protection; that is, the Act in no way deters incompetent behavior by licensed individuals.

Attorneys in California are also enjoined from committing any act involving "moral turpitude," corruption, or dishonesty, whether accomplished in the course of their duties as attorneys or otherwise.²⁰³ Proscribed acts include intentional or unintentional misstatement of information, misrepresentation, breach of trust, breach of fiduciary duty, failure to account, fraud, deceit, misappropriation or commingling of funds, and embezzlement. Other provisions of the Professional Rules and the State Bar Act limit attorney advertising and publicity,²⁰⁴ solicitation of clients,²⁰⁵ and compensation.²⁰⁶ Breach of these rules can be grounds for suspension or disbarment even when no criminal or civil penalty attaches.²⁰⁷ Such severe professional penalties create powerful

199. *Id.* Rule 3-300(A).

200. *Id.* Rule 3-300(B), (C).

201. Rule 3-110 provides in part: "(A) A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently. (B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation." *Id.* Rule 3-110.

202. Rule 3-110(B) continues: "If the member does not have sufficient learning and skills . . . the member may nonetheless perform such duties competently by associating or . . . professionally consulting another member reasonably believed to be competent . . ." *Id.* Rule 3-110(B).

203. CAL. BUS. & PROF. CODE § 6106 (West 1990) (commission of act involving moral turpitude, dishonesty, or corruption is cause for disbarment or suspension).

204. See PROFESSIONAL RULES, *supra* note 29, Rule 1-400 (rules governing advertising and solicitation).

205. See CAL. BUS. & PROF. CODE § 6152 (West 1990) (prohibits solicitation); PROFESSIONAL RULES, *supra* note 29, Rule 1-400.

206. See PROFESSIONAL RULES, *supra* note 29, Rule 4-200(A) (fee must not be illegal or unconscionable).

207. CAL. BUS. & PROF. CODE § 6101 (West 1990).

disincentives for attorneys tempted to deal unscrupulously with their artist-clients and provide more stringent protection for artists than the Act.

2. *Redundant and Contradictory Nature of the Act's Provisions in Light of California's Legal-Ethics Rules*

The surety bond requirement of section 1700.15 of the Talent Agencies Act is one illustration of the Act's redundancy in light of the ethical rules controlling lawyers.²⁰⁸ The \$10,000 bond requirement of the Act is duplicative because the California Bar administers the Client Security Fund (CSF) to compensate clients who have suffered "pecuniary losses caused by the dishonest conduct of . . . members of the State Bar."²⁰⁹ And an injured client's recovery from the security fund does not affect that person's right to institute an action against the lawyer individually or his firm.²¹⁰ While the bond requirement arguably offers more direct protection to the artist than the CSF alone, this contention loses much of its vitality when one realizes that most lawyers also carry professional liability insurance in amounts sufficient to protect their clients.²¹¹ Moreover, the wisdom behind the bond requirement can be challenged even as applied to nonattorney agents because the amount of the bond can be trivial in comparison to the compensation paid to many artists.²¹²

The trust-fund requirement of section 1700.25 of the Act is also repetitive because the Professional Rules require an attorney to deposit funds collected on behalf of the artist in a separate trust fund²¹³ and to maintain records and promptly disburse funds to the client.²¹⁴ Violations of these rules often result in disciplinary action against the attorney.²¹⁵ The Professional Rules include additional proscriptions against commingling of funds, requiring the attorney to notify the client of the receipt of funds and demanding that—absent written permission from the client to the contrary—the trust fund be maintained in the State of California.²¹⁶ In short, these ethical standards offer at least as much pro-

208. See Nimoy & Hamilton, *supra* note 177, at 567-68 (discussing redundancy of bond requirement with respect to Athlete Agencies Act, CAL. LAB. CODE §§ 1500-1547 (West 1989)).

209. CAL. BUS. & PROF. CODE § 6140.5(a) (West 1990).

210. Marks, *supra* note 69, at 500.

211. Nimoy & Hamilton, *supra* note 177, at 567.

212. *Id.*

213. PROFESSIONAL RULES, *supra* note 29, Rule 4-100 (requiring attorney to preserve identity of funds and property of client).

214. Compare CAL. LAB. CODE § 1700.25 (West 1989) (requiring disbursement within 15 days) with PROFESSIONAL RULES, *supra* note 29, Rule 4-100(B)(4) (requiring disbursement to occur "promptly").

215. Nimoy & Hamilton, *supra* note 177, at 568-69 (citing *Rogers v. State Bar*, 620 P.2d 1030 (Cal. 1980)).

216. PROFESSIONAL RULES, *supra* note 29, Rule 4-100(A).

tection to the artist as the Act, and the Act's proscriptions as applied to attorneys would simply constitute unnecessary duplication.

The Act's fee requirements are also redundant. The Act's regulation of fees is limited to a requirement that talent agents file fee schedules²¹⁷ and the Commissioner's discretionary authority to set an unofficial limit on fees.²¹⁸ By contrast, the Professional Rules declare that an attorney "shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee"²¹⁹ and set forth numerous criteria for determining whether a fee is reasonable.²²⁰ Thus, "[t]he astute artist who recognizes that an attorney is subject to standards of reasonableness with respect to fee setting might engage an attorney to perform services which otherwise would be provided by other personal representatives."²²¹

Those provisions of the Act that directly conflict with California's legal-ethics rules are as troublesome as its redundant provisions. One conflict imperils the attorney-client privilege. Under section 1700.27, the talent agent must make all records and books available to the Labor Commissioner for inspection upon request;²²² those records may contain "[a]ny . . . information which the Labor Commissioner requires."²²³ Pursuant to section 6068(e) of the State Bar Act, however, attorneys are commanded to sustain client confidences and safeguard secrets, notwithstanding any threat to themselves.²²⁴ While this conflict might seem illusory because the documents would ordinarily be sought only in a dispute involving the artist against the attorney—a situation in which the privilege does not apply—there are instances in which the Labor Commissioner can seek the records for other purposes, such as to police fee requirements and other regulations of the Act. In such cases, where the Act's disclosure requirement conflicts with the attorney's strict duty of confidentiality, the attorney-client privilege is imperiled.

A final, yet minor, incongruity derives from the restriction contained in section 1700.35 of the Act, which prohibits talent agents from knowingly permitting persons of "bad character" to frequent the agency.²²⁵ This provision interferes with the attorney's express right and moral obligation to represent such individuals by effectively barring them from the lawyer's offices.

217. See CAL. LAB. CODE § 1700.24 (West 1989).

218. The Talent Agencies Act contains no express provision regulating the amount of fees an agent may charge. Talent agents' fees are governed more directly by guild and union fee ceilings. See *supra* text accompanying note 44.

219. PROFESSIONAL RULES, *supra* note 29, Rule 4-200(A).

220. *Id.* Rule 4-200(B).

221. Cole-Wallen, *supra* note 4, at 523.

222. CAL. LAB. CODE § 1700.27 (West 1989).

223. *Id.* § 1700.26(4).

224. CAL. BUS. & PROF. CODE § 6068(e) (West 1990).

225. CAL. LAB. CODE § 1700.35 (West 1989).

3. *Applicability of Legal-Ethics Rules to Attorneys Engaged in Dual Occupation*

California's ethics rules apply even where the attorney engages in a dual occupation, serving either as the artist's attorney-manager or attorney-agent.²²⁶ While no ethics rule in California forbids an attorney from engaging simultaneously in another discipline or endeavor, an attorney " 'remains bound at all times by the ethical rules which govern his activities qua attorney.' " ²²⁷ The attorney's relationship with his or her clients remains that of a fiduciary in connection with any secondary occupation even where the affiliation between others engaged in that activity and their clients does not contemplate a fiduciary duty.²²⁸ The attorney is bound by rules of legal ethics even where the secondary occupation includes legal tasks that may be performed by a layman.²²⁹ One commentator described this phenomenon as follows:

If a lawyer provides extralegal services and enters into business or investment deals with a client, legal ethics demand that he always conduct himself *as a lawyer*. A lawyer cannot ethically switch hats. He cannot ethically operate his law practice and a . . . management company as nominally distinct businesses; he cannot ethically engage in extralegal activities to feed his law practice. If the lawyer offers extralegal services, ethics of his profession demand that he always handle himself in accord with the ethical and legal constraints imposed on him *as a licensed attorney-at-law*.²³⁰

In sum, when attorneys inadvertently engage in extralegal activities or purposely don two hats, they are required to abide by the state's rules of legal ethics. These rules cover the entire range of legal functions and penalize most categories of attorney misconduct. The standards, geared specifically to the professional behavior of lawyers, are strict, extensive, and well established. Because the ethics rules protect artists to the same degree as the Talent Agencies Act and in some instances surpass the Act's protection, attorneys should be exempt from the Act's regulatory regime.²³¹

226. See BASKERVILLE, *supra* note 6, at 162-63.

227. Jim Melanson, *Attorney/Manager Combo Under Fire*, BILLBOARD, Dec. 27, 1975, at 1, 12 (quoting 1935 opinion issued by Los Angeles County Bar Association).

228. Formal Op. 328, *supra* note 77, at 65.

229. *Id.* ("In every case where a lawyer performs services for a client which could be performed by one not a member of the bar, nevertheless, in performing them in the course of his legal services *he is acting as a lawyer*" and is bound by principles of legal ethics (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 272 (1946)).

230. BASKERVILLE, *supra* note 6, at 162-63.

231. One may argue that the Act's proscriptions are a good supplement to the state's ethics rules and provide the aggrieved artist with an avenue of relief that is specifically tailored to their problem. This argument is not without force. However, it simply ignores the obvious sufficiency and stringency of the state's legal ethics rules to police attorney conduct in the entertainment industry, and the sentiment of legislators that that Act's proscriptions, if applied to attorneys, would

IV

ALTERNATIVES TO EXPRESSLY EXEMPTING ATTORNEYS
FROM THE TALENT AGENCIES ACT*A. Imposing a Registration Requirement on Attorneys*

As an alternative to an express exemption, the California Legislature should consider amending the Act to require only registration—as opposed to licensure—of attorneys. This would, at the very least, relieve the attorney of the burden of depositing a surety bond. The registration requirement would also eliminate the conflicts that currently exist between the Act and California's legal-ethics code.²³² Furthermore, attorneys would be free to engage in negotiating contracts—one of the functions for which the entertainment lawyer is best suited—without facing excessive restrictions.

Registering attorneys would also free the Labor Commissioner from unnecessary administrative burdens. By maintaining a directory of attorneys engaged in procurement activity, the Commissioner could selectively monitor their activities to detect improprieties. Moreover, the Labor Commissioner could assign a single staff member to supervise attorneys, freeing other staff members to concentrate on more immediate threats to artists.

B. Reassessing the "Incidental Booking" Option

Notwithstanding hostile reactions to the recommendation in the past, the legislature should reconsider an "incidental booking" exception—this time specifically tailored to exclude lawyers from the Act when procurement activity is not their primary function. Such an exception would further clarify the intended scope of the Act and would eliminate the unreasonable restrictions that currently face lawyers who occasionally seek employment for their artist-clients. Members of the California Bar who represent athletes enjoy an analogous exception under the California Athlete Agents Act.²³³ The exemption in that statute demonstrates the legislature's recognition that the licensure provisions are duplicative because attorneys are already held to stricter standards than nonattorney athlete agents.²³⁴ The Talent Agencies Act's lack of a similar exception is illogical: there is no expressed reason to

be unnecessarily duplicative. *See, e.g., Hearings, supra* note 10, at 45 (comments of Roger Davis) (arguing that duplicate regulations are not necessary under any circumstances).

232. *See supra* notes 222-25 and accompanying text.

233. CAL. LAB. CODE § 1500(b) (West 1990) ("Athlete agent" does not include . . . any member of the State Bar of California when acting as legal counsel for any person.')

234. Jelin, *supra* note 122, at 24 (stating that the "reasoning behind the expressed exemption for attorneys as sports managers" is that attorneys have already been "scrutinized" by the state bar); Cole-Wallen, *supra* note 4, at 529 (confirming that exception acknowledges higher fiduciary duty imposed on attorneys).

differentiate between attorneys who procure employment for artists and those who procure for athletes.

An incidental-booking exception to the Act must, of course, be drafted in a realistic and pragmatic manner to appease naysayers who regard such exceptions as vague and unworkable. New York currently has an exception that applies to "incidental" booking performed by managers. Section 171 of New York's General Business Law provides: "Theatrical employment agency' . . . does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only *incidentally* involves the seeking of employment therefor."²³⁵ Echoing New York's example, California should consider adding language to the following effect to section 1700.4(a) of the Act:

"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 an attorney duly licensed to practice law in the State of California shall not be subject to regulation and licensing under this chapter (a) when the attorney is acting primarily as legal counsel for the artist or artists, or (b) when the attorney's representation only incidentally involves the seeking of employment or results in employment for the artist or artists.²³⁶

New York has experienced no major problems with its incidental-booking exception—which is even broader than the proposed language above—nor has the entertainment industry in New York fallen apart as a result.²³⁷ In fact, only a handful of cases in New York have arisen under the exception, owing probably to the New York judiciary's strict application of this safe harbor.²³⁸ New York has handled the issue in a sensible manner, recognizing that attorneys with many years of experience in the business who are intimately involved in their clients' work necessarily engage themselves in some way in the employment aspects of their clients' careers. California should acknowledge these entertainment-industry realities, and the lawyer's role therein, and follow suit.

235. N.Y. GEN. BUS. LAW § 171(8) (McKinney Supp. 1991) (emphasis added).

236. CAL. LAB. CODE § 1700.4 (West 1989) (language in italics denotes proposed change).

237. *Hearings, supra* note 10, at 144 (comments of Howard L. Thaler).

238. *See, e.g., Pine v. Laine*, 321 N.Y.S.2d 303 (App. Div. 1971) (holding that an individual who was not licensed as a theatrical employment agency was not entitled to recover from an artist for services in arranging recording contract for that artist unless he was the artist's personal manager and the seeking of employment was only incidental to the business of management); *Friedkin v. Harry Walker, Inc.*, 395 N.Y.S.2d 611 (Civ. Ct. 1977) (holding that an agent who procured lectures for a client who was a motion picture director was required to acquire an employment-agency license where the agent was not in the business of managing the client and the seeking of employment was not only incidentally involved).

CONCLUSION

Attorneys figure prominently in the entertainment industry; they serve diverse functions and represent many types of clients. When representing artists, however, they must be mindful of California's Talent Agencies Act because the Act's proscriptions have been interpreted to include functions, such as contract negotiation, traditionally performed by lawyers.

The Act's legislative history, its ambiguous language, and California's legal-ethics rules governing attorney conduct render regulation of attorney behavior under the Act unfair, unnecessary, and redundant, and warrant an express exemption for attorneys. Attorney conduct should not be subject to scrutiny under the Act because the Act, as initially conceived by its drafters and as understood by those involved in the legislative process, was never intended to apply to the activities of attorneys. Because current translations have abandoned the Act's original design by purporting to regulate attorney conduct, the Act can ambush individuals already subject to rigorous behavioral restrictions and harsh penalties for their breach. In addition, the Act's ambiguous language—in particular, its failure to define the operative term "procurement"—and the Labor Commission's inability to formulate a coherent and consistent definition unfairly expose attorneys to the Act's severe penalties when they engage in endeavors customarily performed by lawyers. Exemption is also justified because the Professional Rules and the State Bar Act are clearly sufficient to secure the ends of the Talent Agencies Act with respect to attorney conduct. Indeed, in some instances the state's legal-ethics code provides greater protection to artists against overreaching or improper activity by attorneys. Moreover, because the Act's provisions are not designed specifically to regulate lawyers, they frequently duplicate and occasionally contradict rules governing the ethical obligations of attorneys.

The legislature should consider two proposals either in addition to, or as an alternative to, an express exemption of attorneys from the Act: a registration requirement or an incidental-booking exception. A registration requirement could have the dual effect of alleviating some of the Labor Commission's administrative burdens with respect to enforcement of the Act and enabling attorneys to render their much-needed services to artists without fear of reprisal under the Act. An artfully drafted incidental-booking exception could permit attorneys to counsel their artist-clients even if the lawyer's legal services incidentally resulted in employment for the artist.

If no change is forthcoming, the position of attorneys in California's entertainment industry, insofar as they represent artists, remains uncertain. Attorneys must constantly beware of a statutory regime without

knowing whether it actually applies to their conduct. Alternatively, attorneys can simply choose to ignore the Act's proscriptions, factoring the possibility of artist dissatisfaction into their decisions regarding representation of clients. To alleviate these problems and to improve the Act, the California Legislature should consider the proposals set forth in this Comment.

