THE FINE LINE: LEGAL ISSUES SURROUNDING THE PROCUREMENT OF EMPLOYMENT BY AGENTS AND MANAGERS

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The entertainment industry can often times be an unforgiving environment, where creative talent (like recording artists and actors, for example) and their representatives navigate a jungle of various employment and service opportunities, including live events, personal appearances, endorsements, recording agreements and film agreements. Creative talent, therefore, often needs the assistance of sophisticated representatives to help them locate employment opportunities and to assist them in making career decisions. This is where talent agents and personal managers step in—agents procure employment and managers help shape their careers. To add to the seemingly gray distinction between these two roles, many states' legislatures, including New York and California, have enacted laws that that govern the procurement of employment for creative talent. Many entertainment professionals concede, however, that the line between the roles of an agent and manager is extremely fine, existing only in theory.[1] As a result, there could often be confusion about responsibility and expectations in the artist-manager or artist-agent relationship.

In fact, a recent high profile case arose in January of 2015 highlighting these issues, where *American Idol* ("*Idol*"") winner Phillip Phillips filed a petition[2] with the California Labor Commissioner ("CLC") against *Idol's* production and development company, 19 Entertainment ("19"). Phillips stated that 19 violated California's Talent Agency Act[3] ("TAA") by procuring career opportunities on Phillip's behalf, despite not being licensed as an agent,[4] and further that 19 breached its fiduciary role as Phillip's personal manager by manipulating him into accepting jobs for 19's own benefit.[5]

Phillips' petition raises a series of important, ongoing questions regarding the roles that personal managers and talent agents play in an artist's career while highlighting the conflict that often arises when the distinctions between these two roles are blurred. Traditionally, talent agents act as "intermediary broker[s] between the buyers and sellers of talent […] with the primary objective of securing employment in the entertainment industry for their clients."[6] On the other hand, personal managers "perform a comprehensive advisory function and essentially coordinate all aspects of an artist's professional and personal lives [often helping to] counsel artists in selecting appropriate projects."[7] Personal managers focus on "advising and counseling each artist with an eye to making the artists as marketable and attractive to talent buyers as possible, as well

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[1] Richard Busch, *Walking on the California Talent Agency Act's Thin Ice: Personal Managers Beware!*, FORBES, (Mar. 25, 2013), http://www.forbes.com/sites/richardbusch/2013/03/25/walking-on-the-california-talent-agency-acts-thin-ice-personal-managers-beware/#6031488c2845

[2] Petition to Determine Controversy, Phillips v. 19 Entertainment (2015).

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.*

[6] Michael J. Plonsker, *The Talent Agency Act: protecting artists from abuse*, L.A. DAILY JOURNAL (2011). http://www.robinskaplan.com/files/The%20Talent%20Agencies%20Act%20-%20protecting%20artists%20from%20abuse.pdf

[7] *Id.*

as managing the artist's personal and professional life in a way that allows the artist to focus on creative productivity."[8] Thus talent agents procure employment for artists whereas personal managers foster an artist's career growth, technically without procuring employment. Part of the reason of the blurring of these two roles, however, is that "personal managers often seek and obtain employment for artists"[9] as part of their day to day advisory role, despite not being licensed to do so, leading to controversies such as that presented by the Phillips' case. While the "primary responsibilities of managers includes advising, counseling, and shaping the talent's career,…many managers in the music industry, [for example], also take phone calls from concert promoters and labels, handle the artist's scheduling, set up meetings, facilitate communications with various representatives, and engage in many other activities that could arguably be procurement of the employment."[10] As one article noted: "[i]t is typical for managers to procure employment and for agents to act as producers [meaning] it is typical for managers to behave like agents and for agents to behave like managers."[11] More than ten years later, this still holds true, often leaving courts to determine what action is appropriate in cases like Phillips', where the possible penalties for procuring employment without a license in California include loss of future earnings and the cancellation of management contracts.[12]

Two of most influential states governing agency relationships are New York and California,[13] which each have statutes requiring anyone who solicits and arranges employment for others to be licensed, including agents booking employment for artists.[14] In the context of entertainment agents, such regulations are meant to protect artists from "the potential for abuse embedded in the dynamic between artist and representative […]."[15] New York's statue defines "employment agency" to include "theatrical employment agency", but specifically contains an exception for managers where the procurement of employment is incidental to their role, stating that:

> "Theatrical employment agency" means any person (as defined in subdivision seven of this section) who procures or attempts to procure employment or engagements for an artist, *but such term does not include the business of managing entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor* [emphasis added].[16]

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[8] Marathon Entertainment v. Blasi, 42 Cal. 974, 984 (2008).

[9] Seth Williams & Susanna Fischer, *Special Report: The Implications of Talent Agency Licensing*, NEWSEUM INSTITUTE (Sept. 24, 2014), http://www.newseuminstitute.org/2014/09/24/special-report-the-implications-of-talent-agent-licensing/

[10] Busch, *supra* note 1.

[11] David Zelenski, *Talent Agents, Personal Managers, and Their Conflict in the New Hollywood*, 76 S. CAL. L. REV. 979, 980 (2003).

[12] Busch, *supra* note 1.

[13] James M. O'Brien III, *Regulation of Attorney's Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 472 (1992) (stating that California plays a dominant role in the entertainment industry; *see additionally* footnote 1 stating that New York plays a major role in the entertainment industry as well).

[14] Brian Taylor Goldstein, *A License to Manage: State Licensing Requirements for Artist Managers,* GG ARTS LAW, 1 http://ggartslaw.com/License%20to%20Manage.pdf

[15] Plonsker, *supra* not 6.

[16] N.Y. Gen. Bus. Law §§171, 185 (McKinney 2004).

California's statute, however, does not contain an exception for the incidental procurement of employment by artist managers generally, instead providing an exception for the procurement of recording contracts, stating 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."[17] The reason for this exemption is that personal managers, and not talent agencies, typically handle negotiations between record companies and artists for such contracts.[18] As such, the exemption has been narrowly interpreted to apply only where managers are procuring employment for artists directly with record companies, and does not extend to managers procuring employment for artists with producers[19] or songwriting services.[20] Thus, in California, anyone seeking to procure employment on behalf of talent outside of recording contracts falls within the purview of the TAA and must be licensed, whereas in New York, personal managers can legally procure employment as long as it is incidental to their central role as the artist's personal manager.[21]

Talent agents nationwide are also regulated by guilds such as the Screen Actors Guild (SAG), American Federation of Television and Radio Artists (AFTRA), Directors Guild of America (DGA), Writers Guild of America (WGA) and American Federation of Musicians (AFM).[22] Guilds and unions often require agents to agree to a certain codes of conduct and place restrictions on the content of talent agency contracts.[23] In California, any contract form used by a talent agency must be submitted for approval by the Labor Commission, except that "SAG, AFTRA, AFofM, AGVA, Writers' Guild, and Directors' Guild contracts need not be submitted

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[17] Cal. Lab. Code §1700.4(a).

[18] Wachs v. Curry, 13 Cal. App. 4th 616, 625 (stating that in amending the TAA to include this exemption the California Entertainment Commission stated: "In the recording industry, many successful artists retain personal managers to act as their intermediaries, and negotiations for a recording contract are commonly conducted by a personal manager, not a talent agent. Personal managers frequently contribute financial support for the living and business expenses of entertainers. They may act as a conduit between the artist and the recording company, offering suggestions about the use of the artist or the level of effort which the recording company is expending on behalf of the artist").

[19] Petition to Determine Controversy, Lindsey v. MMG, 3 (2014).

[20] Yoakam v. The Fitzgerald Hartley Co., California Labor Comm'r Case No. 8774 (2013) citing Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997).

[21] Plonsker, *supra* note 6 (explaining that "In California, talent agents (i.e., people procuring or attempting to procure employment in the entertainment industry for artists), whether or not they have a state license to be a 'talent agency,' are subject to the TAA's requirements and prohibitions").

[22] Plonsker, *supra* note 6.

[23] Christine Kargill Kinney, *Managers, Agents & Attorneys*, LEXIS PRACTICE ADVISOR JOURNAL (Nov. 25, 2015) https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2015/11/25/managers-agents-amp-attorneys.aspx (explaining that "Agents are effectively subject to regulation by the various guilds or unions, which may require agents to agree to a code of conduct and restrictions on terms included in agent-talent contracts. In the majority of jurisdictions, an agent is limited to 10% of whatever employment they book for their client, and 10% is the norm. In California, a talent agency must file the Schedule of Commission Fees with the Labor Commissioner, and its fee schedule must be posted in the agent's office. Generally, the Labor Commissioner will approve up to a maximum fee of 20%, but guild franchise agreements limit the commission to 10%").

for approval by the Labor Commissioner,"[24] and instead, agencies must simply submit a letter to the Commissioner stating which of the above contracts they intend to use.[25] While personal managers are not regulated by guilds or by statutes in the same way talent agents are, they do owe a fiduciary duty to the artists they represent and can be found liable for a breach of their fiduciary duties.[26]

Phillips' petition states that since winning *Idol*, 19 procured various career opportunities for Phillips including performing at the NBA All-Star Game, singing "The Star Spangled Banner" at a World Series game, and appearing on various TV shows, despite 19 not being licensed as an agent.[27] Phillips' further asserts that 19 breached their fiduciary duty to him by failing to disclose material facts and by manipulating him into accepting jobs for 19's own benefit, such as performing for 19's sponsors.[28] The petition alleges that 19's actions display a "pattern and practice of flagrant violations of the TAA"[29] and as a result, Phillips' terminated every one of his agreements[30] with 19.[31] Phillips has requested several forms of relief, including a determination that 19 violated the TAA that his Agreements with 19 are illegal and unenforceable rendering Phillips not liable under them, a disgorgement of any fees that 19 received as a result of the Agreements, and costs and attorneys' fees.[32]

The plot thickened when 19 filed for bankruptcy in April of 2016 and then filed an adversary proceeding in the Bankruptcy Court against Phillips in June.[33] 19 claimed that Phillips breached his agreements with 19 by failing to perform, and by holding on to large sums of money owed to 19 in management fees in anticipation that the agreements will be voided.[34] 19 sought a turnover of this money from Phillips pursuant to the agreements as well as a declaratory judgment that the agreements are still in effect.[35] However, the bankruptcy judge recently decided that the adversary proceeding should be put on hold until the CLC resolves the dispute regarding whether 19 engaged in substantial procurement, thus violating the TAA.[36] Past California courts have adopted an exception parallel to that codified in New York's law, determining that isolated instances of procurement will not void entire agreements if the majority of the work a manager performs does not require a license.[37] Accordingly, the CLC has discretion to decide whether to

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Petition to Determine Controversy, Phillips v. 19 Entertainment, 3-5 (2015).

[28] *Id.* at 2.

[29] *Id.* at 3.

[30] *Id.* at 2-3 (stating that Phillips and 19 entered into the following agreements: Management Agreement, Merchandising Agreement, Exclusive Recording Agreement, Exclusive Songwriting and Co-Publishing Agreement).

[31] *Id.* at 7.

[32] *Id.* at 8.

[33] Eriq Gardner, *American Idol Winner Files Bold Legal Claim to Escape 'Oppressive' Contracts*, THE HOLLYWOOD REPORTER (Jan. 26, 2015), http://www.hollywoodreporter.com/thr-esq/american-idol-winner-files-bold-767088

[34] AOG Entertainment Inc. v. Phillips, No. 116-11090(Bankr. S.D.N.Y.) 1, 8 (2016).

[35] *Id.* at 8-9.

[36] *Id.* at 25.

[37] *Blasi*, 42 Cal. Rptr. 2d. at 974.

void 19's entire contract or to just to sever out any illegal procurement that 19 performed for Phillips.[38]

If Phillips' attempt at voiding his Agreements with 19 under the TAA is successful, the consequences for 19 and for the entertainment industry could be significant. If voided, any of 19's claims arising from the contract would be precluded, preventing 19 from recovering commissions being held by Phillips.[39] The court also has the ability to order a disgorgement of all past commissions obtained by 19 through representing Phillips.[40] Such a result may have a chilling effect on the work of personal managers, deterring them from doing certain customary work for their clients due to fear of the possibly severe consequences in the event such activities are later determined to be procurement. Many personal managers in California feel that the TAA is overly vague as to what activities constitute procurement, leaving them guessing as to what acts are a violation of the regulation.[41] As a result, managers in California have in the past urged the legislature to explicitly adopt an exception akin to the one in New York allowing for "incidental" procurement of employment for artists.[42]

As legislatures and courts grapple with finding an appropriate balance between regulating the procurement of employment for talent on the one hand, and acknowledging the reality of the often blurred roles personal managers and talent agents necessarily play, on the other, lawyers must continue to carefully counsel their clients—both on the talent side and the manager side—to ensure that they both avoid potential liability. One way lawyers can help address the potential liability that managers face, and particularly managers who are based out of or working with clients in California, is to include an arbitration clause in all management contracts, requiring that disputes be referred to arbitration. In the case of Preston v. Ferrer, the United States Supreme Court upheld the arbitration clause in a contract between an artist and a manager even though doing so took away the CLC's "exclusive jurisdiction," leaving it up to the arbiter, and not the CLC, to decide on the legality of the contract. It is worth noting that over the past twenty years, around ninety percent of cases filed by artists in California claiming that a manager has impermissibly engaged in job procurement on their behalf have been decided in the artist's favor.[43] Lawyers should inform their clients as to the various applicable regulations placed on both personal managers and agents, the potential conflicts of interest that arise from procurement, and provide viable ways for artists, managers and agents alike to successfully traverse the current landscape.

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[38] *AOG Entertainment* (Bankr. S.D.N.Y.) at 20-21.

[39] *See generally AOG Entertainment*.

[40] Waisbren v. Peppercorn Prods., Inc., 48 Cal. Rptr. 2d 437, 446-447 (1995) (holding that "the most effective weapon for ensuring compliance with the Act is the power…to…declare any contract between the parties void from the inception.").

[41] Busch, *supra* note 1.

[42] Complaint For Declaratory and Injunctive Relief at 10, National Conference of Personal Managers v. Brown, No. CV 12-09620 (C.D. Cal. Mar. 5, 2013).

[43] Busch, *supra* note 1.