1-1-1978

The Personal Manager in California: Riding the Horns of the Licensing Dilemma

David F. Charles

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
David F. Charles, The Personal Manager in California: Riding the Horns of the Licensing Dilemma, 1 Hastings Comm. & Ent. L.J. 347 (1978). Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol1/iss2/4

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
The Personal Manager in California: Riding the Horns of the Licensing Dilemma

By DAVID F. CHARLES
Member, third year class

Introduction

The last twenty years has been a period of phenomenal growth and change within the music industry. The complexity of the business aspects accompanying this growth has created a need for a liaison between the performing artist and the world of attorneys, accountants, and promoters with which the artist would otherwise have to deal directly. This role has been filled by the personal manager, who has been defined as one who, for a fee, engages in the occupation of advising, counseling, or directing artists in the advancement of their professional careers, but who has no contractual obligation to procure or attempt to procure employment or engagements for artists.¹

In the music industry, the relationship between artist and personal manager often begins before the artist has achieved formal recognition.² This occurs because artists' managers and booking agents are reluctant to enter into a contract with an artist who does not have a recording contract, and the personal manager is often the only person willing to invest the time and money to help the artist obtain a recording contract.³

---

² In Gold v. Bureau of Employment Agencies, Civ. No. C146604 (Los Angeles, Cal. Super. Ct., filed Dec. 30, 1975) plaintiff stated: Personal managers such as myself . . . are typically the closest professional advisers of the artists they represent. It is our function, among other things, to assist the artist in the creation and perfection of his act and performance; to arrange for the necessary financing to tide the artist over the period before he obtains competence and public recognition to generate income in excess of his expenditures; to obtain artists' managers to procure employment for the artist . . . and to advise the artist in connection with his general business affairs, including, in the case of more successful artists, arranging for the services of lawyers, accountants, business managers, investment counselors, and the like.
³ Declaration of Steve Gold at 2 (Dec. 29, 1975).

---

347
In California, one who procures, offers, promises or attempts to procure employment or engagements, including a recording contract, for artists and, in addition, advises or counsels artists in the advancement of their professional careers must be licensed by the State of California. Furthermore, the artists' manager is required to assume the statutory duty to procure or attempt to procure employment or engagements for artists, and failure to fulfill this obligation may result in termination of the contract with the artist. However, the personal manager, who is not licensed as an artists' manager, is not authorized to engage in employment procurement. If a personal manager is found to have procured, offered, promised or attempted to procure employment for the artist, the Labor Commissioner has the power to determine the contract between artist and personal manager void, subject to a trial de novo in superior court.

It has now become commonplace for artists who wish to get out of personal management contracts to rescind the contract, alleging that the personal manager acted unlawfully by procuring or promising to procure employment or engagements for the artist without being licensed as an artists' manager. If the allegations are proven, the artist may recover all commissions paid to the personal manager under the void contract. In fact, even when the personal manager

the artist's manager "very often [will] not sign until they have a record because . . . overhead is so high." The Licensing and Regulation of Artists' Managers, Personal Managers, and Musicians' Booking Agencies: Hearings on S.B. 733 Before the Senate Committee on Industrial Relations, Cal. Leg. 173-74 (Nov. 20, 1975) [hereinafter referred to as Hearings on S.B. 733].

5. Cal. Lab. Code defines "artists' manager" as:

[A] person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist.


A person who, for consideration, advises, counsels or directs artists in the development or advancement of their professional careers and who, in fact, either procures, offers, promises, or attempts to procure employment or engagements for an artist shall be deemed to be an artists' manager even though the agreement or contract with an artist provides that there is no obligation to do so.

has not actually procured or promised to procure employment for
the artist, if the contract provides that all offers of employment to
the artist be made through the personal manager (as is generally the
case), such control over the artist's employment opportunities may
render the contract void.9

Consequently, the personal manager is precluded from procuring
employment for the artist unless the manager is willing to obtain
an artist manager's license and thereby assume a legal obligation to
procure employment. While it is often in the best interest of the
artist to allow the personal manager to help the artist procure em-
ployment (particularly the initial recording contract), it is inconsis-
tent with the manager's function to be required to assume the
statutory duty to procure employment for the artist. The personal
manager is valuable to the artist because the manager possesses
business expertise helpful to the advancement of the artist's career,
not because he or she possesses the contacts or expertise necessary
to provide employment or engagements for the artist.10 Any effort
by the personal manager to procure engagements for the artist is
done out of necessity, and the personal manager does not ordinarily
want to assume responsibility for this aspect of the artist's career.

Recently the California Legislature was presented with two differ-
ent proposals to amend the Artists' Managers Act11 to include the
personal manager. The purpose of this note is to examine how the
existing legislation developed and why further legislation is neces-
sary. In particular, an in-depth examination will be made of the
landmark case Buchwald v. Superior Court,12 the Artists' Managers
Act, and the Whetmore Act.13 The two recent legislative attempts
to remedy these problems of personal management will also be dis-

cussed: Assembly Bill 2535 represented an attempt by the Artists'
Managers Guild14 and the American Federation of Musicians to
require the personal manager to be licensed, while at the same time
prohibiting the personal manager from engaging in employment
procurement. In contrast, Senate Bill 1764 would have allowed the
personal manager to procure employment for artists without being

---
9. See text accompanying note 48, infra.
10. See note 2, supra.
14. The Artists' Managers' Guild, consisting of over 450 members, was organized in Califor-
nia in 1937 and was responsible for the recognition of artists' managers by the California
licensed by the state. This note will attempt to determine why both bills failed to achieve their purpose and why the licensing dilemma of the personal manager has gone unresolved for nearly twenty years.

**The Meaning of Procurement**

The contract between artist and personal manager generally provides that the personal manager shall have the exclusive right to represent the artist in an advisory capacity for the duration of the contract. In the event of dispute between artist and manager, the personal management contract will usually provide for the dispute to be settled by arbitration or an action in a court of law. However, a prima facie showing that the personal manager engaged in procurement of employment or engagements for the artist will invoke the jurisdiction of the Labor Commissioner, and a finding that the personal manager did procure or promise to procure employment for the artist without a license will render the contract void.

The trend of the cases has been to give a liberal reading to the definition of artists' manager under the Act. Procurement of employment was recognized as a basis for distinguishing the artist manager from the personal manager in *Raden v. Laurie*, the first case to grapple with the distinction. In *Raden*, Rosetta Jacobs, known professionally as Piper Laurie, sought to avoid a personal

---


   I engage you and you agree to act for a period of five (5) years from date as my exclusive personal representative, advisor and manager in the entertainment field, primarily to advise me with respect to contracts and offers of employment and other business and professional aspects of my career... It is clearly understood that you are not an employment agent or theatrical agent, that you have not offered or attempted or promised to obtain employment or engagements for me, and you are not obligated, authorized or expected to do so.

Motion for Continuance for Plaintiff (Dec. 31, 1976).

16. The contract in *Buchwald* stated:

   Any controversy or claim arising out of or relating to this contract, or in breach thereof, shall be settled by arbitration in Los Angeles in accordance with the rules of the American Arbitration Association then obtaining, and judgment entered upon the award rendered by the arbitrators may be entered in any court having jurisdiction. Id.


19. "Remedial statutes should be liberally construed to effect their objects and suppress the mischief at which they are directed." 254 Cal. App. 2d at 354, 62 Cal. Rptr. at 369.

management contract with her personal manager on the grounds that Raden had attempted to procure employment for her without being licensed as either an artists’ manager or employment agency. The contract provided that Raden “was to receive 10 per cent of all the professional earnings of Rosetta” for his services as “advisor and counsel and as business manager” for Piper Laurie and her mother; and that he was not required to obtain employment or engagements for the artist. Although the personal manager admitted taking Piper Laurie to places where she might have found employment, alleging that it was for “the general development and education” of the artist, the court held that this was not enough to constitute procurement of employment in contravention of the licensing requirements. The court stated that “in the absence of any evidence that the [agreement] was a mere subterfuge or otherwise invalid the court was required to give effect to its clear and positive provisions”. Under the holding in Raden, a person acting as personal manager for an artist need not be licensed unless engaged in procuring or attempting to procure employment or engagements for the artist.

However, the task of determining whether there has been employment procurement was to prove to be problematic. In the landmark decision of Buchwald v. Superior Court, plaintiffs, members of the rock band the Jefferson Airplane, were able to make a prima facie showing that Matthew Katz, the group’s personal manager, had engaged in the procurement of employment for the group, thereby conferring original jurisdiction upon the Labor Commissioner to determine whether Katz had been acting unlawfully as an unlicensed artists’ manager. In Buchwald, members of the Jefferson Airplane had individually signed exclusive personal management contracts and publishing agreements with Katz, a recognized personal manager. The contracts provided that Katz was to render services as “advisor and manager” for the group, but that Katz was

21. Id. at 779 n.1, 262 P.2d at 63 n.1.
22. Id.
23. Id.
24. Id. at 780, 262 P.2d at 64.
25. Id. at 782, 262 P.2d at 65.
28. Id. at 356-57, 62 Cal. Rptr. at 371.
not obligated to procure or attempt to procure employment or engagements for the group.\(^{30}\) Less than a month after the signing of the management contracts, Katz obtained a recording contract for the group with RCA record.\(^{31}\)

Within a year of the signing of the management contracts, Buchwald, known professionally as Marty Balin and leader of the group, gave written notice to Katz of his intention to rescind the contract, alleging that Katz had used fraud and undue influence in obtaining the contracts.\(^{32}\) Katz immediately began arbitration proceedings as provided for in the contract, and the Jefferson Airplane filed with the Labor Commissioner, alleging Katz had acted unlawfully as an unlicensed artists’ manager in procuring employment for the group.\(^{33}\) The Airplane also filed an action in San Francisco Superior Court to obtain an order restraining arbitration, contending that before the provision for arbitration could be given effect the contract must be shown to be valid.\(^{34}\) Katz moved for the court to order arbitration, and the court granted his motion, relying on the holding in *Raden*. On appeal by the Jefferson Airplane, the Court of Appeals annulled the lower court’s order, and instructed that the case be heard before the Labor Commissioner.\(^{35}\) The court distinguished *Raden*, stating: “[N]o showing, prima facie or otherwise, was made . . . that Raden had agreed to act, or had acted as an artists’ manager . . . . . In the proceedings before us a prima facie showing was

\(^{30}\) See note 15, *supra*.

\(^{31}\) The contract with RCA was obtained on November 15, 1965. Katz had also “negotiated” engagements for the group at the famous Fillmore Auditorium. In fact, the group had been the opening act for the Fillmore in 1965. In testimony at the Labor Commissioner’s hearings, Bill Graham, owner of the Fillmore, stated that he had gone to Katz’ home, where the contract was negotiated and signed. Thereafter, Katz would make periodic calls advising of the band’s open dates and asking: “What is availability”? Graham stated: “When he needed something from me, he would call me. When I needed something from him, I would call him.” Record at 200, Buchwald v. Katz, Lab. Comm’r. Det. No. AMSF-00017 (Feb. 17, 1970).

\(^{32}\) Plaintiffs alleged that Katz had told them RCA would not enter into a recording contract with them unless they were signed to Katz as manager, when in fact RCA had no such policy. Plaintiffs also alleged that Katz assured them that the management contracts were “only for RCA,” and that plaintiffs were free to consult a lawyer later and work out a satisfactory contract. Post-Trial Memorandum for Plaintiff at 9-10 (Jan. 27, 1977), Buchwald v. Katz, Civ. No. 614-027 (San Francisco, Cal. Super. Ct., filed 1970). See also, Cal. Civ. Code § 1689 (West 1978).

\(^{33}\) Id.

\(^{34}\) “It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which rights might arise.” Loving & Evans v. Blick, 33 Cal. 2d 609, 610 (as appearing in 254 Cal. App. 2d at 361, 62 Cal. Rptr. at 373. See also Cal. Civ. Proc. Code § 1281.2 (West 1971).

\(^{35}\) 254 Cal. App. 2d at 361, 62 Cal. Rptr. at 373.
made to the Labor Commissioner as to matters over which he had jurisdiction."

Discussing the arbitration provision in the contract, the court went on to state:

Since the clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public, a contract between an unlicensed artists' manager and an artist is void. [Citations omitted] . . . . If the agreement is void, no rights, including the claimed right to private arbitration, can be derived from it. (emphasis added).\[37\]

In the following hearing, the Labor Commissioner determined that the management contracts between the artists and Katz were "mere subterfuge" to avoid the licensing requirements of the Act, and ordered Katz to return all commissions he had received under the contracts.\[38\] Katz appealed the determination to the San Francisco Superior Court for a trial de novo, as provided for by the Act.\[39\] The case was bifurcated with only four issues to be determined in the first portion of the proceedings:

1. Did Katz act, or agree to act, as an artists' manager?
2. Were the management contracts with the individual group members void because of violation of the licensing requirements of the Artists' Managers Act?
3. Were the publishing agreements between individual members of the group and Katz void or unenforceable because of any alleged violation of the Artists' Managers Act or other statutes?
4. Were the management contracts and publishing contracts separate and severable agreements?\[40\]

The jury concluded that Katz had not acted or agreed to act as an artists' manager for the group; nor were the contracts voidable because of violations of the licensing requirements of the Act.\[41\] The publishing agreements were found to be severable and were voidable.

\[36\] Id. at 356-57, 62 Cal. Rptr. at 371.

\[37\] Id. at 351-60, 62 Cal. Rptr. at 367-73. See note 34, supra.

\[38\] The determination ordered Katz to return to petitioners $49,004.88 in commissions received by Katz under the contracts. The hearing committee also found Katz had obtained the RCA contracts and engagements at the Fillmore for a fee, in violation of the licensing requirements of the Artists' Manager Act, and that Katz made representations regarding the RCA contract when in fact he did not know what RCA's policy was. See note 32, supra.


\[41\] Id.
by the artists for Katz' breach of fiduciary duty in failing to disclose material information within his knowledge to the group.42

A Conflicting Determination

The result of the legal proceedings in Buchwald is two diametrically opposing determinations on the issue of the existence of employment procurement. The Labor Commissioner held that Katz' role in obtaining the RCA recording contract for the Jefferson Airplane constituted procurement of employment for the artists, and that the "negotiations" between Katz and prospective employers of the group constituted procurement requiring an artists' manager's license. Yet the jury in the trial de novo found that Katz had not engaged in procurement, and consequently the attainment of the RCA recording contract on behalf of the group did not require a license as an artists' manager.

Throughout the de novo proceedings, the most litigated issue was the meaning of "procurement." Katz argued that "to procure" meant to solicit, and thus one was not acting as an artists' manager by negotiating with a prospective employer of the group so long as the other party had instigated the negotiations.43 The Jefferson Airplane argued that "procurement" encompassed negotiation of employment or engagement agreements, regardless of who made the initial contact.44 The Jefferson Airplane relied heavily on Deane v. Rippy,45 a case ironically decided under the precedent of Buchwald v. Superior Court. In Deane, the personal manager sought to enforce a contract almost identical to that between Katz and the Jefferson Airplane.46 The contract gave the personal manager complete control over employment opportunities of defendants Ronald Rippy and his mother, but at the same time specifically stated that the personal manager was not "to function as an employment agency".47

42. Id.
43. Post-Trial Memorandum for Plaintiff at 2 (Jan. 27, 1977). In interrogatory, Katz had stated: "As the groups' personal manager, it was my principal responsibility to advise them in the development and enhancement of their professional careers, including giving them advice on which job offer to accept, and which to reject and for what reasons." The interrogatory also recorded that all inquiries regarding employment for the group were referred to Katz. Plaintiff's Interrogatory of Matthew Katz at 5 (June 21, 1976).
44. Post-Trial Memorandum for Plaintiff at 2 (Jan. 27, 1977).
46. See notes 47, 49, infra.
47. The contract stated:
On appeal, the court concluded that the contract conferred complete control over the artists' employment opportunities to the personal manager, supporting the trial court's finding that the personal manager had acted illegally as an artists' manager.48

Because Katz' contract gave him similar control over the employment opportunities of the Jefferson Airplane, under the precedent of Deane, Katz would have been found to be an unlicensed artists' manager.48 Counsel for Katz wrote to the California Supreme Court protesting the holding in Deane on the basis that the issue of whether Deane was licensed as either an artists' manager or employment agency had never been raised in the proceedings, and no evidence had been received on the issue.50 Deane was decertified shortly thereafter, and the case against Katz was weakened considerably.51

At this writing, the second portion of the trial de novo of the Jefferson Airplane case has not commenced, and the case now enters its thirteenth year on the records at San Francisco Superior Court. The precedent of Buchwald still remains, that upon a prima facie showing that a personal manager has obtained a recording contract

Your duties will be to advise (me) with respect to contracts and offers of employment and other business and professional aspects of said minor's career. It is understood that you are neither to devote your full time to minor nor to function as an employment agency . . . BETTY DEANE reserves the right to decide on which licensed agent said minor should sign with, and I agree to consult with her and get her written consent before signing. Deane v. Rippy, note 45, supra.

48. In discussing plaintiff's control over defendant's employment opportunities, the court stated:

Here [plaintiff], if not directly procuring employment attempted to procure employment indirectly. She sought and exercised the authority to approve employment and to exclusively decide on an employment agency, without incurring any obligation or liability therefor. This type of contract is a sham and a ruse and the trial court clearly perceived it as such . . . The fact that the manager in a contract such as at bench is labeled 'personal manager' instead of 'artist manager' or 'agent' and that the words in the contract purport to relieve the manager of obligations of seeking employment for the artist is insufficient to relieve such manager from the requirements of being licensed under either the Business and Professions Code or the Labor Code relative to such employment agencies. Id.

49. The contract in Buchwald stated: "I shall at all times utilize theatrical or other employment agencies to obtain engagements and employment for me, but I shall not engage any theatrical or employment agency of which you Katz may disapprove." Motion for Continuance for Plaintiff (Dec. 31, 1976), Buchwald v. Katz, Civ. No. 614-027 (San Francisco, Cal. Super. Ct., filed 1970).


51. A hearing was denied on Jan. 27, 1977 and the Reporter of Decisions was directed not to publish the opinion pursuant to Cal. Const. art. VI; Cal. R. Ct. 976. For a detailed discussion of the Deane decision see Harris, Personal Managers in the Entertainment Field, 11 J. Beverly Hills B.A. 12 (1977).
or in any other way procured, promised, or attempted to procure employment or engagements for an artist, the manager is subject to the jurisdiction of the Labor Commissioner, who may render the management contract void.

In a recent Los Angeles case before the Labor Commissioner, the Hearing Committee reaffirmed the Buchwald holding that a personal manager who procures, promises, or attempts to procure a recording contract for an artist for a fee without first being licensed as an artists’ manager is acting unlawfully and the contract is void. Furthermore, the committee held that procurement involves “more than the initial overture”, and that mere acceptance of employment offers by the personal manager without the use of a booking agent or artists’ manager was in contravention of the Act. Under this holding, a personal manager who had not instigated negotiations leading to employment or engagements for the artist, but had been approached by a potential employer and accepted employment or engagements on behalf of the artist, would have procured the employment and thus would be subject to the Act.

It is apparent that the activities in which the personal manager may engage on behalf of the artist are very limited with respect to the attainment of employment opportunities for artists, and the personal manager is left with a Hobson’s choice: to continue to represent artists and advance their careers with the hope that the artist will not seek to rescind the contract for the personal manager's failure to have a license, or to obtain an artists’ manager license and assume the statutory duty to procure employment for the artists. To better understand how this dilemma came to be, it is necessary to look at the legislative history of the Artists’ Managers Act.

53. Id. at 8. The hearing Committee analogized acting as an unlicensed artists’ manager in the procurement of employment for artists to the definition of “employment agency” under Cal. Bus. & Prof. Code § 9902 as “any agency, business or office which procures, offers, promises or attempts to procure employment or engagements for others . . . or for giving information as to where and from whom such help, employment or engagement may be procured . . . where a fee or other valuable consideration is exacted . . . .” (emphasis added). The hearing committee determined § 9902 should be extended to cover respondent’s engaging and discharging artists’ managers on behalf of petitioners, thus requiring a license as artists’ manager. See Deane v. Rippy, note 46 supra, in which the court took the same approach in finding plaintiff to be acting unlawfully as an unlicensed employment agent. Surprisingly, the committee allowed respondents to keep the commissions earned under the void contract under a quantum meruit theory. This is inconsistent with other licensing cases. See Woods v. Krepps, 168 Cal. 382, 143 P. 691 (1914); Precision Fabricators, Inc. v. Levant, 182 Cal. App. 2d 637, 6 Cal. Rptr. 395 (1960); Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 308 P.2d 713 (1957).
The Artists' Managers Act

The Artists' Managers Act, which is comprised of sections 1700.1 through 1700.46 of the California Labor Code, was enacted in 1959 at the behest of the Artists' Managers Guild.\textsuperscript{44} In 1943, the California Legislature recognized the difference between the artists' manager and ordinary employment agencies, and had enacted statutes to regulate artists' managers and to bring them under the jurisdiction of the Labor Commissioner.\textsuperscript{45} In addition, certain sections of the Labor Code regulating employment agencies were made applicable to artists' managers.\textsuperscript{46} The Artists Managers Guild contended that these sections were not relevant to the artists' manager, since the relationship with the artist was generally on a long term basis as opposed to the short duration of the relationship between employment agencies and job applicants.\textsuperscript{47}

The Artists' Managers Act did not make any significant changes in the legislation under which artists' managers had operated previously, other than relieving the artists' manager of a few formalities required of employment agencies but not necessary for artists' managers, such as keeping a register\textsuperscript{48} and giving a client an employment slip.\textsuperscript{49} The Act was founded on the Employment Agents Act of 1913.\textsuperscript{50} The 1913 Act required that theatrical employment agencies and any other person engaged in procuring or attempting to procure employment or engagements for artists, or giving information as to where such engagements may be procured, was required to be licensed by the state.\textsuperscript{41} The purpose of these early provisions was to protect artists and other persons seeking employment through agents from exploitation by those agents.\textsuperscript{62}

Many of the provisions of the 1913 Act are to be found today in the Artists' Managers Act. For example, applicants were required to submit a written application accompanied by affidavits of at least two reputable citizens attesting to the applicant's good moral

\footnotesize{\textsuperscript{54} 2 Journal of the Assembly (Cal.), No. 3, app. at 28 (1959).}  
\footnotesize{\textsuperscript{55} 1943 Cal. Stats., ch. 329, §§ 1-14 at 1326-29 (repealed 1959).}  
\footnotesize{\textsuperscript{56} Id. § 14 at 1329.}  
\footnotesize{\textsuperscript{57} 2 Journal of the Assembly (Cal.), No. 3, app. at 28 (1959).}  
\footnotesize{\textsuperscript{58} 1937 Cal. Stats., ch. 90, § 1620 at 235 (repealed 1967) based on 1913 Cal. Stats., ch. 282, § 9 at 518 (repealed 1937).}  
\footnotesize{\textsuperscript{59} 1927 Cal. Stats., ch. 334, § 1 at 555 based on 1913 Cal. Stats., ch. 282, § 11 at 518 (repealed 1937).}  
\footnotesize{\textsuperscript{60} 1913 Cal. Stats., ch. 282, §§ 1-20 at 515 (repealed 1937). See 1903 Cal. Stats., ch. 11. §§ 1-10 at 14-16 (repealed 1913).}  
\footnotesize{\textsuperscript{61} 1913 Cal. Stats., ch. 282, § 1 at 515 (repealed 1937).}  
\footnotesize{\textsuperscript{62} Buchwald v. Superior Court, 254 Cal. App. 2d at 350, 62 Cal. Rptr. at 367.}
The application had to show an established place of business; registration fees and bond requirements insured that the applicant was financially solvent; form contracts had to be approved by the Commissioner; and licensees were required to maintain records of their activities and make them available for inspection by the Commissioner.

The other significant provisions of the Artists' Managers Act also pre-date the 1943 provisions. In 1923, the Labor Commissioner was given jurisdiction to hear and determine controversies arising under the Act, subject to a trial de novo in the superior court. This section was further expanded in 1937 to require a bond to stay an award for money damages during the trial de novo, and a provision was also added requiring the submission of blank contract forms to the Commissioner for approval. In 1939, a section was added to the Act which allowed for enforcement of an arbitration clause in the contract.

In summary, all the provisions now found in the Artists' Managers Act are to be found also in the Labor Code provisions affecting artists' managers in 1943. The Artists' Managers Act was added to the Labor Code in 1959 as a response to the request by the Artists' Managers Guild that "an amendment be made to the Labor Code which will completely divorce artists' managers from private employment agencies and thus complete the original 1943 intention of setting up a separate and distinct code for artists' managers." There was no opposition to the bill.

63. 1913 Cal. Stats., ch. 282, § 2 at 516 (repealed 1937). See also CAL. LAB. CODE § 1700.6 (West 1970).
64. Id. § 3 at 516.
65. Id. ch. 282, §§ 3, 7 at 516, 517. See also CAL. LAB. CODE §§ 1700.12-1700.17; 8 CAL. ADMIN. CODE § 12000.2 (1970).
66. Id. ch. 282, § 16 at 520. See also CAL. LAB. CODE § 1700.23 (West 1970); 8 CAL. ADMIN. CODE § 12003 (1970).
67. Id. § 9 at 518. See also CAL. LAB. CODE § 1700.27 (West 1970).
68. 1923 Cal. Stats., ch. 412 § 19 at 936 (repealed 1937). See also CAL. LAB. CODE § 1700.44 (West 1970). The submission to the Labor Commissioner of all disputes arising under the Act is a mandatory prerequisite to any legal action. Collier & Wallis, Ltd. v. Astor, 9 Cal. 2d at 205, 70 P.2d at 174 (1937).
70. Id. at § 1644 at 239.
71. 1939 Cal. Stats., ch. 454, § 1 at 1800. See also CAL. LAB. CODE § 1700.45 (West 1970); Garson v. Div. of Labor Law Enforcement, 33 Cal. 2d 861, 206 P.2d 368 (1949).
**The Whetmore Act**

One of the anomalies of the Artists' Managers Act is its failure to include the booking agent. The booking agent also engages in the occupation of procuring employment for artists but is not required to advise and counsel artists in the advancement of their professional careers, as is the artists' manager. When the Artists' Managers Act was enacted in 1959, the booking agent was under the jurisdiction of the Labor Commissioner under those provisions regulating employment agencies. However, in 1967, those sections of the Labor Code regulating employment agencies were repealed, and jurisdiction over employment agents, including booking agents, vested in the Bureau of Employment Agencies through the enactment of the Employment Agency Act.

Senate Bill 733, now known as the Whetmore Act, was originally intended to remove the booking agent from the jurisdiction of the Bureau of Employment Agencies and bring the booking agent, personal manager, and artists' manager all under the jurisdictional umbrella of the Labor Commissioner, thus providing economy and efficiency in regulation. However, the Bill was amended to be added to the Business and Professions Code, so the bifurcation of jurisdiction over artists' managers and booking agents remains.

As amended “Musician Booking Agency” was defined in the Whetmore Act as:

> [A]ny agency which advises musical artists in their professional careers and which engages in activities relating to the procurement of employment or engagements for musical artists seeking employment or engagements, or which advises musical artists in their professional careers or which engages in activities relating to the procurement of employment or engagements for musical artists where a fee is extracted or attempted to be collected for such services.

Under this definition, both booking agents and personal managers were required to be licensed. The license would authorize the personal manager to engage in employment procurement for the artist,

---

73. 1937 Cal. Stats., ch. 90, § 1551 at 230 (repealed 1967).
76. As originally introduced, the bill read:

1710.6. No person shall engage in or carry on the occupation of musician booking agent without first procuring a license therefor from the Labor Commissioner . . .
S.B. 733 (1975).
and thereby eliminate the threat of contract recission for engaging in such procurement activity without a license.\textsuperscript{78}

However, under the Whetmore Act, a booking agency was prohibited from engaging in any business activity which might involve a conflict of interest between the booking agency and the artist.\textsuperscript{79} Furthermore, the booking agency could not have a financial interest in "any other person, firm, or corporation which acts as a representative of any musical artist in any capacity other than as attorney or accountant. This was totally inconsistent with the realities of the music industry, for quite often personal managers are also engaged in other activities within the industry which would bring them within these prohibitions—music publishing, record production, and artists' management.\textsuperscript{81} Under the Whetmore Act the licensee could no longer function in a dual capacity. He or she would be forced to choose whether to represent the artists solely in the capacity of, for example, either music publisher or personal manager, thereby depriving the artist of the full benefit of the manager's knowledge and abilities.\textsuperscript{82}

The Whetmore Act was criticized as overbroad in its definitions of musician booking agency and musical artist;\textsuperscript{83} and opponents argued that the Act itself was unnecessary since all areas which it would regulate were already covered by existing legislation and the regulations of the various artists' unions.\textsuperscript{84} Although the Act was to have become effective on January 1, 1976 a last minute injunction was obtained the day before the Act was to take effect. In \textit{Gold v.}

\textsuperscript{78} See text accompanying notes 27-53, \textit{supra}.
\textsuperscript{80} \textit{Id.} at § 9999.31.
\textsuperscript{81} Hearings on S.B. 733 at 149-153.
\textsuperscript{82} "If the record company or music publishing company acts as a representative of any musical artist in any capacity other than a purely professional capacity as attorney or accountant, the applicant would have to divest himself of his interest in such company in order to be licensed." Letter from George H. Murphy, Leg. Counsel of Cal., to Senator Zenovich (Nov. 19, 1975).
\textsuperscript{83} In \textit{Gold v. Bureau of Employment Agencies}, note 2 \textit{supra}, plaintiff's attorney argued: The Whetmore Act . . . was originally designed to protect musicians who were subject to certain unfair and anti-competitive practices of persons known as booking agents. In imposing such regulations, however, the Act has cast a net so broad as to cover persons in occupations not even remotely similar to that of booking agents, and to render illegal activities which are normal and accepted business practices throughout the entertainment industry.
\textsuperscript{84} \textit{See also} Hearings on S.B. 733 at 126, 149, 153.
Bureau of Employment Agencies, plaintiff personal manager was also an officer and shareholder in a music publishing company and a music production company. Alleging that the enforcement of the Act "would threaten to throw the entire management phase of the entertainment industry into chaos," Gold sought an injunction against enforcement of the Act on constitutional grounds that it violated due process, was vague and indefinite, impaired existing contracts between himself and artists, and created a substantial burden on interstate commerce through its nationwide applications. The injunction against enforcement of the Whetmore Act was granted, and the law remains in limbo, awaiting an inevitable repeal.

Proposals to Regulate Personal Managers

In 1978, four different bills were presented to the California Legislature which would have affected persons acting as artists' managers, personal managers, or booking agents. A bill introduced by Senator Carpenter would have brought artists' managers under the jurisdiction of the Bureau of Employment Agencies by amending section 9999.57 of the Business and Professions Code (The Whetmore Act). Since there is an injunction against the enforcement of the Whetmore Act provisions, the motivation for the amendment is questionable. The bill found no support.

The most controversial proposal was that of Assemblyman Fazio. As originally introduced, the Fazio Bill would repeal the Whetmore Act and bring the booking agent within the jurisdiction of the Labor Commissioner by changing the classification "artists' manager" to "talent agency," and by changing the definition of artists' manager to abrogate the present duty to advise and counsel artists. In addition, the Bill would have required that the personal

85. See note 2, supra.
89. See text accompanying notes 73-80, supra.
91. Id. (Leg. Counsel's Digest).
92. "1700.4 (a) A talent agency is hereby defined to be 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. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." Id. (emphasis added).
manager be licensed, yet prohibited from engaging in procurement of employment for artists.

On May 1, 1978, the Fazio Bill was further amended to include specific provisions which would be applicable to personal managers, similar to those governing talent agencies. The Bill was strongly opposed by personal managers, and on May 10, 1978 the Bill was again amended to exclude the personal manager completely. In addition, the classification "talent agency" was changed back to "artists' manager." As the Bill now stands, the Whetmore Act would be repealed and the booking agent would be allowed to be licensed as an artists' manager under the new definition.

On March 22, 1978, a bill identical to the original Fazio Bill was introduced in the Senate by Senator Greene. Greene later co-authored the Fazio Bill, and the Greene Bill has not been pursued; however, the dormant Bill could be reintroduced to the Legislature should the Fazio Bill be abandoned.

In response to these proposals to prohibit the personal manager from procuring employment or engagements for artists, Senator Zenovich introduced a bill which would allow the personal manager to procure employment or engagements "incidental" to the obligations contracted for, and which would exempt the personal manager from the licensing requirements of the Act. The Zenovich Bill also

93. "1700.5 (b) The Labor Commissioner shall issue a separate personal manager's license to all personal managers and shall adopt such rules and regulations as are necessary to administer and regulate such licensee." Id.

94. "1700.4 (b) Personal manager means a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers. A person who procures, offers, promises, or attempts to procure employment or engagement for a artist in any way whatsoever is not a personal manager. Id, (emphasis added).

95. A.B. 2535 (1978) was amended in the Assembly on May 1, 1978 to add Chapter 5, §§ 1701 - 1709 to the CAL. LAB. CODE.

96. A.B. 2535 (1978) was amended in the Assembly on May 10, 1978 proposing revision of CAL. LAB. CODE § 1700.4.


The bill introduced by Senator Zenovich would amend CAL. LAB. CODE § 1700.4 to read:

1700.4 (b) Personal manager means a person or corporation who, for compensation, engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers, and is not contractually obligated to procure or attempt to procure employment or engagements for an artist or artists, but may do so if the same does not constitute the primary function of said personal manager or is only incidental to the obligations contracted for. A personal manager is not required to be licensed hereunder, and jurisdiction to determine
proposed amending the definition of "artists' manager" to "talent agency" and abrogating the dual duty of the present statute. In addition, the Bill proposed that the Act be amended to prevent a minor's disaffirmance of the personal management contract on grounds of lack of capacity.

The Zenovich Bill met with strong opposition from the Artists' Managers' Guild and various artists' unions. Consequently, the Bill died on file and will not be reintroduced.

Analysis of the Proposals

The proposals to amend the Artists' Manager Act to include the personal manager exemplify the conflict which has existed for nearly twenty years between the Artists' Managers Guild, various artists' unions, and the personal managers in California. The fact that neither the Whetmore Act nor any of the recent proposals has succeeded in bringing the personal manager under government regulation raises a serious question as to the future of the Labor Commissioner's jurisdiction over personal managers allegedly acting as unlicensed artists' managers.

The Fazio Bill was the result of the combined efforts of the Artists' Managers Guild and the American Federation of Musicians (A.F. of M.). The Artists' Managers Guild feels that the personal manager's jurisdiction over personal managers allegedly acting as unlicensed artists' managers.

whether one has acted as a personal manager or talent agent shall be with the applicable court. S.B. 1764 (1978).

The Zenovich bill was authored by Howard Thaler, legal counsel for the Conference of Personal Managers, West. Thaler had suggested that California adopt the "incidental" procurement approach at the Zenovich hearings in 1975. The "incidental" approach is to be found in N.Y. GEN. BUS. LAW § 171(7) (McKinney 1968) which states:

"Theatrical employment agency" means any person... who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theatre, motion pictures, radio, television, phonograph recording, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions, or performances, but such term 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. (emphasis added).


100. Id. (proposing revision of CAL. LAB. CODE § 1700.37). See also Harris, The Personal Manager in the Entertainment Field: There Ought to be a Law, 4 J. BEVERLY HILLS B.A. 19 (1970); CAL. LAB. CODE § 1700.37 (West 1971); CAL. CIV. CODE §§ 35, 36 (West 1971).

manager engaging in procurement of employment for artists should be required to be licensed as an artists’ manager and opposes any legislation which would allow the personal manager to engage in procurement without a license.\textsuperscript{102}

The A.F. of M. maintains that their interest in the licensing of personal managers is to prevent exploitation of the artist by the personal manager,\textsuperscript{103} but there are other reasons for their concern. Under the Union’s By-Laws, members are prohibited from securing or accepting employment from any “booking agent”\textsuperscript{104} who is not a party to a subsisting Union franchising agreement.\textsuperscript{105} The Union will not enter into a franchising agreement unless the agent has been licensed by the State as either an artists’ manager or booking agent,\textsuperscript{106} and limitations are placed on the percentage fee members may pay an agent for a booking.\textsuperscript{107} If the Union artists act in viola-

\textsuperscript{102} At the hearings on S.B. 733, Marvin Faris, spokesperson for the Artists’ Managers Guild, stated:

The Artists’ Managers Guild does not oppose the licensing of Personal Managers or allowing them to procure employment provided they are subject to the same rules and restrictions as are Artists’ Managers.

Any bill such as those introduced in recent years to license Personal Managers and allow them to procure and negotiate employment without being subject to the Labor Commissioner and Unions and Guilds will be opposed as being discriminatory against Artists’ Managers who abide by the laws set up by the Legislature to specifically regulate such activities.

\textit{Hearings on S.B. 733} at 10.

\textsuperscript{103} In a telephone conference with Jerry Zilbert, spokesperson for the A.F. of M. (Feb. 16, 1978), Zilbert stated that the union’s involvement in the controversy was to regulate exploitation. As he stated: “We’re after the fifty percenters.”

\textsuperscript{104} “‘Booking Agent’ means any person, firm or corporation 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.” Constitution: By-Laws and Policy, A.F. of M. of the U.S. and Canada § 2 (1977). (hereinafter referred to as By-Laws).

\textsuperscript{105} “No member of the Federation shall employ or retain any booking agent or secure or accept any employment or engagement, directly or indirectly, through or with the assistance of any booking agent . . . unless such booking agent is party to a subsisting Booking Agent Agreement with the Federation stipulating the terms and conditions pursuant to which such booking agent shall perform such services for members of the Federation . . . .” Id. at § 5.

\textsuperscript{106} The agreement form used by the A.F. of M. provides: “Agent shall fully comply with all applicable laws, rules and regulations of governmental authorities and secure such licenses as may be required for the rendition of services hereunder.” A.F.M. Exclusive Agent-Musician Agreement § 2(d).

\textsuperscript{107} By-Laws at §§ 8, 9. The Artists’ Managers Act does not set a limit on fee percentages for artists’ managers but a maximum of twenty per cent is provided in § 8. § 8 of the A.F. of M. By-Laws sets a maximum limit on the amount a member may pay for a booking at 25% where the artists’ manager also acts as personal manager. However, in California the Labor Commissioner will not allow enforcement of this provision, because the artists’ manager already has the statutory duty to render services of advising and counseling the artist.
tion of the By-Laws by paying a non-franchised personal manager a fee for procuring an engagement, they may be fined by the Union or expelled. 108

If the Artists' Manager Act were amended to relieve the artists' manager of the duty to advise and counsel the artist, the argument by the Artists' Managers Guild, that the personal manager is engaged in the same activities as the artists' manager, and should therefore be subject to the same regulations, would no longer be valid. 109 The need for personal managers would be even greater, since the artists' manager would no longer have a statutory duty to advise and counsel the artists.

It is now clear that proposals which would allow the personal manager to engage in procurement of employment or engagements for the artist without first being licensed by the state would not be acceptable to the Legislature. The licensing requirement is a reasonable regulation for the protection of the artist. But the imposition of a statutory duty to procure employment is unacceptable to the personal manager—while anything less would be strongly opposed by the Artists' Managers Guild and various artists' unions. The California Legislature has been unable to appease these diverse interests and to produce reasonable legislation for the regulation of personal managers in the interest of the artist. The Legislature was given the opportunity to finally resolve the dilemma of the personal manager by amending either the Fazio Bill or the Zenovich Bill to arrive at an equitable means of allowing personal managers to be licensed so that they might seek employment on behalf of their clients without being forced to assume the duty of procuring such employment. The opportunity remains, as does the dilemma of the personal manager.

Conclusion

It seems likely that Assembly Bill 2535 will be approved, as amended. If so, the Whetmore Act will be repealed and the booking agent brought under the jurisdiction of the Labor Commissioner. More importantly, the artists' manager will be relieved of the duty to advise and counsel artists in the advancement of their profes-

108. "Any member who shall violate the provisions of this Article shall be subject to a fine not exceeding $500.00, and to expulsion from the Federation, or both, and to such other direction as the International Executive Board may find proper in the circumstances." By-Laws at § 3.

109. See note 102, supra.
sional careers. The personal manager will still be unable to obtain an artists’ manager license unless he assumes the statutory duty of procuring engagements for the artist, so the dilemma remains.

Since the California court gave the Labor Commissioner original jurisdiction over personal managers allegedly acting as unlicensed artists’ managers in *Buchwald*, there have been approximately one hundred such disputes brought before the Labor Commissioner.\(^{110}\) Although statistics for all the determinations are not available, the determinations made between 1972 and 1975 show that from a total of forty-one cases brought before the Commissioner, twenty-six were decided against the personal manager, three were decided in favor of the personal manager, and the remaining twelve were settled or dismissed.\(^{111}\) Once the Labor Commissioner has made a determination, that decision may be appealed to the superior court, which very likely will render a completely different verdict.\(^{112}\)

The Labor Commissioner was originally given jurisdiction to determine disputes between artists and artists’ managers “to save time for the agency, the applicant, and the courts by having such controversies determined by a *specialist*.\(^{113}\)” (emphasis added). In fact, licensed artists’ managers do not use the forum of the Commissioner to determine disputes, but instead rely on arbitration as provided by contract.\(^{114}\) As a result, the only disputes heard before the

---

\(^{110}\) Figures supplied by the Dept. of Ind. Relations, Div. of Labor Law Enforcement.


\(^{112}\) For a discussion of the *Buchwald* trial *de novo* see text accompanying notes 27-53, supra.

\(^{113}\) Bess v. Park, 144 Cal. App. 2d at 806, 301 P.2d at 983.

\(^{114}\) The A.F.M. Exclusive Agent-Musician Agreement provides:

9. Submission and Determination of Disputes
   (a) Every claim, dispute, controversy or difference arising out of, dealing with, relating to, or affecting the interpretation or application of this agreement, or the violation or breach, or the threatened violation or breach thereof shall be submitted, heard and determined by the International Executive Board of the A.F.M., in accordance with the rules of such Board . . . and such determination shall be conclusive, final and binding on the parties.
   (The following paragraph relates only to California)
   (b) This provision is inserted herein by A.F.M., . . . Under this agreement, Agent undertakes to endeavor to secure employment for the Musician. Reasonable written notice shall be given to the Labor Commissioner of the State of California of the time and place of any arbitration hearing hereunder. The said Labor Commissioner or his authorized representative has the right to attend all arbitration hearings. The provisions of this agreement relating to said Labor Commissioner
Commissioner are those involving unlicensed artists' managers, particularly personal managers.\textsuperscript{115} If the personal manager were licensed by the Labor Commissioner, the number of disputes brought before the Labor Commissioner involving artist-management disputes would be reduced to practically nothing, since the personal manager could also take advantage of the ease and economy of arbitrating any dispute which might arise between the artist and manager. This, of course, would be a welcome relief to the Labor Commissioner's Office.

In order to require the personal manager to be licensed by the Labor Commissioner, the personal manager must be allowed to procure or attempt to procure employment or engagements for artists. Furthermore, the personal manager must be allowed to do so without having to assume the statutory duty to do so, in order that the manager's purpose of advising and counseling the artist not be defeated. The only other solution that would allow the personal manager to continue to exist is to specifically define the term "procurement" in the Act to exclude acceptance of unsolicited offers of employment or engagements on behalf of the artists, and to define "employment or engagements" to exclude recording contracts. If this were done, the personal manager would be able to function without being licensed, and would be protected from actions alleging the manager acted as an unlicensed artists' manager in obtaining a recording contract for the artist or accepting an unsolicited offer of employment on behalf of the artist.

The solution to the problem is to license the personal manager and allow the personal manager to procure or attempt to procure employment or engagements, including recording contracts, for the artist when the services of an artists' manager are unavailable. To reach such a solution, the Artists' Managers Guild, A.F.of M., Conference of Personal Managers, and Labor Commissioner's Office must all be willing to compromise and work together for the best interests of the artist.

\textsuperscript{115} Telephone conference with Marie Monte, spokesperson for the Labor Commissioner's Office (April 5, 1978).