Don't Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard

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by

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Introduction

Since 1978, actors, personal managers and talent agents have been regulated by the California Talent Agencies Act. The Act regulates those individuals whose primary purpose and function is procuring employment for an artist. It requires individuals who engage in procurement activities be licensed. Personal managers by nature are unlicensed. If a personal manager is unlicensed, she cannot legally enforce her compensation agreement for procurement activities with an artist. In such cases, the personal manager can appeal to the California Labor Commission. Once notified of a dispute, the California Labor Commissioner convenes an administrative proceeding where each party may state her case. After this hearing, the Labor Commissioner issues a decision. Generally, the Labor Commission has strictly interpreted the Talent Agencies Act. But by precluding compensation to a personal manager, the Talent Agencies Act fails to take into account the realities of the entertainment industry: specifically, the difficulty of unknown artists securing representation licensed to procure employment. Often artists must rely on a personal manager to obtain their first “gig.” As a result, the Talent Agencies Act creates a conflict between rational behavior and lawful activities.

Sometimes a personal manager may legally enforce a compensation agreement that conflicts with the strict interpretation of the Talent Agencies Act. This continuum is best illustrated by two California Appellate court decisions; Wachs v. Curry and Waisbren v. Peppercorn. The specific issues in dispute were whether or to what extent an unlicensed personal manager may procure employment for an artist. In 1993, the Seventh District Appellate court, in Wachs, held that a personal manager does not violate the Talent Agencies Act if the procurement constitutes an insignificant portion of his or her total contractual services to the artist. Two years later, the First District Appellate court rejected this incidental exemption in Waisbren. The Waisbren court established a brightline rule, declaring that a personal manager must always be licensed in order to procure employment for an artist.

The California Labor Commission exacerbated this conflict by abandoning the *Wachs* significance test and enforcing the *Waisbren* standard. The commission reasoned that the *Waisbren* holding is more appropriate because the "*Waisbren* court upheld the Labor Commissioner’s long-standing interpretation that a license is required for any procurement activities, no matter how incidental [these activities are] to the agent’s business as a whole." Because the First District cannot overrule the decision of the Seventh District, *Wachs* is still valid law. Hence, the California Labor Commission’s arbitrary decision to follow *Waisbren* muddies the waters of the California entertainment industry by creating confusion over which standard a personal manager can legitimately rely upon when carrying out her duties. Thus, the personal manager finds herself in a precarious economic position.

The personal manager plays a prominent role in the economic vitality of the entertainment industry. Nineteen-Ninety-Six was the most successful year for Hollywood at the box-office in thirty-seven years. This success is not the result of legendary Hollywood illusion. Rather it is the product of the hard work of the many individuals who toil in the entertainment industry—from the actor, to the executive assistant, to the personal manager. Historically, the personal manager in the entertainment industry has enjoyed a prominent position. The personal manager finds the artists and nurtures them to stardom. Specifically, "[t]he manager’s function is to groom the young artist, open doors through connections with agents and casting directors to make it easier for the artist to pursue her career. [They] don't look at credits, . . . [t]hey look at talent—raw talent." The personal manager calls on her resources and helps "the artist in all their crea-

8. *Id.*
10. *Id.*
12. Brian Fuson, *Year Ends With Highest Admission Totals in 37 Years*, HOLLYWOOD REP., Jan. 2, 1997, at 1. Box office receipts "surged eight percent . . . to an all-time high near 5.92 billion [and] . . . the number of tickets sold rose seven percent to an estimated 1.35 billion." *Id.*
14. *Id.*
15. *Id.*
16. Muriel Broadman, *To Be or Not to Be . . . An Actor With a Personal Manager*, BACK STAGE, Nov. 4, 1988, at 1A.
tive endeavors." These relationships create opportunity for the artist. Yet the majority of the money generated from personal managers' hard work goes into the pocket of others under the existing statutory scheme in California.

Consider the following hypothetical. Imagine yourself as a personal manager in the entertainment industry. One day at a local restaurant, you strike up a conversation with your waiter, who claims to be an aspiring actor. You recognize the waiter has a spark that spells success. Knowing that an unknown actor will not be able to obtain significant exposure, you decide to give the kid a break by offering to represent him as his personal manager. After sending the actor to a lawyer, you both enter into a personal management contract.

In hopes of jump-starting the actor's career, you place a call to your very good friend who happens to be a television producer. Your friend agrees to take a look at the actor's publicity packet and decides to offer the actor a chance to audition for a proposed network comedy series. The actor performs well at the audition and is offered the part. The show is a success and actor's career blossoms. His sudden notoriety garners attraction and further offers.

Then one day, the actor declares that your services are no longer required and terminates the contract, refusing to pay your commission. You file a claim in superior court for breach of contract. To counter your breach of contract claim, the actor files a petition with the California Labor Commission asserting that you procured employment as an unlicensed talent agent, violating the Talent Agencies Act. Under the terms of the Act, the Labor Commissioner convenes an administrative hearing. At the hearing, the Labor Commissioner determines that your one call to your friend the producer is a procurement activity and the contract is declared void. In addition, the Labor Commissioner disgorges your commissions. You file a de novo appeal with the Superior Court. However, this proves futile. The result in this hypothetical seems rather punitive. If not for the efforts taken by the personal manager on behalf of the artist, success would have been a fleeting fantasy. But this result frequently occurs under the current statutory system in California.

17. Id. at 2A.
18. Id. at 1A.
19. This hypothetical is based a series of Labor Commission cases and is meant to emphasize the current situation that a personal manager faces.
Statutory limitations have been imposed on the breadth of the personal managers' creative and business counseling duties. Specifically, in states such as California and New York, which house a large portion of the entertainment industry, these statutes strictly regulate individuals who attempt to procure employment for an artist without a state-issued license. For instance, New York's General Business Law "exempts from licensing those [individuals] whose 'business only incidentally involves the seeking of employment' for their clients." While California's Talent Agencies Act goes one step further by mandating "a license . . . for any procurement activity, no matter how incidental to the agent's business as a whole." As a result, the personal manager in California faces an untenable situation. If the manager attempts to open the door for the artist, the manager's action constitutes procurement of employment under the Talent Agencies Act. Thus, California's license requirement is counter-intuitive to the economic realities of the entertainment industry because the Act ignores the vital contribution the personal manager makes to an artist's career.

This note addresses the current conflict in case law surrounding the California Talent Agencies Act. It examines the validity of the Wachs v. Curry incidental procurement exemption and Waisbren v. Peppercorn's strict rule prohibiting procurement without a license. It then suggests alternatives which may lead to more equitable solutions for artists, personal managers, and talent agents. Part II discusses the history of the Talent Agencies Act and its application to cases which preceded Wachs. Part III explores the Wachs decision and its resulting "significance test." Part III also evaluates the significance test through an analysis of Labor Commission determinations. Part IV discusses the impact of the Waisbren decision and return to a strict interpretation of the Talent Agencies Act and its subsequent enforcement by the Labor Commission.

20. See, e.g., CAL. LAB. CODE § 1700 (Deering 1996); N.Y. GEN. BUS. LAW § 171 (McKinney 1996).
21. Id.
25. Locker, supra note 7, at 11.
26. Johnson & Lang, supra note 11, at 471.
27. Id.
Part V offers possible solutions to mitigate the conflict created by the Wachs and Waisbren decisions. This note weighs whether a return to the Wachs “significance test” is advisable or whether the California Legislature should revisit a more expansive incidental exemption. In addition, this note explores other jurisdictional approaches to employment relationships in the entertainment industry. Specifically, it analyzes New York’s incidental exemption. Part VI discusses alternative methods which offer a more realistic regulatory approach in light of the personal manager’s duties. Finally, this note discusses whether this conflict could be resolved by instituting a more equitable remedy scheme applicable to both parties.

I

Beginnings: Legislative Regulation in the Entertainment Industry and Protection of the Artist

Since the turn of the century, California has been concerned with artist welfare in the entertainment industry. The state has passed a series of statutes designed to protect the performer from scam artists who offer stardom and riches.30 In 1913, the legislature passed the Private Employment Agencies Law, establishing licensing requirements for all types of employment agencies operating within the state.31 The law regulated “theatrical employment agencies and theatrical contracts.”32 To enforce the 1913 law, the legislature passed an amendment in 1923, “empowering the state Labor Commission to hear and determine all controversies.”33 Shortly thereafter, in 1937, the legislature incorporated the Artist Manager Law into the state’s labor code, signaling the importance of guarding the artist’s welfare in the entertainment industry.34

In an effort to create further protections for the artist, the California Legislature revamped the regulatory framework for employment agencies in 1943.35 The Artist Managers Act created new regulatory categories which recognized the varying functions and needs within the different fields of entertainment.36 Specifically, the law

31. Id.
32. Id.
33. Id. This amendment also established the right to a de novo appeal.
34. Id.
35. Id.
36. Johnson & Lang, supra note 11, at 384. Specifically, the categories covered the various types of artists’ managers such as: the motion picture employment agents, theatric-
stipulated that the duties of the artist’s personal manager included procuring employment, advising, and counseling the artist’s career.\(^\text{37}\) Thus at the end of 1943, the California legislature designated four distinct areas of regulation in the entertainment industry.\(^\text{38}\) However, the growth of the industry resulted in employment relationships which did not fit neatly into one classification—often relationships straddled all four. As a result, the classifications proved too cumbersome to implement.

The confusion surrounding the 1943 Act is exemplified in *Raden v. Laurie*.\(^\text{39}\) The case attempted to define allowable procurement activities which a personal manager, not licensed under the Artist Managers Act of 1943, could undertake.\(^\text{40}\) The case involved a conflict between Piper Laurie, a child actress, and her manager, Ted Raden.\(^\text{41}\) Piper Laurie and her mother entered into a non-exclusive management agreement with Raden.\(^\text{42}\) Under the agreement, Raden “promised” to secure engagements for Laurie in theater, radio, motion pictures and television, for a ten percent commission.\(^\text{43}\) In July 1948, the parties entered into a second agreement which specified that Raden would act only as an advisor and counselor to Laurie and receive ten percent of all her professional earnings until the actress’ twenty-first birthday.\(^\text{44}\) However, Laurie and her mother became “disenchanted with Raden” and terminated the agreement.\(^\text{45}\) Subsequently, Raden filed suit in superior court against Laurie for breach-of-contract damages.\(^\text{46}\) At the trial, Laurie moved for summary judgment on the grounds that Raden, in promising to obtain employment, had acted as an unlicensed employment agent.\(^\text{47}\) The trial court granted Laurie’s summary judgment and Raden appealed.\(^\text{48}\)

\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) 120 Cal. App. 2d 788 (1953).

\(^{40}\) *Id.*

\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) *Id.*

\(^{44}\) *Id.* The agreement specifically designated Raden to act as Piper’s business manager as well as “to counsel and advise [Piper] in connection with all business activities. Nothing herein contained shall be deemed to require [Raden] or authorize [Raden] to seek or obtain employment for the undersigned, [Piper].” *Id.* at 779 n.1.

\(^{45}\) Johnson & Lang, *supra* note 11, at 394.

\(^{46}\) 120 Cal. App. 2d at 779.

\(^{47}\) *Id.*

\(^{48}\) *Id.*
The Appellate court rejected Laurie's argument that the act of seeking employment, rather than any specific contractual provisions, triggers the licensing requirement under the Artist Managers Act. Instead, the court held that an unlicensed personal manager's activities in seeking employment will trigger the licensing requirements of the Act only if the "contract were [found to be] a mere sham and subterfuge designed...to misrepresent and conceal the true agreement of the parties and to evade the law." But the court failed to establish whether "one not licensed as an artists' manager [may] engage in the procurement of employment." Thus, Raden appeared to provide for some allowable unlicensed procurement activity, as long as the activity did not result from contractual "fraud or pretext."

Nevertheless, the holding failed to clarify which specific activities and classes of people in the entertainment industry were regulated under the Artist Managers Act. The employment categories of the 1943 Act strained under the continued expansion of the industry and the rise of new employment relationships. In an attempt to clarify the law and focus on the procurement activities of talent agents, the California Legislature repealed the classifications for motion picture and theatrical employment agents in 1967. But the Raden holding did not reduce the confusion because the Artist Managers Act still failed to reflect accurately the dynamics of the industry. As the industry expanded, talent agencies "increased in size and complexity which in turn depersonalized the artist-talent agent relationship." As a result,

49. Id. at 782.
50. Id.
51. Johnson & Lang, supra note 11, at 395 (citing Respondent's Brief at 11).
52. Id. at 396.
53. Id.
54. Id. at 378.
55. Id.
56. Id. The forties witnessed a major retraction in the economic structure of the film industry. The postwar years saw families opting to stay home and watch television. As a result, the old Hollywood studio system with its long term employment contracts declined. Numerous actors and actress found themselves looking for work. Thus, the talent agent became the primary conduit for employment opportunities for artists.

In the 1975 California State Senate, Licensing and Regulation of Artist Managers Hearings, Claude McCue, Executive Secretary of AFTRA commented that need for an agent has grown because "[i]individual actors really don't have an open door to producers. It's almost impossible for that individual likely to get through to the casting office to see [the producer] without a liaison, without an intermediary who is a talent agent, who might be known particularly by that producer..." The Licensing and Regulation of Artists Managers, Personal Managers, and Musicians Booking Agencies: Hearings Before the Cal. Senate Comm. on Industrial Relations (Cal. 1975) (on file with author) [hereinafter Hearings].

With procuring of employment as the talent agent's primary business, the personal
the talent agency became more concerned with procuring employment and less concerned with the day-to-day demands and problems of their clients. This in turn led to the rise of the personal manager: "The personal managers became involved in all aspects of the artist's career, from publicity to selection of the right lawyer." The breadth of these duties complicated the legislative classifications. In essence, "it was becoming hard to avoid the growing confusion between duties of the 'personal managers' and the duties of the 'talent agent.'"

The confusion surrounding the appropriate position of the personal manager within the state regulatory scheme came to a head in a battle between the musical group Jefferson Airplane and their manager, Matthew Katz. Buchwald returned to the issue addressed in Raden: what is the "definitional boundary of 'artists' manager?" Each member of Jefferson Airplane entered into a separate agreement with Katz whereby he acted as each member's "exclusive personal representative, advisor and manager." In addition, each contract contained a provision which stated that Katz would not act as an employment agent. Within a year, a dispute arose. Katz took the matter to arbitration, while the band filed a petition with the Labor Commission alleging that Katz acted as an unlicensed artist's manager because he secured employment for the band. Katz argued that the Labor Commission lacked jurisdiction to hear this matter and that arbitration would facilitate the appropriate resolution of the matter. The band filed suit in court to restrain the arbitration hearing, but the trial court denied their claim. The band appealed.

manager stepped in to attend to other needs, such as publicity and creative direction, that were once the domain of the talent agent. This was particularly significant in the music business where talent agents could not devote the necessary time to assisting in the selection of tracks for an album as well as production and marketing matters. Hearings, supra, at 157-59 (comment by Joe Smith, President of Warner Bros. Records, Inc.).

57. Hearings, supra note 56, at 157-59 (comment by Joe Smith, President of Warner Bros. Records, Inc.).
59. Johnson & Lang, supra note 11, at 395.
60. Id.
64. Id.
65. Id.
66. Id. at 352.
67. Id.
68. Id. at 353.
The Appellate court held that Jefferson Airplane had made a prima facie showing that Katz had violated the Artist Managers Act by attempting to procure employment on numerous occasions. Thus, the Labor Commission was held to have jurisdiction over the case. Subsequently, the Labor Commissioner determined that Katz had acted as an unlicensed artist's manager and ordered him to return over twenty-five thousand dollars in commissions. Katz appealed the Labor Commissioner's determination, but the Superior Court dismissed his appeal after he was unable to meet the bond requirements. Katz sought review of the Labor Commission decision to the California Supreme Court on the grounds that the Labor Commissioner lacked jurisdiction. The California Supreme Court affirmed the original jurisdiction of the Labor Commission. In a subsequent related case, the California Supreme Court guaranteed the right to trial de novo.

The Buchwald cases thus established the authority of the Labor Commissioner to determine controversies and guaranteed the right of trial de novo. However, the combined cases left the lingering question: "what constitutes 'activities' which might trigger regulation under the Act?" The inability of the court to explain which activities trigger the licensing requirements prompted the California legislature to step into the fray and construct a workable solution.

In an attempt to refine the role of the personal manager as well as the licensing requirements of the Artist Managers Act, legislators introduced several bills to codify an incidental exemption. At the California State Senate Hearings, Howard Thaller, attorney for the Con-

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69. Id.
70. Id. at 356.
71. Id.
72. Id. at 358.
73. Id. at 352.
74. Id.
75. Id.
76. Id.
78. Id.
79. Id. at 402.
81. Hearings, supra note 56, at 143-44.
82. Id. Concerns about the need for consistency and uniformity prompted Thaler to introduce an incidental exemption law. Thaler argued that "[p]ersonal manager laws of both states should be consistent because personal managers frequently operate out of both
ference of Personal Managers, West Coast, advocated for the enactment of an incidental exemption based on New York General Business Law. The California legislature refused to accept Thaller’s proposal, and instead attempted to develop a workable statutory system. The legislature amended the “Artists’ Managers Act” to the “Talent Agencies Act of 1978.” The intent of the Talent Agencies Act was to “regulate those individuals whose primary purpose and function is the procurement of employment for the artist.” However, the Talent Agencies Act failed to stipulate which individuals and activities fell under the purview of the licensing requirements, and it also failed to provide a bright line for the industry to follow. Thus the previous problems continued.

The Labor Commissioner strictly interpreted the Act in a series of disputes between prominent entertainers and their personal managers, disallowing all unlicensed procurement of employment, no matter how incidental. The first case involved a conflict between Bo Derek and her personal manager, Karen Callan. In 1978, an acquaintance informed Callan that Blake Edwards was looking for a “perfect ten” to play a role in his proposed movie “Ten.” Shortly thereafter, Callan mentioned to Blake Edwards that she knew the “perfect ten” for the role. Derek, Edwards and his representatives arranged a meeting. It was alleged that Callan actively negotiated in this meeting on behalf of Derek. After the meeting, Derek and Callan supposedly entered into an agreement whereby Callan agreed “to negotiate for Derek in regards to posters and t-shirts....” Subsequently, Derek terminated the employment relationship. Callan filed suit, alleging breach of contract.

states, making it desirable for the laws to be the same.” Id.
83. N.Y. GEN. BUS. LAW § 171 (McKinney 1996).
84. Johnson & Lang, supra note 11, at 388.
85. Id. at 378.
86. Greenberg, supra note 80, at 860 (citing Johnson & Lang, supra note 11, at 388).
87. Id.
90. Id. at 4.
91. Id.
92. Id.
93. Id.
94. Id. at 5.
95. Id.
96. Id.
To counter Callan's suit, Derek filed a petition with the Labor Commissioner, claiming that Callan violated the Act by procuring employment without a license.\textsuperscript{97} The Commissioner rejected Callan's assertion that her activities did not fall under the Act because she procured only incidental employment.\textsuperscript{98} Callan argued that the "legislature meant to regulate only those individuals whose primary purpose was seeking employment and not personal managers who might be involved in ‘incidental’ procurement of employment."\textsuperscript{99} In response, the Labor Commissioner stated that Callan's position was comparable to a claim that "you can sell one house without a real estate license or one bottle of liquor without an off-sale license."\textsuperscript{100} In addition, the Labor Commissioner observed that the legislature rejected an incidental procurement exemption when the 1978 Act was enacted.\textsuperscript{101} Callan's procurement of employment for Derek therefore constituted a violation of the licensing provisions of the Act.\textsuperscript{102} Thus, the Derek case marked the beginning of the Labor Commissioner's strict interpretation of allowable procurement activities under the Act for individuals who are not licensed.\textsuperscript{103}

In another dispute involving Richard Pryor and his personal manager David Franklin, the Labor Commissioner was afforded an opportunity to further its strict interpretation of the Act through the application of a broad definition of what activities constitute procurement.\textsuperscript{104} Pryor alleged that his 1975 personal management agreement was void because Franklin acted as an unlicensed talent agent in violation of section 1700.4.\textsuperscript{105} Pryor prayed for disgorgement of commissions from 1975-1980.\textsuperscript{106}

The Labor Commissioner found that Franklin acted as an unlicensed talent agent.\textsuperscript{107} The Commissioner determined that Franklin promised and secured employment for Pryor in movies, television shows, and live performances, as well as a recording contract.\textsuperscript{108} In
addition, the Commissioner found that Franklin falsely portrayed himself as Pryor's talent agent in numerous business dealings.  

Franklin counter-argued that his activities did not fall within the Act because the Act was intended to regulate those individuals who actively seek employment opportunities for their clients. Franklin asserted that he only responded to solicitations or offers and he was not actively seeking employment for Pryor. The Labor Commissioner rejected Franklin's construction of the Act holding that it ran counter to the "well-established principles which [the Labor Commission] choose to follow." For example, the Labor Commissioner stated that the furthering of an offer constitutes a significant aspect of procurement. Because its intended purpose is to reach an agreement to market an artist's talents, this activity is prohibited. In addition to finding Franklin in violation of the Act, the Labor Commissioner held that Franklin was guilty of moral turpitude because he abused his trust with Pryor by committing Pryor to projects purely for his own economic gain. Based on these findings, the Labor Commissioner voided the agreement and instructed Franklin to remit over three million dollars in commissions.

The *Derek* and *Pryor* decisions illuminate the Labor Commission's strict interpretation of the Talent Agencies Act. Yet the cases fail to provide brightline rules for determining which activities trigger the Act. Thus, the California legislature was once again forced to re-evaluate and amend the Talent Agencies Act.

In re-evaluating the 1978 Act, the legislature sought to construct a model act. It therefore implemented several experimental provisions in 1982. First, additional language allowed an unlicensed individual to work in conjunction with a licensed talent agent in negotiating employment contracts. Second, the recording exception was added.

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109. *Id.*
110. *Id.* at 15.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 3.
116. *Id.* at 20.
118. *Green & Green*, *supra* note 30, at 81.
119. *Id.*
120. *Id.*
121. *Id.*
This provision allowed for soliciting, offering or procurement of a recording contract by an unlicensed individual. Finally, the legislature created the California Entertainment Commission to review and recommend changes to Act.

The California Entertainment Commission, addressed six issues. First, under what circumstances may a personal manager procure, offer, promise or attempt to procure employment or engagements? Second, what changes, if any, should be made in the Act's provisions exempting a person who procures recording contracts for an artist? Third, should the criminal sanctions be reinstated? Fourth, should the added sunset provisions be deleted? Fifth, should the entire Act be repealed and/or should there be a separate licensing law for personal managers? Finally, what changes should be made to the Act?

Three years later, the Entertainment Commission delivered its report. The Commission maintained that the Act should neither be repealed nor should a separate statutory scheme for personal managers be instituted. This decision reflected the Commission's belief that the Act protected the artist by permitting only licensed individuals to procure employment. Furthermore, the Commission concluded that there was no room for an incidental exemption. The Commission stated that "exceptions in the nature of incidental, occasional or infrequent activities ... cannot be permitted: one either is, or is not, licensed as a talent agent. ... There can be no 'sometimes' talent agent, just as there can no 'sometimes' professional in any other licensed field of endeavor."

122. Id.
123. Id.
125. REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION (1985) [hereinafter REPORT].
126. Id.
127. Id. at 1.
128. Id.
129. Id.
130. Id.
131. Id. at 20.
132. Id.
133. Id. at 11.
134. Id. at 11-12.
Although the Commission rejected the implementation of an incidental exemption, it did suggest that the experimental provisions—allowing unlicensed individuals to work in conjunction with a talent agent, repealing of criminal sanctions, and the exemption for an unlicensed individual to solicit, promise or procure a recording contract—be fully incorporated into the Act. With the California Entertainment Commission findings in hand, the legislature once again attempted to overhaul the Talent Agencies Act.

The Act now defines a talent agency as a person or corporation engaged in the procuring, offering, promising or attempting to procure employment or engagements for an artist. Talent agents are also allowed to counsel or direct artists in the development of their career. An artist is defined as an “individual who renders services on the legitimate stage and in production of motion pictures, radio artists, musical artists. . . . The Act contemplates that all employment must be procured in accordance with the licensing requirements.” Under section 1700.5 individuals who procure employment must obtain a license as talent agent.

To become a licensed talent agent under section 1700.4, one must file an application and pay a fee of $25, a license fee of $225, and branch office fee of $50. Section 1700.15 requires that each talent agent post a $10,000 surety bond. Under section 1700.44 (a) the labor commission is granted jurisdiction over controversies which arise under the Act. In addition, section 1700.44 imposes a one year statute of limitations on claims. Finally, the right to appeal de novo to the superior court is guaranteed.

While the 1986 version of the Talent Agencies Act provides a tidy framework for talent agents, it fails to fully consider the realities of the entertainment industry and the prominent role that personal managers play. The Act envisions the talent agent as the most significant

135. Id. at 2.
136. Green & Green, supra note 30, at 81.
137. CAL. LAB. CODE § 1700.4 (Deering 1996).
138. Id.
139. Id.
140. CAL. LAB. CODE § 1700.5 (Deering 1996).
141. Id.
142. CAL. LAB. CODE § 1700.4 (Deering 1996).
143. CAL. LAB. CODE § 1700.15 (Deering 1996).
144. CAL. LAB. CODE § 1700.44(a) (Deering 1996).
145. Id.
player in the entertainment industry. Yet, in reality, the role of a talent agent is limited to procuring employment for artists. In certain circumstances, a talent agent’s role may be more expansive, involving deal-making, artistic and career advice. But overall, the personal manager is more deeply involved in the artist’s career.

A personal manager sees that all facets of the artist’s career run smoothly: she serves as the gatekeeper, the guardian angel, and the supportive parent for the artist. Additionally, a personal manager may assist the artist in making decisions relating to diverse matters such as an artist’s public image and mystique. She is also involved in selecting of other individuals, such as an attorney and business manager, to handle particular facets of the artist’s career. The personal manager’s indispensability is unquestioned in the industry by all except the Labor Commission.

II
Creation of a Workable Standard

A. Wachs v. Curry and Progeny

The California Entertainment Commission’s refusal to recommend an incidental exemption left the personal manager in an untenable position. As Derek v. Callan and Pryor v. Franklin demonstrate, the personal manager was extremely vulnerable to the Labor Commission’s strict construction of the Act. That the Labor Commissioner can base determinations on inferential evidence only compounded this situation. Thus the personal manager faced a Hobson’s choice: either take the risk and procure employment or commit professional “suicide.” This situation changed with Wachs v. Curry.

147. Id.
148. Id.
149. Id. at 380.
150. Id.
151. Id.
152. Id. at 381.
153. Id.
154. Id.
157. Greenberg, supra note 80, at 850.
Wachs effectively leveled the playing field for personal managers in regards to procuring incidental employment.\textsuperscript{159} Under Wachs, personal managers could present an affirmative defense in their conflicts with artists.\textsuperscript{160} The Labor Commissioner, through a series of cases, developed the Wachs significance test into an equitable standard under which to adjudicate conflicts.

The newly-created incidental exemption for personal managers arose out of a conflict between entertainer Arsenio Hall and his personal managers Robert Wachs and Mark Lipsky.\textsuperscript{161} In 1987, Mr. Wachs and Mr. Lipsky were introduced to Arsenio Hall by their business partner, actor Eddie Murphy.\textsuperscript{162} At the time, Hall’s career was expanding at a fast clip and he felt that he needed the assistance of a manager.\textsuperscript{163} Shortly thereafter, Hall entered into a personal management contract with Wach’s and Lipsky’s company, X-Management.\textsuperscript{164} During contract negotiations, Wachs promised Hall “that he would get [Hall] the best deals available.”\textsuperscript{165} According to Hall, Wachs left him with the impression that X-Management would, “provide all the necessary services, including legal advice and procurement of employment.”\textsuperscript{166}

Wachs immediately went to work, re-negotiating Hall’s contract with Fox\textsuperscript{167} as host of their late night TV show as well as entering into negotiations with Paramount regarding a supporting role in Eddie Murphy’s movie “Coming to America.”\textsuperscript{168} Later, Paramount approached Wachs and Lipsky to discuss development of a late night talk show hosted by Hall.\textsuperscript{169} Negotiations proceeded and a deal was struck.\textsuperscript{170} However, Hall was unaware that Wachs and Lipsky had positioned themselves as Production Executives, thus benefiting from weekly salaries of $5,000 each.\textsuperscript{171}

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{162} Id. at 8.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 10.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 15.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 16.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
The show was a success, prompting several major studios to approach Hall regarding a production deal. Hall authorized Wachs and Lipsky to contact the studios and enter into negotiations for a production deal. The negotiations netted several lucrative offers, and Hall accepted Paramount's $7 million offer. Both Wachs and Lipsky received a commission of $1.5 million. However, the business relationship quickly soured after Wachs informed Hall that the parties had entered into an oral contract to divide the talk show's proceeds. Hall denied having entered into any such agreement, and in 1990 Hall terminated the management agreement. Later, Hall filed a petition with the California Labor Commission to void the management contract.

The Labor Commission found for Hall, voiding the management contract on the grounds that Wachs had acted as an unlicensed talent agent in violation of section 1700.4. The Commissioner held that on "at least eight occasions ... X-Management engaged in and carried on the occupation of a talent agent on behalf of the petitioner, [thus] violating [the] provisions of the Talent Agencies Act." Furthermore, the Commissioner found that X-Management "engaged in acts of self-dealing and overreaching. ..." The Commissioner pointed out that when Wachs and Hall entered into the personal management agreement, Wachs was aware of Eddie Murphy's interest in Hall playing a significant role in "Coming to America." The Labor Commissioner therefore not only found that Wachs violated the Talent Agencies Act but that he failed to act in the best interests of his client. As a remedy, the Labor Commission awarded Hall damages in excess of $2.1 million. This sum represented the total allowable damages available to Hall under the Act's one year statute of limitations.

172. Id. at 17.
173. Id. at 18.
174. Id.
175. Id. at 19.
176. Id. at 20.
177. Id.
178. Id. at 2.
179. Id. at 3.
180. Id.
181. Id. at 4.
182. Id. at 25.
183. Id. at 51.
184. Id. at 50.
185. Id.
An uproar followed the Labor Commissioner’s determination in *Hall v. X Management*. The decision “. . . galvanized managers . . . nationwide to criticize strict California licensing laws which they say don’t give managers the leeway to take risks with unknown artists who later blossom into money trees.” Following the adverse Labor Commissioner’s determination, Wachs filed an appeal, alleging that:

the licensing provisions of the Act, are unconstitutional on their face and as applied because no rational basis exists for providing an exemption from the licensing requirements to those who procure recording contracts but not for those who procure other contracts in the entertainment industry and because it cannot be determined from the language of the Act which activities require licensing as a talent agent.

The Appellate Court dismissed Wachs’ assertion that no rational basis exists for the recording exemption. The court found that the California Entertainment Commission’s report “provided a sufficiently rational basis for the challenged exemption in view of the proposition that persons in the same general type of business may be classified differently where their methods of operation are not the same.”

The court also considered whether the licensing requirements should be void for vagueness. Here, Wachs argued that the “term occupation of procuring employment [as used in section 1700.44 (a)] does not sufficiently define conduct [undertaken by a personal manager] which requires a license.” To resolve this issue, the court reviewed the history of California’s regulation of the personal manager to determine the meaning of “occupation of procuring employment.”

First, the court looked to the Managers Act of 1943. The 1943 Act defined an artist’s manager as one who directs “clients in develop-

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187. *Id.* Wach’s attorney, Howard Weitzman, reacted to the decision by commenting on the Act. He stated, “the law is archaic, it’s bizarre, and it’s inconsistent with the custom in the industry . . . . It makes managers less likely to want to do the best job they can for their clients.” *Id.*


189. *Id.* at 626.


192. *Id.*

193. *Id.*

194. *Id.* at 627.
opment and advancement of their professional careers and who pro-
cures, offers, promises, or attempts to procure employment or en-
gagements for an artist." Next, the court reviewed the language in
the Talent Agencies Act, finding that the personal manager had been
redefined as "a person or corporation who engages in the occupation
of procuring, offering, promising, or attempting to procure employ-
ment or engagements for an artist." After reviewing the legislative
history, the court concluded that to
effectuate the intent of the Act, the term "occupation of procuring
employment" was to be determined according to a balancing test that
measures the significance of the agent’s employment procurement
function compared to the agent’s counseling function as a whole. The
court explained that an individual must be licensed if her
"employment procurement function constitutes a significant part of
the agent’s business as a whole." Finally, the court held that the use
of the term procurement in the Act was not so vague as to render the
Act facially unconstitutional.

The court upheld the Labor Commissioner’s determination, but
in the process erected a judicial exemption, providing the personal
manager with an affirmative defense to lessen her financial expo-
sure. Personal managers were able to argue to the Labor Commissi-
oner that they did not violate the Act by procuring incidental em-
ployment, thus protecting their well-earned commissions. Yet the
Wachs significance test did not subordinate the remedial nature of the
Act, as evidenced by the Appellate Court’s decision to affirm the La-
bor Commissioner’s determination.

The Wachs decision was a major victory towards safeguarding the
financial security of the personal manager. The holding, however, of-ered little guidance in defining what activities would constitute a sig-
ificant part of a manager’s business as a whole. As a result, cases
since Wachs have grappled with what activities constitute extensive
procurement. The Labor Commissioner initially developed a bal-

195. Id.
196. Id.
197. Court Upholds, supra note 190.
198. See Wachs, 13 Cal. App. 4th at 628.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id.
204. California Labor Commissioner Voids Contract Between Actor and Personal Man-
ancing test with overall activities on one side and incidental procurement activities on the other. But the liberal application of the Wachs significance test was gradually restricted to those contracts which are silent about procurement and to situations in which a manager inadvertently steps over the line.

The first case to apply the Wachs' significance test in the context of a balancing test was Church v. Brown. The Church case is significant because it further defines the term "occupation" in the Wachs significance test. Ross Brown and Thomas Hayden Church met at a seminar in Dallas, Texas in 1988. At the time, Brown was working as a casting director on the movie "Stolen Moments," and Church was a struggling actor. Brown encouraged Church to travel to Los Angeles to audition for a part in the movie. Brown privately coached Church for the role and presented him with a fake resume on William Morris Talent Agency letterhead, which he insisted was necessary for Church to obtain the part in "Stolen Moments." After several callbacks, Church received the part.

Following his role in "Stolen Moments," Church entered into a management contract with Brown. At the time the parties signed the contract, Brown stated that he would use "his contacts, influence, and expertise in the industry to get Church acting jobs . . . ." After several false starts, Church landed a starring role on the network TV show "Wings." Shortly thereafter, Church ceased making commission payments to Brown.

ager Who was Not Licensed as a Talent Agent, Because a "Significant Portion" of the Manager’s "Business as a Whole" Involved Procuring Employment for Clients, ENT. L. REP., Oct. 1994.


206. California Labor Commissioner Voids Contract Between Rapper Recording Artist and Former Personal Manager, Because Management Agreement Provided that Manager Would Not Attempt to Obtain Personal Engagements even though Manager was Not Licensed as Talent Agent, ENT. L. REP., Dec. 1994 [hereinafter California Labor Commissioner].


208. Id.

209. Id. at 2.

210. Id.

211. Id.

212. Id. at 3.

213. Id.

214. Id.

215. Id. at 3-4.

216. Id. at 5.

217. Id.
Brown submitted the matter to arbitration.\textsuperscript{218} In response, Church filed a petition and was granted a hearing before the Labor Commission.\textsuperscript{219} At the hearing, Brown argued he met the \textit{Wachs} exemption because his procurement activities did not constitute a significant portion of "his business as a whole" in comparison to his activities outside the management agreement with Church.\textsuperscript{220}

The Labor Commission rejected Brown's interpretation of the \textit{Wachs} significance test, declaring instead that the correct interpretation looks at those activities which involve the representation of talent separate from other employment activities outside the artist-manager relationship.\textsuperscript{221} In this case, Brown asserted that his job as a casting director constituted a significant portion of his business as a whole.\textsuperscript{222} However, the Labor Commissioner dismissed Brown's claim, stating that "other activities in which the person may engage in . . . are not considered or counted as part of the person's business as a whole in making the assessment."\textsuperscript{223}

Under the Labor Commissioner's interpretation, a person cannot present their second career as an affirmative defense to a violation of the Act.\textsuperscript{224} In addition, the Labor Commissioner elaborated on what constitutes a significant portion of a manager's business as a whole.\textsuperscript{225} According to the \textit{Church} decision:

procurement of employment constitutes a 'significant' portion of activities of a [personal manager] if the procurement is not due to inadvertence or mistake or is simply a \textit{de minimis} aspect of the overall relationship between the parties when compared with the [personal manager's] counseling functions on behalf of the artist.\textsuperscript{226}

Under \textit{Church}, then, a manager qualifies for the incidental exemption only if her procurement activities result from inadvertence and are incidental to her overall duties.\textsuperscript{227}

Furthermore, in \textit{Church}, the Labor Commissioner developed a two-prong test for application of the \textit{Wachs} significance test.\textsuperscript{228} To show that a personal manager has violated the Act, a petitioner must

\begin{itemize}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id. at 1.}
\item \textsuperscript{220} \textit{Id. at 10.}
\item \textsuperscript{221} See California Labor Commissioner, supra note 206.
\item \textsuperscript{222} \textit{Church}, Cal. Lab. Comm. No. TAC 52-92 at 12.
\item \textsuperscript{223} \textit{Id. at 11.}
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id. at 12.}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.}
\end{itemize}
DON'T BITE THE HAND THAT FEEDS

establish that their "contractual relationship was permeated and pervaded by employment activities." After the petitioner has established this prima facie case, the burden shifts to the personal manager who must present sufficient evidence to sustain a finding that the procurement activities did not constitute a "significant part of [his] business as a whole." In other words, procurement activities must have happened by inadvertence or honest mistake.

Here, Church met his burden of proof and established a prima facie case that his contractual relationship with Brown was "permeated and pervaded by employment activities." The Commissioner then found that Brown "failed to produce any evidence that would show that such activities were not a significant part of" his business as a whole. As a result, the Labor Commissioner determined that Brown acted as an unlicensed talent agent and declared the management contract "illegal and void, thus denying Brown access to any commissions."

Finally, the Labor Commissioner clarified the one year statute of limitations under section 1700.44. Under this section, an artist can make a claim at any time alleging that the manager acted as an unlicensed talent agent. However, the artist is entitled only to a refund of the commissions paid to the personal manager within the last year. Church, therefore, only collected fees paid to Brown over the past year.

Through Church, the Labor Commissioner developed the Wachs significance tests into a single standard that embodies the Talent Agencies Act's tenet of preventing artist exploitation. This standard evolved further through a series of cases that refined the definition of what constitutes a significant portion of the personal managers' business as a whole and narrowed the application of the "significance

229. Id.
230. Id. at 13.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id. Section 1700.44 reads: "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." CAL. LAB. CODE § 1700.44 (Deering 1996).
237. Id. (Church was entitled to fees totaling sixty-eight thousand dollars).
test” to those personal managers who in good faith inadvertently engage in procurement activities.239

Shortly after the Church determination, the Labor Commissioner developed the Wachs significance test into a more equitable tool by bifurcating the business relationship of the artist and manager into distinct periods, thus lessening the financial exposure of the manager to an adverse determination under the Act.240 The case which prompted this salutary development involved Pamela Anderson and her manager Robert D’Avola.241 In September of 1990, D’Avola and Anderson entered into an oral agreement, whereby D’Avola agreed to serve as Anderson's personal manager.242 In order to assist Anderson in obtaining employment, D’Avola arranged for Barbara Pollins, an agent at ICM, to serve as a “hip pocket agent.”243

In 1991, D’Avola was informed by an acquaintance that Disney was interested in a “Playboy-type actress” for a planned network situation comedy series.244 D’Avola represented himself to Disney as Anderson’s agent and arranged for an audition.245 Disney selected Anderson to play the character of Lisa on “Home Improvement.”246 Shortly after, Anderson fired D’Avola and hired another personal manager.247 However, one month later, Anderson re-hired D’Avola.248 The parties then executed a written contract specifying that D’Avola would serve as her personal manager.249 At the same time, Anderson signed with a talent agency to seek further employment opportunities.250

In 1992, Anderson was selected for the part of C.J. Parker on the television show “Baywatch.”251 Shortly thereafter, Anderson stopped paying D’Avola commissions and terminated his services.252 D’Avola

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241. Id.
242. Id.
243. Id. As a hip pocket agent, Pollins played no significant role in procuring employment for Anderson. Instead, Pollins acted in accordance with D’Avola’s instructions, contacting potential employers on his behalf. Id.
244. Id. at 5.
245. Id.
246. Id. at 6.
247. Id.
248. Id.
249. Id.
250. Id.
251. Id. at 7.
252. Id. at 8.
submitted the dispute to arbitration. Dissatisfied with the arbitrator's decision, Anderson brought the matter before the Labor Commissioner claiming that D'Avola was not entitled to commissions because he acted as an unlicensed talent agent, thus violating the Talent Agencies Act.

The Labor Commissioner took an unusual approach to the Anderson case. The Commissioner bifurcated the business relationship into two distinct periods. The first period covered conduct that occurred between the 1990 oral agreement and the execution of the 1991 personal management contract. The second period covered the latter half of the relationship, focusing on activities subsequent to the 1991 personal management contract.

The Labor Commissioner applied the Wachs significance test to determine if D'Avola's procurement functions constituted a significant portion of his duties as compared to his counseling function as a whole. Under this standard, the Labor Commissioner determined that the first period of the party's business relationship was "permeated and pervaded by employment procurement activities undertaken by [D'Avola]." The Labor Commissioner held that D'Avola's use of Barbara Pollins as a "hip pocket agent" did not meet section 1700.44(d)'s exemption for personal managers who work in conjunction with a licensed talent agent. Rather, D'Avola's arrangement with Barbara Pollins was nothing more than "transparent subterfuge designed solely as a means of attempting to evade the licensing requirements of the Act."

In effect, the Labor Commissioner implied that D'Avola used Pollins' credentials as a front to procure employment for Anderson without running afoul of the Act. Thus, the Labor Commissioner determined that Anderson's role on "Home Improvement" was "a direct result of [D'Avola's] unlawful procurement activities."
fore, D'Avola was not entitled to commissions generated from Anderson’s employment on “Home Improvement.” But D’Avola was entitled to compensation for activities undertaken during the second period of the party’s relationship because they were incidental to his overall duties and Anderson had been represented by a licensed talent agent. The Labor Commissioner held that these later procurement activities no longer constituted a “significant part of [D’Avola’s] relationship with Anderson.” Therefore D’Avola was entitled to monies from Anderson’s involvement in “Baywatch.”

In Anderson, the Labor Commission stepped away from a strict interpretation of the Act and took into consideration the entire business relationship, protecting the personal manager from inadvertent violation of the Act. While relaxing the rigid test, the Labor Commissioner punished D’Avola for soliciting employment for Anderson from Disney. The outcome provided Anderson with an enormous economic windfall. This result leads one to question whether the Labor Commissioner is truly following the spirit of the Wachs standard.

The Labor Commissioner’s interpretation of D’Avola’s relationship with Barbara Pollins, the hip-pocket agent, is illogical given the difficulties for a “neophyte” artist in obtaining the services of a licensed talent agent. D’Avola instructed Pollins to initiate contacts with producers for parts discovered by D’Avola through his subscription to a script breakdown service. This relationship does not seem as invidious as the Labor Commissioner asserts. Thus, if the Labor Commissioner had indeed employed the Wachs standard, logically, D’Avola’s activities would have been found to be incidental to his overall duties, and would not have violated the Act. Nonetheless that bifurcation of the business relationship may, in the majority of

D’Avola’s arrangement to use Barbara Pollins as hip pocket agent failed the section 1700.44(d) exemption for unlicensed individuals to work in conjunction with a licensed talent agent. Id.

266. Id.
267. Id.
268. Id.
269. Id.
270. Id.
271. Id.
272. Id.
274. Id. at 4.
275. Id. at 10.
276. Id.
cases, reduce the financial exposure of the personal manager and therefore inject another dose of equity into the Wachs significance test.\textsuperscript{277}

The Anderson case is representative of the equitable standard that the Labor Commissioner has developed through its application of the Wachs significance test.\textsuperscript{278} Several years later, however, the Commissioner severely narrowed the Wachs significance test in a case involving a rapper and his personal manager. That decision limited the application of the Wachs significance test to exempt only those personal managers who in good faith inadvertently procure employment.\textsuperscript{279}

In Ivy v. Howard,\textsuperscript{280} the Labor Commissioner limited the Wachs significance test to only those situations where the personal management contract is silent regarding procurement activities.\textsuperscript{281} In 1992, Ivy, known professionally as Domino, entered into a personal management contract with Jerome Howard and Cherie Kirkwood.\textsuperscript{282} The contract contained a clause stating that, as personal managers, Howard and Kirkwood would be responsible for obtaining personal en-

\textsuperscript{277}. Id.
\textsuperscript{278}. See also Flame Music v. Smith, Cal. Lab. Comm. No. TAC 23-92 (1992). There the Labor Commissioner bifurcated a personal management contract and applied the Wachs significance test. The Commissioner determined that the personal manager had violated the Act in one period of the contract, but not the other. Smith and the members of Flame Music, Inc. entered into a personal management contract, for Smith to provide services in the areas of business affairs and creative counseling. During the first six months of the relationship, Smith handled the band's cash management, obtaining capital for equipment purchases as well as "attempting to procure bookings for live performances." Id. Shortly thereafter, Smith's primary function changed to procuring live performance for the band. In 1989 Flame terminated Smith's services. Smith filed a breach of contract claim in superior court, while members of the band petitioned the Labor Commissioner for a hearing to declare the contracts void due to violations of the Talent Agencies Act.

As in the Anderson case, the Labor Commissioner bifurcated the business relationship into two periods—the first one beginning prior to 1987 and the later occurring after, and applied the Wachs significance test. The Commissioner found that, during the first period of the relationship, Smith's counseling functions constituted a significant portion of his business as a whole. Thus, Smith's activities prior to 1987 did not violate the Act. However, Smith's activities after 1987 were found to be predominately oriented towards procurement of employment. As a result, the Labor Commissioner determined that Smith acted in the capacity of an unlicensed talent agent in violation of section 1700.44 of the Act. The holding of Flame Music thus follows the Labor Commissioner's holding in Anderson. In both cases, the Labor Commissioner's bifurcation of the business relationship into distinct periods prevents the personal manager from facing daunting judgments in disgorged fees. Id.

\textsuperscript{280}. Id.
\textsuperscript{281}. Id.
\textsuperscript{282}. Id.
gagements for the artist. Ivy terminated the agreement and brought the matter before the Labor Commissioner asserting that Howard acted as an unlicensed talent agent.

Howard asserted that he should be exempted from the licensing requirement of the Act under the Wachs significance test for two reasons. First, Howard claimed that he never attempted to solicit or procure employment on the artist’s behalf and Ivy had failed to establish that procurement activities constituted a significant portion of his activities. Second, Howard asserted that the procurement clause in the contract was surplusage. He never intended to carry out this obligation; therefore, the clause should be ignored.

The Labor Commissioner rejected Howard’s assertion that he qualified for the Wachs exemption, stating that Wachs is intended to protect only those individuals whose personal management contracts are silent on the issue of procurement and “who in good faith inadvertently step over the line in a particular situation and engage in conduct that might be classified as procurement.” The Labor Commissioner determined that Ivy’s contract was “permeated and provided by promises to procure personal appearances. . . .” As a result, the Labor Commissioner declared the contract void, precluding Howard from obtaining further commissions.

The holding of Ivy eviscerates the Wachs significance test. However, Ivy is arguably an aberration in the cases following Wachs. Howard did not procure employment for Ivy, he was penalized for merely having a clause in the contract saying he was obligated to seek, solicit and attempt to procure employment. Factually, the previous cases which exempted personal managers from violations of the Talent Agencies Act all involved situations where the personal manager sought employment for the artist on their own initiative. Yet, in this

283. Id.
284. Id.
285. Id.
286. Id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
292. Id.
case, Howard was unjustly penalized by the Commissioner for not carefully reviewing his contract.\textsuperscript{294}

The \textit{Ivy} case appears to be an attempt by the Labor Commissioner to proscribe the liberal interpretation of the Talent Agencies Act which followed the Appellate Court's determination in \textit{Wachs}.\textsuperscript{295} But \textit{Ivy} can be distinguished from \textit{Wachs} and its progeny because specific language in the contract instructed the personal manager to seek employment for the artist. Thus, \textit{Ivy} could be characterized as only applying to those cases which have specific employment procurement language in the contract.\textsuperscript{296} But given the history of the Labor Commission, \textit{Ivy} most likely is an attempt by the Commissioner to return to a strict interpretation of the Act.\textsuperscript{297}

\section*{III}
\textbf{Making it Official: A Return to a Strict Standard with \textit{Waisbren} and Progeny}

The decision in \textit{Waisbren v. Peppercorn}\textsuperscript{298} signaled a return to a strict interpretation and application of the Talent Agencies Act.\textsuperscript{299} The decision caught the entertainment industry by surprise and led to confusion over its ramifications for personal managers.\textsuperscript{300} Indeed, one leading entertainment law journal commented that the \textit{Waisbren} decision had "thrown [the industry] a curve ball...."\textsuperscript{301}

In 1982, Brad Waisbren and the puppet design house, Peppercorn Inc., entered into an oral agreement whereby Waisbren was to promote services available at Peppercorn.\textsuperscript{302} For six years, Waisbren "assisted in project development, managed business affairs, supervised clients relations, publicity and casting duties."\textsuperscript{303} On occasion, Wais-

\begin{footnotesize}
\begin{enumerate}
\item \textit{id}.
\item \textit{id}.
\item California Law May Now Subject Personal Managers to Licensing Requirements, \textsc{Ent. L. Rep.}, Nov. 25, 1996.
\item \textit{id}.
\item \textit{Waisbren}, 41 Cal. App. 4th at 250. Waisbren agreed to assist in project development, supervise client relations, undertake publicity, perform casting duties, run the front office, coordinate production and human resource matters, and advise Peppercorn on talent acquisition. \textit{id}.
\item \textit{id}.
\end{enumerate}
\end{footnotesize}
bren solicited and procured employment for Peppercorn, but this duty was minor in comparison “to his other responsibilities.”

In 1988, Peppercorn notified Waisbren that it was terminating their relationship. Waisbren filed a claim in superior court alleging breach of contract. Peppercorn responded by filing a motion for summary judgment arguing that Waisbren was precluded from alleging a claim for damages because he had acted as an unlicensed talent agent. Because “his [procurement] activities were minimal and merely incidental to his other responsibilities,” Waisbren contended that he did not need a license. The trial court granted summary judgment for Peppercorn. Waisbren filed an appeal.

The Appellate Court upheld Peppercorn’s summary judgment. In affirming the lower court’s decision, the court analyzed six areas pertaining to the Act. First, the court discussed whether Waisbren had to be licensed as a talent agent for incidental or minimal procurement efforts. To determine this issue, the court turned to section 1700.5 of the Act. The court interpreted the language of the Act to mean that no person shall engage in procurement of employment, however minimal, without a license. The court defined the contours of a personal manager’s duties “as one whose primary functions are advising, counseling, directing and coordinating the artist in development of their career.” The personal manager oversees the “business and logistical concerns of the artist, not procurement of employment.” The court then looked to legislative intent, finding that the Act applies to those whose “occupation” involves procuring employment. As a result, the court rejected Waisbren’s interpreta-

304. Id.
305. Id.
306. Id.
307. Id.
308. Id. at 251.
309. Id.
310. Id. at 250-51.
311. Id. at 263.
312. Id. at 252.
313. Id.
314. Id.
315. Id.
316. Id.
317. Id.
318. Id.
319. Id. at 253.
tion of “occupation” as “the principal business of one’s life.” Instead, the court embraced a broad definition, stating that a “person can hold a particular “occupation” even if it is not his principal line of work.”

Second, the court determined that the Act is remedial in nature, designed to correct abuses that “have long been recognized and which have been subject of both legislative action and judicial decision.” As a result, the court determined that the Act should be liberally construed to “ensure the personal, professional, and financial welfare of artists.” The court concluded that exempting individuals from the requirements of the Act because they engaged in incidental activities provides little solace to those artists “who fall victim to a violation of the Act.” Therefore everyone who procures employment, regardless of its proportion to their other activities, must be licensed.

Third, the court found support for this position in the established practices of the Labor Commissioner, noting that the Labor Commissioner has “long taken the position that a license is required for incidental procurement activities.” Fourth, the court reviewed the findings of the California Entertainment Commission and found that the Commission had rejected an exemption for incidental procurement and advocated licensing all who procure employment. Fifth, the court turned to the limited exception for an unlicensed person under the Act. It determined that the Act only contemplates an exception for those individuals who work in conjunction with a licensed talent agent. The court reasoned that if an incidental exemption were allowed, it would render that exception superfluous.

Finally, the court turned to prior judicial construction of the Act and the Wachs holding. Here, the Waisbren court stated that the California Supreme Court under Buchwald had held that a license is

320. Id.
321. Id. at 254.
322. Id. at 255.
323. Id.
324. Id.
325. Id.
326. Id.
327. Id.
328. Id.
329. Id. at 259.
330. Id.
331. Id.
332. Id. at 260.
required for procurement activities.\textsuperscript{333} Thus the \textit{Wachs}'s exemption was nothing more than "incorrect dicta, contrary to the intent of the Act."\textsuperscript{334} The \textit{Waisbren} court further determined that the \textit{Wachs} court applied too narrow a concept of "occupation" and did not factor into their holding the remedial or legislative intent of the Act, nor the precedent established by the Labor Commission determinations.\textsuperscript{335} The \textit{Waisbren} court therefore refused to follow the \textit{Wachs} significance test.\textsuperscript{336} The court stated "[t]here can be no 'sometimes' talent agent[: ...]" a license is required for every degree of procurement activities.\textsuperscript{337}

The Labor Commissioner's decision to implement \textit{Waisbren} halted the judicial exemption for incidental procurement of employment. Even though \textit{Waisbren} was adjudicated in a court without the power to directly overrule the \textit{Wachs} significance test, the Labor Commissioner concluded that \textit{Waisbren} had exposed the \textit{Wachs} significance test as wrongly decided dictum.\textsuperscript{338} Thus, the Labor Commissioner has embraced \textit{Waisbren}'s strict interpretation of the Talent Agencies Act.\textsuperscript{339} Although there have been few decisions utilizing the \textit{Waisbren} standard, the cases that have come before the Labor Commissioner are in stark contrast to those determined under \textit{Wachs}.\textsuperscript{340}

In \textit{Cernile v. D.B. Management},\textsuperscript{341} the Labor Commissioner applied the holding of \textit{Waisbren} in determining that the manager's procurement of two live performances out of a total of thirty constituted a violation of the Talent Agencies Act.\textsuperscript{342} In 1991, Sven Gali (a music group) entered into a personal management agreement with D.B. Management.\textsuperscript{343} The following year, the band performed in a total of thirty shows.\textsuperscript{344} The majority of these shows were procured by the band's talent agent; however, D.B. Management did secure the band employment for two shows.\textsuperscript{345} In 1992, the band informed D.B. Man-

\begin{thebibliography}{9}
\bibitem{333} \textit{Id.}
\bibitem{334} \textit{Id.}
\bibitem{335} \textit{Id.}
\bibitem{336} \textit{Id.}
\bibitem{337} \textit{Id.} at 255.
\bibitem{338} Locker, \textit{supra} note 7, at 11.
\bibitem{339} \textit{Id.}
\bibitem{341} \textit{Id.}
\bibitem{342} \textit{Id.}
\bibitem{343} \textit{Id.} at 2.
\bibitem{344} \textit{Id.} at 3.
\bibitem{345} \textit{Id.}
\end{thebibliography}
agement that the agreement was terminated. The band argued they had a right to terminate the agreement without any further obligations because D.B. Management had acted as an unlicensed talent agent. D.B. Management asserted that its activities did not violate the licensing requirement of the Act because the services were rendered outside the state of California. The matter was brought before the Labor Commissioner.

The Labor Commissioner determined that it had jurisdiction over the case because D.B. Management was based in California and a "substantial amount of business was carried out by telephone from California." The Labor Commissioner applied the Waisbren holding, requiring a license for all procurement activities; D.B. Management's "promise to procure employment at the inception of the [management agreement] and their procurement of the live performances subjects them to the licensing requirements of the Act." Thus, the Commission held that D.B. Management had acted as an unlicensed talent agent, and D.B. was ordered to disgorge commissions and expenses totaling $6,000.

The D.B. Management decision sets a chilling precedent for personal managers because in it the Labor Commissioner penalized individuals for activities which clearly constituted a miniscule portion of their overall duties. But the outcome of this case is not merely punitive. Rather, it sends a clear signal that if an artist is unhappy with her personal manager for failing to provide the artist the "right" dressing room, the artist need only allege a violation of the Talent Agencies Act to extricate herself from the management contract. Clearly, this does not serve the Act's intent of protecting the artist's welfare. Indeed, it is questionable whether exploitation of the artist was occurring in D.B. Management. However, according to the Labor Commissioner, the intent of the Act is best served by policing the

346. Id. at 3-4.
347. Id.
348. Id. at 2.
349. Id. at 5.
350. Id.
351. Id.
352. Id.
353. Id. at 6.
354. Id. at 4.
356. See CAL. LAB. CODE § 1700 (Deering 1996).
activities of personal managers and penalizing them for any violation.\textsuperscript{358} But as the outcome of the \textit{D.B. Management} case demonstrates, this position sets a dangerous precedent allowing artists to invalidate their personal management contracts by claiming a violation of the Talent Agencies Act.\textsuperscript{359} This behavior on the part of the artists frustrates the intent of the Act.

\section*{IV}
\textbf{Wachs versus Waisbren: A Return to a Workable Standard}

The \textit{Waisbren} decision was an attempt to return to a strict interpretation of the Talent Agencies Act.\textsuperscript{360} However, given the nature of the entertainment industry, especially a "neophyte artist's" difficulty in obtaining representation by a licensed talent agent, \textit{Waisbren}'s holding runs counter to the interests of both the artist and the personal manager. The artist's need to obtain work justifies greater flexibility in employment relationships. A return to the \textit{Wachs} standard benefits both the artist and the personal manager.

The \textit{Waisbren} court interpreted the term "occupation" too broadly.\textsuperscript{361} The court stated that an individual can have several occupations, rejecting \textit{Waisbren}'s definition of occupation "as the principal business of one's life."\textsuperscript{362} The court asserted that its definition is consistent with the intent of the Act's licensing scheme.\textsuperscript{363} However, the \textit{Wachs} approach more effectively advances the intent of the Act and provides more equity in the artist-personal manager relationship.\textsuperscript{364}

Following \textit{Wachs}, the Labor Commission applied the \textit{Wachs} definition of procurement to cases such as \textit{Anderson} and \textit{Church}.\textsuperscript{365} The equitable standard developed in post-\textit{Wachs} decisions promotes the remedial nature of the Act through bifurcation.\textsuperscript{366} Furthermore, the post-\textit{Wachs} cases created an equitable safeguard by requiring that unlicensed procurement activities constitute a significant portion of

\begin{thebibliography}{99}
\bibitem{358} \textit{Id.}
\bibitem{359} \textit{Id.}
\bibitem{360} \textit{Waisbren}, 41 Cal. App. 4th at 254.
\bibitem{361} \textit{Id.}
\bibitem{362} \textit{Id.}
\bibitem{363} \textit{Id.}
\end{thebibliography}
overall duties to trigger the Act.\textsuperscript{367} The \textit{Wachs} definition constitutes a workable standard because it focuses the Act on those individuals committing pervasive violations of the Act, not ones who book a single engagement.\textsuperscript{368}

The \textit{Waisbren} court held that any procurement activity requires a license.\textsuperscript{369} Presuming that the Talent Agencies Act was intended for the artist’s benefit, one must ask whether occasionally procuring employment is harmful. It would be difficult to find a personal manager or a talent agent who thinks procuring a single engagement is detrimental to the artist’s welfare.\textsuperscript{370} For instance, the amount of money an incidental booking might generate is minuscule in comparison to the dollars generated by the employment procured by a licensed talent agent. In sum, the \textit{Waisbren} standard is an overzealous application of the Talent Agencies Act, which ultimately undermines the Act’s purpose.\textsuperscript{371}

The \textit{Waisbren} court’s effort to facilitate the remedial aspect of the Act does more harm than good to the artist. Subjecting the personal manager to the expense of complying with the Act’s regulations would severely limit the avenues of opportunity available to the struggling actor.\textsuperscript{372} No longer would a personal manager be willing or able to invest in young talent; opportunities would be limited to a few lucky artists.\textsuperscript{373}

\textit{Waisbren} asserted that the incidental exemption was an unworkable standard on the theory that its vagueness would undermine the intent of the Act.\textsuperscript{374} The court asked, “should a manager’s procurement activities no longer be considered ‘incidental’ when they exceed ten percent . . . or perhaps the line should be drawn at twenty-five percent or fifty percent.”\textsuperscript{375} According to the court, nothing in the Act dictates a clear answer. Ironically, the court’s fear is unfounded, as the Labor Commission had been making this very determination all

\textsuperscript{367} Id.
\textsuperscript{368} Id.
\textsuperscript{369} \textit{Waisbren}, 41 Cal. App. 4th at 246.
\textsuperscript{370} Roger Davis, Vice President of the William Morris Agency, testified at the California Senate Hearings that “neophyte artists” will not attract the attention of a Talent Agent until they can command significant earning power. \textit{Hearings, supra} note 56, at 171-72.
\textsuperscript{371} \textit{Waisbren}, 41 Cal. App. 4th at 246.
\textsuperscript{372} Greenberg, \textit{supra} note 80, at 2.
\textsuperscript{373} Id.
\textsuperscript{374} \textit{Waisbren}, 41 Cal. App. 4th at 254.
\textsuperscript{375} Id.
Despite the Waisbren court’s concerns, Wachs and its progeny have demonstrated a workable standard.

The Wachs significance test has been adopted and refined successfully through a series of Labor Commission determinations. In Church, the Labor Commissioner added to the significance test by clarifying what constitutes a “significant portion” of a personal manager’s overall duties. In addition, Anderson’s bifurcation of the artist-personal manager relationship provides an example of an equitable standard that considers the entire employment relationship, not just an isolated act. The Labor Commissioner further refined the test in Ivy to individuals who procure employment by inadvertence, thereby eliminating protection to those individuals who were the extreme violators of the Act. Through these refinements, the Labor Commission had developed a workable incidental rule that was equitable in application.

In concluding that the incidental procurement was an unworkable standard, the Waisbren court ignored the history of New York’s incidental exemption for personal managers. New York, like California, is home to a substantial portion of the entertainment business. In order to prevent the exploitation of artists, the New York General Business Law mandates that every employment agency must obtain a license. An employment agent is defined as a person who attempts to procure employment or engagements for circus, vaudeville, the variety field, radio, television, opera, ballet, legitimate theater or other entertainment’s or exhibitions. . . . Personal managers are exempted from the licensing requirements if their “. . . business only incidentally involves the seeking of employment for their clients.” The New York judiciary has determined the meaning of “incidental,” but such a determination rests upon a review of the contract’s description of the personal manager’s obligatory services.

In Paine v. Lerbman, a New York state court held that an individual does not meet the incidental exemption if their primary con-

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380. Id.
381. Id.
382. Id.
tractual obligation is to procure employment. In this case, the plaintiff and the defendant entered into a personal management agreement, whereby the defendant promised to secure a recording contract. The court held that under the employment contract the defendant’s only function was to solicit and secure a recording contract. In short, Paine holds that for a personal manager to come within the ambit of the incidental exemption, the majority of her duties must be related to management issues, not employment procurement.

The New York incidental rule was further defined in Friedkin v. Walker. There, a motion picture and legitimate theater personality brought suit to recover commissions paid to a booking agent who had secured lectures and other engagements. The court based its determination on the language in the contract, holding that the booking agent did not meet the incidental rule because the agent’s primary business was seeking employment, not managing the artist’s affairs. New York’s incidental rule is thus similar to the Wachs significance test. Like Wachs, the New York rule places the activities of the personal manager under discrete review. There is no substantial difference between the two standards.

Given the transcontinental nature of the industry, it is illogical not to develop a uniform standard that protects the artist, while permitting the personal manager to carry out her duties without the fear of being penalized. Uniformity of the laws, however, was not a primary concern of the Waisbren court. It is possible to envision a scenario where a California artist obtains the services of a New York personal manager and is then “discovered” by a Los Angeles studio. The studio and the New York-based personal manager enter into negotiations and strike a deal. Under the New York rule, as well as the Wachs significance test, such a scenario may be legal if the personal manager spends a majority of her time tending to the artist’s creative

385. Id.
386. Id.
387. Id.
388. Id.
390. Id.
391. Id.
392. Id.
393. Id.
issues. However, under Waisbren, the personal manager would violate the Act because the transaction took place in California. Clearly, the need for uniformity of the laws cannot be easily dismissed.

The Waisbren court determined the viability of the incidental exemption through the Labor Commission's prior interpretation of the Act. Here, the court asserted that the Labor Commission has long taken the position that a license is required for procurement. To a certain extent Waisbren is correct. The Labor Commission did require a license for procurement activity, as evidenced in Pryor and Derek. Ironically, however, it was the Labor Commissioner, as the defendant in the Wachs case, who successfully argued at the appellate level for the significance test in determining violations of the Act—a fact which the Waisbren court overlooked.

Furthermore, after the Wachs decision, the Labor Commission followed and expanded the Wachs significance test. In other words, the significance test exists because it was urged on the courts by the very state official responsible for enforcing the Talent Agencies Act; and it has been used by that official in deciding cases under the Act ever since. Logically, the court in Waisbren should have respected the wishes of the administrative body implementing the Act, taking this fact into account when it reviewed the Labor Commission's interpretation of the Act, and letting the incidental exemption remain.

In further support of its decision, the Waisbren court relied on the findings of the California Entertainment Commission, which rejected the incorporation of a New York-type incidental exemption. However, the Commission based its findings on Labor Commission precedents which preceded the Wachs case, leaving a lingering suspicion that the Commission's decision might have been different in light of Wachs and its progeny. Regardless, the Commission's report was completed well over a decade ago and the entertainment industry has

396. Id.
397. Id.
399. Id.
401. REPORT, supra note 125, at 2.
402. Id.
403. REPORT, supra note 125, at 2.
grown dramatically, making it much more difficult for an artist to gain exposure without the assistance of a personal manager. The personal manager has become integral in developing the artist's career, and it would therefore be wise to develop uniformity on this point.

The limited exemption provided by the Talent Agencies Act does not adequately reflect the personal manager's role in the entertainment industry. The 1986 Talent Agencies Act specifically exempts, under section 1700.4(d), unlicensed individuals who work in conjunction with a licensed talent agent.\textsuperscript{405} The \textit{Waisbren} court stated that this limited exemption is the only exemption allowed under the Act.\textsuperscript{406} The court asserted that if the incidental procurement was allowed it would directly conflict with the "working in conjunction with" exemption."\textsuperscript{407} Yet, this exemption is of little value to the "neophyte artist" who cannot get a talent agent in the first place. Even if the artist is lucky enough to find a personal manager, it is highly unlikely that a talent agent would be willing to work in conjunction with the personal manager on an unknown artist unless that artist had instant profit potential. Thus, a paradox exists: only an artist who has worked is in a position to obtain a talent agent, but the only way to work legally is through the services of a talent agent. For example, in \textit{Anderson}, the manager attempted to qualify under this exemption by getting a "hip pocket agent;"\textsuperscript{408} however, the Labor Commissioner declared that this was an attempt to circumvent the licensing requirements of the Act.\textsuperscript{409} Following \textit{Anderson}, the Labor Commissioner advised that this exemption will be extremely hard to meet unless the talent agent explicitly invites the personal manager to work alongside in procuring employment. But the Labor Commissioner has interpreted the exemption too strictly, creating an undue burden on both the artist and the personal manager.

In addition, the Act's exemption for the procurement of recording contracts places a burden on personal managers who cannot represent musical groups.\textsuperscript{410} It seems logical that if an unlicensed individual can procure a recording contract, then there should also be an incidental exemption for a personal manager to secure employment for other kinds of artists. The argument that the recording exemption is based on the different nature of the industry is a valid one, but the situation

\textsuperscript{405} \textsc{Cal. Lab. Code} § 1700.4(d) (Deering 1996).
\textsuperscript{406} \textit{Waisbren}, 41 Cal. App. 4th at 259.
\textsuperscript{407} \textit{Id}.
\textsuperscript{409} \textit{Id}.
\textsuperscript{410} \textit{See Cal. Lab. Code} § 1700 (Deering 1996).
is no different for the "neophyte artist." In sum the statutory exemptions seem illogical at best and counterintuitive given the realities of today's entertainment industry.

Since Wachs and Waisbren were decided by equivalent appellate courts, a split in authority exists within California. The Labor Commission has compounded this split by choosing the Waisbren standard to adjudicate Talent Agencies Act disputes. When a conflict in appellate court decisions exists, "the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." Here, the Labor Commission is the tribunal with inferior jurisdiction, and thus was obligated to make a choice between the two standards. The Labor Commissioner selected Waisbren on the theory that it most accurately reflected the intent of the Act. However, this decision has placed personal managers in an untenable position by exposing them to adverse and costly decisions. Given the importance of the entertainment industry to the state of California, the State Supreme Court or the legislature should take heed of this current crisis and step in to resolve it.

V
Alternate Solutions

This note has attempted to refute the current views of the Labor Commission about the Talent Agencies Act by exposing the inherent inequity in the Waisbren standard. It has also advocated a return to the Wachs standard, among other possible solutions. These solutions range from the incorporation of a New York-type incidental exemption for incidental procurement to the reliance upon fiduciary duty and the institution of an equitable damage scale.

Although advocated numerous times and rejected by the California Entertainment Commission, and the legislature, in 1978 and 1982, the Legislature should revisit the incorporation of a New York-type exemption for the procurement of incidental employment for a variety of reasons. First, the realities of the entertainment industry

411. Greenberg, supra note 80, at 2.
413. Auto Equity v. Superior Court, 57 Cal. 2d 450, 455 (1962).
415. Greenberg, supra note 80, at 12.
417. Greenberg, supra note 80, at 12.
make it very difficult, if not impossible, for a "neophyte artist" to secure representation from a talent agent when he or she first arrives in Los Angeles.\textsuperscript{418} An artist will simply not be considered by a talent agent until that artist has gained name-recognition of some value.\textsuperscript{419} Thus, the first person with whom a "neophyte artist" comes into contact is the personal manager.\textsuperscript{420}

The return to the incidental exemption would resolve the current problem faced by personal managers.\textsuperscript{421} The artist would be able to gain the notoriety needed to advance his or her career and the personal manager would avoid the punitive measures of the Act.\textsuperscript{422} The incidental exemption has a proven record of protecting not only the artist, but also the personal manager.\textsuperscript{423} This is evidenced in the Labor Commissioner's decisions following \textit{Wachs}, as well as the success of New York's incidental exemption.\textsuperscript{424}

In order to promote artists, personal managers are forced to invest "financially in their clients."\textsuperscript{425} Most new artists require living expenses in addition to promotional and performing expenses.\textsuperscript{426} Thus, a personal manager expends time and money on an artist who is unable to obtain work because his name is not recognized by a licensed talent agent.\textsuperscript{427} The personal manager is then left with two options: obtain a talent agency license or procure employment for the artist.\textsuperscript{428}

The Labor Commissioner would argue that the personal manager should simply get a license.\textsuperscript{429} But obtaining a license is both time-consuming and expensive for the personal manager already feeding and clothing the "neophyte artist."\textsuperscript{430} The state requires a $10,000 surety bond, application fees which range from $300 to $2,225, and the maintenance of a separate office as a place of business.\textsuperscript{431} In addition to these state requirements, as a talent agent, the personal manager would be further restricted by the numerous guild requirements—

\textsuperscript{418} Id.
\textsuperscript{419} Id.
\textsuperscript{420} Johnson & Lang, \textit{supra} note 11, at 490.
\textsuperscript{421} Id.
\textsuperscript{422} Id.
\textsuperscript{423} \textit{Wachs}, 13 Cal. App. 4th at 616.
\textsuperscript{424} N.Y. GEN. BUS. LAW § 171 (McKinney 1996).
\textsuperscript{425} Greenberg, \textit{supra} note 80, at 2.
\textsuperscript{426} Id.
\textsuperscript{427} Id.
\textsuperscript{428} McPherson, \textit{supra} note 355, at 17.
\textsuperscript{429} Interview with Miles Locker, \textit{supra} note 414.
\textsuperscript{430} Greenberg, \textit{supra} note 80, at 12.
\textsuperscript{431} See \textit{CAL. LAB. CODE} § 1700 (Deering 1996).
most notably, the limitation of talent agent commissions to ten percent. Because the majority of neophyte artists are found by neophyte personal managers who cannot afford the licensing fees, only well-established management companies would be able to implement the Labor Commission's scheme. Therefore, the only logical option for the personal manager is to run the risk of violating the Talent Agencies Act by procuring employment for the artist. The untenable situation of the personal manager provides reasonable grounds for the incorporation of an incidental exemption either through legislative action or a return to the Wachs significance test.

The incidental exemption would not, as talent agents may argue, create an environment where personal managers have free reign to procure employment, effectively usurping the role of the talent agent. The exemption by definition is predicated upon a distinction between the professional roles of personal managers and talent agents. Even under the most liberal of interpretations, the law would limit the activities of personal managers in seeking employment for artists. On a practical level, it is not feasible for a personal manager to attend to both the creative and employment needs of an artist who has obtained a "modicum of success." Furthermore, it is evident that talent agents control most of the lucrative relationships that lead to the "big deals." With the incidental exemption, personal managers would be able to obtain the kind of employment that would create the appropriate buzz for the artists, thus leading to representation by a licensed talent agent. In essence, the incidental exemption should be thought of as a means to an end.

Most importantly, the incidental exemption would defeat attempts by artists to extricate themselves from their personal management agreements because something better comes along. The incorporation of an incidental exemption would rectify the current problems associated with the unjust enrichment of the artist. Such a

432. Greenberg, supra note 80, at 3.
433. Roger Davis, Vice President of the William Morris Agency, testified at the California Senate Hearings that "neophytes artists" will not attract the attention of talent agents until they can command significant earning power. Greenberg, supra note 80, at 2 (citing Hearings, supra note 56, at 172).
434. Greenberg, supra note 80, at 2.
435. Id.
436. Id. at 12.
437. Id.
438. Id.
439. Id. at 2.
move would also effectuate the purpose of the Act—protecting the welfare of the artists—rather than awarding them a fistful of dollars they do not deserve.

Incorporating an incidental exemption should not remove the personal manager from the watchful eye of the Labor Commission. The personal manager should be required to comply with the Act’s regulations if they procure employment which violates the incidental exemption. Furthermore, the incidental procurement activities of personal managers should be regulated under a fiduciary standard.441

Under fiduciary law, a business relationship is viewed in terms of a dominant and a vulnerable party.442 The dominant party in a relationship—in this case, the personal manager—owes a high level of duty towards the vulnerable party, the artist.443 In a fiduciary relationship, the dominant party, the fiduciary, is entrusted with the power to perform specific tasks.444

If the dominant party breaches this trust by failing to perform the specific tasks, the vulnerable party has a variety of protections.445 For instance, the parties can enter into a contract specifying the scope of the sanctioned activities as well as the appropriate remedies.446 Furthermore, the vulnerable party has a right to terminate the relationship, suing for misrepresentation or misappropriation.447 Under fiduciary law, the personal manager’s actions are strictly controlled, mitigating any fears that an incidental exemption would permit an end run around the Act’s requirements.448

The return to a strict interpretation of the Talent Agencies Act resulted in the imposition of severe damages against personal managers.449 The Talent Agencies Act seeks to protect the welfare of the artist, but it is far from clear whether the most effective way to protect the artist is to destroy the financial welfare of the personal manager.450 The Act does address this concern through the one year statute of limitations codified in section 1700.5.451 Under this provision, the art-

441. Greenberg, supra note 80, at 13.
442. Frankel, supra note 416, at 800.
443. Id.
444. Id. at 809.
445. Id.
446. Id. at 813.
447. Greenberg, supra note 80, at 13.
448. Id.
450. Id.
ist can sue for commissions received by the personal manager only within the past year.\footnote{Id.} But the statute of limitations does not stipulate which activities are legitimate and which are in violation of the Act. Thus the personal manager may suffer financial devastation for the year the artist decides to file a petition with the Labor Commission.\footnote{Id.} An equitable damages scale would better implement the intent of the Act.

Under the \textit{Waisbren} standard, an artist is empowered to refuse to pay the personal manager a commission simply by filing a petition with the Labor Commissioner declaring that the personal manager has violated the licensing requirement of the Talent Agencies Act.\footnote{Waisbren, 41 Cal. App. 4th at 254.} Thus, the \textit{Waisbren} decision provides the artist with a guaranteed economic windfall. Under \textit{Waisbren}, a personal manager is forced to disgorge all fees collected within the statute of limitations, regardless of the source of those fees.\footnote{Id.} Furthermore, assuming the Labor Commissioner declares the personal management agreement void, the personal manager is precluded from initiating a damages suit on breach of contract or restitution grounds.\footnote{Id.} This practice is illogical and an unjust implementation of the remedial provisions of the Talent Agencies Act.\footnote{Id.}

Moreover, prior to the \textit{Waisbren} decision, the Labor Commission had been in the process of creating a more equitable damage scheme through the use of bifurcation.\footnote{See, e.g., \textit{Anderson}, Cal. Lab. Comm. No. TAC 63-93 at 10.} The \textit{Anderson} holding is significant in that the court only punished D’Avola, the personal manager for activity which directly related to the violation of the Act’s licensing requirements.\footnote{Id.} In contrast, the personal manager in \textit{Derek} was forced to return all commissions resulting from both the personal management and collateral agreements over merchandising.\footnote{Derek, Cal. Lab. Comm. No. TAC 18-80.} Thus, bifurcation creates a structure in which damages will reflect the monies created through a violation of the Act, not through legitimate work.

In addition to endorsing bifurcation, several experts have advocated the institution of an equitable damage scale.\footnote{Greenberg, \textit{supra} note 80, at 861.} In his article, \textit{The

\begin{footnotes}
\item[452.] Id.
\item[453.] Id.
\item[454.] Waisbren, 41 Cal. App. 4th at 254.
\item[455.] Id.
\item[456.] Greenberg, \textit{supra} note 80, at 13.
\item[457.] Id.
\item[459.] Id.
\item[460.] Derek, Cal. Lab. Comm. No. TAC 18-80.
\item[461.] Greenberg, \textit{supra} note 80, at 861.
\end{footnotes}
Plight of the Personal Manager: A Legislative Solution,\textsuperscript{462} Gary Greenberg argues for a damage scale which accurately reflects the harm committed.\textsuperscript{463} For example, the booking of one live show would bring a fine equal to the commission payable to a licensed talent agent. If a personal manager has violated the good faith and trust of his client, as in the Pryor case, the manager would have fines levied against him as punishment.\textsuperscript{464} A damages continuum would inject equity into the enforcement of the Talent Agencies Act, thereby creating punishment that fits the crime.\textsuperscript{465}

VI

Conclusion

It is undisputed that some aspects of the Talent Agencies Act have had a positive impact on employment relationships in the entertainment industry. The Act has sought to protect artists from exploitation by unscrupulous individuals. Yet the Act, as interpreted by the Waisbren court and administered by the Labor Commission, jeopardizes the vital relationship between personal managers and artists.

Because the Waisbren and Wachs decisions were handed down by equal appellate courts, the Labor Commission can choose to enforce either holding. Unfortunately, the Commission has elected to follow Waisbren, which fails to consider the integral role of the personal manager in advancing an artist’s career. It is the personal manager, not the talent agent, who discovers the artist and invests in his or her future. A talent agent will rarely pay attention to an unknown artist until a potential profit exists.\textsuperscript{466} Yet Waisbren’s interpretation of the Act prevents the personal manager from undertaking necessary incidental activities that might lead to valuable and potentially lucrative exposure for the artist. These difficulties, faced by both the artist and the personal manager, warrant a return to the workable standard of Wachs and its progeny.

Wachs is the more logical choice for the Labor Commission to follow because it benefits both the personal manager and the artist. The Wachs standard allows the personal manager to perform her duties without fear of punitive measures, so that the artist sees her career advance. While the standard is flexible for the parties involved, it does

\textsuperscript{462} Id.
\textsuperscript{463} Id.
\textsuperscript{464} Id.
\textsuperscript{465} Id.
\textsuperscript{466} Id. at 862.
not eviscerate the intent of the Talent Agencies Act. The *Wachs* standard enables the artist-manager employment relationship to meet the realities of the entertainment industry.

This note demonstrates that the *Waisbren* strict standard is too rigid to serve the interests of artists in the contemporary entertainment industry. It advocates either a return to the *Wachs* standard or the adoption of other remedies which seek to inject equity into the artist-personal manager employment relationship. With the rapid globalization of the entertainment industry, all employment relationships within this industry are at a crossroads. A strict interpretation of the Talent Agencies Act inhibits the industry’s general prosperity. The legislature or the courts should therefore create a permanent equitable standard to regulate one of the most fundamental employment relationships in entertainment.