THE ROTTEN, NO GOOD, SHAMEFUL, UNCONSTITUTIONAL ENFORCEMENT OF CALIFORNIA'S TALENT AGENCIES ACT

As troubling as the current enforcement is,
if something is not done it will get worse.

For over a half-century, an artist[1] that either works or lives in California has had the opportunity to claim the efforts of their personal manager to find them a good job, which is exactly the reason they enlist a manager's help, violates the State's Talent Agencies Act (*CA Labor Code* § 1700 *et seq*. "Act," "TAA") and as such has no legal right to be compensated.

Despite the mountain of law review articles over the decades bemoaning the incongruities, confusion and draconian-like consequences of the Act's enforcement, none have ever delved deeply into the whys why has the Act fostered inconsistent and often contradictory determinations.

This piece will show how among other ills, there is no rational basis for the way the California Labor Commission[2] ("CLC") interprets the Act and their enforcement is judicially unsupportable. Enforcement does not follow well-founded CA Supreme Court ("CASC") precedent and relatedly, is violative of the Due Process Clauses of the 5th and 14th Amendments, the Commercial Speech Clause of the 1st Amendment, The Dormant Commerce Clause (Article 1 of the U.S. Constitution), along with being arguably, and however controversial, a violation of the Involuntary Servitude Clause of the 13th Amendment.

I. THERE ARE DISCONNECTS BETWEEN THE RATIONALE FOR THE CREATION OF THIS LAW AND HOW IT IS ENFORCED

The California Legislature codified the precursor of the TAA in 1913, as the mechanism to stop employers from masquerading as employment counselors. Before that, a young ingenue moving to Los Angeles with a dream to be on the silver screen would walk into one of the slew of talent agencies on Sunset Boulevard and ask how they can be in the movies. The 'agent' would say, "It's

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[1] Artist, as defined in CA Labor Code § 1700.4, entertainment industry creatives including actors, writers, directors, musicians, band other. Hereinafter, all Section Codes will be part of the Labor Code unless expressly noted otherwise.

[2] The Legislature empowered the Commission to administer and enforce the Act (see §§ 1700.5, 1700.6, 1700.7, 1700.10-15, 1700.20 – 30) and serve as the original adjudicator for TAA controversies. *See* §1700.44 (a).

your lucky day. I have two places where you can start today; would you rather work in the burlesque hall downtown or the bordello in the Hollywood Hills."

"You must not understand," replies the ingenue. "I want to be in pictures." To which the 'agent,' who really was working to lure young women into lurid jobs, answers, "If you really want to meet the filmmakers like D.W. Griffith and Rudolph Valentino, you got to work at the bordello."[3]

A licensing scheme barring employers from also serving or masquerading as employment counselors is of clear and a needed benefit to artists. Had the CLC, once empowered to oversee the Act, stayed true to serving that objective, a century of problems might have been avoided. Yet as enforced, the TAA is almost exclusively a tool for the greedy; robbing those hired to and successfully changed the artist's career plateau, from the benefit of their labors. "The Act is a perfect example of interest-group politics supplanting legislative integrity. … Interested groups such as the Association of Talent Agents changed sides frequently, opposing in one instance the powerful entertainment unions and in the next joining them against personal managers or other potential procurers."[4]

Looking at administrative agency's history as businesses strayed into being employment counselors and employers leaves the impression that the CLC believes their job was to protect the licensee, not the artist.

For example, in 1952 the Screen Actors Guild ("SAG") President Ronald Reagan gave his talent agency (MCA) a waiver to create a production entity, allowing it to serve as an employment counselor and employer.5 Though the waiver violated both the Act and SAG's own bylaws and resulted in MCA clients not hearing about opportunities from other studios, the CLC stood to the side. Only a 1962 threat of a federal antitrust suit prompted MCA to tether the agency and make production its sole business.[6]

In the 1990's, studios began making deals creating production entities with the some of the top-tier personal management companies, leaving those firms

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[3] See *Regulation of Attorneys Under California's Talent Agencies Act; A Tautological Approach to Protecting Artists*; CA. Law Review, Vol. 80, Is. 2, pg. 492 (1992) James M. O'Brien III.

[4] Philip R. Green & Beverly R. Green, Talent Agents and the New California Act, in 1988, "Entertainment, Publishing and the Arts Handbook" 357 (John D. Viera & Robert Thorne eds.): "

[5] https://www.moldea.com/ReaganRedux.html, "A Justice Department memorandum indicated that the waiver became 'the central fact of MCA's whole rise to power."

[6] See *Id.*

as both employment counselors and employers. Not only did this mirror the MCA actions, but arguably an even more egregious violation of the Act, as these new production entities were being funded by the studios.[7]

The potential for mischief from these entanglements were on display in the lawsuit Garry Shandling initiated against his manager Brad Grey.[8] The comedian "alleged, among other things, that Grey had 'double-dipped,' taking fees from HBO both as Shandling's manager and as the executive producer of 'The Larry Sanders Show"; made lucrative television deals by trading on his relationship with Shandling without cutting his client in; and inveigled writers from "Larry Sanders" to create other shows for Grey's television studio."[9]

Many argue that had the CLC properly enforced the TAA's legislative objectives, Shandling would not have had need to litigate. Similarly, had the CLC taken a stance protecting creators, the Writers Guild of America may not have felt its only choice was to sue the industry's four largest talent agencies to end of the practice of 'packaging.'

Packaging rewards agencies, with fees from the buyer of anywhere between 2.5 and 10% of a project's budget and a similar back-end percentage,[10] for agreeing to attach their clients as essential elements, be they the director, writer and/or star. It creates, quoting the suit's complaint, clear conflicts of interest:

> "Agencies receiving a packaging fee do not negotiate on their clients' behalf with the same vigor they would if they were being paid a portion of their clients' compensation, and their financial interest in the program creates an incentive for them to hold down or reduce the amount paid to their clients. … The Guild's members … have seen their writing wages stagnate or decrease over the last decade, particularly

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7 See https://variety.com/1994/tv/news/abc-inks-prod-n-duo-117993/, https://variety.com/1993/film/news/3-arts-fox-pact-108886/, https://variety.com/1996/scene/vpage/zuckerman-inks-3-arts-deal-1117466131/. https://variety.com/1998/biz/news/addis-wechsler-now-industry-1117469199/

8 All future mentions of the term 'manager' denotes 'personal manager' unless otherwise notated.

9 https://www.newyorker.com/magazine/1998/04/13/the-eighteen-year-itch "By controlling both the talent and the production company that employs the talent, Grey has become what Lew Wasserman, the chairman of MCA, was prevented from becoming in 1962, after an antitrust investigation forced him to divest MCA's talent agency and stick to making television shows."

10 https://www.vulture.com/article/wga-hollywood-agents-packaging-explained.html..

> on shows packaged by their Agencies, despite the substantial expansion of the television market in recent years."[11]

Packaging fees are not garnered in the standard way to collect commissions, from an agency's clients. These fees are remitted directly from a production entity's budget and backend profit.[12]

As the TAA states that, "No talent agency shall divide fees with an employer, an agent or other employee of an employer," it seems clear that this practice was a violation of the Act. Only not to the Labor Commissioner.[13]

For example, in 1959 a law firm submitted a request for opinion letter asking about the propriety of packaging. In reply, the Commissioner wrote that packaging "is concerned exclusively with 'creative property or package show' and contains nothing with respect to the employment of an artist for the rendering of his professional services."[14]

Just the opposite, packaging was 100% about employment. Talent agencies received packaging fees only once one or more of their top-tier writers, directors, and/or meaningful stars committed to work on a project.

In 1964, the artists' Guilds sent a request for opinion letter inquiring if packaging violated the Act violated §1700.39. No, replied the Commissioner; it was codified to stop talent agents from splitting the fee they received from the artist with the employer, not splitting the monies the project gleaned.[15]

The explanation defies logic. There is no evidence the State had concern agencies were taking advantage of clients with kickbacks from commissions to an employee of, or the production entity, that hired the artist. It would not be the artist's, but the agent's revenue that would be lessened. Nor is there evidence of any State concern about the common practice of agencies sharing representation and splitting commissions, and the CLC never spoke about or took any action to stop it. Sharing representation is legal and helps the artist.

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[11] https://www.scribd.com/document/410896680/WGA-v-WME-CAA-UTA-ICM-First-Amended-Complaint, Pg. 17, lines 17-23. ("WGA Complaint.")

[12] Packaging fees are "paid directly by the production companies from a program's budget or revenues to the Agencies simply because the Agencies represented the writers, directors, and actors who will be employed by the production companies in producing the show." WGA Complaint, Pg. 2, lines 2-5.

[13] All future use of the term 'Commissioner' denotes the CA Labor Commissioner, unless expressly notated. Also note though referred to an individual officeholder, it stands for the officeholder in a general sense.

[14] https://www.scribd.com/document/518318075/Packaging-Letters-1959-1998 ("Packaging letters."), Pg. 1.

[15] See Packaging Letter, Pgs 2-3 (Pgs 1-2 of the letter to the Guilds).

In 1998, when a film producer requested an opinion letter requesting the CLC reconsider its thinking on packaging, the Commissioner cited the same reasoning as in 1959 and again refused to interfere in the practice.[16]

As the Act's mission is to protect artists from agents, it is confounding the CLC believes talent agencies, whose main responsibility ends when the deal is consummated, deserve an equal or better payday than the clients who then labor for thousands of hours to make the project. It may be standard for financiers putting up the money have similar rewards as the party providing the labor, but in these cases, the talent agencies have made at times tens of millions of dollars more than their client artists for simply facilitating the opportunity.[17]

The repeated petitions are evidence of how unfair the Guilds considered packaging. The WGA considered it inequitable enough not just to later initiate the 2019 suit but require its members to leave any agency that would not agree to stop the practice. Only when William Morris Endeavour became the last agency agreeing to phase out packaging, marking the recent end of this year-plus-long dispute, were the creators of television and film projects sure to make more money than their agencies.[18] It corrected a malady the administrative agency empowered to enforce the agency might have resolved long ago.

In example after example, CLC enforcement seems misaligned with the Act's objective of protecting artists; instead, buttressing talent agents' powers against envisioned competitors and helping maximize the agents' revenue potential, irrespective of what deleterious effects they might have on artists.

In concluding 'packaging' is selling an idea and not tied to employment, the Commissioner exhibited an odd understanding of the industry. More often, especially with films, completed scripts are part of the transactions. A-list actors are loathe to commit to working on project before there is a written script.

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16 See Packaging Letter, Pgs 4-5 (Pgs 1-2 of the letter to Leonard Hill of Leonard Hill Films).

17 https://labusinessjournal.com/news/1999/jan/18/packaging/ This 1999 article gives the example of Bill Cosby's talent agency receiving over $100,000.000 in packaging fees for The Cosby Show from 1984-1989. For his work as producer and stary, his salary went from a reported $100,000 in 1984 to $1,000,000 by 1989, totaling between $50,000,000 and $80,000,000. While Cosby is an imperfect subject, the math clearly shows a huge inequity in favor of the agency. A "200-member Caucus of Writers, Producers and Directors petitioned the State Labor Commissioner's office to hold hearing on packaging commissions," but the effort failed after the Commissioner, in his letter to Hill, "ruled that it did not have jurisdiction."

18 See https://www.latimes.com/entertainment-arts/business/story/2021-02-05/wme-agency-ends-standoff-with-writers-guild

Even more curious, if the sale does come from a pitch of an idea, a writer then needs to write that script and that contract is an essential element to the transaction. The Commissioner's opinion also conflicts with the CLC's enforcement interpretation, as it considers it an attempt to procure a job[19] when manager sells a client's finished manuscript with no requirement for any further labor.[20] In analyzing why that is a violation but not when agents sell a pitch, which axiomatically calls for a writer to write, it seems the Commissioner has harsher interpretations when adjudicating licensing violations.

Whether intentional or accidental, the TAA serves as a protectionist tool for talent agencies. As there is no codified statute expressly prohibiting non-licensees from engaging in procuring written, the Act as written does not reserve procuring for those with talent agency licenses. The CLC interprets a defining activity of a talent agent as a regulated activity, and in doing it has sanctioned a monopoly. A defining activity can be a regulated activity, but when and only when a statute expressly states licenses are required to engage in it.

Nothing in the Act's legislative history denotes or implies the Legislature saw reason to give California's talent agents exclusivity on creating revenue opportunities for artists. There is no 'public good' rationale: on average, only some ten percent of show business Guild members are working in their chosen profession at any one time. How can anyone helping get the others work be to the artists' detriment? What is the possible damage to an artist to get help in finding a job with a third party they can choose to accept or reject in exchange for compensating the representative a mutually agreed-to percentage?

Prohibiting all but licensed agents from helping an artist cannot be related to a fear of malpractice. The foundational case from which all other TAA licensing controversies are based on is *Buchwald v. Superior Court*, 254 Cal.App.2d 347 (1967). Per *Buchwald* (at 351), "the clear object of the Act is to prevent improper persons from becoming [talent agents][21] But unlike most licensed professions, California requires applicants for talent agency licenses to show no proof of training or apprenticeship, no testing or other proof of competency that doctors, lawyers and other specialists must possess.

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19 All mentions of the terms 'procuring' or 'procurement' are referencing procuring employment for an artist.

20 See *Strouse v. Corner of the Sky*, TAC 13-00, Pgs. 6-8.

21 Before 1978, the TAA was called the Artists' Managers Act, and talent agents were called artists' managers.

Buchwald does not delineate what an improper person is, and there is no mention of that term in the Act. To qualify for a talent agency license, one must submit to a criminal history background check,[22] as well as answering whether any of the proposed owners of the agency have any outstanding judgments or owe any unpaid wages. But California has no law prohibiting anyone with a criminal history from becoming an agent.

Past that, applicants must provide the addresses of where the business will be located and the residence(s) of all profit participants, and know if the entity will be a DBA, LLC or corporation. Applicants must also certify in writing that the agency location will not endanger the health, safety or welfare of an artist, and submit their agent/client contract and fee schedule. would be an inability to pay the $250.00 administration fee and post a $50,000 bond, pass a cursory background check or not have fingerprints to print.[23] Until recently, the requirement of fingerprints could be satisfied without a notary and submitted by mail, so the applicant could, if there was reason, use another's prints.

Rather than requiring competency, the CLC bars specialists in negotiation, attorneys, from negotiating employment for an artist unless the lawyer does so at the request and in conjunction with a licensed agent,[24] even if the objective is only to renegotiate a deal on a job the artist already has.[25]

How can it benefit an artist to have to pay an agent 10% when an attorney has the skills to do it for an agreed-to hourly rate, or the industry standard for transactional attorneys of 5%?

Should an artist want the comfort of an attorney's skills and the lawyer wants to follow the CLC's interpretation and engage an agent as well, what benefit does the artist glean by needing to pay 15% versus just paying a lawyer?

Marathon v. Blasi, 42 Cal.4th 974, 979 (2008), the most recent TAA licensing dispute decided by the CA Supreme Court, speaks to how personal managers

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22 https://www.dir.ca.gov/dlse/Talent/Talent_live_scan.pdf

23 https://www.dir.ca.gov/dlse/Talent/Talent_application.pdf

24 See *Jewel v. Vainshtein*, TAC 02-99, Pgs. 24-25: "An attorney is not specified in 1700.44 (d), or for that matter anywhere else within the Act that could be construed to extend the exemption to licensed California attorneys." … "There may be considerable opposition that could argue an attorney's license involves far greater protections for an artist/client than a talent agency license. However, we cannot rewrite the statute."

25 In *Blancarte v. Vainshtein*, TAC 02-99, the Commissioner ruled that a lawyer without also having a talent agency license violated the licensing provision when he negotiated a new contract for a weekend sports anchor to remain at KNBC-TV without an agent.

are called on to procure for neophyte talents: "not-yet-established artists, lacking access to the few licensed agents in town, hire managers to promote their career." If the client cannot get access to agents because they are not established, how can it be of benefit to the artist if only agents can lawfully procure them employment opportunities.

Rather than protecting artists, the TAA as currently enforced creates an unfair barrier making it harder for new performers to compete. *Marathon* recognized this, and without willing agents to work to jumpstart their careers, procuring "employment opportunities may be standard operating procedure for many managers" despite it not being unlawful.

How is it of benefit to artists, the group the State means to protect, if it is imperative to have someone submit you for potential jobs,[26] only talent agents can lawfully procure these opportunities, and it is nearly impossible to obtain an agent without building a resume.

Luckily for artists, personal managers, faced with the prospect of either not being able to help or act in a way the CLC considers unlawful to change the plateau of their client, work to change their clients' plateaus.[27]

The artists petitioning the Labor Commissioner for relief because their representative was unlicensed do not allege being damaged by their manager's actions. Rather they are taking advantage of how the CLC's enforcement to relieve themselves of the need to pay for the benefits they have received, in the way others take advantage of a tax loophole. Since and including when the Jefferson Airplane's manager lost over $12,000,000 in commissions in the *Buchwald* case, an estimated $500,000,000 in otherwise owed compensation has been disgorged by the CA Labor Commission, by a court following CLC enforcement, or by settlement or the manager simply walking away instead of engaging in litigation.

As the rest of this treatise shows, the Labor Commission's enforcement of the licensing requirements of the TAA is judicially and constitutionally unsupportable. But even on its face, in creating a monopoly for agents and creating untenable roadblocks for artists to ignite their careers, there is simply

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[26] Most buyers/show business employers do not accept unsolicited submissions directly from an artist.

[27] Author's note: as a standup turned comedy manager, I was friendly with all three of these comedians and their managers so this knowledge, as other insights about the industry in this article, is first-hand.

no rational basis for prohibiting someone from helping get anyone else, even in the protected party of being an artist, a job with a third party.

Instead of protecting artists, as the State was interested in doing, the Act as interpreted allows those who are already whole to enjoy undeserved financial benefit at the expense of those who they employed and benefitted from.

For a law to satisfy constitutional questions, including due process and equal protection under both the Fifth and Fourteenth Amendments, the statute or ordinance, or more specifically with regard how the CLC interprets the TAA licensing statutes, the enforcement must have a legitimate state interest.[28]

The rational basis test bars irrational or arbitrary restrictions or drawing distinctions between persons without constitutionally legitimate ends. While laws "enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons," it must nevertheless, at least, bear "a rational relationship to a legitimate governmental purpose."[29]

Clearly, the Talent Agencies Act as it has been enforced fails the rational basis test.

The next question: what caused this oversized snafu?

For a statute to pass the bar of constitutionality, there must be clarity as to (1): *who* is being regulated; (2): *what* conduct is being regulated; and (3): *which*, if any remedy is there for ignoring the relevant regulations.[30] The CA Supreme Court has opined on the 'who,' but it has neither been asked nor opined on whether there was significant clarity of that issue.

One Court of Appeals case questioned whether the 'what' in the TAA reached the constitutional bar. While that court found the terms 'occupation' and 'procurement' were understandable enough on their own to be facially constitutional, it pointedly noted that it may not be as the CLC enforces it… "Whether the Act is unconstitutional as applied to plaintiff is a question for another day."[31]

Neither party in *Marathon* asked the Court to opine on any of the three

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28 See https://www.law.cornell.edu/wex/rational_basis_test; *U.S. v. Caroline Products Co.*, 304 U.S. 144 (1938).
29 See *Romer v. Evans,* 517 U.S. 620, 635.
30 See *VA Law Review,* "Due Process Limitations on Occupational Licensing" Vol. 59, No. 6 (Sept. 1973)
31 *Wachs v. Curry*, 13 Cal.App.4th 616, 629.

constitutional issues and as such, there was no reason for the ruling to detail the Act's written shortcomings in these areas. Perhaps realizing the Act's failures, as made clear hereinunder, the opinion's author, Justice Kathryn Werdegar, provided a clear roadmap for future litigants to use when seeking to expose the Act's undeniable unconstitutionality.

II. THERE IS A LINGERING QUESTION AS TO WHO THE TAA REGULATES

Two issues were presented for review in *Marathon v. Blasi*, 42 Cal.4th 974 (2008). One, must adjudicators consider severability should they find one or more violations of the Talent Agencies Act, to which the Court answered 'yes.'

The second question: does the Act apply only to talent agents, to all representatives, or all save personal managers, because during the process of passing the TAA into law, provision expressly regulating personal managers were first inserted into the bill, and then deleted before passage.[32]

Until 1978, the laws regulating talent agents was called the Artists' Managers Act, aligning with 'artists manager' being for many years the moniker for those representatives. The objective of the name change was to clarify the licensed profession, and the burgeoning unlicensed profession of personal managers.

The bill that was presented to the Legislature, *A.B. 2535: The Talent Agencies Act of 1978,* was at the same time going to clarify what the differences are in the activities of a talent agent, a booking agent, and a personal manager; as well as incorporate the licensing of personal managers into the licensing scheme.

The Court ruled that the Act applies to anyone trying to find artists work, as it "regulates *conduct*, not labels; it is the act of procuring (or soliciting), not the title of one's business, that qualifies one as a talent agency and subjects on to the Act's licensure and related requirements."[33]

In *Marathon,* the management firm ("MEI") claimed that the Legislature's first inserting and then removing personal managers from *A.B. 2535: The Talent Agencies Act of 1978* was dispositive.

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[32] Author's note: as the owner of Marathon Entertainment, the author is the one who petitioned the Court to answer this issue. Blasi, in reply, petitioned the Court to review and overturn the lower court decision requiring adjudicators to consider severability should the find someone had violated the Act.

[33] *Marathon* Supra at 986.

Quoting the bill's June 20, 1978 legislative report: "[E}artier amended versions of this Bill were considerably more controversial as they provided for the regulation" of personal managers. They are not addressed in AB 2535 as currently amended."[34]

MEI asked the Court to follow *Beverly v. Anderson,* 76 Cal.App. 4th 480:

> "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision. The fact that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision." (Citations omitted.)
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> The proposed legislation (A.B. 2243 (1993-1994 Reg. Sess.) § 2) was amended after its introduction to provide for the investigation of claims of lost or stolen warrants before replacement warrants were issued… However, the Senate removed that provision before sending the bill back to the Assembly… As we have seen, section 29853.5 as enacted contains nothing corresponding to the deleted provision. Therefore we conclude that the Legislature intended no such provision to be judicially grafted onto the statute."[35]

MEI forwarded how the instant facts differentiated from Court of Appeals cases that later rejected the *Beverly* holding.[36] One found *Beverly* did not apply because the provision which had been injected, then rejected before the bill was codified, "merely expressed the same thought in a different way. [*Beverly* only applies when an Act] as enacted contains nothing corresponding to the deleted provision."[37]

The other Court of Appeals ruled *Beverly* did not apply because after the Legislature deleted a provision included in an earlier version of a bill, the bill

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34 A.B. 2535 at 278, https://www.scribd.com/document/133916986/Legislative-Record-AB-2535-1978.

35 *Beverly* at 486.

36 MEI Appellant's Opening Brief, pgs. 25-27.

37 *El Dorado Palm Springs, Ltd. v. City of Palm Springs,* 96 Cal.App.4th 1153 (2002)

itself was never codified. As such, "No inference can be drawn from a bill upon which the Legislature took no action."[38]

The legislative history shows the fact pattern mirrored *Beverly*. Unlike the later cases, A.B. 2535 was codified, and nothing in the codified version can be considered "the same thought in a different way" as what was first proffered.

Quoting the February 5, 1978 written introduction to A.B. 2535:

> This bill would change the scope of the regulation from artists' managers to talent agencies, and define talent agencies. Personal managers would also be defined, and provision made for issuance of a license to act in such capacity."[39]

The September 13, 1978 Enrolled Bill Report memorialized, like the process in *Beverly*, "Originally, this bill was intended to place solicitation regulations on personal managers. However, the latest amendments are applicable only to [talent agents]."[40]

The *Marathon* Court rejected MEI's argument:

> "Marathon correctly notes that in 1978, after much deliberation, the Legislature decided not to add separate licensing and regulation of personal managers to the legislation. (See A.B. 2535 as amended May 10, 1978, pp. 16-18 [deleting new licensure provisions].) The consequence of this conscious omission is not, as Marathon contends, that personal managers are therefore exempt from regulation. Rather, they remain exempt from regulation insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing the things that make one a talent agency under the Act."[41]

Pointedly, *Marathon* does not explain how the Legislature's actions during the discussions of A.B. 2535 differentiated from the facts in *Beverly* or why *Beverly* was otherwise inapplicable.

What is inarguable: despite one of the "three necessary and needed ends" of A.B. 2535 was to have personal managers "licensed by the Labor

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38 *State of California ex. Rel. CA. State Lands Comm. v City of Long Beach*, Slip Cal.App.4th (2005)

39 A.B. 2535 Pg. 2, https://www.scribd.com/document/133916986/Legislative-Record-AB-2535-1978.

40 A.B. 2535 Supra, at 282. https://www.scribd.com/document/133916986/Legislative-Record-AB-2535-1978.

41 *Marathon* Supra at 989.

Commissioner and brought into the jurisdiction of that department,[42] the Legislature chose not to take that action, leaving the scope only to talent agencies and left managers, like all unregulated professions, undefined by statute, and no provision was enacted to require personal managers to be licensed or otherwise incorporated into the scope of the regulation.

As codified, the legislation changed the title from the Artists Managers Act to the Talent Agencies Act. Not to an all-encompassing Artists Employment and Procurement Act, which would allow anyone who helps artists get work understand they were subject to regulation; or the Talent Agents and Personal Managers Act, which would have made it clear managers were now regulated. As written, the passed legislation plainly, exclusively regulates talent agents.

Likewise, despite a stated purpose for A.B. 2535 was to clarify what "constitutes procurement," nothing on the subject was codified, nor is there is any mention of delineations between lawful and unlawful behavior with regard to procurement in the Act's 297-page Assembly Final History Synopsis.

Perhaps MEI did not make these points clear enough. If personal managers were already subject to the regulations, why did the Legislature give so much consideration, before its rejection, to incorporating managers into that fold? Certainly they, then, did not consider the words of the Act to clearly limit their activities. Should another litigant to be in front of the CA Supreme Court and elucidate them plainly, the Court's answer might be different. Or perhaps the answer is a constitutional challenge; if the verbiage failed to have clarity legislators felt was needed, a Court might and perhaps find the lassoing of personal managers into the Act's regulation unconstitutional on its face and/or as applied. That combined with a challenge that there is no rational basis for the enforcement, might and should be a winning combination.

A. WHAT ACTIVITES, IF ANY, ARE BEING REGULATED?

While the TAA has numerous regulations agents must follow to be in compliance, almost all the controversies that reach the CLC for adjudication involve allegations of attempts or the successful procuring of employment opportunities for an artist without first obtaining a talent agencies license.

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42 A.B. 2535 Pgs 68-69, https://www.scribd.com/document/133916986/Legislative-Record-AB-2535-1978.

Which leaves the $500,000,000 questions: exactly does procurement mean, what, if any, exact activities are reserved for licensees, and is it possible for a personal manager to fulfill his responsibilities without engaging in what might be considered the exclusive purview of licensees? And, if the problem is being unlicensed, why do personal managers just get licensed.

Since getting licensed would make all the other questions moot, it is the best place to start.

Managers cannot get a talent agency license. The CLC forbids it.

Personal manager David Belenzon applied for a talent agency license. Among the requested documents he forwarded was his client/ fee agreement, honestly stating he was a personal manager. The CLC's full response is below:

"Dear Mr. Belenzon,

DLSE has no jurisdiction over managers.
The management agreement is being returned. Thank you.

Sincerely, Jeanie McBride
Management Services Technician, DLSE-Licensing &Registration Unit[43]

This aligns with the warning CLC Attorney David Gurley offered as conclusion to finding a personal manager had unlawfully procured:

> "If a manager engages in talent agency activity and wants to protect him/herself from the harsh outcome of securing engagements for an artist without a license, **then he/she must work in conjunction with a licensed agent or secure a license and become an agent**."[44]

If, as the CLC wrote to Belenzon and Gurley memorialized, the only way a personal manager can be licensed is to change professions, unless and until the Legislature makes personal management an unlawful profession, is it fair to penalize someone for not having a license one cannot obtain?

Even if the CLC changes that policy to better fit their stated objections, there is a second roadblock: getting paid. The great majority of artists employing personal managers also employ talent agents. Should personal

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[43] https://www.scribd.com/document/510358926/Labor-Commission-letter-to-personal-manager

[44] *Nipote v. Lapidus Entertainment,* TAC 13-99 at 10, lines 2-6, emphasis supplied.

managers become categorized as a talent agent, those with both agents and managers will need to make a representational choice.

All Guilds'[45] bylaws limit their members to paying a 10% cumulative agency commission.[46] So if the artist is paying the existing talent agency the standard 10% commission, as most do, there is none left to compensate the manager-cum-agent. The answer, which only the CLC and the Guilds can control, is a change of policy.

1. The Real-World Difference Between Agents and Managers

Per § 1700.4 (a), a talent agent is a "person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. … Talent agencies may, in addition, counsel or direct artists in the development of their careers."

In short, the talent agent is an artist's sales arm.

In the short time during the legislative process of passing A.B. 2535, the Legislature defined personal managers as those engaging "in the occupation of advising, counseling or directing artists in the development or advancement of their professional careers. A person who procures, offers, promises or attempts to procure employment or engagements for the artist in any way whatsoever is not a personal manager."[47]

Marathon notes how personal managers are "exempt from regulation insofar as they do "what the things that personal managers do,"[48] but offered no details as to what it is managers do. Nor does any Court of Appeals or CA Supreme Court effort to give the defining activities of a personal manager. It is simply assumed, without listing specifics, that personal managers can accomplish their job objectives without in any way engaging in procuring.

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45 SAG/AFTRA, the WGA, the Directors Guild (DGA) and Actors Equity

46 For example, SAG-AFTRA, Codified Agency Regs., Rule 16(g), Section XI(B) Notwithstanding anything in the Regulations, Basic Contract or any agency contract, no member shall ever pay more than ten percent (10%) commission for agency services in the motion picture industry, and if he has contracted to pay more than such ten percent (10%) to two or more agents, the arbitration tribunal shall decide which agent shall receive the commission, but in any event, the member shall only pay ten percent (10%)." https://www.sagaftra.org/files/sag_rule_16_g.pdf

47 *Id* at 67-68; proposed Labor Code § 1701.

48 *Id.* at 989.

But as Justice Werdegar noted in *Marathon*, this definition "exists in theory only. The reality is not nearly so neat," especially when the manager is working with "not-yet-established clients."[49]

"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."[50]

The most cited definition is all-encompassing yet vague: "[A] manager's task encompasses matters of both business and personal significance … [t]he primary function of the personal manager is to advise and counsel artists and to coordinate and supervise all business aspects of their careers."[51]

In the real world, many of the common definitions of a manager is by pointing out how their job responsibilities are different than agents:

'Agents market what is; managers market what can be.' Especially as they often offer representation for neophyte artists before an agent is interested, they are more often the ones that turn dreams into goals into reality.'

'An agent's job is to get their clients' job opportunities; the personal manager's job is to both maximize the quality and quantity of the artist's career opportunities.'

'Agents are like advertising salespeople. Managers are more like advertising agencies; they get involved with a client's development and creative choices.'

'An agent's job ends when the client gets work. For managers, that's when the real work begins."

The clearest way to differentiate the two professions while more fully defining what a manager does is to visualize a corporate chart. The artist serves as Chairman of the Board and the product being sold; analogous to being both Steve Jobs and the iPhone.

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49 *Marathon* Supra at 979.

50 Chip Robertson, *"Don't Bite the Hand that Feeds: A Call for a Return for a Return to an Equitable Talent Agencies Act Standard,"* Hastings Comm. and Ent. Law Journal, Vol. 20, No. 1, Article 7; January 1997.

51 James M. O'Brien, CA Law Review; Vol. 80:47, pgs. 481-482. This attempted definition is even more lacking with the recognition that the terms 'advise' and 'counsel' are synonymous.

The manager is the chief executive officer; as O'Brien wrote, advising the artists while supervising all business aspects of their clients' careers.

The publicist is the vice president of public relations, the transactional attorney the vice president of business affairs, with the agents being the vice presidents of sales.

More seasoned clients have multiple agents. A multi-hyphenate will have different agents for writing, acting, and directing for TV, and others for writing, acting, and directing for film. They might also have an agent or different agency for personal appearances, another for voiceover, another for endorsements, , another set of reps for Broadway, and if imports from a foreign land, another mirrored set of agents for work opportunities in their home country. And all report to and are supervised by the personal manager, as are the publicists, transactional attorneys, and to a lesser extent, the clients' business managers. The manager is also, as needed, a cheerleader, motivator, life coach, business advisor and therapist.

2. The Not-So-Secret Secret: All Personal Managers Procure

It is flat-out impossible to maximize the quality and quantity of a client's career opportunities while remaining separated from the procurement process. Nor is that what any client wants: what artist would want to give 10-15% of their earning to someone whose greatest contribution is, "You look best in blue."

Before any business grows, it is necessary for the leader of the business to take on a variety of responsibilities. Managers often will invest in their young clients and handle their finances.[52] And yes, until agents come aboard, they must also serve as the client's sales representative.

In an Amicus Brief defending the CLC's enforcement, the artists unions wrote how, "personal managers take a calculated risk when engaging in activities covered by the Act. Although the consequences can be severe, there

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[52] i.e.: "Personal managers usually handle the artist's finances until the artist has earned sufficient funds to require the services of a separate business manager." Donna Cole-Wallen, Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Secondary Occupations, 8 HASTINGS COMM. & ENT. L.J. 481, 521 n.218 (1986).

is little to no regulatory oversight of managers' activities and disputes typically arise *only* when the manager-client relationship deteriorates."[53]

The Guilds are correct: no Labor Commission representative, policeman or district attorney will seek out and prosecute TAA violators. It is the artist with no short-term need for procurement efforts on their behalf, like those on long-running television series, or the musicians who have changed career plateaus and are now getting opportunities with one or two more zeros at the end of their compensation checks, who have the millions of reasons (read dollars) for the relationship to deteriorate and choose to invoke the Act. And why, rather than a shield, the TAA is more often used as a sword.

III. THE LEGISLATURE'S FAILURE TO DEFINE 'PROCUREMENT' CREATED CONFUSION, INCONSISTENCIES, AND QUESTIONS OF UNCONSTITUTIONAL VAGUENESS

The Legislature's failure to create that needed bright line was the focus of a Law Review article published soon after the Act's codification:

> "Two questions that remain unresolved after passage of the TAA are when, if ever, 'procurement activity' is permissible by an unlicensed 'talent agent,' and what quantum of activity constitutes 'procurement activity.'"[54]

Law review commentators continually write of the Act being so convoluted:

> "The TAA, the TAA's predecessors and amendments, the CEC, California courts, and the Labor Commissioner have each failed to define precisely which activities constitute 'procurement.'"[55]

> "[I]nconsistent interpretations by the Labor Commission and courts [have created] an environment where no one is quite sure what is allowed. The ambiguity leaves personal managers unfairly exposed to staggering potential liability." [56]

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[53] SAG-AFTRA/WGA/DGA Amicus Brief in *Nat. Conf. of Personal Mgrs., v. Edmund Brown,* No. 13-55545 (2015), pg. 6. The Guilds' admission that they recognize the benefit of these procurement activities yet have no interest in changing their by-laws provides a window into the frustration of many managers.

[54] *The Personal Manager In The California Entertainment Industry,* Southern California Law Review, Vol. 52:37 (1979) Neville L. Johnson and Daniel Webb Lang. ("Johnson & Lang")

[55] *Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, Pepperdine Law Review, Vol. 28, 381 (2001) Gary E. Devlin.

[56] Gregory Albert, *Taking Away an Artist's "Get Out of Jail Free" Card*, Pierce L. Rev., Vol. 8, No. 3 (2010)

> "A significant ambiguity was drafted into the Act … when the Legislature neglected to define procurement."[57]
>
> "The Legislature fostered confusion by failing to stipulate precisely which individuals and specific activities fall beneath the umbrella of the new licensing requirements."[58]
>
> "Ambiguous language renders the Act inherently unjust because it does not give fair and adequate warning of the type of activity that constitutes procurement and it does not provide a consistent standard that the Labor Commissioner can apply to determine whether an individual has violated the Act."[59]

The depth and age of this morass was summed up in 2007:

> "In 1979, attorneys Neville Johnson and Daniel Webb Lang noted that "[f]or over twenty-five years, the personal manager [] has been in the throes of a controversy, the specific issues of the dispute being whether and when personal managers need a California state license to procure employment for professional entertainers. Change the "twenty-five" to "fifty," and this statement still rings true. It is time again for review, and for meaningful change."[60]

It is now another fourteen years, and still the Labor Commission has not answered any of these mayday clarion calls.

Courts have been likewise confounded the Act's unclear verbiage. *Wachs v. Curry*, 13 Cal. App 4th 616 (1993) noted how the Legislature's failure to define the term "procure" has been continually criticized in law reviews. While it found the term not 'so lacking in objective content as to render the Act facially unconstitutional. … Whether the Act is unconstitutional as applied is a question for another day."[61]

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[57] *O'Brien* Supra at 497. See also *The Controversy Over Procuring Employment: A Case for the Personal Managers Act*, Heath Zarin, Fordham Law Review, Vol. VII, Book 2, Spring 1997 at 054; "*The Plight of the Personal Manager in California in Counseling Clients,* Gary A Greenberg, at 501.

[58] *Don't Bite The Hand That Feeds: A Call For A Return To An Equitable Talent Agencies Act Standard*, Hastings Comm. & Ent. Law Journal, 223, 233 (1997) Chip Robertson.

[59] *Regulation of Attorneys Under California's Talent Agencies Act; A Tautological Approach to Protecting Artists*; CA. Law Review, Vol. 80, Is. 2, pg. 492 (1992) James M. O'Brien III.

[60] Tracie Parry-Bowers, *The Talent Agencies Act: A Call for Reform*, Loyola L.A. Ent Law Review Vol. 27, 431, 460-461 (2007).)

[61] *Id.* at 626.

The *Marathon* Court was asked to decide whether previous TAA court cases and CLC disputes were decided correctly. Instead of looking at the issue *de novo*, it simply leaned on precedent, along with noting how, "the Labor Commissioner's views are entitled to substantial weight if not clearly erroneous;[62] accordingly, we likewise conclude the Act extends to individual incidents of procurement."[63]

While *Marathon*'s finding that personal managers were regulated kept the Labor Commissioner's enforcement from being eviscerated, managers did celebrate its holding that adjudicators had to consider severability. Under the controlling case before *Marathon*, a single found act of procurement would result in the voidance *ab initio* of the personal manager's contractual rights.[64]

Yet without clarity on where the bright line of procurement is, no manager will know what single act might be risking their economic well-being.

Not surprisingly, this lack of clarity has led to contradictory rulings. In *Creative Artists Group v. Jennifer O'Dell* (TAC 26-99), LC attorney David Gurley cites *Wesley Snipes v. Delores Robinson Entertainment* (TAC 36-96), stating procurement is allowed, "as long as the activities were done as part of a 'team effort' with a licensed agent."

Conversely, in *Jason Behr v. Marv Dauer and Associates* (TAC 21-00), Gurley writes of a manager's incorrect assumption that "if he had a favorable relationship with a casting director or producer and was instructed by the agent to discuss a potential role with that casting director or producer, that those types of communications would be protected. They are not, absent convincing testimony from the artist's agent that the agent instructed the manager to conduct those specific communications." (*Id.*, at p. 9, lines 15-22.)

In defining how the Safe Harbor[65] should be enforced, *Snipes* states, "The requirements of the statute cannot be construed to call for a game of "Mother May I?" every time an artist manager takes some action during a long-term relationship … To find otherwise would be to ignore the realities of day-to-day

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62 *Id.* citing *Styne v. Stevens*, 26 Cal4th 42, 53 (2001).

63 *Marathon* Supra at 988.

64 *Waisbren v. Peppercorn Productions,* 41 Cal.App.4th 246 (1995).

65 § 1700.44 (d) It is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract.

life in the film industry." (TAC 36-96, at p. 6, fn. 2.) With three different interpretations, how would a "reasonable person" know what they can or cannot do? This lack of clarity literally screams unconstitutional vagueness.

There is even uncertainty as to whether the accused or the accuser has the burden of proof. The CLC determination in *Marathon Entertainment v. Rosa Blasi* found that the management firm had not met its burden of proving its acts of procurement were done lawfully. (TAC 15-03 at 7.) Yet in *Marathon Entertainment v. Reggie Hayes*, published the same day by the same hearing officer with a nearly identical fact pattern, the CLC found that Hayes had not met his burden of proving Marathon procured unlawfully. (TAC 33-02 at 6-7)

As referenced earlier, the National Conference of Personal Managers (NCOPM) filed suit in Federal Court claiming among other things, the Act unconstitutionally interfered with the Dormant Commerce Clause discussed hereinunder and that as enforced, the lack of clarity regarding what constitutes procurement was unconstitutional.

The CLC was represented in the suit by the office of the CA Attorney General. As part of its defense of the statute, Deputy Attorney General John W. Killeen wrote how, "Personal managers do not need a license to 'send [] out resumes, photographs, videotapes, or written materials for an artist.' Appellant's Opening Brief at 27-28."[66]

Clearly, then, the Attorney General and Labor Commissioner concur that a personal manager does not violate the TAA if he/she sends out videotapes.

In the aforementioned *Nipote v. Lapidus* (TAC 13-99), CLC hearing officer Gurley found "no smoking gun" of procurement,[67] but found that the TAA had been violated based on the manager's assistant testifying to a "vivid recollection of sending out resumes and biographical tapes" and his "understanding that sending out resumes was to get jobs for the client [artist]."[68]

"Here, the petitioner has established by a preponderance of the evidence the respondent procured employment by sending petitioner's videotapes directly to casting agents." [69] If the CLC tells a federal court no license is

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66 *NCOPM v. Edmund Brown,* 15-56388; CA. Labor Commissioner's Appellee Answer Brief at 28.
67 *Nipote* Supra, Pg. 9, lines 17-18.
68 *Id.*, pg. 6, lns. 19-24.
69 *Id.*, pg 9, lns. 4-7.

required to send out marketing materials, why would a manager lose his contractual rights for that activity? If those empowered to enforce the law are unable to uniformly interpret this law, how can an ordinary person protect themselves? Is there any better example an unconstitutionally vague statute?

TAA rulings also give rise as to whether doing something that is lawful one time, if repeated, becomes unlawful. The CLC rejected singer Macy Grey's petition seeking to void her management agreement, ruling that the showcases her manager put together to find a recording contract deal and booking agent were not violations, as, "Labor Code §1700.4(a) exempts from licensing requirements the activities of procuring, offering, or promising to procure recording contracts for an artist." *Gray v Leve Management* (TAC 18-00 at 6.)

This decision came a year after a Court of Appeal found a personal manager had violated the Act by setting up of 82 showcases even while understanding that there was no money made at these shows and accepting the manager's "goal in procuring engagements for the Deftones was to obtain a recording agreement." *Park v. Deftones* (1999) 71 Cal. App.4th 1465.[70]

The Labor Commission differentiated the decisions by explaining Gray's manager succeeded in procuring the recording contract, whereas the Deftones' representative fell "short of the desired result." (*Gray* Supra at 7, lines 1-2) If it is lawful to arrange one showcase to procure a recording contract, yet unlawful to arrange eighty showcases with the same objective, how many times *can* one participate legally in the same activity before it becomes illegal? To remain lawful, must the adage for managers be, "If at first you don't succeed, stop?"

Again, this confusion points to the law being unconstitutionally vague.

The *Gray* ruling spotlights another manifestation of the impossible Catch-22 that managers have in trying to accomplish what they have been hired to accomplish without potentially violating the Act. It is a manager's job to "alleviate [the Artist's] logistical representative concerns." (*Gray Supra* at p. 10, lines 2-3) For music and comedy acts, the way to attract an agent is through a

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[70] In *Gray* (at 10), the CLC characterized the manager's making $98.00 on the showcase to find the singer an agent as "simply fortuitous." Conversely, the CLC ruled (TAC 9-97, Fn 1, pg 3) that the $530 the manager received for negotiating and receiving payments from the venues "to cover gasoline, meals, telephone, printing of flyers, supplies and other items, which averages out to be $6.42 per showcase, "could be regarded as a form of compensation." Like Snipes and Hayes, Gray is a person of color.

live showcase. However, per *Gray*, procuring for the intended result of securing a talent agent "is not exempted within the Act." (*Id.*, lines 16-20) Following that logic, personal managers can neither lawfully find an unrepresented client a licensed talent agent nor find clients licensed alternatives when they are unhappy with their current licensees.

Consider this hypothetical: you are a smart young man named Brian, and though you have little musical skill, you do have four friends, named Richard, George, John and Paul, who show the potential to be pretty special.

Enamored with their talent and believing you could add the needed business savvy to get them some gigs, you offer to be their booking agent. You investigate obtaining a talent agency license, an effort that ends when you learn you would need to pay for a $50,000 bond.[71]

You get them gigs, maybe even at a cool club out of town, in Hamburg, Germany. Then, as their popularity grows, a talent agency signs them. And after world-changing albums, those four former fabulous boys go to the Labor Commissioner and say that getting them those Hamburg gigs was a violation of the Talent Agencies Act.[72] And the CLC rules that because those engagements predate them getting signed by the agent, the CLC rules you violated the Act (not that CA-based agents worked to procure their clients jobs in Germany at the time). And if this happened before *Marathon*, the CLC may not have considered severability, and if before *Thomas Haden Church v Ross Brown*, TAC 52-92, when, without statutory guidance the CLC unilaterally changed the penalty to where only the last year before the filing of the petition for controversy was filed would be voided and commissions would need to be returned to the artist, the Commissioner would have voided the entire representative/client relationship. Had it been the real Beatles, this would have required the manager to return tens of millions of dollars.[73]

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[71] Though the $50,000 bond being of no material worth to protect artists at most talent agencies, it does stand as an impossible barrier to most who want to enter the profession, which unintentionally protects talent agents against new competition.

[72] See *Baker v. Bash*, TAC 12-96, where the CLC ruled that procuring Anita Baker engagements in France without a CA-based agent to be a violation of the Act.

[73] According to Gerard Fox, the attorney who represented Anita Baker in her TAA controversy against her newly retired manager (*Baker v. Bash,* TAC 12-96) and whose company represented the author thru three CLC cases, Mr. Bash died of a heart attack just weeks after learning he had to return some $6,000,000 in paid commissions.

It is especially common for musicians or comedians to have managerial representation first, and with large success, the representative receiving the benefits of their labor is, as the Guilds note, solely determined not by the law, but on the morality of the artist. Respectfully, personal managers should have something more the same right to contract as all other American workers.

IV. WITHOUT NOTICE OR DEFINITION, THE ENFORCEMENT OF UNLICENSED PROCUREMENT' IS UNCONSTITUTIONAL AS APPLIED

Respectfully, this is not even close. The mystery is not whether the policing of unlicensed licensing is unconstitutionally vague as applied, as the mountain of law review articles and court decisions discussed above. Instead, it is why fixed either through litigation, legislative action or initiative of the Labor Commissioner,[74] the ambiguities still stand 42 years after its passage and only months later, its first law review where commentators noted how the new law left the problems with the "statutory construction unresolved."[75]

The United States Supreme Court, in speaking to the void for vagueness doctrines, holds that, "Impossible standards of specificity are not required. The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[76]

From High Court rulings, the constitutional bar is closer to a more common denominator: "The due process clause [of] the fourteenth amendment requires a statute be declared void when it is so vague that "men of common intelligence must guess at its meaning and differ as to its application…" [77]

From the CA Supreme Court: "Statutes, regardless of whether criminal or civil in nature, must be sufficiently clear as to provide adequate notice of the

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[74] Per § 1700.29, the Labor Commissioner may "adopt, amend, and repeal such rules and regulations as are reasonably necessary for the purpose of enforcing and administering this chapter and as not inconsistent with the chapter."

[75] *Johnson & Webb* Supra at 387.

[76] *Jordan v. De George,* 341 U.S. 223, 231 (1951).

[77] *Conally v General Constrn. Co.*, 269 U.S. 385, 391 (1926).

prohibited conduct as well as to establish a standard of conduct which can be uniformly interpreted by the judiciary and administrative agencies."[78]

The Talent Agencies Act fails in grand fashion with both notice and with a defined bright line to affect uniform interpretation.

A. THE TAA DOES NOT PROVIDE NOTICE THE ACTIVITY OF PROCURING IS RESERVED FOR LICENSED TALENT AGENTS

"Even a 'reasonable person' who took the extraordinary action of researching how the Labor Commission has enforced the Act would be unable to forge a clear understanding of what comprises unlawful 'procurement.'[79]

The Talent Agencies Act is only one of California's dozens of licensing schemes. Some only reserve the title of the regulated profession to licensees allowing anyone to engage in their defining activities, with the codicil they are barred from holding themselves out as licensed practitioners. Most have express statutory prohibitions from non-licensees engaging in the activities of the regulated profession. As detailed below, though the TAA as written mirrors the schemes that only regulate title, it is enforced as if the codified licensing scheme has the statutory language of the latter.

Business & Professions Code ("BPC") § 2903 (a) of the California ("CA") Psychologists Act defines the practice of psychology as, "rendering or offering to render … any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships…"

BPC § 2903 (c) defines psychotherapy as using "psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes, and behaviors that are emotionally, intellectually, or socially ineffectual or maladaptive."

The Psychologists Act has no statute expressly reserving those activities to those with a psychologist's license, nor are there examples of Scientologists, who regularly engage in constructing, administering and interpreting tests of

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78 *Hall v. Bureau of Employment Agencies*, 64 Cal.App.3d 482, 491 (1976)

79 Heath Zarem, *The California Controversy Over Procuring Employment: A Case For The Personal Managers Act* (Fordham Law Review Volume VII, Book 2: Spring 1997 at 954,

mental abilities, aptitudes, interests, etc. to affect others' behavior being found in violation of § 2903. Nor has any court found a pastor, rabbi, salesperson, life coach, teacher, trainer, doctor, physical or drug rehabilitation professional, advertising executive, nurse or any other person using psychological principles to understand and influence the behavior of others in violation of law without the violator claiming or otherwise holding themselves out to be a psychologist.

BPC § 5050 of the CA. Accountancy Act states that, "no person shall engage in the practice of public accountancy in this state unless the person is the holder of a valid permit to practice public accountancy in this state unless the person is the holder of a valid permit to practice public accountancy."

The Accountancy Act's defining activities can be found in BPC § 5051. The Legislature, through statute, has expressly reserved the first five (BPC §§ 5051 (a) (e) of the regulated occupation's defined activities to licensees, and allows anyone to engage in § 5051 subdivisions (f) to (i) of § 5051 if the person engaging in those activities, "does not hold himself or herself out, solicit or advertise for clients using the certified public accountant or public accountant designation." "Unlicensed persons are permitted to make 'audits' and prepare 'reports.'"

No state court has ever found anyone in violation of law for engaging in BPC §§ 5051 (f) (i) without also claiming to be an accountant.[80]

Anyone can not only engage in the defining activities of an accountant, but they also have the right to advertise their doing so. Non-licensed persons "must be permitted to use the terms 'accountant,' 'accounting,' or 'accounting services,' if the use of those terms is further qualified by an explanation, disclaimer or warning stating that the advertiser is not licensed by the state, or that the services being offered do not require a state license, thereby eliminating any potential or likelihood of confusion regarding those terms."[81]

California has other licensing schemes without statutes that expressly bar non-licensees from engaging in the defined activities of the regulated profession, including the Landscape Architects Act (BPC § 5615/maintaining and beautifying outdoor areas) and the Geologists Act (BPC §§ 7802.1/7803, examining the Earth's materials). No California Court has ever found anyone

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80 *Moore v. CA State Board of Accountancy* (1992) 2 Cal. 4th 999.

81 *Id.*

engaging in any of the defining activities of those professions, unless the accused has also held themselves out as a licensee, in violation of law.

As clarified in the CA Vocational Nursing Act, non-licensees can engage in all the activities as a licensee, "provided that such person shall not in any way assume to practice as a licensed vocational nurse."[82]

Most of California's licensing schemes limit the defining activities of the regulated professions to those who have qualified to obtain the requisite license. For instance, the CA State Contractor's Act makes it unlawful to advertise[83] or engage in the activity of contracting.[84] It specifically defined each activity that is reserved for licensees[85] including those that require additional certification,[86] and assigns individual remedies to each violation.[87]

In California, only licensed cytotechnologists can lawfully examine cytological slides (*BPC* §1270 (a); only licensed physicians may prescribe drugs (*BPC* § 2052); only those with valid California veterinary licenses can practice veterinary medicine (*BPC* § 4825.1), and only those with valid locksmith licenses can engage in the activities of a locksmith (*BPC* § 6980.10). Similarly, the occupational licensing schemes for dentists (*BPC* § 1700), respiratory therapists, (*BPC* 3760 (a) and (b)), pharmacists (*BPC* § 4051 (a)), veterinarians (*BPC* § 4825), acupuncturists (*BPC* § 4935), professional engineers (*BPC* § 6730), geologists (*BPC* § 7830), and among others, structural pest control specialists (*BPC* § 8550(a)) create clear demarcation lines between the activities anyone can engage in and those that require a license.

All of California's licensing schemes in which non-licensees are barred from engaging in a regulated activity have provisions making it clear to reasonable persons that those activities are reserved for licensees, and anyone else who engages in those activities face a statutorily expressed consequence.

Save a single anomaly: the Talent Agencies Act. The TAA's statutory construction mirrors the Accountancy, Psychologists, Nursing and other Acts

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82 BPC § 2861.
83 BPC § 7027.1 - § 7027.4.
84 BPC § 7028).
85 BPC § 7026.3 - § 7026.12, § 7055- § 7058.
86 BPC § 7058.5 - § 7058.7.
87 BPC § 7027.1 (c), § 7027.3, § 7028 (a-h), § 7028.1 (a) and (b).

where only the unlicensed use of the occupation's title is unlawful and ignites penalties.

Unlike all the licensing schemes where the Legislature clearly regulated activity, the TAA has no express provision proclaiming how only licensees can engage in the defined, or any other activities. Adding to the confusion, the Act offers no clarity as to whether counseling and directing artists, the other two defined activities talent agents engage in, is reserved for licensees.

If defining activities of an occupation in licensing schemes are axiomatically limited to licensees, the statutes that limit the engaging of those activities are redundant; surplusage. Just the opposite however, per California law, in working to determine the Legislature's intent of creating laws, "a court must first look to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. *A construction making some words surplusage is to be avoided*."[88]

To find, as the Labor Commissioner does, that a defining activity of a talent agent (1700.4 (a)) is reserved for licensees though the Act has no corresponding statute prohibiting non-licensees from engaging in it, conflicts with every rule of statutory construction. It clashes with the plain language of the Act. There is no legislative history showing the Legislature ever agreed on such regulation.[89]

B. NOT EVEN THOSE ENFORCING THE TAA KNOW WHAT IS AND IS NOT LEGAL

In *Desertrain v. City of Los Angeles,* 754 F.3d 1147, (2014), a 9th Circuit Court invalidated a Los Angeles ordinance prohibiting the use of a vehicle "as living quarters either overnight, day-by-day, or otherwise," (*Id.* at 1149 cars was found void for vagueness because it failed "to draw a clear line between innocent and criminal conduct." *Id.* at 1156.

The *Desertrain* Court found the statute, without fully delineating what the term 'living quarters' meant, left too many uncertainties to be constitutional. "Is

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[88] *Dyna-Med Inc. v Fair Employment & Housing Comm.* (1987) 43. Cal.3d 1379, 1386-1387. Emphasis added.

[89] In its discussion about the lack of legislative guidance, *Johnson-Webb* (at 408) noted how "the Talent Agencies Act presents a peculiar situation – no legislative intent can be discerned regarding personal managers and when the need licenses to procure employment for their clients."

it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain?" Those unanswered questions created ambiguities making it, "impossible for citizens to know how to keep their conduct within the pale." *Id.*

In *Marathon,* Justice Werdegar pointed out how, like the failings of the *Desertrain* ordinance, the Talent Agencies "Act contains no definition [of procurement], and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist's career and which stray across the line to illicit procurement."[90]

As agents are the procurers, is it lawful for an unlicensed representative place a client with a talent agency, in other words, putting the artist's sales team together? Clearly hiring the sales team is part of the procurement process. Per Labor Code § 1700.44 (d), the 'Safe Harbor' provision, personal managers can work in conjunction with, and at the request of, a licensed talent agency, but does not clarify whether personal managers can proactively work to get agents come aboard. The Act, as written, leaves this unanswered.

Is it lawful for a personal manager to create the sales materials, an essential part of procurement? It is universally accepted that personal managers, even when the artist also has an agent, are the ones who choose the photos, refine the artists' resumes, and edit the videos that are used to interest potential buyers. The Act, as written, left this unanswered.

Is it lawful for personal managers to forward sales materials to buyers? As noted earlier, in a legal brief the Commissioner declared that it was lawful for non-licensees to, "send [] out resumes, photographs, videotapes, or written materials for an artist." The Act, as written, left this unanswered.

Accepting that anyone can send out an artist's marketing materials, does one need a talent agency license to follow that up with a phone call or email? The Act, as written, left this unanswered.

Has a non-licensee crossed the line to unlawful should the recipient of the marketing materials proactively call the unlicensed representative?

The Act, as written, left this unanswered.

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[90] *Marathon* Supra at 990.

What if, without receiving any materials, a buyer contacts an unlicensed representative to inquire about the availability of their client, is that only lawful if one has a talent agency license? The Act, as written, left this unanswered.

What if the unlicensed representative receives a call from a buyer late at night and the buyer explains they cannot find the client's agent and they need the artist to report to work at 6AM the next morning? Is that call unlawful? If receiving the call is legal, is telling the artist about the opportunity legal? What if the artist chooses to take the job; has that made the manager's actions unlawful, even if the manager just received an offer and simply passed on this information to the client? The Act, as written, left this unanswered.

Assuming it is lawful for an unlicensed representative to receive a call and inform their client about a job starting hours away, what if, in that situation, if the client asks the manager and the manager asks the buyer for more money, is that legal? The Act, as written, left this unanswered.

Is it a violation if the unlicensed representative is talking with a casting director, producer, studio/network executive or any other buyer and in bringing up the name of his client, the buyer asks about the artist's availability for an upcoming project? The Act, as written, left this unanswered.

The U.S. Supreme Court has established minimums for required clarity for either a criminal or civil statute to be constitutional:

> "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'"[91]
>
> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[92]
>
> Civil matters must receive the "same basic protections against 'judgments without notice' as criminal matters."[93]
>
> A 'statute cannot require the public to speculate as to its meaning while risking [] property in the process.'[94]

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91 *FCC v. Fox Television Stations,* 132 S. Ct. 2307, 2317 (2012).

92 *Grayned v. Rockford*, 408 U.S. 104, 108 (1972).

93 *BMW v. Gore*, 517 U.S. 559, 574 (1996).

94 See *Lanzetta v. NJ*, 306 U.S. 451, 453 (1939).

Justice Werdegar concluded her opinion in *Marathon (*at 999) speaking to the need for action to fix the statutory failures of the TAA:

> "We, of course, have no authority to rewrite the regulatory scheme. In the end, whether the present state of affairs is satisfactory is for the Legislature to decide, and we leave that question to the Legislature's considered judgment."

The most confounding commentor on the Act's ambiguities and how they wrongly compromise unlicensed representatives? The Labor Commissioner, the one person, from being empowered by § 1700.29 with the authority to make changes to the enforcement of the Act as is "reasonably necessary," could by edict end this judicial morass.

In 1982, to get recommendations on how to rid the Act of its imperfections and make the statute fairer in its protections, the Legislature created the CA Entertainment Commission. The Commissioner served as its chairperson and authored the committee's final report. In objecting to the idea that adding criminal sanctions for unlicensed procurement would improve the Act, the Commissioner wrote of there being…

> "… an inherent inequity and some question of constitutional due process in subjecting one to criminal sanctions in violation of **a law which is so unclear and ambiguous as to leave reasonable persons in doubt about the meaning of the language or whether a violation has occurred.**
>
> **"'Procuring employment' is just such a phrase** … the uncertainty of knowing such activity may or may not have occurred … has left the personal manager uncertain and highly apprehensive about the permissible parameters of their daily activity." (Emphasis added.)[95]

Personal managers procure. They must. It is impossible to do their job maximizing the quantity and quality of their clients' career opportunities without being involved in the hiring or working with their clients' salespeople; creating, overseeing or at minimum helping choose the sales materials, having a working idea of what and who the networks and studios are looking for; or help the clients make the most money possible for the jobs they get.

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[95] https://www.scribd.com/document/133919610/1986-Report-of-the-CA-Entertainment-Commission pg. 25

Managers who put in their contracts or tell people they refrain from procurement activities are, in many cases out of fear that the CLC would somehow make things even worse, are part of the charade.

But the biggest charade is enforcing a law that does not exist. Until and unless the Legislature codifies statutes prohibiting all but licensees from procuring, and fulling defining what procurement is to create a bright line as to what activities are reserved for licensees and which be done by anyone, and if there are activities that managers can do for a client once but becomes unlawful with repletion, clarity as to what those activities are and how many times they can be lawfully done, the Labor Commission and adjudicators need to acknowledge that the Act is woefully and unconstitutionally vague as applied, violating the Due Process Clause of the Fourteenth Amendment of the United States.

An important note: § 1700.4 (a) is not unconstitutional on its face. As written, it simply defines a talent agent by the activities in which they engage.

V. AS THE TALENT AGENCIES ACT HAS NO PENALTY PROVISION, NO ADJUDICATOR HAS THE AUTHORITY TO PENALIZE

As Justice Werdegar stated in *Marathon*, "The Act provides no remedy for its violation."[96] It "is silent — completely silent — on the subject of the proper remedy for illegal procurement."[97]

Marathon was not asked and did not opine on whether that silence has any constitutional relevance. Spoiler alert: it does. As stated by the United States Supreme Court in *U.S. v. Evans*, violations of law are "made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no [violation]."[98]

"Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."[99]

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96 *Id.* at 988.

97 *Marathon* Supra at 987.

98 333 U.S. 483, 486 (1947); ("*Evans*"). The TAA has neither the former nor latter.

99 *BMW of America v. Gore* 517 U.S. 559, 574 (1995).

"Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed."[100]

"Where a statute fails to provide a penalty it has been uniformly held that it is beyond the power of the court to prescribe a penalty."[101]

In *Evans,* the U.S. Supreme Court held that no matter how evident it is that a legislature may want to punish a violator, notice is needed. At issue was a federal statute prohibiting both smuggling undocumented persons into the country and harboring undocumented persons already in the country.

However, Congress had only codified consequences five years in prison for smuggling. After Evans was found guilty of harboring, he argued and the Court affirmed that guilty or not, with only a codified remedy for bringing an alien *into* the country, adjudicators had no authority to decide upon and mete out a remedy for hiding him. *Evans* holds that assigning a penalty without statutory guideposts "is a task outside the bounds of judicial interpretation, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. We could do no more than make speculation law."[102]

The CA Supreme Court has specifically spoken to how the lack of a codified remedy relates specifically to the Labor Commission:

> "An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. 'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.' (Citation omitted.)"[103]

> "It is fundamental an administrative agency may not usurp the legislative function."[104]

It is in making that fundamental error, the usurping of this legislative function to create a remedy that the California Legislature had withheld, that

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100 *Lambert v. CA.* 355 U.S. 225, 228 (1957)

101 *New Jersey v. Fair Lawn Service Center, Inc.* (N.J. 1956) 120 A.2d 233, 236.

102 *Id.* at 495

103 *Dyna-Med Inc. v. Fair Empl. & Housing Comm.,* 43 Cal. 3d 1385,1388 (1987).

104 *Agricultural Lab. Relations Bd. v. Sup. Court*, 16 Cal.3d 392, 419 (1976).

has resulted in wrongly costing unlicensed representatives what the National Conference of Personal Managers estimates is a half-billion dollars after getting entwined in Talent Agencies Act controversies.

As noted above, *Buchwald v. Superior Court* 254 Cal. App. 2d 347 (1967) is the foundational holding all subsequent adjudicators use as providing the authority to void a found violator's contractual rights. The logical question: how did *Buchwald* reach a different conclusion that what the New Jersey Supreme Court said had been "uniformly held," that courts are powerless to prescribe a penalty when a statute fails to provide a penalty? The answer: whether by mistake or mischief, *Buchwald* misinterpreted the four holdings it used for its authority to void the manager's contract.

Buchwald holds at 351:

> "Since the clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public, a contract between an unlicensed artists' manager and an artist is void. (See *Wood v. Krepps*, 168 Cal. 382, 386; *Loving & Evans v. Blick*, 33 Cal. 2d 603, 608-609; Contracts otherwise violative of the Act are void (see *Severance v. Knight- Counihan Co*., 29 Cal. 2d 561, 568; *Smith v. Bach*, 183 Cal. 259, 262."

To be clear: *Buchwald* and its TAA progeny are the only cases to prescribe penalties without penalty provisions. All four of the above precedents *Buchwald* claims to follow instead align with *Evans* and the other "uniformly held" cases.

In *Wood* at 386, the Court refused to void a contract because the licensing scheme in question did not, "declare that a contract made by any one in the conduct of the various businesses for which licenses are provided to be procured … be invalid; nor is there any provision therein indicating in the slightest this failure was intended to affect in any degree the right of contract."

Had *Buchwald* properly followed *Wood*, as the TAA has no provision indicating a failure to get a talent agency license should invalidate or in any way affect anyone's right to contract, it would have held the court had no authority to invalidate or impair the manager's contractual rights.

Per *Loving* at 608, "[I]t has been repeatedly declared in this state that 'a contract made contrary to the terms of a law designed for the protection of the

public ***and*** prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract.'" (Emphasis added.)

Had *Buchwald* properly followed *Loving,* without the TAA having the requisite prescribed penalty, it would have held that Katz's contract may be enforced.

Per *Severance* at 568: "The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum."

"If the statute does not provide expressly that its violation will deprive the parties to sue on the contract and the denial of the relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied."[105]

Smith (at 262) holds, "The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void."

Had *Buchwald* properly followed *Smith,* without the Legislature imposing by statute any penalty to the activity of procuring employment for an artist without a license, it would have held that contracts made between artists and their representatives based on those actions are not to be voided.

Anyone currently facing TAA litigation should not have to return to a Court of Appeals to overcome *Buchwald* as the higher court rulings supersede. It is those four State Supreme Court holdings the Labor Commissioner, Superior and Courts of Appeals are bound to follow.

As stated by the California State Supreme Court…

> "The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts

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105 *Id.* at 572.

> exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." [106]

Adjudicators must follow *Dyna-Med*, as neither an administrative agency nor any court can by its own regulations create a remedy which the Legislature has withheld. While *Dyna-Med* limited its review and prohibition to creating a remedy for punitive damages, three years later the CA Supreme Court similarly held that without statutory authority, administrative agencies are also barred from creating compensatory remedies.

In application, the extracting of remedies without notice, along with wrongfully not following the numerous above-mentioned US and CA Supreme Court holdings, violate the Due Process Clause of the Fourteenth Amendment of the United States.

VI. IN VOIDING CONTRACTUAL RIGHTS WITHOUT CRIMINALITY, THE COMMISSIONER'S ENFORCEMENT UNCONSTITUTIONALLY RESULTS IN CREATING INVOLUNTARY SERVITUDE[107]

The Thirteenth Amendment of the U. S. Constitution has broader meanings than just, as many laypeople assume, the condition of holding another in the confines of slavery. However unintentional it may be, the Labor Commission, the administrative agency empowered by the state of California to ensure that all its citizens are paid, have wrongly and unconstitutionally kept that most American of rights, the right we fought a Civil War over, from those found to have procured employment for an artist without a license.

Per Section 1 of the Thirteenth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The U. S. Supreme Court defines involuntary servitude as "a condition of servitude in which the victim is forced to work by the use or threat of physical

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[106] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Ca1.2d 450, 455.

[107] This posit is admittedly controversial. It is also the reason this author, a non-lawyer, has for the last two decades made ending the current enforcement of the Talent Agencies Act his raison d'être. Most important, the argument has merit and thus worthy of discussion.

restraint or physical injury or by the use or threat of coercion through law or the legal process."[108] To repeat for emphasis, involuntary servitude occurs when someone is not paid the benefit of their labor "by the use or threat or coercion through law or the legal process."

Involuntary servitude "may exist in the United States, but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the Constitution. A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude."[109]

The TAA expressly states the "failure of any person to obtain a license from the Labor Commissioner pursuant to this chapter **shall not** be considered a criminal act under any law of this state." § 1700.44(b).[110] As such, failing to obtain a the TAA license cannot be viewed a criminal violation.

It leaves this important question: if there are no allegations of fraud or non-performance, can the benefit of one's labor be forfeited without a conviction of a crime, opposite to the Thirteenth Amendment which expressly forbids such withholdings "except as a punishment for crime whereof the party shall have been duly convicted?"

Here again it is illuminative to compare the statutory construction of the TAA versus California's other licensing schemes.

Per *BPC* § 1280 of the Clinical Laboratory Act, it is a crime for an unlicensed person to represent themselves or "act as a licensed individual, and,

Per *BPC* § 1287, such a violation constitutes a misdemeanor punishable with imprisonment of up to six months and/or a fine of up to $1,000 to

Per *BPC* § 1700, it is a criminal misdemeanor punishable by imprisonment between 10 days and one year and/or a fine between $100 and $1,500 to assume the degree of a dentist, represent oneself as a dentist, or engage in the practice of dentistry without the proper certifications.

Per *BPC* § 1700, it is a criminal misdemeanor punishable by imprisonment between 10 days and one year and/or a fine between $100 and $1,500 to assume

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108 *United States v. Kozminski* 487 U.S. 931 (1988).

109 *Robertson v. Baldwin*, 165 US 275, 292 (1897).

110 In law, "shall" means must. (Emphasis added.)

the degree of a dental hygienist, represent oneself as a dental hygienist, or engage in the practice of dental hygiene without the proper certifications.

Per *BPC* § 2790, it is a criminal misdemeanor "punishable by imprisonment" for up to six months, and/or "a fine not exceeding" $2,000, for an unlicensed person to claim to be a psychologist.

Per *BPC* § 5120, it is a criminal misdemeanor, punishable for not more than six months," and/or a fine up to $1,000 for non-licensees to engage in the regulated activities reserved for those with public accountancy licenses.

Per *BPC* § 5640, it is a criminal misdemeanor punishable by a fine of $100 to $500 and/or imprisonment not exceeding six months, for an unlicensed person to engage in the practice of landscape architecture, use that title or other that implies having a license, use the stamp of a licensee, or advertise in ways imply having a license.

Per *BPC* § 7027.1, it is a criminal misdemeanor punishable by a fine between 4700 and $1000 to advertise to do construction work or engage in any of the defining activities of a contractor without a valid contractor's license.

Per *BPC* 7402, it is a criminal misdemeanor punishable by fines up to $2500 and imprisonment of up to six months for an unlicensed person to represent themselves to be a cosmetologist or barber.

Per *BPC* § 7523, it is a misdemeanor punishable by a $10,000 fine and/or a year in prison for an unlicensed person to act as or represent oneself to be a private investigator or in any way have identification, business card, letterhead or electronic messaging that indicate being a licensed private investigator.

Per *BPC* § 10139, it is a misdemeanor punishable by a fine of up to $20,000, and/or by imprisonment of up to six months for "acting as a real estate broker, real estate salesperson, or mortgage loan originator without a license or license endorsement.

Not only did the Legislature decide against making unlicensed procurement a criminal act, but they also spotlighted their legislative intent by codifying a provision memorializing that such failures **shall not** be considered criminal.

The Constitution allows one exception for someone to forfeit the right to their labors: "as a punishment for crime." There is no other way to characterize it: without it being a punishment for crime, in extinguishing a manager's right

to be paid by their labors the Labor Commissioner has unconstitutionally created a situation of involuntary servitude.

Some might argue involuntary servitude does not apply because unlicensed persons have choices; they can either obtain a license, refuse to procure employment, or do so and hope their client chooses to pay them.

The first argument fails because, as explained earlier, it is impossible for a personal manager to get a talent agency license without also changing professions. Once a talent agent, they become unable to partner with other agents, as all established managers do, because of the Guild restrictions.

Also as explained above, it is impossible to prophylactically gird from a licensing scheme where no one, not even those in charge of enforcing it, which activities can non-licensees engage; and equally unattainable for a personal manager to both separate themselves from procuring and properly fulfill their professional responsibilities.

Personal management is a legal profession. All its practitioners ask, paraphrasing the Fourteenth Amendment's Equal Protection Clause, is the same right to be paid as all other American workers. Are there any other professions that need to, "hope their clients will pay them anyway?" Neither should managers.

Curiously, the 'hope' argument was forwarded by the California Attorney General, who was representing the Labor Commission in the suit initiated by the National Conference of Personal Managers. If they sincerely considered unlicensed procurement to be unlawful, or in any way a risk to the public good, would they still be so laisse-faire? Do they recommend folks who strip stolen cars for their parts simply go ahead and hope their clients pay them anyway?

More important, either intentionally or otherwise, these arguments fail to recognize the effect the timing of the threat of coercion through law or the legal process has on the situation. An artist -- be they a neophyte or a star needing to reignite their career takes on a personal manager; the Chairman of the Board hires the Chief Executive Officer.

With success and on a different career plateau, the artist now has more options; now able to garner interest of a blingier management firm. More often than not, it's bottom-line decision about the artist's bottom line.

While personal management can seem like a quite haughty job, at its core managers are temporary employment counselors. Show business jobs last a day, a week, a couple of months on a big movie. An artist who lands on a hit series quickly realizes they have steady employment for years, and the manager, to some, then changes from an asset of the Chairman's business to a liability.

Everyone loves their bank the day their mortgage is approved, and they can buy the house they want. That appreciation lasts for about 29 days, morphing into a monthly expense for the next 29 years. Imagine if one could go to the labor commission and say that the bank did not have a talent agency license and use it as a get out of paying free card. Absurd, yes; the law would never be interpreted that way.

The TAA, however, is interpreted that way. Artists should have the freedom to change or lessen their level of representation, and their representatives should be able, like all other Americans, to use the courts to get whole if the ex-client chooses to breach their financial obligations.

The enforcement further violates the Thirteenth Amendment in that before one loses the right to be paid for their labors, they "shall have been duly convicted." Duly convicted requires due process, and the Labor Commissioner denies due process in their administrative hearings. The evidence rules are not to the standards required in a court of law, and the officers routinely limit or bar depositions. It also violates the Equal Protection Clause of the 14th Amendment of the United States. For those offended by the insinuation of involuntary servitude, imagine being victimized by it.

VII. THE TALENT AGENCIES ACT UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE

Along with ruling that Anita Baker's manager had violated § 1700.4(a) by using a Paris-based agency to get Ms. Baker a French endorsement deal and for her concert dates, the Labor Commissioner also found it was also a licensing violation for his partnering with the Associated Booking Corporation ("ABC"), a New York domiciled agency, to procure her domestic concert dates.[111]

Co-founded by the legendary Louis Armstrong, ABC had long been

[111] See *Baker v Bash,* TAC 12-96, Pg 5, lines 6-14. Though ABC was not licensed, Baker chose not to end that relationship. This may be the most insidious problem with the enforcement, that the artist can choose when and if to prosecute, who and for how long they may want to pay someone.

recognized as the premiere booking agency for black artists, from Billie Holiday to Bob Marley. No in-state agency had the capability, know-how and roster to provide the quality of opportunities ABC could offer.

To keep the procurement actions inside of the Labor Commissioner's edicts, Bash could have either had Baker sign with an inferior but licensed agent or enlisted a licensee as a buffer; requiring ABC to get permission from the licensee before each effort of procurement.

Either option would have burdened Baker, the person the Act was enacted to protect. Using an in-state agency over ABC almost inevitably would have lowered her job options; using a second agency, even if ABC agreed to those time-wasting conditions, would have necessarily lowered her net profit by 10% by having to compensate a second agency.

It is also, perhaps for issues just like this example, unconstitutional. As held by the United States Supreme Court, requiring citizens to use an in-state licensee versus a professional from another domicile is unconstitutional and illegal when "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."[112]

The TAA's burden versus local benefits is clearly excessive, especially as it is clear the one who benefits is the artist that the TAA was created to protect.

Clearly this barrier to interstate commerce is an unfair burden and, per *Pike*, unconstitutional, to Baker, her manager, and the many others in similar positions, be they country or oldies artists that play regional fairs that regional agents are used for,[113] or performers who have moved to America but still want to use agents from their native lands to better look out for them back home. It also favors the group being regulated over the group the Act was created to protect; hence eviscerating the rational basis of the law.

The enforcement is also protectionist, giving an unfair business advantage to the in-state licensed agency, to the detriment of the out of state entity. The Supreme Court…

> "has viewed with particular suspicion state statutes
> requiring business operations to be performed in the home

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112 *Pike v. Bruce Church Inc*, 397 U.S. 137, 142 (1970).

113 See *Robi v. Wolfe*, TAC 29-00.

> State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.[114]

No public purpose is served by a barrier which adds costs to the parties the Act was created to protect. The only beneficiaries are protected parties using the Act as a sword to sever contractual obligations to those who had been looking out for their welfare. None of the more recent cases that narrow *Pike* have any applicability in this matter, leaving the Act unconstitutional, violative of the dormant commerce clause.

Section 1700.44 (d) of the TAA clearly establishes a discriminatory two-tier system for talent representation in violation of the dormant Commerce Clause. Since TAA precludes out-of-state license applicants and requires non-licensed out-of-state entities to engage in the negotiation of an employment contract only with the involvement and consent of a licensed California talent agency, the Act materially burdens interstate commerce, impeding the flow of trade across state lines and depriving out-of-state competitors access to local markets.

The TAA, to out of state personal managers' direct injury and detriment, discriminates in favor of California economic activity and against out-of-state participants in the entertainment industry. This protectionist measure has insulated California economic interests in talent representation from interstate competition. The Supreme Court has applied the dormant Commerce Clause to "prohibit [] economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[115]

The TAA grossly favors California residents over the rest of the country; effectively barring personal managers from bringing their clients to thousands of talent, literary and booking agents that do not have California operations; and in doing so, for the reasons alleged, interferes with interstate commerce.

The CLC acknowledged and dismissed a controversy when the artist's claims arose precisely because of their engaging in interstate commerce, refusing to affirm tolling provisions against a non-resident.[116]

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114 *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1; *Toomer v. Witsell*, 334 U. S. 385." *Pike* Supra at 145.

115 *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

116 See *Garner vs. Gillaroos,* (TAC 1994-65).

Yet, the CLC exercised jurisdiction over a New York-based manager who arranged a Los Angeles showcase for his New York domiciled-comic that resulted in the artist moving to California to accept employment. Facially and as applied, the Act impedes the flow of trade across state lines and deprives out-of-state competitors of equal access to local markets.[117]

The TAA's mission is to protect artists, not talent agents. Yet in requiring artists to pay an in-state agent either as an extra layer of financial obligation or not use a superior out-of-state procurer, or for the other-domiciled agent need to procure a California license to book a California-based artist in the other 49 states and internationally is financial protectionism for licensed in-state talent agents and more important, an inarguable burden on interstate commerce.

VIII. IF ACTION IS NOT TAKEN TO END THE ENFORCEMENT, IT IS ABOUT TO GET MUCH WORSE

After the *Marathon* Court decreed the CLC must incorporate severability into every TAA equation and artists could no longer use isolated procurement efforts to void all their contractual obligations, there was a noticeable decrease in TAA controversies. Two recent cases, however, may have re-opened the floodgates.

A. A Sports Agency Walks Away From a Seven-Figure Breach Of Contract Suit In The Face Of An Unlicensed Procurement Claim

In March of 2020, International Sports & Entertainment ("ISE"), a licensed California-based sports agency[118] sued Jimmy Butler of the NBA's Miami Heat for the non-payment of commissions on endorsement deals.[119]

In May of 2021, after Butler's attorney petitioned the CLC claiming that those deals were unlawfully procured those deals without the correct license, the agency withdrew its suit with prejudice.[120]

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117 See *Breuer v. Top Drawer Entertainment* (TAC 18-95)

118 California codified a separate licensing scheme for Athlete Agents (*BPC* 18895 *et seq.*) in 1996. Just as all other scheme, save the TAA, makes it a criminal misdemeanor to represent an artist without a license, subject to a fine of up to $50,000 and/or a year in prison.

119 https://heitnerlegal.com/wp-content/uploads/ISEComplaint-JimmyButler.pdf

120 https://www.law.com/litigationdaily/2021/05/06/to-defend-nba-star-jimmy-butler-against-claims-from-his-former-talent-agency-this-greenberg-traurig-partner-played-offense-407-17691/

This suit, and more important the resultant withdrawal, may open the floodgates: save the sports arms of the major talent agencies, few sports agencies ever thought there was a need. But the Commissioner has historically found that the public off-the-field activities of athletes fit under the interpretation of 1700.4 (a), leaving the sports agents unable to defend any copy-cat suits. As every athlete of ISE and its peers now or will soon know the sports agencies cannot enforce their client/representative contracts, the question may not be how many will use this loophole, but how many will not?

B. Bacall v. Shumway: Perhaps The Biggest Problem Of All

On March 15, 2021, With the March 15, 2021 publication of *Bacall v. Shumway*, 61 Cal. App. 5th 950 (*Bacall*), it is now virtually impossible for any representative to protect themselves against licensing claims.

The situation developed after arbitrator Michael Donaldson found that Jeffrey Shumway, an attorney who went voluntarily inactive to become a personal manager, had engaged in the unlicensed practice of law by continuing to do legal work for screenwriter Michael Bacall. The legal work Donaldson spoke of was Shumway's continuing to negotiate Bacall's deals.

On its own, this was an odd, questionable decision, as it is commonplace for agents, business affairs execs without degrees and others to negotiate their clients' deals. But as an arbitration, it would only affect the two private parties.

Except then Shumway chose to petition a Los Angeles Superior Court to vacate the Arbitration Award, and after that effort was denied, appealed to the Court of Appeals. Once published, it became a law affecting all Californians.

Quoting *Bacall*,

> According to Appellants, [§ 1700.44 (d)] gave them the right to perform all the services that the arbitrator concluded constituted the unlicensed practice of law, such as corresponding with attorneys, redlining agreements, and making comments on proposed contracts. The plain meaning of the 'safe harbor' provision … is to exempt individuals and corporations from obtaining a talent agency license when a licensed talent agent requests assistance in the negotiation of an employment contract, not to permit the practice of law without a license." (*Id.* at 960.)

In rejected the idea that the finding "improperly 'highjacked' the regulatory power of the State Bar and the courts," *Bacall* avers,

> "[T]he arbitrator did not regulate the practice of law or impose discipline on [the personal manager]. Rather, it is clear he concluded Respondents were entitled to restitution because Shumway's unlicensed practice of law rendered portions of the [] agreements illegal."

With this decision, California becomes the only of the fifty states where the elements of negotiating a standard business contract "corresponding with attorneys about a contract, redlining agreements, and making comments on proposed contracts" are not just defining activities of an attorney, but regulated actions reserved for only those with a valid Bar license.

Searching for a case adjudicated anywhere in the country about whether negotiating contracts is the unlicensed practice of law is a near-impossible task. In Oklahoma, the reinstatement of an attorney was challenged because while inactive, the applicant had "acted as a 'senior contract negotiator' and "her job duties required her to draft and negotiate complex agreements … negotiate contract terms and details with contract administrators, negotiators, and managers of other companies.

The Oklahoma State Supreme Court rejected the challenge, ruling that her actions were "not what is considered the practice of law in Oklahoma. It was business oriented and many nonlawyers conducted these contract negotiations as well."[121]

Attorneys negotiate. But is negotiation a defined activity of the profession that does not require licensure, or a regulated activity reserved for licensees? The plain language is of no service, as there is no statute expressly prohibiting non-licensees from such activities. Nor is there any legislative history showing the legislature has ever wanted to reserve the elements of a commercial negotiation, regardless of the nature of the transaction, to licensed lawyers.

"The legislature adopted the State Bar Act in 1927 and used the term `practice law' without defining it." *Baron v. City of Los Angeles*, 2 Cal 535, 542. Without creating a statute to expressly reserve the action for attorneys in the 94

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121 *Reinstatement of Montgomery,* 242 P.3d 528, 528, 529 (Okla. 2010).

years of the Bar Act's existence, it defies logic to conclude the Legislature sees negotiating contracts for others as a concern.

A secondary methodology for statutory interpretation is to compare a statute to other like laws; are the defining activities of other regulated occupations automatically reserved for licensees? The clear answer is no: for example, there are no express provisions requiring one to first obtain a psychologist's license before applying psychological principles to influence another's behavior. Among others, life and athletic coaches, teachers, religious practitioners and business consultants all use those principles; and unless they also falsely identify as psychologists, they can lawfully engage in those activities.

Similarly, non-licensees can engage in the defining activities of a nurse, geologist, or landscape architect, but without also wrongly claiming to have obtained a license, they are acting lawfully. Conversely, many of the defining activities of regulated occupations bar non-licensees are barred from engaging them by codified statute, like those in BPC §§ 7027 – 7029 of the State Contractors Act, or the Clinical Laboratory Technology Act.

Two licensing schemes are particularly illuminative. The Accountancy Act expressly states that non-licensee reserves the first five of the regulated occupation's defined activities to licensees, but anyone can engage in subdivisions (f) to (i) of § 5051, the statute that defines the practice of public accountancy, if the person engaging in the activity "does not hold himself or herself out, solicit or advertise for clients using the certified public accountant or public accountant designation."

The Pharmacy Act reserves distributing regulated drugs and medical devices to licensed pharmacists (Business and Professions Code Section 4170), but it does not make distribution exclusive. The Legislature expressly identified and codified specific circumstances as to when licensed prescribers (i.e., doctors, dentists, osteopaths; see Section 4170(c)) are permitted to dispense drugs. Other licensing schemes, like the Locksmith Act, similarly prohibit all defined activities of the regulated occupation (see BPC § 6980.10) but also have codified exemptions for when others can engage in the defined activity (see BPC § 6980.12).

With *Bacall*, negotiating will now be an activity reserved for licensees in the same the way doing electrical or plumbing work is for contractors, without

having, as all other schemes that enforce defined activities with the notable exception of the Talent Agencies Act, statutes that clearly reserve certain activities for licensees.

As interpreted by the CLC, the regulations of a licensing scheme apply to all Californians save for those statutorily exempted from those prohibitions. [122]

The Commissioner and courts have uniformly found that agents can legally negotiate contracts. "Generally speaking, an agent's focus is on the deal: on negotiating numerous short-term, project-specific engagements between buyers and sellers."[123]

The Talent Agencies Act itself speaks to agents' lawfully negotiating, first by definition in § 1700.4 (a), and then again in § 1700.44 (d) when it exempts non-licensees from the prohibition of negotiating if it is done under the umbrella of a licensed agent.

As stated in *Bacall* at Pg. 10, the plain meaning of the "Safe Harbor" provision based on the language of *CA Lab. Code* 1700.44 (d) is to exempt individuals and corporations from [needing to first obtain] a talent agency license when a licensed talent agent requests assistance in the negotiation of an employment contract, not to permit the practice of law without a license."

In *Solis* and *Doughty,* attorneys were found to have violated the TAA by negotiating deals without working inside the safe harbor. The Commissioner explains why in *Jewel v Vainshtein*, (TAC 02-99, pgs 24-25): "An attorney is not specified in 1700.44 (d), or for that matter anywhere else within the Act that could be construed to extend the exemption to licensed California attorneys."

Just as the TAA does not exempt does not exempt licensed attorneys, the State Bar Act does not specifically exempt talent agents in CA Business & Professions Code ("BPC") §§ 6125 and 6126 or "anywhere else that could be construed to extend the exemption to licensed talent agents." Thus, licensed talent agents, like all other Californians, must follow the tenets of the State Bar Act. As such, this case may have opened a Pandora's Box of litigants alleging that their agents have, in engaging in their defining activities, have violated the State Bar Act.

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122 See *Solis v. Blancarte*, TAC-27089 (2013), *Doughty v. Hess*, TAC 39547 (2017)).

123 *Marathon* Supra at 983.

IX. NEXT STEPS?

The problems of *Bacall* and *Buchwald* both result from confusing a defining activity of an occupation that anyone can engage in with a regulated activity that only licensees can engage.

"[W]hatever is necessarily implied in a statute is as much a part of it as that which is expressed."[124]

"But an intention to legislate by implication is not to be presumed."[125]

Although in years past it may have been necessary for courts to read into a statute provisions not specifically expressed by the Legislature, the modern rule of construction disfavors such practice."[126]

The State Bar Act does not reserve the negotiation of a business contract to licensees. Now following *Bacall,* California's contractors, who negotiate written and oral contracts for clients and other third parties every day, will now use an attorney on each of those transactions of be at risk of being accused of engaging in the unlicensed practice of law. As will art dealers, retail store clerks, car brokers, insurance, real estate and talent agents, auctioneers, architects and so many others.

And unlike the TAA, where the Labor Commissioner could change the enforcement by edict, the best correction would be legislative, with the legislature making clear by amendment that attorneys do not have the exclusive right to negotiate contracts.

As for the TAA, whether it is done through the Commissioner's edict or through a litigant using the arguments herewithin is immaterial, just as long as something is done.

Fifty-five years is enough. The enforcement is not just unconstitutional, it is indefensible. It is un-American. It hurts those it is supposed to protect, and it protects those just out to hurt others.

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124 *Johnston v. Baker* (1914) 167 Cal. 260, 264 (1914).

125 *First M. E. Church v. Los Angeles Co*. (1928) 204 Cal. 201, 204 (1928)

126 *Woodland Joint Unified School Dist. v. Comm. on Professional Competence,* 2 Cal.App.4th 1429, 1451 (1992), quoting *San Diego Service Auth. for Freeway Emergencies v. Sup. Court*, 198 Cal.App.3d 1466, 1472. (1988)