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How the Kuehl Act Would Affect the Regulation of Managers

by

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Entertainment litigators have long exploited the civil remedies available under the California Talent Agencies Act, Calif. Labor Code Sec. 1700, et seq., to terminate personal manager contracts. Last month, a bill was introduced in the California Legislature that would require personal managers to obtain licenses from the State Labor Commissioner--and criminalize the activities of managers who solicit or procure professional engagements for their clients.

In its original version, A.B. 884, proposed by California Assemblymember Sheila Kuehl, D-Encino, would have imposed fines of up to \$50,000 and imprisonment for up to one year, for each incident of illegal solicitation or procurement. A revised draft that emerged from the Legislative Counsel's office leaves the amount and duration of the criminal penalties blank, to be filled in through amendment.

Introduction of the proposed bill coincides with the outbreak of open warfare between the Creative Artists Agency (CAA) and its founder, Michael Ovitz, who is building a new company called Artists Management Group--a personal management company that CAA now considers a threat.

Members of the Los Angeles entertainment bar widely regard A.B. 884 as an "anti-Ovitz" measure. Assemblymember Kuehl states, however, that the bill was requested by the Los Angeles City Attorney's office, which gets dozens of complaints every year about self-styled "personal managers" who take advantage of fledgling actors in Hollywood.

The California Talent Agencies Act included criminal penalties until 1982, when the penalties were repealed following the highly publicized arrest of a prominent Hollywood manager who had bragged about procuring employment for actress Jane Wyman on the television series "Falcon Crest."

The 1982 repealer legislation also established the California Entertainment Commission (CEC) which considered--and rejected--reenactment of criminal penalties. In its December 1985 final report to the California Legislature, the CEC concluded that "the most effective weapon for assuring compliance with the Act is the power...to... declare any contract between the parties void from the inception."

In addition to granting the Labor Commissioner power to declare artist/manager agreements void ab initio, the act also empowers the Commissioner to order restitution of commissions earned from the outset of the unlawful relationship.

In a pioneering case involving actor Richard Pryor, his lawyer obtained a Labor Commissioner order voiding a management agreement and requiring Pryor's ex-manager to make restitution of \$3,110,918. *Pryor v. Franklin*, No. TAC 17 MP114 (1982). In another instance, comedian Arsenio Hall obtained a \$2,148,445 restitution order against his former management company. *Hall v. X Management*, No. TAC 19-90 (1991).

As a result of these and similar Labor Commissioner decisions against personal managers, the existing statute leaves managers, some of whom have built multimillion dollar businesses, operating in a legal "gray zone," never certain whether they can enforce their contracts. Whether the Kuehl legislation ends that legal uncertainty--or aggravates it--will depend on the effectiveness of an alliance that was recently organized by some of the industry's top managers (including Ovitz), who have hired attorneys Bertram Fields, of Los Angeles' Greenberg, Glusker, Fields, Claman & Machtinger, and Ronald Olson, of Los Angeles' Munger, Tolles & Olson, to spearhead a lobbying effort.

Filing A Petition

Procedurally, a petition is usually filed with the Labor Commissioner after a terminated manager has sued to enforce a commission agreement. Typically, counsel for the artist will seek both a determination by the Labor Commissioner that the management contract is void, and restitution of all commissions, fees, and other monies paid to the manager during the entire relationship.

This petition must be filed administratively because the Labor Commissioner has exclusive jurisdiction over claims under the act. Once the administrative proceeding is under way, the artist's attorney can usually obtain a stay of the manager's Superior Court lawsuit or arbitration, pending "exhaustion of administrative remedies." Such stay requests are routinely granted by courts and arbitrators, and have the tactical effect of paralyzing the manager's lawsuit--sometimes for a period of years--while the administrative proceeding slowly moves forward.

If, after the Labor Commissioner rules, either party wishes to contest it, the party may seek a trial de novo in the Superior Court. However, the losing party has only ten days after issuance of the Labor Commissioner ruling to appeal, a deadline that is frequently missed.

The current act only prohibits solicitation or procurement of employment, but does not prohibit managers from charging for "advice" and "counsel." For this reason, many written management contracts include a recital that the manager is not promising to solicit or procure employment and will not do so. These clauses have not fared well in practice, however, because the courts will reject them as a sham if a manager was functioning as a de facto talent agent, actively soliciting and procuring employment for the artist.

There is some authority for defending against a Labor Commissioner petition on the theory that the manager's solicitation and procurement activities are merely "incidental" to the rendering of advice and counsel. *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 16 Cal.Rptr.2d 496. However, this defense suffered a blow when the Court of Appeal did a careful analysis of the act's legislative history and held that even "incidental" solicitation and procurement were sufficient grounds for voiding a manager's contract. *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 48 Cal.Rptr.2d 437.

In cases where a manager cannot dispute that solicitation and procurement activities did take place, the manager can still defend under Labor Code ' 1700.44(d). This subsection expressly permits the manager to negotiate employment agreements if done "in conjunction with, and at the request of, a licensed talent agent."

The "conjunction" defense was successfully employed by Los Angeles litigator Lawrence Y. Iser of Greenberg, Glusker, Fields, Claman & Machtinger, on behalf of personal manager Dolores Robinson in a Labor Commissioner proceeding filed by actor Wesley Snipes. There was ample evidence presented that Robinson had acted as a de facto talent agent and negotiated employment on Snipes' behalf. But a licensed talent agent, Donna Chavous, testified that Robinson's activities fell within the "conjunction" exception under the statute. Because Chavous had been Snipes' talent agent during the relevant time period, the Labor Commissioner refused to void Robinson's contract. *Snipes v. Dolores Robinson Entertainment*, No. TAC 36-96 (1998).

The "conjunction" defense is not affected by A.B. 844 in its current form.

Another tactic commonly used by attorneys for personal managers is to wait for the Talent Agencies Act statute of limitations to expire before suing for commissions in the Superior Court. The "wait-a-year" tactic is possible because claims under the act are subject to a one-year statute of limitations that runs from the date of the last "violation" (Labor Code ' 1700.44(c)). On the other hand, the statute of limitations are two years for breach of oral contract and four years for breach of written contract. Calif. Code of Civil Procedure ' ' 337, 339.

The Labor Commissioner's application of the statute of limitations has varied. In *Kerns v. Dayton*, No. TAC 2-90-SF (1992), the Labor Commissioner refused to void a management contract because no violations were alleged and proved to have fallen within one year before the filing of the petition. That left manager Arlene Dayton free to pursue her claim for commissions.

By contrast, in *Church v. Brown*, No. TAC 52-92 (1994), the Labor Commissioner declared a management contract void, notwithstanding the absence of any violations within the one-year statute. The court concluded that the statute of limitations runs only against claims for affirmative relief (restitution of commissions paid) and does not bar the Commissioner from declaring a contract void as a defensive matter.

The Kuehl legislation would extend the Talent Agencies Act statute of limitations to three years, thus effectively eliminating the "wait-a-year" tactic.

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