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The Personal Manager in the Entertainment and Sports Industries

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THE PERSONAL MANAGER IN THE ENTERTAINMENT AND SPORTS INDUSTRIES

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I. INTRODUCTION

"Opportunity is where you find it," reads an old proverb. The job of the personal manager is to find and foster opportunities for his client. The personal manager, generally, is an individual employed to assist in the overall direction and development of an entertainer's or athlete's career. This article looks at the interrelationship between the personal manager, his client and the client's opportunities. First, the article describes the various roles and functions of a personal manager. Then, the article looks at the considerations that should be taken into account when formulating the personal management agreement. Finally, the article suggests regulations that should be imposed by the government to control the relationship between the personal manager and the client.

II. THE PERSONAL MANAGER'S ROLE

The term personal manager has been said to have "no distinctive definition of its own,"[1] it is a "generic term encompassing professional and business representatives of talent".[2] The term is often meaningless because of the numerous combinations of roles that a personal manager can perform. Each personal manager serves his client in a different manner. Personal managers assume such roles as attorneys, business managers, publicists, and produc-

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1. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 71 (4th ed. 1979).
2. *Id.*

ers.[3] For the purpose of clarity, this article will describe each role as separate aspects of the personal manager's job. It should, however, be kept in mind that these functions often occur in some combination.

A. *The Alter Ego*

The personal management role is perhaps the most demanding job in the entertainment and sports industries. In a general sense, "the personal manager [functions as] the alter ego of the artist . . . the part of the artist the audience never sees. He is a planner, advisor, organizer, strategist, overseer, munipulator, detail . . . [person], . . . [parent] figure, traveling companion, and friend."[4] Moreover, the job description of the personal manager must continue to grow to keep pace with the ever-increasing number of methods of career development and advancement.

Despite the importance of the personal manager, there is no special educational requirement that an individual must meet in order to represent clients. Business executives, attorneys, certified public accountants, former entertainers and athletes, spouses, relatives, and family friends have all functioned as personal managers. It is widely accepted, however, that a personal relationship with a client prior to representing him or her in a management situation can be highly detrimental both to the personal relationship and to the business affairs of the client.[5] This is so because the personal manager needs to be in a position to objectively criticize and evaluate the business needs and opportunities of the client. In order to maintain this needed objectivity, the personal manager must retain a certain degree of estrangement from the client.[6]

This required estrangement is, of course, lost when the athlete or entertainer acts as his or her own personal manager. Even in today's complicated world of entertainment and sports management, self-representation is not uncommon, especially at the start of a career. However, most athletes or entertainers who advance in

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3. For example, personal manager Bill Graham—owner of RSO Inc., a recording and music management company—also works as a film and stage producer. *See Rock Tycoon*, NEWSWEEK, July 31, 1978, at 40.

4. X. FRANSCOGNA JR. & H. HETHERINGTON, SUCCESSFUL ARTIST MANAGEMENT 12 (1978).

5. *See* B. WOOLF, BEHIND CLOSED DOORS 91 (1976). Woolf stated that "as a practical matter, [personal managers] should never get too close to their clients, especially athletes. The rule is that you take them to advise not to raise. Yet I have never been able to remain uninvolved . . . ." *Id.*

6. *Id.*

their profession find at some point that it is difficult to reconcile personal abilities and tastes with the realities and requirements of the business world. This problem is normally compounded by the inability of most athletes and entertainers to deal effectively with business professionals. It is at this point in the performer's career that he or she generally seeks career management help. As we shall see, this help can best be provided by a professional personal manager who is contractually bound to act to further the client's best career interest.[7]

B. The Career Planner

No matter who serves as the personal manager, the initial role of such a representative is to serve as a career planner.[8] The personal manager must steer the client in a well-defined direction while maintaining flexibility for unanticipated changes in the entertainer or athlete's career. All decisions made by the personal manager should take into account the client's overall career plan.

For example, the decision to secure an advertising endorsement for the client should be made with consideration as to whether the product will enhance or damage the client's public image. Indeed, public image, especially in the entertainment field, is a major marketing factor that can affect the client's future success.[9] Similarly, it is important for the personal manager to discern the appropriate time to forego certain employment opportunities, such as live appearances. These are only a few of the career steering decisions a personal manager is confronted with on a day-to-day basis.[10]

C. The Negotiator

In order to implement the career plan, once it is developed, the personal manager must either negotiate contracts for the client or arrange for competent counsel to negotiate on the client's behalf.[11] Negotiation of an employment contract is not only the per-

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7. *See infra* notes 77-81 and accompanying text.

8. *See* Kennedy, *On His Mark and Go-Go-Going*, SPORTS ILLUSTRATED, May 12, 1975, at 82.

9. *Id.*

10. *See* Lourie, *The Lawyer/Manager Role*, RECORD WORLD, Apr. 23, 1977, at 17 (The personal manager must "be aware of the whole gamut of the artist's business. . . .").

11. M. MAYER, THE FILM INDUSTRIES 17 (1973). *See generally* 1 J. TAUBMAN, PERFORMING ARTS MANAGEMENT & THE LAW 117 (1972) ("[L]awyers become necessary. . . [in] the negotiations on behalf of the author . . . counsel must be skilled in the law of literary and artistic property so as to know and advise as to the ownership and legal possibilities in the

sonal manager's single most important function, but it is also, generally, the focal point of the relationship between the client, owners, management and others in the entertainment industries.[12]

It is certainly in the client's best interest to be represented by an attorney during the negotiation process.[13] A personal manager with legal training not only has additional negotiation skills, but a strong arsenal of legal devices available to protect the client's interests. This additional expertise may be vital to a client who creates intellectual property, for example. First-hand knowledge of copyright law provides the client and his work with invaluable protection. Without these protective measures, the client may lose control of his own creation.[14] Also, it is important for the personal manager to oversee and protect screen, television and leisure industry credits. These credits often play a role in establishing a new artist's name or solidifying an established performer's reputation.[15]

For the athlete-client who participates in team competition, important protection is derived from the use of carefully drafted interest clauses which preserve his freedom of movement.[16] An athlete without adequate legal protection, can be denied security and the opportunity to create a stable home life. The attorney who simultaneously functions as a personal manager is clearly in a better position to know how to protect his client.[17]

The traditional role of the lawyer in the entertainment and sports industries is threefold: (1) provide counsel; (2) draft and negotiate legal instruments; and (3) represent the client in court.

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subsidiary rights.").

12. Boardman, *Forward* to 1 T. LINDEY, ENTERTAINMENT PUBLISHING & THE ARTS at v. (1980) ("The ingenuity of man has yet to devise an iron clad contract. The advantage of the carefully drawn agreement is not that it will be breachproof, but that it will strongly dissuade the potential repudiator from attempting to suspend his obligation and will provide adequate remedies if he does.").

13. *Id.* at iv.

14. *See* 17 U.S.C. § 102 (1982). *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976). In *Bright Tunes*, an action was brought claiming that the song "My Sweet Lord" infringed on the copyright held by the writers of the song "He's So Fine." The court held that inasmuch as "My Sweet Lord" had a strikingly similar musical arrangement to "My Sweet Lord," the copyright was infringed. *Id.*

15. *See* Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (action against a film distributor for leaving the name of an actor off the credits of a film).

16. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972); Robertson v. National Basketball Ass'n 625 F.2d 407 (2d Cir. 1980); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Washington Capital Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal. 1969). *See generally* Schneiderman, *Professional Sport: Involuntary Servitude and the Popular Will*, 7 GONZ. L. REV. 63, 69 (1971) ("The Professional Athlete is like legal chattel of his club, and can be sold or traded at will.").

17. *See generally* S. GALLNER, PRO SPORTS: THE CONTRACT GAME 2 (1974).

These services make an attorney invaluable in entertainment and sports representation.

Whether the entertainer or athlete should be represented by a personal manager and a separate attorney or whether such representation can be accomplished by one person performing both roles is a controversial question. "Because the managerial function is inextricably bound with problems of law and contracts, sometimes counsel gravitate into the managerial functions, and in fact, become managers side by side with [sic] law practice."[18] Indeed, they may even work exclusively in management positions. Some attorneys change hats for different clients. They may represent one client as an attorney while at the same time as a complete personal manager for another.[19]

Many lawyers believe that the personal manager and attorney functions should be performed by a given client by separate individuals.[20] The attorneys who believe in the separation of the legal and management professions have advanced several arguments to support their position. First, they state that because an attorney works on a flat fee basis, the client's decision on whether or not to accept a contract will not determine whether the attorney receives his fee. In this manner, independent, unbiased legal advice is assured. Whereas, if an attorney, acting as a personal manager, works on a commission basis, he may advise a client to accept a contract in order to guarantee himself a percentage share.[21]

The second argument advanced by those opposed to the mixing of the attorney and personal manager roles, is that the most important function an attorney provides in a transactional relationship is that of an independent third party advisor.[22] This role may be lost when the personal manager also acts as the client's counsel. The attorney who is not a direct party in such a transaction can deliver more objective advice without any conflict of inter-

18. TAUBMAN, *supra* note 11, at 47.

19. *Id.*

20. *See* J. CSIDA, THE MUSIC/RECORD CAREER HANDBOOK 322. According to this author, "[w]hat a lawyer should bring to a client is almost total objectivity, which is to say, lawyers should be paid on an hourly rate . . . If you pay a lawyer on a percentage . . . the lawyer's fee becomes dependent upon his advice. . . ." *Id.*

21. *Id.*

22. *See* Clifford David Management Ltd. v. WEA Records Ltd. [1975] 1 All E.R. 237. In this case, the former personal manager of the musical group Fleetwood Mac also served as legal counsel for the group. The personal manager/lawyer sought to enjoin the group from releasing a recording upon which he claimed a copyright. The court denied the injunction, stating: "That the bargaining power of each of the composers was gravely impaired by the position . . . [of the personal manager/lawyer]." *Id.*

est, thus protecting the client from numerous pitfalls. Attorneys placed in the role of a third party can become a buffer between the personal manager and the funds of the client. This role, however, can also be played by others, including a business manager.[23]

Finally, some commentators argue that from a management standpoint, the attorney who works regular hours in a law firm will find it difficult to participate in the client's day-to-day career. The hours involved in each position would simply conflict.[24] To provide a client with complete legal services, the attorney must be competent to handle a variety of legal complexities and specialties. Outside counsel may be a necessity when the client's lawyer is also the personal manager and does not practice law on a fulltime basis since such an attorney may not be up to date on the most recent trends in the legal profession.[25]

Despite the numerous arguments against the combining of professions, a number of individuals have apparently succeeded in the dual role of attorney/personal manager.[26] A later section of this article discusses in great detail the mechanisms that can be put into operation to adequately protect the entertainer or athlete from the problems that may arise when his personal manager is also his attorney.

D. The Business Manager

Often an attorney/personal manager will hire a business manager to help manage a client's affairs. Also, many large personal management firms have employees who are given the title and function of "business managers." Typically, however, the personal manager will also act as the client's business manager.[27] It has been said that "[t]here is no precise definition of a business manager . . . [the] role varies from client to client and from business manager to business manager."[28] The business management role

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23. *See* CSIDA, *supra* note 20, at 322.

24. There are many areas of law that an entertainment lawyer should be familiar with in order to provide his client with adequate legal services. An attorney who actually functions as the personal manager cannot possibly maintain a freshness in the necessary areas of law. *See* Rudell, *Entertainment Lawyer as a Generalist*, N.Y.L.J., Nov. 14, 1979, at 11.

25. *See* Culbreth v. Simone, 511 F. Supp. 906 (E.D. Pa. 1981) (lawsuit brought against an entertainer's attorney for conflict of interest because the attorney allegedly acted improperly while performing personal management services).

26. *See* Horewitz, *Personal Management: Syllabus on Representing Musical Artists; Legal, Business, and Practical Aspects*, 1975 ENTERTAINMENT L. INST. 51, 55-57.

27. *See* Lourie, *supra* note 10, at 17.

28. Thomas, *Legal Responsibilities and Liabilities of the Business Manager*, 1975 PROCEEDINGS OF THE CAL. CPA FOUND—ENTERTAINMENT INDUS. CONFERENCE, B-1.

typically includes one or more of the following: (1) personal budget planning; (2) investment advice; (3) tax advice; and (4) estate and financial planning.[29] It is well accepted that a business manager who is well acquainted with the sports and entertainment industries is better able to perform these functions more competently for an athlete or entertainer than a businessman who is unfamiliar with these industries.[30] A business manager familiar with the sports and entertainment industries will be in a better position to exploit unique financial opportunities while at the same time maintaining a stable flow of income for the client.

The uniqueness of business management for an entertainer or athlete centers around the relatively short period of time in which the client generates high income. The business manager must protect and invest this short lived income stream. Football star O.J. Simpson summed up his thoughts on the subject by stating: "Fame . . . is a vapor, popularity is an accident *money takes wings*. The only thing that endures is character."[31]

A business manager, functioning as a personal budget planner, should begin by analyzing the present financial needs of the client. The business manager and client can then develop a personalized budget by determining the needed cash flow for maximum liquidity and flexibility, while investing funds for the client's future needs.[32]

After determining the present needs of the client, the business manager must function as an investment advisor. In this capacity, the business manager must stretch the present high income to provide for the client's future financial security. While doing this, the business manager must also be planning and implementing an overall estate and family financial program to provide for the client's family in the event the client dies, or is disabled, or otherwise can not function in the entertainment or sports fields. In short, the function of the business manager is not to plan what should be done tomorrow, but plan today to protect the client's tomorrow.[33]

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29. P. Ames, *Business Managers Role in Counseling the Music Client* in COUNSELING CLIENT IN THE PERFORMING ARTS 163-71 (G. Margolis & M. Silfen eds., 1976).

30. *Id.*

31. Interview with O.J. Simpson, *printed in* SPORTS ILLUSTRATED, Nov. 26, 1979, at 38 (emphasis added).

32. David Niven and John Wayne had their business managers provide them with a small allowance to live on, while investing the remainder of their income. *See* W. HAWES, THE PERFORMER IN MASS MEDIA 297 (1978).

33. *Id.*

E. The Tax Planner

In addition to managing the day-to-day business concerns of the client, the personal manager must also secure tax advice. Athletes and entertainers have unique tax problems because they tend to earn a high amount of income for a relatively short period of time. Without proper planning, the present tax system would take as much as fifty percent of an athlete or entertainer's income. With effective tax planning, the athlete or entertainer can legitimately and dramatically reduce his tax burden.

It would be impossible in this article to give a detailed account of all the tax shelters and other tax saving devices available for a high-salaried professional athlete or entertainer—indeed, there are numerous books and articles that explore this one narrow area of tax law.[34] Moreover, any description provided here may soon become dangerously out-of-date because this area is in a constant state of change.[35] Despite this seeming complexity, however, tax planning for athletes and entertainers involved two simple concepts: spreading and sheltering. The first concept involves spreading this client's income over as many years as possible and to as many different tax paying entities, in order to reduce the client's marginal tax rate.[36] "Income-averaging"[37] is the classic spreading device. Sheltering involves the investment of the client's money in projects which initially, at least, lose a great deal of money. Because the client's share of the project's loss is tax deductible, the project in effect "shelters" the client's income until the project

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34. *See, e.g.*, Bailey, *Section 482 and the Aftermath of* Foglesong: *The Beginning of the End for the Personal Service Corporation*, 15 IND. L. REV. 639 (1983); Conners, *The Role of Self-Incorporation By Professional Athletes in Today's Tax Climate—After TEFRA and TRA '84*, 2 ENT. SP. L. J. 1 (1985); Feuer, *Section 482, Assignment of Income Principles and Personal Service Corporations*, 59 TAXES 564 (1981); Gombinski & Kaplan, *Demise of the Tax Motivated Personal Service Corporation*, 1 J. COPYRIGHT, ENTERTAINMENT & SPORTS L. 73 (1982); Hira, *Self-Employed Retirement Plans: TEFRA Brings Parity, but Disparities Remain*, 10 J. PENS. PLAN. & COMP. 225 (1984); Manning, *The Service Corporation: Who is Taxable on its Income: Reconciling Assignment of Income Principles, Section 482 and Section 351*, 37 U. MIAMI L. REV. 657 (1983); Scallen, *Federal Income Taxation of Professional Associations and Corporations*, 49 MINN. L. REV. 603 (1965); Weiss, *Pension Changes Under TEFRA*, 27 B. BAR J. 8 (1983); Wood, *The* Keller, Foglesong and Pacella *Cases: 482 Allocations, Assignment of Income, and New Section 269A*, 10 J. CORP. TAX 65 (1983).

35. *Id.* These articles discuss the major changes in this area of tax law which taken place over the past five years.

36. *See* Frost v. Commissioner, 61 T.C. 488 (1974); Heidel v. Commissioner, 56 T.C. 95 (1971).

37. I.R.C. §§ 1301-05 (1982).

starts to produce a profit.[38] Real estate limited partnerships are the classic form of shelters.[39]

F. Conclusion

As this discussion has indicated, there are numerous roles and functions to be performed in developing the career of an athlete or entertainer. Although the personal manager is the driving force behind the advancement of the client's career, it is becoming increasingly difficult for one person to provide all of the services needed by today's "big-time" athlete or entertainer. Because of the complexity of personal management in today's leisure industries, there are a growing number of companies that provide all of the personal management services through the efforts of several people working in combination.[40] The problem with these large firms is that they often give the client less personal attention and leave him feeling like a commodity. The best alternative for today's athlete or entertainer is to have assembled a team of professionals to act as his booking agent, attorney, business manager and accountant. The main problem with this "team" approach is its high cost, which makes it all but unworkable except for the highest paid athlete or entertainer.[41] Therefore, the vast majority of today's athletes or entertainers face the dangers of being underrepresented by a sole personal manager or being lost in the crowd with a large personal management firm.[42] The only protection an athlete or entertainer has against these two alternatives is to select a personal manager or management firm carefully and once one is selected, to seek to protect his interests through the personal management contract.

II. Selecting the Proper Manager and Negotiating the Management Agreement

Because of the importance of the personal manager, the client, before negotiating the management agreement, should take adequate time to evaluate the prospective personal manager. In the ideal situation, the manager, once selected, would stay with the athlete or entertainer throughout his career. For such a long-term relationship to develop, the client must give extreme consideration

38. I.R.C. § 165 (1982).

39. Commissioner v. Tufts, 461 U.S. 300 (1983) (use of nonrecourse debt can increase tax loss).

40. *See* Shemel & Krasilovosky *supra* note 1, at 78.

41. *Id.*

42. *Id.* at 77-79.

to both the manager's qualities and personality.

Before a personal manager is hired, the client should personally meet and evaluate the personal manager. Time must be taken in developing a rapport with the prospective manager. The client and the personal manager have to respect each other professionally, as well as, socially in order for their relationship to work. Equally as important is that the client and personal manager share the same goals and priorities in the development of the client's career.

After selecting a personal manager, the athlete or entertainer should use extreme caution in negotiating an agreement with his personal manager. The relationship at this point should not be taken for granted. The entertainer or athlete and the prospective personal manager will be adversaries during this period of time; therefore, a third-party attorney working for the entertainer or athlete is required.

A. The Scope of Representation

The specific services to be provided by the personal manager should be clearly indicated in the management agreement. The personal manager will often attempt to exclude certain services from the contract in order to avoid state regulation.[43] The athlete or entertainer, however, should be assured of these services through some kind of understanding with the personal manager.[44] Likewise, the athlete or entertainer, by signing the agreement, will have an implied duty to provide the personal manager with the opportunity for providing service.[45]

B. Exclusivity

The personal manager often requires that the contract grant the exclusive right to represent the entertainer or athlete. Although the agreement is for exclusive representation, the entertainer or athlete is free to rescind the contract at any time, and to hire a new manager, provided certain procedures are followed. These procedures normally call for the personal manager to receive money damages.[46] The contract itself may provide for liquidated

43. *See infra* notes 83-108 and accompanying text.

44. *See generally* L. REMICK, ARTIST MANAGEMENT (1983).

45. *Id.*

46. *See* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 165-75 (West 1964); *See generally* Schoenfeld, *Recording Artists and Exclusive Contracts*, N.Y.L.J., June 21, 1978, at 124 (some contracts are so biased in favor of the personal manager that they are referred

damages upon a breach, otherwise, the personal manager will rely on a court to determine damages.[47] Either way, the consequences will be the payment of damages for any harm done as a result of a breach on the part of the client. The personal manager cannot normally prevent the former client who rescinds from being represented by another personal manager.[48] A client may irreparably damage a personal manager who invests time and effort into the client's career, only to find himself out of the contract just when the benefits of his labor start to materialize.[49]

C. *Right of Termination and Compensation*

The client and the personal manager may wish to outline reasons for dissatisfaction with the contractual relationship which will give either party a right to terminate the contract. The termination provision should be very specific as to its terms, because it lets the terminating party out of the contract without incurring liability.[50]

The compensation clause should be similarly specific because of the large sums of money involved.[51] Personal managers in the entertainment field tend to earn between fifteen percent and twenty-five percent of the client's gross income.[52] In the sports industry, personal managers make an average of five percent of the client's earnings.[53] There are cases, however, where the personal manager's compensation has been as much as fifty percent. In order to avoid conflict, the personal management contract must indicate with great specificity the formula for determining the personal manager's compensation. In many cases, the client attempts to exclude the personal manager from certain sources of income.[54] For

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to as contracts of slavery.).

47. *Id.* at § 46. (The athlete or entertainer can revoke the authority of a personal manager, irrespective of an agreement not to do so).

48. In Wilhemina Models, Inc. v. Iman Abdulmayid, 67 A.D.2d 853, 413 N.Y.S.2d 21 (App. Div. 1979), a lower court granted an injunction against a model so she could not perform for another modeling agency. The appellate court lifted the injunction, finding that money damages were an adequate remedy.

49. *See* REMICK, *supra* note 44.

50. *See* Clayton, *Elvis Estate Sues Parker Over License,* BILLBOARD, Feb. 20, 1982, at 4.

51. *Id.* Colonel Tom Parker made fifty percent of Elvis Presley's gross income from RCA recording royalties.

52. *See A Millionaire Slugger, Eddie Murray keeps His Eye on Real Life,* WALL STREET J., Apr. 5, 1982, at 18. California does not limit the amount of compensation by statute, but the labor commission has a policy of disapproving any contract in excess of 25% in commissions.

53. *Id.*

54. *See* REMICK, *supra* note 44.

example, it is not uncommon for singers to exclude the personal manager from sharing in certain royalties.[55] As a further limit, some personal management contracts call for the personal manager's compensation to be based on an incremental formula—instead of a fixed rate formula—that changes as the client's income increases.[56] Supporters of the incremental formula claim that it gives the personal manager more incentive to increase the client's income.[57]

Whether an incremental or fixed rate formula is used, the compensation clause should indicate from which receipts and income, before and after the term of the contract, from which the manager has a right to draw a percentage. Further, the compensation clause should specifically state who will assume responsibility for the proper accounting and disbursement of funds. The personal manager may be charged with the duty of receiving all funds and then disbursing the funds to the client as he needs them. The client in this case should make exacting provisions in the contract for the proper accounting of all funds received by the personal manager,[58] and for the audit of accounts held by the personal manager.[59]

Similarly, if the manager's percentage is to be deducted prior to taking out expenses, there should be a provision in the contract stating who is responsible for what expenses.[60] If expenses are to be taken out prior to the manager's percentage, similar precautions should be taken. Furthermore, there should be a limitation on the amount after which the client's written permission is required prior to further expenditures.[61]

D. Duration of the Contract and the Right to Approval by the Client

The compensation provisions of the personal management contract will often be dependent on the duration of the contract. Many personal management agreements call for an increasing rate of compensation over the term of the contract. Generally, the contract will provide for an initial period with an option in favor of

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See infra* notes 63-65 and accompanying text.
61. *See* REMICK, *supra* note 44.

the personal manager to renew. As will be seen, the duration of the personal management contract is often subject to state regulation.[62]

During the duration of the contract, the athlete or entertainer should retain a right to approve certain fundamental decisions of the personal manager. The failure to contractually provide for such a reservation may cause the client to be bound by or liable for unwanted actions of the personal manager.[63] This is so because the personal management agreement normally contains a clause granting the personal manager the client's power of attorney.[64] This power authorizes the personal manager to sign documents as though the client had approved them. The personal manager typically needs the power of attorney to carry on the client's day-to-day business needs. To prevent possible abuses of the power by the manager, the client should limit the power of attorney to certain specific subjects and call for actual client approval in certain transactions or in transactions over a stated amount.[65]

E. Special Considerations

In addition to the standard terms common to most personal management agreements, the manager and the client may want to make provisions for special circumstances surrounding their relationship. For example, if the personal manager loans the client money, the management agreement may entitle the manager to recoup the loan directly from the client's earnings.[66] For a manager and a client who live or work in different states, another provision in the agreement may determine which state law is to control interpretation of the contract.[67] Similarly, if the client has developed a special trust in the personal manager, the client may ask for a nonassignability clause to be incorporated into the contract. Still another special provision found in a growing number of personal manager agreements calls for an arbitrator to settle disputes between the client and the manager.[68]

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62. *See infra* notes 83-108 and accompanying text.

63. A. CORBIN, CONTRACTS § 1204 (1984).

64. The power can be granted generally or with limitations. 3 AM. JUR. 2D *Agency* § 73 (1962).

65. *Id.*

66. This is not to say that the personal manager should be obligated to lend money to the client. Many in the profession consider lending money to be unethical behavior.

67. *See infra* notes 109-119 and accompanying text.

68. See AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (1982).

F. Conclusion

As this discussion has indicated, concrete terms in the personal management agreement are beneficial to all parties. Clarity of contractual obligations avoids disputes and misunderstandings between the personal manager and the client. This clarity, however, must neither deny the personal manager his flexibility nor the client his creativity in pursuing his talents. It is necessary that the personal manager retain the flexibility to take advantage of business opportunities for the client when they present themselves.[69] Similarly, a contractual scheme, which is specific and exacting on the work requirements of the client, tends to stifle his talents.[70] This notion is especially true of the creative entertainer, whose instinct cannot be counted on to produce a regular income.[71] At some point, however, the personal manager has to adapt the creative desires of the client to the needs and wants of the marketplace. At this point, the client should be contractually obligated to heed the personal manager's advice.

III. Regulation and Reform

The personal manager can be, and in fact is, regulated outside of the management agreement by various organizations and laws. The extent of regulation will depend upon: the functions the personal manager provides for his or her client; the jurisdiction in which the personal manager practices and; whether the manager has voluntarily submitted to the jurisdiction of any organizations. There have been very few lawsuits involving the personal manager-client relationship. Most cases either go into arbitration or are settled before trial. Yet there are some guidelines which indicate the legal responsibilities and ramifications of the relationship.

A. Agency Theory

The personal manager is an agent for the principal athlete or entertainer. As an agent, the personal manager must exercise the utmost good faith, loyalty, and honesty when acting on behalf of the principal.[72] Moreover, the personal manager/agent has a fiduci-

69. Remick, *supra* note 44.

70. H. Golightly, Managing with Style 48 (1977).

71. *See* Taubman, *supra* note 11, at 40.

72. "Agency is a consensual, fiduciary relation between two persons, created by law which one, the principal, has a right to control the conduct of the agent and agent has the power to affect the legal relations of the principal." Seavey, *supra* note 46, at § 3.

ary duty of care when acting within the scope of the agency.[73] Further, a personal manager/agent who handles the funds of the client/principal has a duty to use good faith and good business judgment in the handling of the money.[74] Also, if a person manager/agent holds himself out as a financial advisor, he implies that he has the necessary knowledge and skill to represent his principal in that capacity.

Although the client/principal can theoretically recover under agency theory for breach of duty by the personal manager/agent, this protection is more illusory than real. The practical difficulties in prosecuting a case under agency theory make it all but impossible for the average client/principal to obtain a meaningful remedy.[75] In addition to the time and money involved in litigating a case, under agency theory, the client/principal is confronted with the burden of proving that the agent/personal manager did not act within the scope of the agency. This burden of proof requirement ensures a long and difficult trial.[76]

B. Tort and Contract Law

The personal manager is also held to an implied duty to exercise the ordinary skill and competence of members in the same profession. An action can be brought against the manager under tort law for any intentional wrong or for negligent performance of the personal management duty.

Although the general principles of fraud apply to the management relationship, the remedies are frequently inadequate. In the landmark case of *Buchwald v. Superior Court*,[77] a personal manager of an entertainment group engaged in fraudulent practices to secure contracts from the musicians. Upon discovering the fraud, the musicians brought suit to recover damages from the manager. After ten years of litigation, the musicians prevailed, but recovered only nominal damages.[78]

Similarly, in *Burrows v. Probus Management, Inc.*,[79] a sports agent was sued for misrepresentation and fraud. The defendant, an

73. *See id.* §§ 140-54.

74. *Id.* § 27. The quality of representation will be judged against the level of skill of others engaged in similar activities. *Id.* at § 140. The agent must perform with expertise of others in the trade. RESTATEMENT (SECOND) OF AGENCY § 379 (1957).

75. SEAVEY, *supra* note 46, at § 84.

76. *Id.* at § 155.

77. 254 Cal. App. 2d 374, 62 Cal. Rptr. 364 (1967).

78. *Id.* at 378, 62 Cal. Rptr. at 367.

79. Civ. No. 16840 (N.D. Ga. Aug. 9, 1973).

accountant acted as a sports agent and business manager for several professional ballplayers. The agent defrauded his clients by converting and mismanaging their funds. Punitive, as well as, compensatory damages were awarded to the clients, but these remedies proved to be inadequate because the agent had no assets to cover the liabilities.[80] As the *Buchwald* and *Burrows* cases indicate, although a personal manager may be held liable under tort theory, the right to recover alone does not necessarily assure the athlete or entertainer adequate protection.

Likewise, contract law provides the client a remedy if the personal manager breaches the management agreement.[81] As under the tort theory, this right to recover, however, is often an empty remedy because there is no assurance that the personal manager will have the ability to pay the judgment.

C. *Criminal Law*

The general principles of criminal law can be employed to protect the athlete or entertainer from the corrupt personal manager. Criminal law, like tort and contract law, however, often provides inadequate relief. In *People v. Sorkin*,[82] a sports agent pleaded guilty to misappropriation and converting his clients' funds. Although the agent was sent to prison, he did not compensate his clients for their lost funds.

D. *State Regulation*

As can be seen by the inadequacy of present legal theory, more regulation is needed to improve the remedies presently available to the athlete or entertainer who has been injured as a result of misrepresentation. Some states have recognized the impotency of traditional legal theories in deterring manager misconduct.[83] These

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80. *Id.*

81. For a discussion see WILLISTON, CONTRACTS §§ 1285-1485 (3d ed. 1957).

82. No. 46429 (Nassau Co., N.Y. Ct. Nov. 28, 1977), *aff'd*, 407 N.Y.S. 2d 772 (App. Div. 2d Dept. 1978).

83. *E.g.*, MASS. GEN. LAWS ch. 140, § 180B (1981). Massachusetts law provides:

> No person shall act as a . . . personal agent or actor's manager, or engage, directly or indirectly, in the business of acting as an agent in the employment of persons for a theatrical engagement in the Commonwealth unless he has obtained a license from the Commissioner of Public Safety. Any person so licensed shall maintain one or more offices in the Commonwealth.
>
> . . . .
>
> Whoever violates the provisions of this section shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or both.

progressive states have developed regulatory schemes to control the actions of personal managers and to safeguard the interests of their clients. The statutes which implement these regulatory structures are remedial in nature,[84] utilizing a licensing procedure to lessen abuses in the representation of athletes and entertainers. While not all the states have the progressive regulatory statutes meant to specifically control the abusive manager problem, all the states currently have general employment regulatory statutes.[85] Although these generalized statutes rarely reach all personal management activities, they do provide some protection from corrupt managers.

For example, the California Labor Code Talent Agencies Act (Act)[86] would not appear on its face to regulate the personal manager. Its terms and conditions are specifically designed to regulate talent agents. Moreover, the statutory language does not even mention the term "personal manager." Despite this omission, state regulators have stated: "A personal manager of entertainers must obtain a license under California law if he or she procures or attempts to procure employment for their client."[87] Hence, the absence of the term "personal manager" from the statute is misleading. Although originally designed to regulate talent agents, the Act now reaches those personal managers who involve themselves in employment procurement.[88]

The Act, however, creates a dilemma because it fails to define

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Id.

84. *Id.*

85. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 9900-97 (West 1971).

86. The pertinent section provides that:

> A Talent agency is hereby defined to be a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.
>
> The word "artists" as used herein refers to actors and actresses rendering services on the legitimate state and in the production of motion pictures; radio artists; musical artists, musical organizations; directors of legitimate stage; motion picture, and radio productions; musical directors; writers; cinematographers; composers; lyricists; arrangers; and other artists and persons rendering professional services in motion picture, theatrical radio, television and other entertainment enterprises.

CAL. LAB. CODE § 1700.4 (West Supp. 1986).

87. Telephone interview with Carol Cole, Deputy Labor Commissioner and Area Administrator in charge of Licensing and Registration, California Labor Commission, (Sept. 17, 1982) [hereinafter cited as "Interview with Carol Cole"].

88. *See* Buchwald v. Katz, 8 Cal. 3d 493, 106 Cal. Rptr. 368 (1972) (management contract is unenforceable, where manager fails to obtain license from labor commission).

the term "procurement of employment." The degree of involvement the personal manager has in assisting the client in getting employment may or may not require him to be licensed as a talent agent. The line separating the personal manager from the regulated talent agent remains obscured and blurred. The courts have been given too much discretion to determine where the line is to be drawn.[89] A portion of this line was recently more clearly defined when the Act was amended to exclude two specific procurement activities of personal managers: When they negotiate and secure recording contracts and when they work in conjunction with a licensed talent agent.[90] "A personal manager can now negotiate and secure record contracts for an individual without obtaining a license, but they cannot arrange the tours or any concerts . . . without working with a licensed talent agent."[91]

The State of California has an additional labor statute which specifically regulates the sports agent.[92] Any person who functions as a sports agent, as defined by California law,[93] must obtain a license. Attorneys practicing in California and acting as legal counsel for the athlete are never required to obtain a license because of the regulation already imposed upon them by the Code of Professional Responsibility.[94]

Massachusetts has adopted laws which require a personal manager to be licensed.[95] As of this writing the Massachusetts courts have not interpreted their statute in any published opinions. A Michican court, however, interpreting similar provisions,[96] held that a management agreement is void and unenforceable where the manager fails to obtain a license in violation of state

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89. The definition of procuring employment under California's statute has been interpreted broadly. *See* Deane v. Rippy, 63 Cal. App. 2d 978 (1976) (West 1982).

90. Amended CAL. LAB. CODE § 1700.4 (no longer effective as of Jan. 1, 1985).

91. Interview with Carol Cole, *supra* note 87.

92. *See generally*, CAL. LAB. CODE §§ 1500-47 (West Supp. 1982).

93. The relevant section of the California Labor Code reads as follows:

> Athletic agency means any person who, as an independent contractor, directly or indirectly, recruits or solicits any person to enter into any agency contract or professional sport services contract, or for a fee procures offers, promises, or attempts to obtain employment for any person with a professional sport team.
>
> "Athletic agency" *does* not include any employee of a professional sport team, and does not include any member of the State Bar of California when acting as legal counsel for any person.

Id. § 1500(b) (emphasis added).

94. *See infra* notes 131-46 and accompanying text.

95. For the text of the Massachusetts state law, see *supra* note 83.

96. "Artist's manager means a person acting as a manager or business advisor or rendering technical assistance to an entertainer for which the person is to receive renumeration out of future earnings of the entertainer." 1980 MICH. PUB. ACTS 339.1001.

licensing and criminal law.[97]

Under New York law, personal managers are not regulated with as much scrutiny.[98] If a personal manager performs the functions as such, and only procures employment incidental to that role, then no license is required.[99] It is likely that the states which do not have specific statutes promulgated to regulate the personal manager, will follow the reasoning of the New York legislature. Since these remaining states do not have a specific interest in regulating the personal manager, their employment agency statutes will probably not reach such activities.[100]

Regardless of the provisions in a personal management contract, it is the behavior of the parties under the contract which will determine whether a license is required.[101] Once a personal manager has been required to obtain a license, further regulation can be implemented to control his or her activities. The amount of

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97. Schwartz v. Gonzales, 2 Mich. App. 673, 186 N.W.2d 643 (1970) (where the court found that in view of provisions in the code proscribing an artist's manager from acting as such without a license, the management contract was unenforceable).

98. Section 171(8) of the New York General Business Law provides:

> "Theatrical employment agency" means any person who . . . procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling, or other entertainment or exhibitions or performances, but such term *does not* include the business of managing such entertainments, exhibitions, or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.

N.Y. GEN. BUS. LAW § 171(8) (McKinney 1986).

99. Nazarro v. Washington, 81 N.Y.S.2d 769 (1948); Angileri v. Vivanco, 137 N.Y.S.2d 662 (1954); Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 395 N.Y.S.2d 611 (1977). A contract indicating that the representative is to be the personal manager implies that there will be additional duties and will therefore persuade the courts that procuring employment is more likely an incidental duty. Pawlowski v. Woodruff, 203 N.Y.S. 819 (1924), *aff'd*, 212 A.D. 871, 208 N.Y.S. 912 (1925); Pine v. Laine, 36 A.D.2d 924, 321 N.Y.S.2d 303, *aff'd*, 341 N.Y.S.2d 448 (1971). Where the manager promised to procure employment, the court found that the contractual promise was only incidental to the other duty of the designated attorney. Sublette v. Davis, 82 N.Y.S.2d 77 (1948).

100. *See* National Talent Associates v. Holland, 76 Ill. App. 3d 556, 395 N.E.2d 142 (1979). The Illinois court interpreted its state employment agency act and its definition of a theatrical employment agency. The Illinois court, finding itself reviewing a case of first impression, utilized California and New York cases for its analysis. The court found the activities in question beyond the scope of those intended to be regulated. The plaintiff had solicited potential models and offered assistance to procure contracts with booking agencies. The labor commissioner wanted to require a license for such activities. The Illinois court followed New York law and ruled such procurement activities as only incidental to the relationship of management.

101. *See* Farnum v. O'Neill, 141 Misc. 555, 252 N.Y.S. 900 (1931). *But see* Hyde v. Vinolas, 234 A.D. 364, 254 N.Y.S. 687 (1932) (where the court held that the "incidental-to" distinction is a jury question, to be ruled upon by the character of the contract).

compensation that a manager can demand may be limited.[102] The California Labor Commissioner has determined that a manager and attorney sharing the same offices must keep their records separate.[103] The labor commissioner may investigate the character and responsibility of a licensed individual.[104] The state labor commissioner holds the ultimate remedial weapon of suspending or revoking the license of an individual who fails to comply with state law or is otherwise found to be unfit to be a personal manager.[105] The state may require the deposit of a surety bond to protect athletes from fraud or any misrepresentation by personal managers.[106]

Other state statutes can affect the personal management relationship. The length of an agreement can be limited.[107] The ages of the participating parties to an agreement are also regulated. In both California and New York a minor[108] must follow a specific procedure before performing or rendering services in the entertainment or professional sports areas.

E. Choice of Law Considerations

Attempts may be made to circumvent state laws that regulate the personal manager by inserting choice-of-law clauses into contracts. These clauses reference a specific jurisdiction for the laws that interpret and control the contractual relationship. Such clauses may or may not be upheld depending on both a state's choice of law theory and public policy.[109]

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102. *See* N.Y. GEN. BUS. LAW § 185(8). California does not limit the amount of compensation by statute, but the Labor Commission disapproves of any contractual compensation in excess of 25%. Interview with Carol Cole, *supra* note 87.

103. Interview with Carol Cole, *supra* note 87.

104. CAL. LAB. CODE § 1700.7 (West Supp. 1985).

105. *See* CAL. LAB. CODE § 1700.21 (West Supp. 1985) (an example of the possible statutory standards for revoking or suspending a license).

106. A surety bond is required to protect represented athletes who by reason of "misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omission" might be damaged. CAL. LAB. CODE §§ 1519-20 (West Supp. 1985).

107. *See* CAL. LAB. CODE § 2855 (West Supp. 1985) (Personal service contracts cannot be enforced against the employee beyond seven years.).

108. A minor is a person who has not attained the age of 18 years. CAL. CIV. CODE § 25 (West Supp. 1985); N.Y. GEN. OBLIG. LAW § 1-202 (McKinney 1978).

109. Early choice of law decisions stressed a "vested rights" rationale and held that parties were precluded from designating which state would control. *See* Gerli & Co. v. Cunard Steamship Co., 48 F.2d 115 (2d Cir. 1931). The modern view is that, so long as it is not against public policy, the parties may expressly incorporate some foreign law into their contract. *See* Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948). Under the Restatement, however, the parties' choice of law will be upheld only if there is a "substantial relationship" between the parties, contract and the state law chosen or some other "reasonable basis" for selecting that state's law. *See* RESTATEMENT (SECOND) OF CON-

Choice of law clauses cannot insulate a manager's activities from regulation by other jurisdictions.[110] Irrespective of their domicile or chief place of business, personal managers may be regulated by another state if certain "minimum contacts" can be shown to exist with that state.[111] State statutes and administrative rules may or may not have an extraterritorial effect depending on the type of contacts involved and the choice of law rules applied.[112] For example, a personal manager who is not a resident of California but who is "negotiating with clients there and also finding jobs there probably would need a license [under California law] to support his activities there."[113] In deciding whether or not they have jurisdiction over such person or persons and their activities, the California Labor Commission will "have to look at each one of those cases individually when it involves out-of-state people."[114] The minimum contacts needed before jurisdiction over a personal manager will attach "is not clearly defined."[115]

A 1976 decision illustrates how one court weighed the cummulative effect of a personal manager's conduct within the state. In *Peebles v. Murray*,[116] a Kansas promoter, Harry Peebles, brought a breach of contract action against a California performer, the performer's personal manager and her booking agent. Motions were filed to dismiss the suit for lack of in personam jurisdiction, insufficiency of service of process and to transfer the suit to a federal district in California. In reference to the personal manager, the court held that his contacts did not sufficiently satisfy the due process requirement for sustaining long-arm jurisdiction. His only

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FLICT OF LAWS § 187(2) (1969).

110. *See* Mattgo Enters., Inc. v. Henry Aaron, 374 F. Supp. 20 (S.D.N.Y. 1974).

111. "[D]ue process requires only that in order to subject a defendant to a 'judgment in personam,' . . . he have certain minimum contracts with it such that the maintenance of the suit does not offend traditional notions of fairplay and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The Supreme Court reaffirmed the "minimum contacts" standard in 1980. The Court held that before a court may exercise jurisdiction it must be convinced that "the defendant's conduct and connection with the forum state are such that he would reasonably anticipate being hauled into court there." World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

112. Most states have long-arm statutes which enable their courts to exercise in personam jurisdiction over persons having the proper minimum contacts with their state. *Compare* ILL. REV. STAT. ch. 110, § 17 (1956) (enumerates various specific acts which, if committed in the state, will submit the actor to state jurisdiction) *with* CAL. CIV. PROC. CODE § 410.10 (West Supp. 1985) (authorizes jurisdiction "on any basis not inconsistent with the constitution of this state or of the United States").

113. Interview with Carol Cole, *supra* note 87.

114. *Id.*

115. *Id.*

116. 411 F. Supp. 1174 (D. Kan. 1976).

contacts with Kansas involved sending a letter to Peebles in Kansas and receiving telephone calls from Peebles while Peebles was in the state.[117]

An additional complication in a manager's foreseeing which courts will obtain jurisdiction over him is the disparity of judicial decisions among forums. In *Zwirn v. Galento*,[118] a manager, pursuant to an employment contract negotiated and executed in New York, procured a fight in New Jersey for his employee/boxer. The contract was declared unenforceable as to boxing matches performed in New York since the manager had failed to comply with New York Athletic Commission requirements. However, the same contract was deemed valid and enforceable as to out-of-state matches that did not violate another state's laws. In contrast, the court in *Foreman v. George Foreman Associates*[119] vitiated a contract which violated California law even though the contract was to be performed outside of California.

The parties to a management contract should be aware that the laws and regulations of several states may apply to them. Therefore, the law which controls the relationship between the parties is dependant both upon the clauses within their contracts and the contacts the parties have with various states.

F. Union Regulation

If a personal manager is required to obtain a state license as a talent agent, a union may require that he obtain a franchise in order that they, the union, may also regulate the manager as an agent. The American Federation of Musicians (AF of M), the Screen Actors Guild (SAG), the American Federation of Television and Radio Artists (AFTRA), the American Guild of Variety Artists, the Writer's Guild of America, and the various sports unions, enforce requirements designed to protect their membership.

The constitutions of the first three guilds will be examined here as their memberships comprise the majority of those serviced by personal managers. It should be noted that the dilemma present in the California Talent Agency Act as to what exactly constitutes procuring employment is also present within union regulation. All three guilds indicate a desire to regulate general procurement activities but the question remains as to what activities trigger labeling the personal manager as a procurer of employment.

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117. *Id.*
118. 288 N.Y. 428, 43 N.E.2d 474 (1942).
119. 389 F. Supp. 1308 (N.D. Cal. 1974), *aff'd*, 517 F.2d 354 (9th Cir. 1975).

The AFTRA constitution expresses in general terms a desire to regulate the practices of agents and managers concerning grievances, standard contractual relations and all related and collateral abuses that may affect the welfare of its membership.[120] The union may order members to refrain from dealing with a given personal manager if such person has been found to have been injurious to its membership.[121]

The SAG constitution expresses the same intentions but is more precise in describing the type of manager that will be subject to its regulations.[122] The personal manager will only be regulated if he solicits employment for others in motion pictures or otherwise holds himself out as an agent.[123]

The AF of M has indicated a desire to regulate the personal manager.[124] Its constitution prescribes regulation of activities usually engaged in by booking agents.[125] If applied broadly, it "can

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120. *See* ARTICLES OF AGREEMENT AND CONSTITUTION OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (July 23, 1981) [hereinafter cited as AFTRA CONST.

121. *Id.* Art. XII at 20.

122. *See* SCREEN ACTORS GUILD, AGENCY REGULATIONS, Rule 16(f) § 1 (July 31, 1968). This rule provides in part:

> C. Artist's Manager or Agent is a person . . . who or which offers to or does represent, act as the representative of, negotiate for, procure employment for, counsel or advise any member of the SAG in and about and in connection with or relating to his employment or professional career as an actor in the production of motion pictures. The terms "agent" and "artist's manager," as used herein, are synonymous.
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> . . . .
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> F. Business manager is a person . . . whose services . . . are limited to the giving of financial advise or management of financial affairs. A business manager shall not be deemed an agent within the scope of these regulations if . . . such person . . . does not otherwise engage in the business of an agent . . . .
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> . . . .
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> G. An attorney-at-law, who performs services . . . shall not be deemed an agent unless such services include solicitation of employment in motion pictures for the member, or the attorney holds himself out as an agent . . . .
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> . . . .
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> S. A personal manager is a person . . . whose services are limited to counseling and advising . . . about and in connection with his professional career as an actor. A personal manager who performs services for a member of SAG shall not be deemed to be an agent unless such services include solicitation of employment in motion pictures for a member, or the personal manager holds himself out as an agent . . . .

Id.

123. *Id.*

124. *See generally* CONSTITUTION AND BY-LAWS OF THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (Sept. 15, 1981).

125. *Id.* Art. 23, §§ 1, 2. Section one provides: "It is the policy of the AF of M to assist its members in securing the services of fair, honest, and scrupulous booking agents, and to

encompass regulation of the personal manager."[126] Any personal manager who procures employment for musicians is classified as a booking agent "if he does so without the assistance of an agent."[127] "An attorney who reviews an artist's contract and works on a commission basis rather than a fee basis may also be considered an agent."[128]

A personal manager who is deemed by the guilds to be soliciting or procuring employment may be required to obtain a franchise thereby subjecting himself to union regulation. Union members will be forced to forbear from contracting with any non-franchised managers who have been required by the union to become franchised. Once a manager is franchised, union regulation will control the terms of agreements and contractual relationships with union members.[129] Regulations, such as those limiting the amount of compensation a manager can draw, have a substantial impact on personal managers.

G. ABA Regulation

A substantial advantage in utilizing an attorney as a personal manager is that the attorney must act in accordance with a strict code of ethics.[130] The American Bar Association (ABA) influences the conduct of attorneys through its code of Professional Responsibility (Code). "The disciplinary rules [of the Code] state the minimum level of conflict below which no lawyer can fall without being subject to disciplinary action."[131] The canons within which the disciplinary rules lie are enforceable by the courts, and respected by the members of the Bar.[132] Although the Code cannot control actions by non-lawyers, it has an effect on the personal management profession because many managers are lawyers. The personal management field is virtually void of any other codified ethical standards.[133]

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protect its members against unfair dealing by persons serving in such capacity . . . ." *Id.*

126. Telephone interview with Jerry Zilbert, Assistant to the President of AF of M and Director of the California office (Sept. 9, 1982).

127. *Id.*

128. *Id.*

129. *See, e.g.*, AFTRA CONST. Art. XII.

130. *See generally* MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1983).

131. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement at App. A-7 (1980).

132. *See In Re* Meeker, 76 N.M. 354, 357, 414 P.2d 862, 869, *appeal dismissed*, 385 U.S. 449 (1966).

133. *See* B. WOOLF, BEHIND CLOSED DOORS 56 (1976). "The opportunities for compromising one's integrity are endless in sports [and entertainment] and growing worse." *Id.*

The ABA Code has been adopted with only minor revisions in the majority of states.[134] Where a violation of the disciplinary rules has occurred, "measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant."[135]

The following is a list of disciplinary rules pertinent to the control of the lawyer/personal manager. The lawyer must never engage in any conduct involving dishonesty, fraud, deceit, or misrepresentation.[136] The lawyer is prohibited from giving anything of value to induce employment.[137] The lawyer cannot charge or collect an illegal or clearly excessive fee.[138] A lawyer who is engaged in both the practice of law and personal management cannot indicate so on his legal letterhead.[139] The lawyer must preserve all confidential communications with his client.[140] The lawyer may be prohibited from representing clients with whom his interests conflict.[141] The lawyer is prohibited from handling legal matters which he knows or should know he is not competent to handle, unless he associates with a lawyer who is competent to handle the matter.[142] The lawyer must manage the funds of the client with due care.[143] The lawyer is restricted from accepting employment if the exercise of professional judgment will be affected by his own financial, business property, or personal interests, unless he has the well-informed consent of his client.[144]

Although the activities of a lawyer acting in the role of a personal manager may be difficult to bring within the ABA Code, the threat of disciplining action is a deterrence. The ABA Code can also reach the activities of the employees or associates of the lawyer/personal manager.[145]

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134. ABA Comm. on Professional Ethics & Grievances, Informal Op. 1420 (1978).

135. *See* Note, *Disbarment: No Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 495 (1958).

136. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(4) (1979). [hereinafter cited by DR section].

137. DR 2-103(B).

138. DR 2-106(A) and (B).

139. DR 2-102.

140. DR 4-101.

141. DR 5-105(A).

142. DR 6-101(A)(1).

143. DR 9-102(A) and (B).

144. DR 5-101 and 5-105(C).

145. *Id.*

H. Trade Organizations

There are two trade organizations that have been established to regulate the ethics and improve the standards of athletic and entertainment representation. The Association of Representatives of Professional Athletes and the Conference of Personal Managers have both adopted their own standards.[146]

These organizations, however, are composed of voluntary members. The rules promulgated and rules suggested by them are therefore not binding or effective as to non-members. In fact, enforcement against any injurious activity of members cannot truly be expected since this would induce members to rescind their membership. The existence of the organizations indicates a need to monitor the practicing members of this trade.

I. NCAA Regulations

The National Collegiate Athletic Association (NCAA) regulates all collegiate agent-athlete relationships. The NCAA regulations state that any athlete who enters into an agreement of representation with an agent is ineligible to compete in NCAA sanctioned events.[147] The policy behind this apparently harsh regulation is to discourage the business representation of athletes who have not yet completed their education. The majority of college athletes that retain business managers, however, circumvent the regulations by simply keeping the relationship secret.[148] Further, since the NCAA has no regulatory authority over athletes not in college, it cannot control the legal relationships between non-college athletes and sports agents or personal representatives. This leaves serious legal and ethical problems regarding the professional athlete and his representative as yet unresolved.

J. Security Regulation

Certain state and federal laws reach the activities of those personal or business managers who choose to advise their client in the area of investment planning. A manager who holds himself out as an investment advisor implies that he has the necessary knowledge

146. "A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client." A.R.P.A. CODE OF ETHICS (1979).

147. NCAA CONST. Art. III § 1(C) (1985).

148. *See* Johnson & Reid, *Some Offers They Couldn't Refuse*, SPORTS ILLUSTRATED, May 21, 1979, at 28-30.

and expertise to command a reasonable fee. Even if the manager only screens out the unwise investment recommendations that might reach his client, he may be required by law to register as an investment advisor.[149] Federal securities law, however, only requires those managers that fall within the strict definition of "investment advisor" to register on the federal level.[150] Also, isolated transactions, which are only incidental to the main purpose of the management contract, may not require registration.

K. Federal Laws Generally

With the exception of the securities and tax laws, there are no specific regulations at the federal level concerning the personal manager. Many other countries, however, have enacted such laws. In England, for example, the Employment Agencies Act of 1973 requires anyone in the occupation of entertainment manage to be licensed.[151] In addition, under English law there is a maximum number of clients that a manager may represent at one time.[152] For obvious reasons, it is wise to consult counsel whenever contemplating an international transaction in this field.

L. Conclusion

As described above, there are laws already in place which restrict the conduct of personal managers.[153] Recent history has shown, however, that these laws are inadequate to fully protect those entertainers or athletes who, as a result of mismanagement, have incurred financial damages.[154]

The legislatures of several states have recognized these legal inadequacies and have enacted remedial statutes. California and New York have a vested interest in the regulation of personal managers and have a duty to assume a position of leadership regarding

149. *See* SEC v. Wall Street Transcript Co., 454 F. Supp. 559 (S.D.N.Y. 1978).

150. *See* Investment Advisors Act of 1940, § 80b-3(b)(3) (codified as amended 15 U.S.C. § 80b-3(b) (1982)). This section provides: "[A]ny investment advisor who during the course of the preceding 12 months has had fewer than 15 clients and who would neither hold himself out generally to the public as an investment advisor nor acts as an investment advisor to any investment company" shall not have to register. *Id.*

151. *See* COTTERAL, SECURITIES REGULATION 361 (1971).

152. J. YOUNG & S. YOUNG, SUCCEEDING IN THE BIG WORLD OF MUSIC, 276 (1977). The lawmakers felt that the personal manager role should be so time consuming, if done properly, that they have limited the number of clients a personal manager can take to three. *Id.*

153. *See supra* notes 87-107 and accompanying text.

154. *Id.*

future legislation. To some extent, they have assumed this duty.[155] In fact, the California legislature is currently studying to improve their existing laws.[156] The California Talent Agencies Act and Sports Agency Act are pioneer statutes in the regulation of personal managers and sports agents. The Acts impose a licensing requirement to protect athletes and entertainers from unqualified representatives. The Acts also regulate those agents already licensed.[157] Anyone who violates these laws may suffer sanctions or license revocation.

Unfortunately, in some areas the California statutes fail to fulfill their purpose. Absent from either act is any proscription for violations of the fiduciary duties owed to the client by the personal manager.[158] Agency law may already hold personal managers to a fiduciary duty, but ideally, this duty should be incorporated into a statutory framework. The *Buchwald*[159] case illustrates the vulnerability of entertainers and athletes. A clearly defined statute would provide the client with the legal protection needed to safeguard them from mismanagement.

Presently, an entertainer or athlete who selects an unlicensed personal manager is entrusting his career to someone who may or may not be qualified. A better route would be to secure an attorney as a personal manager. An attorney who operates as a personal manager, whether licensed or not, is bound to the standards set by the American Bar Association.[160] The ABA Code deters mismanagement and provides remedies to aggrieved clients.[161]

To fill the gaping holes present in state regulation, California should enact a personal manager code. New York should follow California's example. Innocent and competent personal managers are injured by the mismanagement of a few unqualified managers. Some entertainers have utilized laws like the Talent Agencies Act to void personal management agreements even for minor violations.[162] Any violation by a licensed personal manager can trigger

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155. *Id.*

156. CAL. LAB. CODE §§ 1701-04 (West 1982).

157. Buchwald v. Superior Court, 254 Cal. App. 2d 350, 351, 62 Cal. Rptr. 364, 365 (1967).

158. *See* Charles, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 HASTINGS COMMUNICATIONS & ENTER. L. J. 364 (1978).

159. Buchwald v. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (1967).

160. *See supra* notes 131-46 and accompany text.

161. *Id.*

162. *See* Johnson and Lang, *The Personal Manager in California Entertainment Industry*, 52 So. CAL. L. REV. 375, 389-91 (1979). "With one exception in every case where the personal manager was found to have violated the act, the management agreement has been

the power of the California Labor Commissioner to declare a management agreement void.[163] Artists deserve protection, but not, certainly at the expense of equally innocent parties.[164] Any new statute should be more specific as to the degree of culpability needed to trigger the most severe sanctions. A personal manager needs an enforceable contract, not a contract which is simply conditioned upon vaguely defined statutory behavior and the whims of the artist. "Is it not a greater crime to use the vagaries of California law to rip from a person the vestiges of his or her livelihood?"[165]

The Talent Agencies Act creates a perplexing problem. The personal manager who procures employment is required to obtain a license as a talent agent. Upon obtaining the license, this same personal manager, under the title of "talent agent," may then be required to obtain a franchise from labor unions.[166] The unions can then additionally regulate the personal manager and possibly limit his compensation. Any new law should avoid describing a personal manager as a talent agent. They are separate professions and should be regulated as such.

The present regulations fail to define and enforce the fiduciary relationship between the manager and his client. Disciplinary rules similar to those present in the ABA code could be developed to outline this fiduciary duty and to provide sanctions for breach of that duty. The specific purpose of the statute should be outlined in detail to give direction to judges and arbitrators. Also, the statute should indicate how it is to be applied to non-domiciliaries, because management agreements almost invariably involve interstate transactions and are therefore subject to the laws of several jurisdictions. California and New York, especially, have an obligation to clarify this jurisdictional problem, because a personal manager is likely to have business contacts with those states, regardless of his state of domicile.

Also, any new regulation should recognize that the personal manager sometimes must secure employment, and in doing so, is not acting adverse to the interest of the state or his client. The limits of procurement activity should be more clearly defined.

Personal managers need to form a strong lobby—one that can

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voided by the Labor Commissioner." *Id.* at 391, n.97.

163. *Id.* at 391-93.

164. Phillips, *Ripping off Management Ties*, BILLBOARD, Apr. 17, 1982, at 14.

165. *Id.*

166. *See supra* notes 86-87 and accompanying text.

correct the present regulations. Now is the time to get organized. The study that is underway in California will be a controlling factor in future regulation. Leadership from within the entertainment and sports industries must guide the legislative process.

Most personal managers will openly oppose any concrete regulations, but as the existence of trade associations indicates, the rules are sorely needed. The present lack of statutory protection over personal representation of entertainers and athletes forces these talented individuals to endure needless hardships.

The personal manager, presently, need only put forth a competent and good faith effort to properly manage the athlete or entertainer. The importance of choosing the proper personal manager and drafting a sufficient management agreement cannot be overemphasized. Luck, chance, and disaster affect personal management as they affect all human endeavors. But the fates never build a successful career. Prosperity comes to those who find and exploit potential. Mere talent is not enough in order to become financially successful in today's sports and entertainment industries. It takes meticulous planning and careful execution to be successful. The personal manager, while sometimes taken for granted, can often be the key to such success. Because there is a limited time to achieve success, it is important to have guidance from the beginning of a career, before opportunity has passed.

Finally, one should try to obtain a personal manager who can counsel and advise the client toward financial success without alienating the client by treating him like a commodity. Such alienation, if it occurs, can deaden the essence of the artist's creativity, or distract the concentration of the athlete, until what was once unique and exciting, fades into the common and mundane.