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# A Contested Ascendancy: Problems with Personal Managers Acting as Producers

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## I. INTRODUCTION: THE FAULT LINES IN HOLLYWOOD

*A long-feared unholy war between managers and agents is a growing possibility.*[1]

*This [Shandling and Grey] split underscores the unique dynamic that can result when talent representatives become more powerful than the artists they represent.*[2]

Finding work in the entertainment industry has been a demoralizing endeavor for aspiring artists ever since Hollywood's earliest years.[3] Indeed, the vast majority of young hopefuls find that enlisting someone to help them procure work is a difficult task in its own right.[4] The role of talent agents—to secure paying opportunities for artists—has evolved to the extent that agents are now a luxury only the most successful artists can afford.[5] The first helpful person an actor will meet in Hollywood, if the actor is lucky, will most likely be a personal manager.[6] When a manager sees a glimmer of potential in a young artist, the manager will attempt to nurture that fresh talent and work with the actor to build a mutually beneficial career in show business.

Managers have long been considered junior peers to the more noble talent agents in the entertainment aristocracy because of the untidy nature of their *in loco parentis* relationship with many artists.[7] Enrolling clients in dance lessons and cleaning up drug-riddled actors is a far less glamorous job than negotiating employment contracts for millions of dollars.[8] The reputational disparity between managers and agents has long been reflected in the relative cachet of the tables each landed at The Palm. In recent

1. Chris Petrikin, *Rival Reps Ready to Rumble*, VARIETY, Oct. 12–18, 1998, at 1 [hereinafter *Rival Reps*].

2. Claudia Eller & Brian Lowry, *Bitter Shandling-Grey Break-Up Strikes a Nerve in Hollywood*, L.A. TIMES, Jan. 23, 1998, at D1.

3. *See, e.g.*, M.K. LEWIS & ROSEMARY R. LEWIS, YOUR FILM ACTING CAREER: HOW TO BREAK INTO THE MOVIES & TV & SURVIVE IN HOLLYWOOD 5–7 (3d ed. 1993).

4. *See, e.g.*, Kim Masters, *Star Wars*, VANITY FAIR, April 1999, at 160 [hereinafter *Star Wars*].

5. *See* Telephone Interview with Mike Macari, Talent Agent, United Talent Agency (Mar. 29, 1999).

6. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

7. *See Star Wars*, *supra* note 4, at 156.

8. *See id.* (describing the efforts of long-time manager Phyllis Carlyle to rehabilitate Melanie Griffith before an audition).

years, however, talent agents have seen much of the sheen of their occupation dulled by the encroachment of lawyers and managers upon their traditional domain.[9] Managers have enjoyed a corresponding ascendancy as they have expanded their fiefdoms into increasingly powerful empires by wielding their unique power ability to own and produce the shows of their clients, which by law, agents cannot do.[10]

Perhaps no single development has signaled the new puissance of personal management more than the formation of Artists Management Group ("AMG") by erstwhile superagent Michael Ovitz.[11] After founding the "mothership" of all talent concerns, Creative Artists Agency ("CAA"), Ovitz resigned at the zenith of his power to take a second-in-command position at the Disney Corporation.[12] Fourteen months and one ignominious termination later, Ovitz seemed banished to the hinterlands of Hollywood.[13] Two years later in November 1998, however, he announced his return to the fray, not as an agent, but as a manager.[14] By stamping his imprimatur on the management business, Ovitz plundered the major talent agencies for clients[15] and managers, thrusting the prominence of personal managers to the front pages of industry publications and beyond.[16]

The power and eminence that managers now possess has not come without a cost. The din of complaints about their mode of business has risen to a cacophony on the front pages of *Variety* and the *Hollywood Reporter*.[17] Because managers are now so much in the sun,[18] new light is

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9. *See* Peter Bart, *Agentosaurus Rex*, GQ, Jan. 1999, at 55, 58 (predicting that the increasing influence of managers and lawyers may make this once dominant Hollywood species irrelevant); *see also* James Bates & Claudia Eller, *Ovitz, Kuehl Rocking Boat for Agents, Managers*, L.A. TIMES, Feb. 23, 1999, at C1 (reporting the recent threats posed to agents by Michael Ovitz's new management firm, Artists Management Group ("AMG"), and Assemblywoman Sheila Kuehl's newly introduced legislation).

10. *See generally* Fred Jelin, *The Personal Manager Controversy: Carving the Turf, in* COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 473 (PLI Pat., Copyrights, Trademarks and Literary Prop. Course Handbook Series No. G-359, 1993) (identifying the economic and legal freedoms enjoyed by managers).

11. *See* Stephen Galloway, *Mike the Manager*, HOLLYWOOD REP., Dec. 8–14, 1998, at 14 (announcing Ovitz's new entrepreneurial venture into the personal management business).

12. *See Star Wars*, *supra* note 4, at 160.

13. *See id.*

14. *See* Corie Brown, *Managing Hollywood*, NEWSWEEK, Nov. 30, 1998, at 40.

15. *See* Chris Petrikin, *Williams, Marshall, Joining Ovitz Stable*, DAILY VARIETY, Jan. 21, 1999, at 1; Frank Rose, *Hide Your Clients! Mike Ovitz Returns to L.A.*, FORTUNE, Mar. 1, 1999, at 44.

16. *See* Kim Masters, *Comeback Kid?*, TIME, Nov. 30, 1998, at 112.

17. *See, e.g.*, Zorianna Kit, *Target: Over-Produced Films*, HOLLYWOOD REP., Mar. 29, 1999, at 4, 28 (describing the problem of managers demanding producing credits on films which they have added no value, thereby diluting the value of credits earned by producers actually performing the traditional tasks of a producer); Chris Petrikin, *Percent Dissent Foments*, DAILY

being shone upon their practice of producing their clients' television shows and films. Unlike talent agents, who are prohibited by law from owning any portion of the work performed by their clients,[19] personal managers may acquire a financial interest in clients' products and thereby participate in the lucrative upside of successful entertainment ventures. Nevertheless, when a personal manager simultaneously acts as an artist's representative and as a functionary of that artist's employer, conflicts of interest loom.[20]

These conflicts have been vividly highlighted by a recently settled lawsuit in which critically acclaimed comedian Garry Shandling sued his former friend and manager,[21] Brad Grey, for one hundred million dollars.[22] Shandling claimed that Grey had breached a host of fiduciary duties.[23] Shandling alleged that Grey had divided his loyalties between Shandling and Grey's own financial interests in the Shandling show he produced, *The Larry Sanders Show*.[24] This litigation illustrates a myriad of problems artists may face when managers produce their artists' works.[25] In combination with this lawsuit, the high profile Ovitz is casting a spotlight on the trade that many managers find unwelcome.[26]

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VARIETY, Oct. 16, 1998, at 1 [hereinafter *Percent*] (reporting the growing annoyance of talent agents with the proliferation of managers procuring employment for artists).

18. *See generally* Kit, *supra* note 17. The changes taking place in the entertainment industry's landscape are being reported well beyond the confines of trade publications. Many national publications, with a variety of target audiences, have also published accounts of this trend. *See, e.g.*, Bart, *supra* note 9, at 55; John Mankiewicz, *Fax From Los Angeles*, NEW YORKER, Mar. 15, 1999, at 34; *Star Wars*, *supra* note 4, at 154.

19. *See generally Star Wars*, *supra* note 4.

20. *See generally* Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest In the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501 (1991) (providing a detailed account of the conflicts of interest that may proliferate between managers and their clients in the music industry and referring to similar phenomena in the entertainment business).

21. Attorneys for Shandling contend that these types of conflicts occurred in the relationship between Grey and Shandling. *See* Telephone Interview with Larry Silverman, Attorney for Garry Shandling (Feb. 10, 1999). Even if these conflicts did not occur, however, the arguments asserted on both sides of the litigation illustrate conflicts to which the profession is vulnerable, and which may very well occur in the relationships between other personal managers and their clients.

22. *See* Brian Lowry, *Garry Shandling Sues Ex-Manager for $100 Million*, L.A. TIMES, JAN. 16, 1998, at D1 (reporting the legal aspects of the newly filed lawsuit).

23. The plaintiffs' causes of action in this suit include breach of fiduciary duty, breach of contract, equitable relief and accounting, rescission, fraud, negligent misrepresentation, and breach of partnership agreement. Amended Complaint, Shandling v. Grey, BC 184316 (Cal. Super. Ct. filed June 23, 1998).

24. *See* Jonathan Davies, *Shandling, Grey Attorneys Spar*, HOLLYWOOD REP., Mar. 12, 1998, at 3, 63 (detailing the contours of the lawsuit).

25. *See Gloves Are Off in Split with Manager*, USA TODAY, Mar. 13, 1998, at 3D.

26. *See Star Wars*, *supra* note 4, at 170.

As the Shandling litigation marched toward trial in the summer of 1999[27] and Ovitz publicly wrestled with his former colleagues at CAA, another development added yet more fuel to this industry conflagration.[28] California State Assemblywoman Sheila Kuehl grew tired of "scam artists"[29] posing as talent managers to defraud would-be child actors and others with fly-by-night operations.[30] In an effort to remedy the problem, she introduced a bill in the California legislature that purported to subject managers to regulations similar to those currently imposed on talent agents.[31]

While talent agents would be happy to see managers lose their highly coveted ability to produce shows, few of them applaud the prospect of state lawmakers dabbling in regulations governing the business of artists' representation.[32] If the Assembly's investigation of the management business expands to the closely related craft of agenting, a blunt legislative parang could ravage agents as well.[33] Agents themselves enjoy the highly profitable right to receive "packaging fees"[34] from studios for herding their clients into tidy bundles for specific projects. Agents would dearly hate to lose that source of income under broad new legislation.[35] Managers, of course, were extremely concerned with Kuehl's legislation and quickly

27. *See* Telephone Interview with Peter Haviland, Attorney for Garry Shandling (Feb. 10, 1999).

28. *See* Sharon Waxman, *Hollywood's Latest Thriller: The Return of Ovitz*, WASH. POST, Jan. 26, 1999, at C7 (describing the confluence of events occurring in Los Angeles that transpired to elevate this issue to an especially high profile).

29. Kirk Honeycutt, *Managers Bill Is Put in Play*, HOLLYWOOD REP., Feb. 26–28, 1999, at 3.

30. *See id.*; *see also* Telephone Interviews with Bethany Aseltine, Legislative Assistant to Assemblywoman Kuehl (Jan. 26, 1999 & Apr. 13, 1999) (providing background on Kuehl's motivations for proposing her bill to regulate personal managers).

31. *See* A.B. 884, 1999–2000 Reg. Sess. (Cal. 1999) (as amended on Apr. 26, 1999) (recommending changes to the currently existing Talent Agencies Act that would broaden that Act's scope to include personal managers and subject them to many similar regulations); Kirk Honeycutt, *Managers Bill Is Put in Play*, HOLLYWOOD REP., Feb. 26–28, 1999, at 3, 113 (reporting Kuehl's introduction of her new legislation).

32. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999) (outlining the perspectives of many talent agents on the legislative developments aimed at personal managers).

33. *See id.*

34. *Star Wars*, *supra* note 4, at 160.

35. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

formed a professional coalition to deal effectively and cohesively with the proposal.[36]

The personal management profession is currently the hottest topic of discussion with the Los Angeles entertainment business[37] and is unlikely to proceed unregulated for much longer. All sides weighed in on the debate, and the California State Assembly fired up the legislative locomotive.[38] As lawmakers begin to consider establishing new rules for the personal manager, they will need to consider the variety of options before them. They must also decide whether any legislation is needed in an area where the "perpetrators" are wildly prosperous representatives and the "victims" are their equally successful celebrities.

This Article argues that the most appropriate response to this situation is for the entertainment guilds to use their strategic position in the industry to oversee personal managers and to regulate the degree to which those managers can act as producers.[39] Correspondingly, state lawmakers should resist the temptation to embroil themselves in a fracas amongst powerful and wealthy businesspersons, by rejecting any attempt to levy blunt regulations upon the entertainment industry.[40] The power of unions will fill the informational gaps that afflict an otherwise capable regime of free contract and common law remedies.[41] The problems accented in the Shandling litigation, for example, can be handled adequately by the common law causes of action the plaintiffs deployed.[42] State lawmakers should defer to collective bargainers to tune this market, which suffers only from informational disparities. Wealthy participants are capable of bargaining freely for what they want by using common law remedies to protect themselves against managers' transgressions.[43]

Part II provides an overview of the traditional roles of managers and talent agents and the distinct regulatory schemes governing the two groups. Section A focuses on talent agents and the specific services they provide to their clients as they procure employment opportunities and negotiate contractual terms. Section B provides an analogous explanation of personal managers and further explores the roles they play through a

36. *See* Stephen Galloway & Anita M. Busch, *Managers Get Together for Key Strategy Session*, HOLLYWOOD REP., Feb. 19–21, 1999, at 1; Chris Petrikin, *Managers Unite to Fight Measures*, DAILY VARIETY, Feb. 22, 1999, at 5.

37. *See supra* note 17 and accompanying text.

38. *See supra* note 29 and accompanying text.

39. *See* discussion *infra* Part IV.

40. *See* discussion *infra* Part IV.A.

41. *See* discussion *infra* Part IV.B.2.a.

42. *See* discussion *infra* Part III.B.

43. *See* discussion *infra* Part V.

description of the contracts they negotiate with artists. Section C outlines the restrictions of the Talent Agent Act ("TAA") and other legal precepts governing agents and their legislative histories. Section D provides a glimpse of the private law governing agents and the way in which the entertainment guilds mediate the business relationship between agents and their clients. Finally, Section E recounts the way in which personal managers have escaped regulation by both public laws and private agreements.

Building upon the legal and historical foundation discussed in Part II, Part III illustrates why the vocation of personal management has been catapulted to the center of the entertainment industry's consciousness in recent years. The public war between Michael Ovitz and his detractors over the birth of AMG—a central ingredient of the imbroglio—is detailed in Section A. Section A also describes the task of producing and why this enterprise has recently proliferated in Hollywood. To provide a study of the conflicts of interest created when managers act as producers, Section B recounts the heated litigation between Shandling and Grey that recently took place in a Los Angeles Superior Court. Section C identifies many of the sharpest criticisms currently being leveled against managers as they produce an increasing number of their clients' projects.

Part IV explores a variety of possible solutions to the complaints against managers. Section A covers the options provided by public law, such as the proposal to regulate managers introduced in Sacramento by Assemblywoman Sheila Kuehl, and the ramifications of expanding Kuehl's proposal in order to ban producing by managers. Ultimately, Section A rejects legislation as a viable solution to the conflicts of interest because of its blunt and inflexible application to the artist representation industry, as well as its political feasibility. Finally, Section B argues that the optimal solution to this problem is a combination of two private law tools: contract and guild regulations. This section explores the informational limitations of the current market in artist representation, but concludes that the exceptional wealth of both groups of participants in this market and their ability to proceed without the state's intervention militate in favor of a primarily private solution. The limitations of absolute laissez-faire can be overcome by invoking the untapped resources of contract's private law sibling, collective bargaining agreements. The entertainment unions are in a better position than state legislatures to determine optimal guidelines for managers and their clients. The guilds can impose these guidelines through their negotiations with all ancillary entertainment professionals, including agents and managers.

Part V presents conclusions that build upon the arguments developed in Part IV. Although the entertainment industry may not have been profoundly altered by the consequences of the Shandling litigation, this litigation has highlighted problems in the industry. The effects of these problems can be modulated by the preemptive actions of private actors. Guilds can no longer afford to abdicate the duty they owe their members and must act to provide artists the necessary information to combat the risks they face from managers who produce. Guilds should also flex the power of their ability to promulgate their own regulations, which are far more tailored and responsive than the clumsy implements of the legislature.

## II. THE REGULATORY SCHEME GOVERNING MANAGERS AND AGENTS

*Agents have regarded most managers as gum on their shoes .... [M]anagers see agents as vultures that swoop in once the managers have worked their magic.*[44]

Los Angeles has, for many decades, been fertile ground for a diverse crop of professionals who seek to serve as attendants to the stars.[45] The business of being a celebrity has metastasized to such a degree that many entertainers now rely upon intermediaries to handle myriad tasks—among them, procuring employment, advising clients about career choices, investing personal monies and providing legal representation.[46] The typical stable for a major entertainment luminary includes a talent agent, a personal manager, a business manager and a lawyer, each of whom may exact a percentage of the client's income.[47] To represent the entertainer effectively, these professionals must work harmoniously to coordinate their efforts on the client's behalf.[48] Recent temblors in Hollywood tectonics, however, have generated friction between two of the dominant masses of representatives: talent agents and personal managers.[49]

While the formal titles and many of the tasks of these entertainment representatives vary, the primary function of each group is to create and

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44. *Star Wars*, *supra* note 4, at 156.

45. *See* PAUL C. WEILER, ENTERTAINMENT, MEDIA AND THE LAW: TEXT, CASES, PROBLEMS 691–95 (1997) (explaining the functions, historical background and legal framework of several players in the entertainment industry).

46. *See id.* at 691–92.

47. *See id.*

48. *See id.* at 692.

49. *See, e.g.*, Josh Chetwynd, *Ovitz, CAA Keep Firing in Talent Turf War*, USA TODAY, Mar. 3, 1999, at 4D; Stephen Galloway, *War's Declared: All Ovitz and CAA Share Is Hostility*, HOLLYWOOD REP., Jan. 26–Feb. 1 1999, at 4, 90; *see also Rival Reps*, *supra* note 1, at 1.

maintain a successful career for their clients. Consequently, a great deal of their work overlaps.[50] The law governing the professional activities of these representatives attempts to parse their roles and to regulate them based upon those distinctions. The difficulty of performing this task clinically has resulted in a lack of true legal differentiation amongst representatives and a corresponding degree of disenchantment in the industry.[51] In the case of talent agents and personal managers, the extensive blurring of lines between their functions has created a growing brawl that is regularly featured on the front pages of entertainment trade publications.[52]

### *A. Talent Agents*

A talent agent's primary role is to procure employment for artists by marketing the artists' talents throughout the entertainment industry.[53] This task is the oldest form of entertainer representation and dates back to the formation of the William Morris Agency ("WMA") in *fin-de-siècle* New York City.[54] In the past century, talent agencies have evolved to dominate the industry to such a degree that the major players—Creative Artists Agency ("CAA"), International Creative Management ("ICM"), United Talent Agency ("UTA") and WMA—are now recognized beyond the entertainment industry. Each of these houses reaps as much as ten percent of all the fees earned by their thousands of celebrity clients.[55] Agents also earn extremely lucrative "packaging fees" for assembling teams of artists—such as a producer, director, actor and writer—and selling these packages to studios that underwrite the entire production.[56]

#### 1. The Role of a Talent Agent

A roster of high-profile clients is the key to success as a talent agent.[57] The efforts an agent expends in finding employment for an artist pay off

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50. *See* WEILER, *supra* note 45, at 692.

51. *See* Erik B. Atzbach, *Drawing the Line Between Personal Managers and Talent Agents:* Waisbren v. Peppercorn, 4 UCLA ENT. L. REV. 81, 82–83 (1996).

52. *See Percent*, *supra* note 17, at 1.

53. *See* Telephone Interview with Mike Macari, Talent Agent, United Talent Agency (Mar. 29, 1999).

54. *See* WEILER, *supra* note 45, at 692; Robert Hofler, *B'way Biz Buzzes On*, DAILY VARIETY, Oct. 20, 1998, at 5.

55. *See* Telephone Interview with Dan Cox, Reporter, *Variety* (Jan. 26, 1999).

56. *See Star Wars*, *supra* note 4, at 160.

57. *See* Telephone Interview with Sheldon Sroloff, Talent Agent, Creative Artists Agency (Jan. 27, 1999).

only when the client is in demand from entertainment purveyors.[58] These labors require agents to build and maintain elaborate databases of industry contacts, to execute complex business negotiations and to service the overhead costs of expensive office space.[59] Because agents subsist by tithing their clients, these clients must earn substantial sums in order to cover their representatives' expenses. Profitability for talent agents, therefore, typically comes from representing established artists. As a result, an agent will rarely, if ever, agree to work for an unknown, aspiring client.[60]

Agents address their precarious position of eating only when their clients feast in other ways as well. In the typical contract between a talent agent and a client, the agent demands exclusivity and universality.[61] That is, the agent aims to capture the right to be the client's exclusive talent agent and represent the client in all forms of entertainment.[62] The universality clause guarantees the agent will receive a percentage of the client's total income.[63] Although superstars occasionally receive job offers without an agent's assistance, most artists rely heavily on agents to find them employment. As a result, the contract between the talent agent and the artist cements the symbiotic relationship between the two parties.

Talent agents assert that their hefty fees are justified by the skills they bring to their clients, such as the ability to mediate between buyers and sellers of talent.[64] First and foremost, skilled agents have access to a great deal of parties interested in hiring artists.[65] Agents must maintain good relationships with individuals financially capable of hiring artists in order to procure engagements for clients. Another important asset of a successful agent is a finely calibrated knowledge of the market for particular artists.[66] This is crucial to negotiating the best possible deal.[67]

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58. *See id.*

59. *See id.*

60. *See* James M. O'Brien III, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Arists*, 80 CAL. L. REV. 471, 480 (1992).

61. *See id.* at 479; Heath B. Zarin, *The California Controversy Over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 936 (1997).

62. *See* O'Brien, *supra* note 60, at 479; Zarin, *supra* note 61, at 936.

63. *See* O'Brien, *supra* note 60, at 479; Zarin, *supra* note 61, at 936.

64. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

65. *See* O'Brien, *supra* note 60, at 471–85.

66. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

67. *Id.*

### 2. The Historical Background of Talent Agents

On October 20, 1898, William Morris, Sr. announced the opening of his talent agency by hanging a shingle at 105 East 14th Street in New York City, proclaiming "William Morris, Vaudeville Agent."[68] Vaudeville was the preeminent form of entertainment at the time and Morris quickly began representing such stars as Al Jolson, the Marx Brothers, Mae West and Charlie Chaplin.[69] Even as he forged his Vaudeville business, Morris recognized the form's impending demise and capitalized on the emerging potential of motion pictures by signing his stars to Hollywood's growing medium, the silent film.[70]

The emergence of television in the 1940's had a profound effect on the film industry.[71] Agencies such as WMA took advantage of the opportunities that emerged during this metamorphosis.[72] In pre-television Hollywood, studios were able to capitalize on the absence of other forms of entertainment.[73] Such a void created a buyer's market for studios vis-à-vis entertainers, forcing stars to sign long-term obligations.[74] The advent of television shifted negotiating clout back to actors and altered artistic contracts from long-term engagements to specific movie deals.[75] With this emasculation of film studios' power, agencies began to wield their power by packaging multiple artists.[76] The expansion of agencies into the packaging business generated a profitable new revenue stream and buttressed their central role in the entertainment industry.[77]

A concomitant factor in the entertainment industry's development occurred in the 1950's and 1960's, when the federal government mandated a breakup of the vertically integrated oligopoly endemic to the film studio system, in which one corporation owned interests in talent, production and

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68. *See* Robert Hofler, *B'way Biz Buzzes On*, DAILY VARIETY, Oct. 20, 1998, at 5.

69. *See* Robert Koehler, *Biggest Show on Earth: William Morris Celebrates Its Centennial*, DAILY VARIETY, Oct. 20, 1998, at 2; *William Morris Timeline*, DAILY VARIETY, Oct. 20, 1998, at 6.

70. *See* FRANK ROSE, THE AGENCY: WILLIAM MORRIS AGENCY AND THE HIDDEN HISTORY OF SHOW BUSINESS 13 (1995).

71. *See* WEILER, *supra* note 45, at 693.

72. *See* Koehler, *supra* note 69, at 5. One of the more impressive deals was struck by agent Johnny Hyde on behalf of Rita Hayworth. *Id.* Her contract with Columbia entitled her to 25% of her movies' net profits and script approval. *Id.*

73. *See* WEILER, *supra* note 45, at 693.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.* at 693.

distribution.[78] When the studios relinquished expensive talent in the wake of this mandated breakup, they lost the ability to coordinate the contracts of artists who possessed the skills necessary to produce a successful film or television series.[79] Only agencies could fill the vacuum for artists. Thus, WMA and other agencies put together lucrative packages for their stars, making this a financial influx and a "cash cow" for WMA.[80]

As the entertainment industry continued to evolve into a multifaceted medium, so too did the departments of talent agencies.[81] In addition to the mainstays of radio, theatrical and literary divisions, new groups developed to handle television, musical, motion picture and nightclub issues.[82] The WMA remained at the forefront, serving as the incubator for such entertainment giants as Barry Diller, David Geffen and Michael Ovitz.[83] The agency landscape changed dramatically in 1975, however, when Ovitz left WMA with his colleague Ron Meyer and three of their fellow agents to form their own firm, CAA.[84]

Under Ovitz's governance, CAA quickly emerged as the dominant talent agency in Hollywood.[85] Having built an expansive list of more than 1000 celebrity clients, CAA leveraged that asset into fruitful packaging deals. After several years of representing the highest profile artists in the business, Ovitz was anointed the "most powerful person" in Hollywood.[86] Ovitz gained a reputation for aggressive business tactics including accusations that he poached talent from rival agencies.[87] Influenced by Ovitz, the talent agency business reached its zenith in the mid-1990's before a series of events undercut the prominence of agents in the entertainment business.

One of these developments was the blow CAA suffered in 1995 when Ovitz resigned from the agency to serve as President of the Walt Disney Corporation, the studio's second-in-command under Chairman and CEO

78. *See* Koehler, *supra* note 69, at 5.

79. *See id.*

80. *See id.*

81. *See* ROSE, *supra* note 70, at 133–302.

82. *Id.*

83. *See generally* ROSE, *supra* note 70.

84. *See* WEILER, *supra* note 45, at 694.

85. *See* Bernard Weinraub, *After Ovitz: How Agency Hung Tough*, N.Y. TIMES, Feb. 8, 1999, at C1.

86. Tom King, *Hollywood Journal: Sticker Shock: The $25 Million Star*, WALL ST. J., Jan. 7, 2000, at W1.

87. *See* Weinraub, *supra* note 85.

Michael Eisner.[88] The agency's co-founder, Ron Meyer, had left CAA only one month earlier to become the President of MCA/Universal. Trade publications speculated effusively as to the consequences these moves would have on CAA and the industry in general. While nothing drastic occurred to topple agents from their lofty perches as Hollywood power players,[89] more and more cracks began to appear in their tower.

While Ovitz and Meyer were departing the profession, attorneys had already noticed the swelling coffers of entertainers and started to ply an increasingly diverse array of services to celebrities. In addition to representing clients in legal matters, many lawyers were called upon by artists to perform functions typically handled by agents, namely; employment contract negotiations.[90] Because lawyers at first charged hourly rates that amounted to far lower fees than agents, frugal artists took advantage of these bargains.[91] Many attorneys subsequently increased their fees to meet the industry's heightened demand. The expansion of options for artists seeking representation diluted the primacy agents once enjoyed in this area. Although talent agents still play a pivotal role in most employment deals in Hollywood, they are no longer the masters of the universe they were when Michael Ovitz and CAA dominated the entertainment business in the early 1990's.

Ovitz stands accused of upsetting much of the balance of power in the entertainment business in his bid to manipulate a celebrity culture. By turning his clients into superstars with massive salaries and participating in gross profits, he amassed tremendous power as the gatekeeper to the stars.[92] One commentator has theorized that Ovitz's strategy was financially successful. By accruing more power as a seller than any buyer, however, he "made himself the target of a great deal of fear and loathing."[93] His legacy still lingers in the entertainment business. Currently, Hollywood boasts over 100 agents and managers earning over $1 million.[94]

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88. *See* Stuart Elliott, *The Media Business: Ovitz Leaves a Legacy of Jolting Madison Ave.*, N.Y. TIMES, Aug. 15, 1995, at D6.

89. *See generally* Weinraub, *supra* note 85.

90. *See Star Wars, supra* note 4, at 160–67.

91. *See id.*

92. *See Newsstand: CNN & Entertainment Weekly* (CNN Television Broadcast, July 8, 1999).

93. Bart, *supra* note 9, at 55.

94. *See id.* at 56.

### *B. Personal Managers*

While personal managers are naturally interested in seeing their clients find employment, their core functions focus on other aspects of an artist's career.[95] Personal managers advise their clients on both the minutiae of daily life as an artist and the broader trajectory of an entertainment career.[96] As one industry journalist has summarized the role, a manager is "supposed to be the deep thinker who masterminds clients' careers and holds their hands."[97] As part of this expansive role, a manager will perform a variety of consulting tasks, including arranging additional representation when a talent agent or attorney becomes necessary, as well as advising the client on accepting deals procured by those other representatives.[98]

#### 1. The Role of a Personal Manager

Ultimately, managers exist to give artists time to hone their craft and to create their art. To clear the schedules of their clients, managers take responsibility for many aspects of their clients' personal and professional lives.[99] They arrange for training to develop skills that can contribute to their marketability, such as acting lessons and voice training, as well as handling such mundane concerns as travel planning.[100] Many managers become close enough to their clients that they basically stand *in loco parentis* and are often in the best position to provide advice on personal problems affecting the artist.[101]

One very important area in which managers facilitate the careers of their clients involves financial matters.[102] Managers often advance funds to their clients to cover the costs of initial personal and business outlays, such as rent, artistic training, miscellaneous bills and a professional portfolio.[103] Managers may also act as rudimentary financial advisors for fledgling clients by collecting revenues, paying taxes and investing profits, all the

95. *See* Telephone Interview with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

96. *See id.*

97. Bart, *supra* note 9, at 56.

98. *See* O'Brien, *supra* note 60, at 482–83.

99. *See id.*

100. *See* WEILER, *supra* note 45, at 691.

101. *See id.*

102. *See id.* at 691–92.

103. *See* Telephone Interview with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

while developing a longer-range financial portfolio.[104] Once a client's financial position has grown to a sufficient level, a personal manager may help locate and retain a more sophisticated financial specialist to act as the artist's business manager.[105] Additionally, managers can acquire a personal financial interest in their client's product by investing in their projects, providing funds necessary to complete artistic ventures and participating in any profits or losses of those essays.[106] This practice of producing a client's project is one critical distinction between agents and managers. Agents are strictly prohibited from such transactions, while managers may reap large profits from such enterprises.[107]

Because personal managers are deeply involved in their clients' lives and strive to provide the constant attention their stars may require, they typically represent only a few artists.[108] Whereas a talent agent may procure work for twenty or thirty clients, a personal manager may represent as a few as five or six.[109] Indeed, even management firms, composed of several managers representing multiple clients, operate on a smaller scale than talent agencies, which can maintain client rosters numbering in the thousands.[110] To compensate for having fewer sources of income and expending more effort per client, managers demand ten to fifty-five percent of their client's gross earnings for their services in contrast to the ten percent charged by agents.[111]

### 2. Personal Management Agreements

Like agents, managers typically seek an exclusivity clause in a personal management agreement to prevent the client from retaining any other managers.[112] Because of the large investments managers make in the lives and careers of their clients, they often ask for long-term contracts to protect their connection to their client's future success. A management agreement will typically run for three to five years, whereas a talent agent's agreement rarely lasts longer than one year.[113]

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104. *See* WEILER, *supra* note 45, at 691–92 .

105. *See id.* at 692.

106. *See also* Zarin, *supra* note 61, at 937–38.

107. *See* Atzbach, *supra* note 7, at 82–83.

108. *See* Telephone Interview with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

109. *See* WEILER, *supra* note 45, at 691.

110. *See Star Wars*, *supra* note 4, at 156, 158.

111. *See* O'Brien, *supra* note 60, at 483; Zarin, *supra* note 61, at 936.

112. *See supra* notes 60–61 and accompanying text.

113. *See Zarin*, *supra* note 61, at 940–91.

Personal managers are prohibited by law from procuring employment for their clients, unless they become talent agents and submit to the regulatory regime that governs agents.[114] Therefore, artists will almost always need the services of a talent agent.[115] Because many agents refuse to represent unestablished talent, artists also need personal managers to help build their careers. Managers are usually the first representation an artist finds. If the relationship is a successful partnership, the manager will also become an artist's closest career advisor. Because they present agencies with filtered talent, managers help artists evade the catch-22 of being unable to find work without an agent and being unable to acquire an agent without being established.[116]

The professional distinction between managers and agents has enough of a logical point of separation to justify many stars and filmmakers retaining the services of both.[117] Describing what was traditionally the distinction between the two, veteran manager Bernie Brillstein, of the prominent management firm Brillstein-Grey Entertainment,[118] commented, "Managers found and nurtured the talent and hired the agents. Managers shaped careers while agents made the deals and, now and then, came up with a piece of material."[119]

While managers, unlike agents, have always been able to acquire an ownership interest in their clients' product, this ability to produce has only recently been recognized as a major asset to the profession. Managers have often been among the first to invest in the talents of artists, long before the general public has acknowledged their worth. Indeed, many celebrities began their careers by persuading managers to underwrite their ventures. One can imagine a manager eagerly providing funds to a young Steven Spielberg to ensure that his first major film was made in the event that the studios and other financiers refused to underwrite his work. For many years, this practice of advancing funds to an artist was viewed in something

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114. *See* discussion *infra* Part II.C.

115. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999). Not all agents see this dependency as a benefit to their profession, however, as many managers allegedly use the services of "shell agents" simply to satisfy the legal requirement, while retaining the bulk of the profits without spurring the agenting business.

116. Emily Chi, *A Catch-22*, 18 CARDOZO ARTS & ENT. L.J. 1, at 44, 44 n.279 (2000). This quandary is only one of many dilemmas facing aspiring artists who attempt to break into the highly competitive and closed entertainment industry. *See, e.g., id.*

117. *See* Bart, *supra* note 9, at 56. As Peter Bart, editor of *Variety* and *Daily Variety* reported, "a growing number of stars . . . now retain both an agent and a manager . . . 'I like the security of having both,' one . . . aging actor confided. Now I have two guys who don't return my calls." *See id.*

118. *Id.*

119. *Id.*

of a charitable light, albeit one in the long-term interest of the manager. In recent years, this process has matured into an elaborate enterprise with enormous upside returns for many managers.[120] This enterprise, however, introduces a number of complications into the relationships between clients and their manager-producers.[121]

### *C. California Regulations Governing Personal Representatives*

Because Hollywood has long had a significant impact on the California economy, the state legislature has promulgated a considerable body of law to govern the entertainment industry.[122] While artists' representatives exist in large part to shield their client's interests, courts and legislative bodies have established many laws to protect artists from being unduly influenced by their managers and agents.[123] Celebrities can also rely upon legal protection from the principles of contract and fiduciary duties.[124] California and New York, the two traditional centers of the entertainment industry, took additional steps decades ago to enact specific regulatory regimes to govern entertainment representatives.[125]

Although the interests of personal managers and talent agents overlap inasmuch as both camps strive to nourish their golden geese, the law treats the two groups very differently. Recent developments in the entertainment industry have further blurred the lines between these two professions and have strained the logical connection of these legal distinctions.[126] Documenting the current statutory scheme and its legislative history creates a prism through which to evaluate the viability of maintaining these differences and appraise possible solutions to the growing problems in the representation industry.[127] While Tennessee, the archdiocese of country music, and New York, are two states with significant bodies of law in this area, this Article analyzes only California law, the reigning see of the filmmaking industry.

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120. *See Percent, supra* note 17, at 53.

121. *See* discussion *infra* Part III.

122. *See generally* REO Broad. Consultants v. Martin, 81 Cal. Rptr. 2d 639 (Ct. App. 1999); Waisbren v. Peppercorn Prod., 48 Cal. Rptr. 2d 437 (Ct. App. 1995); Wachs v. Curry, 16 Cal. Rptr. 2d 496 (Ct. App. 1993).

123. *See, e.g.*, WEILER, *supra* note 45, at 694.

124. *See id.*

125. *Id.*

126. *See* discussion *infra* Part III.A.

127. *See generally* Zarin, *supra* note 61, at 930.

### 1. The Talent Agencies Act

The single most important piece of legislation affecting talent representation in California is the Talent Agencies Act ("TAA"),[128] first enacted as a remedial statute in 1913. The proliferation of tales involving talent agents engaged in unscrupulous activities caused the California Legislature to take notice of the industry early last century.[129] The most notorious accounts featured agents sending artists to work in hazardous locations, sending female artists to brothels, arranging for minors to work in bars and splitting fees with the owners of venues that booked the artists.[130] This practice of fee splitting involved the artist's agent furnishing a dividend of her commission back to the individual who had booked the artist in exchange for booking only artists represented by the agent.[131] Therefore, the artist was billed twice, once by the agent and again by the employer.[132] Aside from the element of graft, this practice also effectively shut the industry's door to artists not represented by agents in the game's inner sanctum.

### 2. Legislative History of the Act

The California Legislature first attempted to remedy these concerns by modifying the existing regulatory regime governing employment agencies.[133] Seeking "to correct abuses that have long been recognized,"[134] lawmakers in 1943 amended the Private Employment Agencies Law of 1913 to regulate talent agents and to proscribe outrageous behavior.[135] This amendment brought talent agents within the jurisdiction of the California Labor Commissioner.[136]

Sixteen years later, in 1959, the legislature responded to agents' complaints that the existing scheme subjected them to rules not formulated to address concerns particular to their vocation.[137] The Assembly severed the regulations affecting them from the general regulatory scheme and compiled them in a distinct section of the Labor Code, newly titled the

128. CAL. LAB. CODE §§ 1700–1700.47 (West 1999). *See generally* Edwin F. McPherson, *The Talent Agencies Act: Time for a Change*, 19 HASTINGS COMM. & ENT. L.J. 899 (1997).

129. *See* Zarin, *supra* note 61, at 943–44.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See* O'Brien, *supra* note 60, at 493–94; Zarin, *supra* note 61, at 943.

134. Waisbren v. Peppercorn Prod., 48 Cal. Rptr. 2d 437, 441 (Ct. App. 1995).

135. *See* O'Brien, *supra* note 60, at 493–94.

136. *See id.* at 494.

137. *See id.*

Artists' Managers Act.[138] This recodification signaled the entertainment industry's ascendancy in California and the state lawmakers' recognition of its importance. After a stint under the jurisdiction of the Bureau of Employment Agencies beginning in 1967, talent agents returned to the Labor Commissioner's bailiwick in 1978 when the Artists' Managers Act was rechristened as the Talent Agencies Act, the name by which it continues to be known today.[139]

In 1982, the legislature revisited the TAA and promulgated a host of regulations affecting its operation. One set of these new rules was a troika of sunset provisions designed to expire four years later, on January 1, 1986, unless the legislature elected to extend them.[140] The first of these amendments allowed an unlicensed individual to act in conjunction with and at the request of a licensed talent agent in the negotiation of an employment contract.[141] The second exempted the procurement of recording contracts from the application of the TAA.[142] The third provided for a one-year statute of limitations to the Act.[143]

The second set of 1982 amendments created the California Entertainment Commission, the task of which was to study the entertainment industry and to recommend revisions to the TAA.[144] After two years, the Commission submitted its recommendations to the legislature, which adopted them with minor language changes.[145] Specifically, the Commission suggested the sunset provisions appended to the 1982 amendments be dissolved and the legislature adopt the regulations permanently.[146] The 1982 provisions remain good law today.

### 3. Operation of the Act

The TAA applies to any person who "engages in the occupation of procuring, offering, promising or attempting to procure employment or engagement for an artist."[147] A person engaging in the specified activity is deemed a talent agent for the purposes of the Act and is brought under its

138. *See id.*

139. *See* O'Brien, *supra* note 60, at 494 (citing Act of Aug. 31, 1982, ch. 682, §§ 1–4, 1982 Cal. Stat. 2814–16 (codified at CAL. LAB. CODE §§ 1700.4(a), 1700.44(c), 1700.44(d) (West 1999))).

140. *Id.*

141. *See* O'Brien, *supra* note 60, at 494.

142. *See id.*

143. *See id.*

144. *See* Zarin, *supra* note 61, at 945.

145. *See id.* at 946–47.

146. *See* O'Brien, *supra* note 60, at 495.

147. CAL. LAB. CODE § 1700.4(a) (West 1999).

ambit. The TAA requires all such agents to obtain a license with the state, post a bond and abide by several other orders.[148] This concomitant package of statutory requirements demand affirmative adherence and threatens punishment for failure to comply with the provisions of the Act.

Because of this increased regulatory scrutiny, personal managers and other entertainment representatives are understandably eager to avoid falling within the TAA's purview. Of course, simply not procuring employment is one sure way to do so, but the precise contours of that activity are hazy and much of the work of representation skirts its boundaries because all parties are primarily interested in seeing the client find work.[149]

Commentators have argued that inherent ambiguities in the definitional clauses of the TAA fail to define "procurement" precisely. This omission allows for a fair interpretation of the TAA that excuses personal managers from its operation.[150] This argument has been made unsuccessfully in various fora and has largely been dismissed by courts as an avenue of relief for managers who are sued by their clients under the Act.[151] Indeed, in 1982, the same California Entertainment Commission ("CEC"), that had been established to evaluate the operation of the TAA, suggested the Act be interpreted to apply to any person who engaged in procurement activity, not simply talent agents.[152] Before this ruling, the debate over whether the broad language of the TAA applied only to agents was unsettled.

The commission considered what activities an unlicensed individual such as a personal manager or attorney could engage in when attempting to find employment for an artist. The commission determined "there is no such activity, that there are no such permissible limits, and that the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are intended to be, total."[153] No matter what one chooses to call oneself—an agent, a manager or an attorney—the commission decisively concluded soliciting employment for an artist will trigger the operation of the Act.

148. *See id.* §§ 1700.6–1700.22 (West 1999).

149. *See* Atzbach, *supra* note 51, at 81.

150. *See, e.g.*, Chip Robertson, *Don't Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. & ENT. L.J. 224 (1997).

151. *See id.* at 224–25.

152. *See* Zarin, *supra* note 61, at 946 & n.103.

153. O'Brien, *supra* note 60, at 495 (citing REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION TO THE GOVERNOR AND LEGISLATURE 11 (1985)).

Only those complying with the TAA's full corpus of strictures can engage in such behavior with impunity.[154]

Recent decisions in the California courts have echoed and amplified the commission's interpretation of the breadth of the Act.[155] These judicial opinions have deemed the following behavior to constitute procurement under the Act: introducing artists to producers or directors, initiating contacts with employers, furthering an offer for an artist-client and negotiating employment contracts.[156] These rulings clearly limit the scope of activities in which a personal manager may engage while still advancing an artist's career. The fact these regulations can so easily be called into play, affecting broad swaths of representatives in the entertainment business, highlights the importance of the Act's specific obligations.

### a. Jurisdiction of the California Labor Commissioner

The first effect of the TAA is to authorize the Labor Commissioner's jurisdiction over any disputes arising under the Act. Section 1700.44(a) of the California Labor Code provides that the commissioner possesses original and exclusive jurisdiction over all matters implicating the Act, regardless of whether one of the parties is a licensed agent.[157] The reach of the Act cannot be avoided, therefore, by simply failing to obtain a license. An artist can force a personal manager or attorney to submit to the commissioner's jurisdiction merely by charging that the representative has engaged in activities that fit the definition of a talent agent according to the Act.[158]

### b. The Arsenio Hall Lawsuit

In 1993, Arsenio Hall did just that when he successfully sued his manager, Robert Wachs, for $2.12 million.[159] Hall had entered a personal management agreement in 1987 with the firm, X Management, of which Wachs was a principal, and agreed to a commission rate of fifteen percent.[160] Despite a clause in that agreement proclaiming that X

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154. *See id.*

155. *See, e.g.*, Mae v. Katz, 503 P.2d 1376 (Cal. 1972); *REO*, 81 Cal. Rptr. 2d 639; *Waisbren*, 48 Cal. Rptr. 2d 437; *Wachs*, 16 Cal. Rptr. 2d 496; Humes v. Margil Ventures, 220 Cal. Rptr. 156 (Ct. App.1985); Sinnamon v. McKay, 191 Cal. Rptr. 295 (Ct. App. 1983); Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Ct. App. 1967).

156. *See* cases cited *supra* note 155.

157. CAL. LAB. CODE § 1700.44(a).

158. *See* O'Brien, *supra* note 60, at 492.

159. *Wachs*, 16 Cal. Rptr. 2d 496; *see also* WEILER, *supra* note 45, at 706–08.

160. *See Wachs*, 16 Cal. Rptr. 2d at 498.

Management would in no way act as an agent for Hall, the firm procured several employment engagements for him over the next few years.[161] Among the jobs Wachs and his firm secured for Hall were his contract to act in *Coming to America*[162] with Eddie Murphy, his deal with Paramount Television for his own talk show, *The Arsenio Hall Show*,[163] and a $1.5 million dollar promotional deal with Coca-Cola.[164] Hall's relationship with his managers soured in 1990 when he learned Wachs and another principal of the firm were not only receiving screen credit as the producers of *The Arsenio Hall Show* but were also collecting $5,000 a week for their "efforts."[165]

In August 1990, Hall terminated his personal management agreement with X Management and brought an action before the Labor Commissioner.[166] Hall alleged his contract was void *ab initio* because the firm had acted as an unlicensed talent agent in violation of the Act.[167] The Labor Commissioner agreed Wachs and his colleagues engaged in the practice of procuring employment for Hall and directed X Management to disgorge $2.12 million of the $2.62 million Hall paid them in commissions.[168] The commissioner rejected X Management's estoppel and waiver defenses based on Hall's awareness of what his managers had been doing. The commissioner also found the Act did apply in cases where major celebrities were concerned.[169]

The *Hall* case illuminates several features of the TAA. First, it is the Labor Commissioner, not the courts, that oversees the enforcement of the Act. Although Wachs and X Management brought suit to challenge the constitutionality of the Act in state court, they did so only after submitting to the commissioner's decision in the initial administrative proceeding.[170] Second, the form of management contract does not control determinations of an individual's status as a talent agent. In *Hall*, X Management recited several sentences from its agreement with Hall that tracked the language of the Act in an effort to assert that it had not engaged in procurement activity. Needless to say, the commissioner found these recitations unconvincing and looked instead to the pattern of activity in which the managers

161. *See id.*
162. COMING TO AMERICA (Paramount Pictures 1988).
163. *Arsenio Hall Show* (Paramount Domestic Television 1989).
164. *See* WEILER, *supra* note 45, at 707.
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.* at 708.
169. *See id.*
170. *See* WEILER, *supra* note 45, at 708.

engaged. The commissioner found that their activities warranted a determination that X Management had acted as a talent agent without a license.[171]

### c. The Administrative Hearing

The Labor Commissioner's hearing under the Act is an administrative process initiated by the aggrieved party's filing of a petition to determine controversy with the commissioner.[172] Much like a complaint, a copy of the petition must be served on opposing counsel, who then has twenty days to file an answer. The commissioner possesses the power to conduct an independent investigation of the facts in dispute to make his own determination as to whether a true controversy exists.[173] If the commissioner finds no real dispute, he may dismiss the matter without a hearing, certifying there exists no real controversy.

This administrative proceeding is presided over by a "hearing officer," typically an attorney within the Division of Labor Standards Enforcement.[174] If the matter is not settled, the hearing officer will hand down a "Determination and Award."[175] Similar to a judicial decision, the Determination and Award describes the facts of the matter, the applicable rules and rationale and grants an award if one is warranted.[176] The unsuccessful party can challenge such a ruling in two ways. First, the losing party may stay the execution of the judgment by posting a bond pending ratification from the state trial court. Second, the losing party can appeal the decision within ten days directly to the superior court for a *de novo* hearing, albeit one in which the judge may rely upon exhibits from the hearing.[177] As a procedural matter, section 1700.44(c) imposes a one-year statute of limitations upon these actions, precluding the recovery of fees and commissions paid before that time.[178] Of course, this one-year statute of limitations simply encourages managers to wait before bringing suit.

The commissioner has wide discretion to craft remedies for violations of the Act.[179] No remedy is more powerful than the nullification of all

171. *See id.* at 707.
172. CAL. LAB. CODE § 1700.44(a).
173. *See id.*
174. O'Brien, *supra* note 60, at 490.
175. *Id.*
176. *See id.*
177. *See id.*
178. *See* CAL. LAB. CODE § 1700.44(c).
179. *See* O'Brien, *supra* note 60, at 491.

agreements entered into by the disputing parties. The decision to void one of these contracts can result in a parade of horribles for the losing party: the commissioner may proclaim that the agent is entitled to no further fees or commissions; that the artist is not liable for any money advanced by the agent to advance the artist's career; that the artist can collect all funds paid to the offender under the contract; and that any collateral contracts executed by the parties are void. While the commissioner may allow the agent to retain certain funds in accordance with principles of *quantum meruit*,[180] the overall effect of a hearing officer's adverse ruling under the TAA can be financially devastating to an artist's representative.

Because the Act leaves the enforcement trigger in the hands of aggrieved artists, it has been condemned both for providing insufficient protections and for transferring too much power to artists.[181] Because the Act is not self-executing, it fails to protect artists who live in fear of retaliation from more powerful entities in the entertainment industry, such as influential management firms. The multimillionaire celebrities—those artists who arguably need the least protection from the Act—may be quick to wield the Act as a powerful sword against representatives. Arsenio Hall, for example, needed very little protection from remedial legislation to ensure he was not imperiled by his representative. Hall was quick to recoup millions of dollars once his relationship with X Management soured.

### d. Licensing Procedure

In addition to bestowing jurisdiction of these matters in the hands of the Labor Commissioner, the Act also requires prospective agents to undergo an application process to gain an agent's license.[182] This process involves an applicant's submission of their name, address and previous occupations to the Labor Commissioner, as well as providing the same information for all of their associates and partners.[183] In the package, applicants must include their fingerprints, two affidavits from members of the community vouching for the applicant's "good moral character" and a filing fee.[184] Successful applicants must also pay an annual licensing fee.[185] In addition to this financial outlay, agents must post a $10,000 surety bond

180. *See id.*

181. *See generally* Zarin, *supra* note 61.

182. *See* CAL. LAB. CODE § 1700.6.

183. *See id.*

184. *See* CAL. LAB. CODE §§ 1700.6(d), 1700.12 (West 1999).

185. *See* § 1700.12.

with the commissioner in accordance with section 1700.15.[186] Much decried by agents,[187] this bond is designed to ensure some source of recovery exists for judgments awarded to complaining parties when a hearing officer determines that a licensed agent has violated the Act.

### e. Business Operations

The TAA empowers the Labor Commissioner to order agents to receive approval for the form contracts they use in their businesses.[188] While this approval may be withheld only if the pact is "unfair, unjust and oppressive to the artist,"[189] this requirement imposes one more constriction on the entrepreneurial freedom of licensed agents. Furthermore, agents are also required to file with the commissioner a schedule of fees outlining the amounts charged to clients and may not adjust these fees until seven days after filing an updated schedule.[190]

Another directive for an agent's business practices delimits the collection and disbursement of a client's funds.[191] Any funds an agent receives on behalf of a client must be deposited in a trust fund and disgorged to the artist within fifteen days of their receipt.[192] Rather than paying artists directly, employers such as studios and television production companies typically dispatch payments for services rendered by the artist to the agent, who takes the commission from the gross payment before forwarding the balance to the client.[193] The Act requires agents to keep records of their client's accounts, names, addresses, engagements, compensation and fees collected, and to keep these records open to inspection by the Labor Commissioner.[194]

The Act also contains specific provisions addressing the original complaints that led to the initial promulgation of the TAA. Thus, section 1700.39 outlaws the splitting of fees between agents and employers; section 1700.34 prohibits an agent from sending a minor to any place

186. *See* CAL. LAB. CODE § 1700.15 (West 1999).

187. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

188. *See* CAL. LAB. CODE § 1700.23–1700.41 (West 1999).

189. *See* § 1700.23.

190. § 1700.24 (West 1999).

191. *See* § 1700.25 (West 1999).

192. *See id.*

193. *See* Telephone Interview with Mike Macari, Talent Agent, United Talent Agency (Mar. 29, 1999).

194. *See* CAL. LAB. CODE §§ 1700.23–1700.41.

where alcohol is sold and consumed; and section 1700.33 bans agents from dispatching clients to unsafe locations.[195]

4. The "Incidental Procurement" Exception Under New York Law

The absence of an "incidental procurement" provision in the Act has a large effect on artists' representatives. The New York Legislature has enacted a regulatory scheme to govern the actions of talent agents that differs in one key way from the TAA. In defining a "theatrical employment agency," New York tracks much of the same language as California but includes the following exception: "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."[196]

This incidental booking exception, applicable only to representatives who act as personal managers for artists, allows managers to engage in procurement activities when such activities are ancillary to the primary task of managing an artist's career.[197] This exception has been applauded by several commentators who feel that it better acknowledges the realities of the entertainment industry in which "any personal manager worth his or her commission procures at least some employment for a client."[198] Nevertheless, no such exception exists in California. This glaring omission has been noted by courts that levy punishment on managers who have made similar claims in their defense.[199]

California does, however, possess one clause not found in New York law. This clause grants individuals not licensed under the TAA the ability to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract.[200] This provision occasionally acts as a major loophole through which managers lawfully secure employment contracts for their clients. Indeed, many agents lament the ability of managers to find "shell" agents, whom they may involve in a negotiation simply to satisfy the Act, while in reality orchestrating the deal

195. *See id.*

196. N.Y. GEN. BUS. LAW § 171(2)(e)(8) (McKinney 1988).

197. *See* N.Y. GEN. BUS. LAW §§ 170–190 (McKinney 1988).

198. *See* Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, *in* COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 485 (PLI Pat., Copyrights, Trademarks and Literary Prop. Course Handbook Series No. G-3896, 1993).

199. *See Waisbren*, 148 Cal. Rptr. 2d 437; *Wachs*, 16 Cal. Rptr. 2d 496 at 502–04.

200. *See* CAL. LAB. CODE § 1700.44(d).

themselves.[201] Of course, agents can combat this practice by emphasizing the uniqueness of their role to the client, making it clear that it is their job to procure employment, not the manager's.

### *D. The Entertainment Guilds*

The entertainment industry is one of the most heavily unionized sectors of commerce in the American economy. These unions, or "guilds" as they are known, are responsible for a large corpus of private law regulating the activities of many of the industry's players.[202] Agents, therefore, must not only comport their activities with controlling state law, but must also comply with regulations enacted by the Screen Actors Guild ("SAG"), the Writers Guild of America, the Directors Guild of America,[203] the American Federation of Television and Radio Artists and the American Federation of Musicians.[204] By representing the interests of Hollywood's most valuable asset, the talent, these guilds have exacted a great deal of concessions from other industry players through their collective bargaining agreements.[205] These agreements now function as a separate but equally important body of entertainment law, and since the 1920's, the unions have endeavored to establish standards to govern the agents who represent their members.

#### 1. The Effect of Guild Regulations

Agents must comply with the proscriptions of the unions for one simple reason: the union members refuse to do business with anyone except agents who are "franchised" by the guilds.[206] For an agent to acquire and maintain a franchise with any given union, that agent must comply with the terms of their agreements.[207] Many of those terms govern the behavior of agents more extensively than do state laws. Some of the most important provisos require agents to obtain a franchise license from the guild, limit

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201. *See* CAL. LAB. CODE. §§ 1700.4–1700.44.

202. *See* Chi, *supra* note 116, at 43–44 .

203. Directors Guild of America, *DGA Membership Benefits* (visited Feb. 29. 2000 <http://www.dga.org/dga-info.member.html>.

204. *See* Chi, *supra* note 116, at 43–44 .

205. *See id.*

206. *See id.*

207. *See* Screen Actors Guild, *1998 Theatrical Motion Pictures & Television Contract Summary* (visited Feb. 29, 2000) <http://www.sag.com/theatrical-tv.html>.

the percentage an agent may charge a union member and obligate the agent to use standardized contracts.[208]

Perhaps the most famous guild regulation that agents must obey is the rule that they cannot collect a commission of more than ten percent of an artist's gross earnings for their services.[209] This regulation explains why agencies are commonly referred to as "tenpercentaries" in the industry patois. Another important union limitation on agents affects the duration of their contracts with artists: agents are usually allowed to sign talent for only one year at a time.[210] This rule may create a somewhat tenuous relationship between artists and agents, but it allows the artist to escape an ill-advised agreement within a relatively short amount of time and creates an incentive for agents to procure the best work possible for their clients if they hope to renew their deals at the end of the year. In contrast, the TAA contains no strictures governing the length of contracts, although the California Labor Code does limit all contracts for personal services to seven years.[211]

Perhaps the most important guild regulation affecting agents is the prohibition against an agent's ownership of any equity interest in a guild member.[212] This rule translates into a bar against agents producing the work of their clients. This practice has recently burgeoned into an extremely profitable enterprise for individuals such as personal managers who are not governed by guild regulations.[213] The origin of this rule dates back to the first half of this century when agencies such as WMA and the Music Corporation of America ("MCA") dominated the industry.[214]

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208. *See* Screen Actors Guild, *Contracts, Wage & Working Conditions* (visited Feb. 29, 2000) <http://www.sag.com/contracts.html>.

209. *See* Telephone Interview with Mike Macari, Talent Agent, United Talent Agency (Mar. 29, 1999). There are, however, upward departures from this number for deals involving musicians. *See* Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501, 511 n.48 (1991).

210. *See* Telephone Interview with Mike Macari, Talent Agent, United Talent Agency (Mar. 29, 1999).

211. *See* O'Brien, *supra* note 63.

212. *See* Screen Actors Guild, *1998 Theatrical Motion Pictures & Television Contract Summary* (visited Feb. 29, 2000) <http://www.sag.com/theatrical-tv.html>.

213. *See* Dave McNary, *A Snag in ATA Deal With SAG*, VARIETY, Feb. 28, 2000, at 6. Additional SAG regulations prohibit talent agencies, but not management companies, from owning or being owned by production and media companies. These rules effectively make it impossible for talent agents to tap into the explosive opportunities of the Internet, since they cannot partner with dot-coms or advertising agencies. *See id.* Despite heated attempts to renegotiate these terms with SAG, the ATA has failed to have these restrictions lifted. *See id.*

214. *See* ROSE, *supra* note 70, at 194–95.

### 2. The Emergence of Guild Regulations

MCA was founded by Jules Stein in the same decade as WMA[215] but, led by Stein's successor Lew Wasserman, quickly eclipsed its competitor to become the leading agency in Hollywood.[216] In addition to acquiring ten percent of his clients' earnings, Wasserman maneuvered MCA into a position from which it could take ownership interests in its stars' films and television shows.[217] This practice irked artists and their guilds because agents profited wildly from owning and producing the fruits of their artists' labors.[218]

In 1938, SAG forced the agents to relinquish this right *vis-à-vis* films in a negotiation with the talent agents, who were represented by Abe Lastfogel.[219] Lastfogel acquiesced to SAG's demand that agents not act as both artist representatives and motion picture producers.[220] In 1952, SAG sought to extend this prohibition to television shows and did so successfully, with one exception.[221] On the strength of their personal relationship, Lew Wasserman convinced his friend and client, Ronald Reagan then the head of SAG, to exclude MCA from the prohibition against producing television shows.[222] For ten years, MCA profited greatly in its safe harbor until it lost its preferred status in 1962. The Justice Department, led by Robert F. Kennedy, instituted an antitrust investigation of MCA and ultimately prodded Wasserman into abandoning agency work.[223] Since then, MCA has confined its business to the production of films, television shows and music recordings. All talent agents have since operated without the luxury of being able to produce.

## *E. The Free Province of the Personal Manager*

Personal managers have enjoyed a very different history of regulation from that of the agents. In fact, neither the states nor the entertainment guilds have promulgated rules to govern managers. Indeed, the only law managers need to concern themselves with is the TAA,[224] when they flirt

215. *See* WEILER, *supra* note 45, at 692.
216. *See id.* at 692.
217. *See id.* at 693.
218. *See id.*
219. *See id.*
220. *See id.*
221. *See Star Wars*, *supra* note 4, at 158.
222. *See id.*
223. *See id.*
224. *See* discussion *supra* Part II.C.1.

with procuring employment. To avoid the appearance of unlicensed talent agents, many managers will include provisions in their agreements specifically stating they will not procure employment for their clients.[225] Of course, both the CEC and courts have repeatedly concluded the acts of these managers, not their contractual recitations, determine whether they are operating as agents under the TAA.[226]

Some managers resent this interpretation because it seems to disregard many of the actualities of what managers do for their clients.[227] Those who would protect managers now protest what they describe as the "ineluctable choice" between continuing to pursue their business as they would like and having to revise their business practices heavily.[228] These managers resent the risk of "having their management agreements invalidated by the Labor Commissioner" or submitting to the TAA's licensing scheme.[229] They also protest "subjecting themselves to the Act's provisions and alerting the unions that because they have procured or intend to procure employment for artists, union fee ceilings and other regulations should become operative against them."[230]

The "Scylla and Charybdis"[231] scenario, these apologists lament, exaggerates the extent to which the current situation is a dilemma for managers.[232] Personal managers can avoid the quandary in two ways: they can adhere to those elements of the profession in which they have particular expertise, allowing agents to handle the actual negotiation and procurement of contracts; or they can take advantage of section 1700.44(d) to work in conjunction with a licensed agent to find and close deals. Because managers and management firms earn vast profits through producing their client's work, a right agents do not share, some agents scoff at managers' dirges lamenting the TAA's financial handcuffs.[233] The managers are maintaining that these complaints have no real basis in today's entertainment market.[234]

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225. *See* Wachs, 13 Cal. Rptr. 2d at 498.

226. *See* discussion *supra* Part II.C.3.

227. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

228. *Id.*

229. *Id.*

230. O'Brien, *supra* note 60, at 484.

231. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15 1999 & Mar. 29, 1999).

232. *Id.*

233. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

234. *See id.*

Although managers are not specifically regulated by state laws or guild regulations targeting their activities, there are certain ambient limitations on particular aspects of their businesses. The maximum length of management agreements, for example, is capped by a state labor regulation limiting all personal service contracts to seven years.[235] This state law is rarely relevant, however, as most managers execute agreements spanning only three to five years.[236] Similarly, managers are not subject to the guild regulations limiting an agent's commission to ten percent of an artist's gross revenues. As a result, a manager's fees may range as high as fifteen to twenty-five percent to compensate them for their greater involvement in an artist's life.[237]

## III. THE CONFLICTS QUANDARY: WHEN MANAGERS ACT AS PRODUCERS

*He's f--king with our business! It's got to be stopped! Ovitz must be stopped.*[238]

*The [Shandling] suit is sheer lunacy.*[239]

In January 1998, celebrated comedian Garry Shandling filed suit in a Los Angeles Superior Court against his friend and personal manager of eighteen years, Brad Grey, seeking damages in the amount of $100 million.[240] Six weeks later, Grey returned the favor by counterclaiming for $10 million.[241] The final exchange of shots in a tense duel that had been brewing for a number of years, this unhappy repartee also illustrates many

235. *See* CAL. LABOR CODE § 2885 (West 1999).

236. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999).

237. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

238. *Star Wars*, *supra* note 4, at 154 (quoting an anonymous CAA agent reacting to Ovitz's return to the representation business) (internal quotation marks omitted).

239. Joe Flint, *Hey, Now! Garry Shandling Shocks Hollywood with his $100 Million Suit Against Former Manager Brad Grey*, ENT. WEEKLY, Feb. 6, 1998, at 16 (quoting Grey's Attorney, Bertram Fields).

240. *See* Flint, *supra* note 239, at 16.

241. *See* Answer for Defendants, Shandling v. Grey, BC 184316 (Cal. Super. Ct. filed Mar. 4, 1998); *see also* Answer to First Amended Complaint for Defendants, Shandling v. Grey, BC 184316 (Cal. Super. Ct. filed July 29, 1998); Defendants Cross-Complaint, Shandling v. Grey, BC 184316 (Cal. Super. Ct. filed Mar. 4, 1998); *Garry Shandling Hit with $10 Million Cross-Complaint*, ENT. LITIG. REP., Mar. 31, 1998, at 4; Michael Fleming, *Grey Counters Shandling Suit*, DAILY VARIETY, Mar. 5, 1998, at 1.

of the complaints that have surfaced about the new roles personal mangers are playing in the entertainment industry today.[242]

At the heart of the Shandling lawsuit was the greater issue of the freedom of personal managers.[243] Managers now enjoy many of the same privileges agents did at their apex under the leadership of Lew Wasserman before the Justice Department broke MCA's hold over talent and production in 1962.[244] Many of the same problems deplored at that time are resurfacing. These criticisms are hurled afresh at managers as they form more production affiliates to produce their artists' films and television shows while continuing to act as these same client's representatives. Unlike Wasserman, managers today have not been forced to choose between representing artists or owning interests in artists' products. This involvement in both areas creates a slew of conflicts of interest.

### *A. A Growing Problem*

When a personal manager's role expands to include producing or otherwise acquiring an equitable interest in a client's work, the manager's interests immediately conflict with the client's.[245] When doubling as a producer, a manager will sometimes act on behalf of the entity that has retained producing services, and on other occasions, on behalf of the manager's own producing career. These conflicts, in turn, open the door to a host of problems in the client-manager relationship. At its most basic level, this issue is a function of the fact that a manager cannot loyally serve three masters at once: the artist, the artist's employer and the manager acting as an independent producer. Talent agents, in contrast, avoid both the profits and the perils of producing because of the guilds' prohibitions against engaging in such activity.[246]

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242. *See* Peter Bart, *Manager-Producers: Life in the Grey Zone*, DAILY VARIETY, Jan. 26, 1998, at 26.

243. *See* Telephone Interview with Peter Haviland, Attorney for Garry Shandling (Feb. 10, 1999).

244. *See* discussion *supra* Part II.C.2.

245. *See generally* Stephen P. Clark, Main Line v. Basinger *and the Mixed Motive Manager: Reexamining the Agent's Privilege to Induce Breach of Contract*, 46 HASTINGS L.J. 609 (1995).

246. *See* James Bates, *Pact Between Agents, SAG Hits Potentially Fatal Snag*, L.A. TIMES, Mar. 8, 2000, at C8. Ironically, agents are the first to point out the conflicts of interest in the way managers currently conduct their business, and the first to demand the same privilege for themselves. Talent agents, obviously not content with this regulatory imbalance, are not just hoping the guilds will regulate managers up to their level; rather, they have taken affirmative steps to remove guild regulations that limit the producing activities of talent agents. Recent efforts to level the playing field have failed, however, as SAG has backed away from such proposals. *See id.*

### 1. Producing

The term "producing" no longer carries much meaning in the entertainment industry.[247] Originally, the producer was the individual who brought together the vital ingredients of a film and then acted as the production's chairman of the board, leaving most of the creative control to the director as chief executive officer. In recent years, the title has been diluted rendered meaningless by the promiscuousness with which it is used. Films now feature credits for producers, executive producers, line producers and associate producers. Furthermore, the number of individuals in each of these categories has multiplied enormously.

Mourners of this development complain "[t]he proliferation of producing credits is a proliferation of control and that means no control if you have an exorbitant number of producers running around on a project."[248] Indeed, the Producers Guild of America ("PGA") has authored a statement, signed by 500 of its members, proposing guidelines that will limit the use of producing credits.[249] Compliance with PGA guidelines is entirely voluntary.[250] Unlike SAG and other entertainment guilds, the PGA is not recognized as a union by the studios. In 1983, the National Labor Relations Board ("NLRB") rejected the PGA's petition for union status, finding its members were supervisors and managerial employees.[251] Relying on this NLRB ruling, the studios have not recognized the PGA as the collective bargaining representative for producers.[252]

The unchecked producer mitosis stems from a variety of interrelated factors.[253] One aggravating condition has been the rise in almost all sectors of the entertainment industry of individuals forming agreements to consult with their creative leaders. A script writer, therefore, may agree to work on a project only if the writer's associate is appended to the project as a producer. In order to secure the services of the writer, the studio must comply with demands to add another producer to the credits. A related outcome of this phenomenon is that personal managers who consult closely with artists on a variety of topics are able to persuade many of their clients not to take on projects unless the managers serve as producers.[254]

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247. *See* Kit, *supra* note 17, at 4.

248. *Id.* at 28 (quoting producer Lynda Obst).

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

254. *See id.*

Personal managers persuade their artists to solicit these concessions from the project's underwriters with a two-pronged argument. First, personal managers suggest the practice will save the artist money. The arrangement begins with an agreement stating the manager will not take a commission if a studio pays the manager a producer's fee. Artists are happy to force studios to pick up the tab, as they would rather not pay a commission if they can avoid so. Second, managers suggest that it is in the interest of an artist to have a confederate on the set to argue for the artist's demands in disputes with the production entity. In the absence of contrary advice, artists have no objection to toting their managers along as producers on their television shows or films.

Producing is very profitable for managers because it typically allows them to receive an equitable interest in the production itself. Rather than simply receiving a fixed percentage of the artist's fee, a manager-producer may share in the profits of hugely successful television shows or films. Indeed, the largest management firms have now begun to create their own television shows by bringing together a team of their own talented writers, directors and actors. In these operations, managers do in fact carry out producing functions, such as investing funds in the venture and overseeing its development. Managers therefore represent the interests of the production entity more than those of the artist and in effect operate as managers *qua* studio representatives.

Great swaths of freshly anointed producers do no actual producing of any kind, however, because "[i]n many cases, credited producers never set foot on the set, or fail to perform any of the normal producing functions."[255] In these situations, the manager never becomes a true agent of the production entity and usually receives a one-time producer's fee, but does not necessarily act as the artist's earnest advocate. This type of representative is a manager *qua* titular producer. These two different breeds of manager-turned-producers create their own unique conflict of interest for their clients.

### 2. The Proliferation of Personal Managers

The practice of managers producing a client's work create inherent conflicts of interest damaging to that business relationship;[256] moreover, those problems are on the verge of greatly expanding. Perhaps no single trend in the entertainment business is more remarkable these days than the

255. *Id.*

256. *See* discussion *supra* Part III.

massive influx of individuals into the management profession.[257] What was once the ugly stepchild to the glamorous agenting profession[258] has now become the hottest role in Los Angeles. Indeed, the erstwhile *über-agent,* Ovitz himself, has announced his reincarnation as a player in the business with the ostentatious launch of his new management firm, Artists Management Group ("AMG").[259]

Ovitz has convinced a number of individuals—several of whom have left positions as agents[260]—to serve as managers under the AMG aegis.[261] In recent months, the trade publications have reported a deluge of new managers and agents-turned-managers,[262] heralding the ascendancy of the position of manager. This exodus is symptomatic of the enormous financial benefits of management,[263] which Hollywood's business elite are only now beginning to exploit. This seismic shift brings with it a magnification of all of the problems afflicting the management profession.

The ability of managers to produce a client's work has become such a profitable enterprise[264] that it has metamorphosed the role of the personal manager from an unsavory chore of client hand-holding to an enticing vision of filthy lucre. The droves of recent converts from agenting to managing have not come as a result of their desire to coddle artists. Instead, they have become aware of the sheer magnitude of production profits and want to partake.

Closely associated with the financial element of management is the reputational value of producing.[265] Naturally, producing provides additional revenue to the manager, but it also carries with it an independent social cachet. Receiving credit on a successful television show or film is gratifying to even the most jaded ego. Credits have distinct currency value in Hollywood, indeed, their size and location in films and on advertising posters have long been negotiated in an artist's employment contract.[266]

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257. *See, e.g.*, Bernard Weinraub, *Ovitz Shakes Hollywood with New Coup*, N.Y. TIMES, Jan. 25, 1999, at C7.

258. *See Star Wars*, *supra* note 4, at 156.

259. *See* Chris Petrikin & Michael Fleming, *Ovitz Ready to Unveil His New Banner, AMG*, DAILY VARIETY, Dec. 2, 1995, at 1.

260. *See, e.g.*, Claudia Eller, *CAA Loses Agent–and Top Star–to Ovitz*, L.A. TIMES, Jan. 21, 1999, at C5.

261. *See* Chris Petrikin, *AMG Nets Two More Managers*, DAILY VARIETY, Mar. 9, 1999, at 5.

262. *See id.*; Petrikin, *supra* note 259, at 27.

263. *See* Weinraub, *supra* note 257.

264. *See id.*

265. *See generally* Kit, *supra* note 17.

266. *See id.* at 28.

Agents are unable to obtain credits, but managers can appear as producers in almost all new film and television productions.

Another incentive for remaking one's self as a manager is that the conversion carries almost no transaction costs. In fact, many managers are accused of violating the TAA by acting as unlicensed talent agents. For agents who remake themselves as managers, this is also true. Agents have long accused managers of procuring work in violation of the TAA, as well as enjoying all the other benefits of managing clients. Agents have also fingered the guilds as accomplices in the unlawful actions. Agents have accused SAG of not enforcing the guild restrictions against artists that do business with managers who act as enfranchised agents.[267] The extent of these violations is impossible to ascertain, but it is safe to conclude that a great deal of agents who now operate as managers perform many of the same tasks as they have in the past, including procuring their clients' employment.

### 3. The Deluge: Michael Ovitz v. Creative Artists Agency

With all these benefits to acting as a manager, many savvy individuals have sought to capitalize on the regulatory disparity between the two professions. The story of Michael Ovitz's return to the entertainment industry is an excellent illustration of the new status managers enjoy in Hollywood.[268] This tale is almost theatrical—replete with elements of classical Greek drama—and has been acted out on the front pages of *Variety* and *The Hollywood Reporter*.[269]

Beginning in the lower echelons of WMA, Ovitz developed a successful career before leaving to form Creative Artists Agency in 1970s.[270] At CAA, Ovitz transformed the role of agents and the clout of celebrities, raising both his agency and himself to the pinnacle of power.[271] He engineered such monumental deals as Matsushita's purchase of MCA and Sony's sale to Columbia Pictures.[272] Not satiated with representing celebrities, Ovitz expanded his domain to include the representation of

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267. *See* Telephone Interview with Karen Stuart, Executive Director, Association of Talent Agents (Jan. 27, 1999) (outlining the perspectives of many talent agents on the legislative developments aimed at personal managers).

268. *See generally* Richard Thomson, *Ovitz Signs Up the Stars for His Hollywood Comeback*, EVENING STANDARD, Dec. 11, 1998, at 45.

269. *See* Weinraub, *supra* note 257, at 11.

270. *See Star Wars*, *supra* note 4, at 160.

271. *See generally O'Brien*, *supra* note 60.

272. *See Star Wars*, *supra* note 4, at 160.

global corporations such as Coca-Cola and Nike.[273] Then in 1995, Ovitz abruptly left the agency he had created to become the president of Disney.[274] Fourteen months later, however, he was fired by his former friend and boss, Michael Eisner. In just under two years, the mighty Michael Ovitz had plummeted into ignominy.[275]

While he did manage to salvage a $100 million severance package from Disney, he had been humiliated by the Disney debacle, and his reputation was tarnished. Things would seemingly only get worse for him. He made an abortive attempt to purchase Polygram before investing in the Canadian theatrical company, Livent.[276] Although Livent has created such Broadway hits as *Ragtime*, *Fosse* and *Showboat*, after Ovitz came aboard, the company promptly devolved into "bankruptcy, litigation, and allegations of egregious fraud."[277] Ovitz was not accused of precipitating this collapse, only of making a poor investment decision. Nevertheless, his Midas touch clearly seemed newly leaden. Amidst this embarrassment, he involved himself in a failed bid with the National Football League to bring a football franchise to Los Angeles.[278]

None of the recent history could have prepared Hollywood for Ovitz's next move. In November 1998, he unveiled his latest venture AMG.[279] By luring two of the hottest managers in the entertainment business and their star-studded client lists to work with him,[280] Ovitz crafted a lavish debut for his new management firm.[281] Rick Yorn would bring Leonardo DiCaprio,[282] Claire Danes and Cameron Diaz to AMG. Yorn's sister-in-law, Julie Silverman Yorn, imported her clients, Samuel L. Jackson, Steve Buscemi and Minnie Driver.[283] Over the next few months, Ovitz

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273. *See id.*

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.*

278. *See Star Wars*, *supra* note 4, at 160.

279. *See* Petrikin & Fleming, *supra* note 259, at 1.

280. *See* Stephen Galloway, *Duo Closer to Ovitz's Artists*, HOLLYWOOD REP., Dec. 3, 1998, at 38.

281. *See* Chris Petrikin, *Clients Walk, Not Run, to Ovitz's New Agency*, VARIETY, Jan. 11–17, 1999, at 4.

282. *See* Kirk Honeycutt, *DiCaprio Agrees to Take on "Gangs,"* ARIZ. REPUBLIC, Feb. 7, 1999, at E6.

283. *See* Weinraub, *supra* note 257.

assembled both a workforce and a client roster from all over the entertainment industry.[284]

One of the boldest moves Ovitz made was converting CAA agent Mike Menchel to an AMG manager, simultaneously capturing Menchel's star client, Robin Williams.[285] Many agencies feared Ovitz's design was not to build a management firm with whom the agencies could work cooperatively, but rather an agency cloaked in management trappings.[286] This nefarious scheme would lead to clients choosing AMG at the expense of their existing agency rather than in conjunction with it. In this apprehensive atmosphere, CAA interpreted the Menchel "defection" as a hostile act,[287] and in a stunning announcement, the agency declared war with AMG.[288]

Ignoring the traditional scenario in which an artist uses the services of both a manager and an agent, CAA stated that it would no longer represent any client managed by AMG.[289] The agency was making a bold move, in which it risked losing the business of Danes and Driver,[290] as well as other major figures such as Martin Scorsese[291] and Marisa Tomei.[292] But for the "Young Turks" who now run CAA,[293] Ovitz's actions constituted an intolerable threat.[294]

For agents, the specter that AMG raised was one of total destruction.[295] "He's come to kill them," warned a WMA agent.[296] This

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284. *See* Claudia Eller, *Gotham Animation Group Joins Ovitz's New Company*, L.A. TIMES, Jan. 25, 1999, at C2; Phyllis Furman, *Ovitz in the Hunt for Disney Talent*, DAILY NEWS, Feb. 10, 1999, at 30.

285. *See* Claudia Eller, *CAA Loses Agent – and Top Star – to Ovitz*, L.A. TIMES, Jan. 21, 1999, at C5.

286. *See generally* Weinraub, *supra* note 257.

287. *See* Stephen Galloway, *War's Declared: All Ovitz and CAA Share is Hostility*, HOLLYWOOD REP. Jan. 26–Feb. 1, 1999, at 4, 90.

288. *See* Josh Chetwynd, *A Power Squeeze in Hollywood*, USA TODAY, Jan. 26, 1999, at 2D; Weinraub, *supra* note 257, *at* C1.

289. *See* Josh Chetwynd, *Ovitz, CAA Keep Firing in Talent Turf War*, USA TODAY, Mar. 3, 1999, at 4D.

290. *Id.*

291. *See* Chris Petrikin, *Scorsese, Levinson Sign with Ovitz-headed AMG*, VARIETY, Jan. 18, 1999, at 37.

292. *See generally* Michelle Caruso, *Ontz Conquers, Divides*, N.Y. DAILY NEWS, Mar. 11, 1999.

293. *See* King, *supra* note 86.

294. *See generally* Claudia Eller, *Creative Artists Counter Punches in Ovitz Fight*, L.A. TIMES, Jan. 29, 1999, at C1.

295. *See* Stephen Galloway & David Robb, *The Great CAA-Ovitz War: Whose Side Are You On?*, BPI ENT. NEWS WIRE, Jan. 27, 1999.

296. *Star Wars*, *supra* note 4, at 167.

source predicted Ovitz's method would convince all his clients that they had no need for an agent when a lawyer could procure employment for only five percent.[297] All an artist would need then would be a manager to represent his interests. Agents feared that Ovitz would redesign the architecture of the entire industry, killing the progeny he had left in charge of CAA and raising his new profession to the entertainment throne.

Not surprisingly, Ovitz denies any such drama and professes sadness at CAA's decision, saying, "[w]e built that business, gave these guys everything they wanted, nurtured them, helped them sign clients. It's just unfortunate that it had to come to this."[298] Nevertheless, the prominence of these hostilities has legitimized the newfound strength of managers. Ovitz continues to add managers to his ranks and to convert agents into AMG managers. Of course, AMG has launched its own production arm,[299] and with each new AMG manager comes the inherent conflicts of interests with producers.

Ovitz and AMG are not, however, the only fount of new managers in Hollywood. Other management firms have burgeoned all over Los Angeles, and AMG is merely illustrative of an industry-wide trend.[300] The true damage that manager-producers ultimately wreak will be a function of the cumulative effect of a massive new population of individuals purporting to represent artists while simultaneously producing the artist's work. Indeed, if an agent's worst fears are realized and Ovitz strikes a death blow to agencies, the problems will only increase for artists. After all, the presence of several individuals representing an artist generates a separation of powers that acts in large part as a check on abuses by one. If agents do die out as a breed, or even simply diminish, managers will become more and more powerful in the lives of their clients. Even assuming managers are not acting as unlicensed agents by procuring

297. *See id.*

298. *Id.*

299. Ovitz is making deals to expand AMG's business activities into various areas of the economy. Beginning with musical talent, he has made overtures to represent artists such as Puffy Combs, Busta Rhymes and Q-Tip. *See* George Rush, et al., *Puffy & Ovitz Talking Teamwork,* N.Y. DAILY NEWS, August 15, 1999, at 20; Phyllis Furman, *Ovitz Eyes Hip-Hop Alliance,* N.Y. DAILY NEWS, July 14, 1999. In a more radical expansion, however, he has also developed connections with internet companies such as AskJeeves.com and Scour.net. *See* Ken Woo, *Jeeves Gets a Hollywood Agent*, NEWSBYTES, Oct. 28, 1999. *See generally* Bruce Orwall, *Mr. Hollywood Plugs in to the Internet*, ASIAN WALL ST. J., Aug. 10, 1999, at 6.

300. The entry costs to the management industry are low relative to those of talent agents, especially given the commensurate, if not greater, returns. "Management can mean less internal politics; as much money (or more) as agenting, with fewer clients; no more demands from agency brass to poach sought-after talent; and you get to see your name on the screen." Chris Petrikin, *Percent Dissent Foments*, DAILY VARIETY, Oct. 16, 1998, at 1; *see also N.Y. Gets the Picture: Ovitz's AMG Is Here*, VARIETY, Mar. 15, 1999, at 4.

employment, clients will continue to suffer the effects of severe conflicts of interest when managers produce.

### *B. The Garry Shandling Lawsuit*

One particularly high-profile lawsuit, involving Garry Shandling's "It's Garry Shandling's Show," illustrates the conflicts of interest created by personal managers who decide to produce their clients' work.[301] Brad Grey served as an involved producer on the show and was influential as a sounding board for Shandling's script ideas.[302] The show was a critical success and ran for four years on Showtime and during the last two years was also broadcast on Fox.[303] After the show went off the air in 1990, development executives from both cable and network companies courted Shandling, encouraging him to create another show.[304]

In 1992, Home Box Office landed Shandling and his new show, *The Larry Sanders Show*.[305] Initially, Grey took an active role in the development of the new series as executive producer. By the end of the final season in 1998,[306] however, Grey had diverted much of his attention to nurturing new shows managed by Brillstein-Grey.[307] Former *Larry Sanders Show* writers, Paul Simms and Steve Levitan, had left the show to create their own television comedies, *News Radio* and *Just Shoot Me,* respectively.[308] Grey invested much of his energy in writers, nurturing these shows, and Shandling allegedly resented it.[309] As one former writer on *The Larry Sanders Show* described the situation, "Garry wanted a manager, which is what Brad was, and Brad wanted to be a mogul. They were out of sync."[310]

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301. *See* Lynette Rice, *Shandling, Grey in $100 Mil Suit*, HOLLYWOOD REP., Jan. 16, 1998, at 1, 120. Garry Shandling and Brad Grey were introduced to one another in 1979 through their mutual friend, Bob Saget. *See* Lynn Hirschberg, *Garry Shadling Goes Dark*, N.Y. TIMES MAG., May 31, 1998, at 50. Grey later became Saget's manager. Saget knew Shandling as a fellow stand-up comedian. See *id.* Grey became Shandling's manager and the two quickly became good friends, vacationing together in Hawaii and confiding in one another. In 1986, Shandling developed a sitcom for Showtime called *It's Garry Shandling's Show*. *See id.*

302. *See id.*

303. *See id.*

304. *See id.*

305. *See* Scott Collins & Lynette Rice, *It's Garry Shandling's Suit,* HOLLYWOOD REP., Feb. 17, 1998, at 14.

306. *See* Ray Richmond, *Shandling Takes Air Out of Sanders*, VARIETY, Jan. 26, 1998, at 35.

307. *See* Hirschberg, *supra* note 301, at 50.

308. *See id.*

309. *See id.*

310. *Id.* (quotations omitted).

The tension between Shandling and Grey mounted considerably once Grey grew tired of his role as strictly a personal manager.[311] In 1992, Grey began to expand his domain in the entertainment business and took a more active role in producing his clients' shows. "He was sick of the 2 a.m. calls from some unhappy comedian," said one network executive.[312] "He wanted a different role in life."[313] Grey began to produce more television shows and films starring Brillstein-Grey clients.[314] Soon thereafter, Shandling began to doubt Grey's dedication to Shandling's work.[315]

One issue disputed in the recent litigation was whether Shandling had independent counsel representing his interests. Shandling claims he asked Grey why Shandling did not have separate legal representation. Grey allegedly replied, "[d]on't you trust me?"[316] Although Grey denies this remark, in 1997 Shandling retained Barry Hirsch as his attorney.[317] Hirsch had difficulty retrieving requested documents from Grey. When he eventually saw some files, he was alarmed by what he saw.[318] In Shandling's complaint accused Grey of double-dipping by taking an executive producer fee of *The Larry Sanders Show* as well as commissions on Shandling's compensation from the show.[319]

Only on the cusp of trial did the lawsuit settle. Several commentators suggested had the case made it to trial, it would have lasting implications for managers.[320] They believed Shandling had evidence showing that Grey had taken advantage of him financially. Despite Grey's assertion "[Shandling's] case doesn't look like a case to me," other insiders predicted, "Brad will settle."[321] Although the case settled, however, the law suit still serves as a stark illustration of the complications that arise out of managers producing their clients' work. When $110 million was riding on the outcome, the case attracted the attention of all Hollywood's major players.[322]

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311. *See* Telephone Interview with Peter Haviland, Attorney for Garry Shandling (Feb. 10, 1999).

312. Hirschberg, *supra* note 301, at 51.

313. *Id.*

314. *See generally* Collins & Rice, *supra* note 305.

315. *See id.*

316. Hirschberg, *supra* note 301, at 51.

317. *Id.*

318. *Id.*

319. Plaintiff's Amended Complaint, Shandling v. Grey, BC 184316 (Cal. Super. Ct. filed June 23, 1998).

320. *Shandling Case Reset for Friday*, DAILY VARIETY, July 1, 1999, at 4.

321. Hirschberg, *supra* note 301, at 52.

322. *See generally* Claudia Eller & Brian Lowry, *Bitter Shandling-Grey Break-Up Strikes a Nerve in Hollywood*, L.A. TIMES, Jan. 23, 1998, at D1.

### C. A Catalog of Conflicts

The Shandling lawsuit provides a narrative background upon which particular conflicts of interest can be examined. Assuming Shandling's allegations were true, Grey's behavior illustrates the problems created when a personal manager expands his role beyond the discrete considerations of an artist's best interests. The litigation raised three particular conflicts of interest.

#### 1. The Janus[323] Conflict: Artist versus Manager *qua* Studio Representative

An artist retains a personal manager to develop the artist's career and to represent the artist's interest in dealings with third parties.[324] When a manager becomes the species of producer that actually performs the duties of a producer and shares in the profitable returns of the production, the manager becomes affiliated with the production entity. This production entity will need to negotiate basic contractual issues with the artist, including: a salary; the number of episodes in which the artist will appear in the case of a television performance; and amenities the artist will enjoy on the set. If the producer-manager receives an equity interest in the profits of the show, the producer-manager will have an interest in limiting the outlays of the production. Consequently, artists lose their personal defenders when managers become producers *qua* studio representatives, as no one remains to champion their interests.

To justify this egregious violation of a manager's fiduciary obligation to the client, producers marshal a variety of counterarguments.[325] First, they point out the many benefits of allowing managers to invest in their clients' product. Arguably, if managers were prohibited from doing so, many undiscovered artists would never break onto the public stage as their talents would lie dormant and untapped without a benefactor to build them a stage on which to display their gifts. Indeed, managers are those taking the greatest risk by investing in underdeveloped artists well before anyone is willing to give them a break. Second, the interests of managers and artists are often aligned, as a producer will make money only if a show is

323. Janus, the two-faced Roman god, is identified with divergent and opposite impulses, such as those that create a conflict for the personal manager who attempts concurrently to serve an artist and that artist's employer. *See* MERRIAM-WEBSTER'S COLLEGIATE DICT. 626 (10th ed. 1993).

324. *See* discussion *infra* Part II.B.

325. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

successful. If it is, the artist will certainly benefit as well. Third, an artist will never be without representation and can retain separate counsel to defend the artists interests when the manager acts as a producer.

These answers are not entirely satisfying, however, and many of these issues possess more or less gravity depending on whether the artist in question is just entering the industry or is an established artist. First, the argument that a manager's investments actually work to their client's advantage is certainly compelling, but only when applicable to the neophyte artist. Shandling most assuredly does not lack for eager and willing patrons. It would be more beneficial for Shandling to enter into negotiations for investment with an uncorrupted representative while keeping patrons at arm's length. Furthermore, equity stakes do not generate sufficient money to distort incentives to a dangerous degree in the early years of an entertainment career. The real threat of a conflict is triggered only where vast sums of money are at stake. For example, where an established comedian is developing a major television show, the manager is certainly not doing the client a favor by investing in the product.

Again, the argument that manager's and artist's interests are largely aligned, therefore obviating a conflict of interest, is not as true for tyros as it is for stars. If a manager is bothering to maintain a client roster that includes untested talent, then it may very well be true the manager is honestly hitching a ride on the same wagon as the artist and will strive to pave a clear path for that career. Many of the most sophisticated production deals, however, involve only established celebrities who are capable of carrying a television show or film. Brad Grey was certainly not arranging similar production deals with neophyte actors as he was for the Cable ACE and Emmy Award-winning Garry Shandling. At that stage of the management relationship, where so much money may be at stake, a producer is capable of reaping vast personal wealth by slighting some of the client's concerns. Grey, for example, would have made far more money from his equity interest in *The Larry Sanders Show* if he could have persuaded Shandling to forgo a tutor on the set, a service that was provided so Shandling could have his children with him. Of course, Shandling, as an equity-holder, would also make more money by agreeing to give up the tutor, but his family ties may be of greater concern to him than his profits. He now faces the unsavory prospect of negotiating the issue with his personal manager.

Many of these concerns can be alleviated by requiring the artist to retain separate counsel for advice when negotiating with a manager-turned-producer. Indeed, this solution is commonly employed in the context of

conflicts of interest in the legal profession. Nevertheless, there are still significant issues with using counsel as a panacea for this problem. First, unlike members of the bar, personal managers are under no obligation to advise their clients to retain independent counsel when potential or actual conflicts of interest arise. Indeed, if the conflict is serious enough, the manager has a distinct interest in not advising the client to do so.

Second, this solution imposes the burden of correcting the problem upon the aggrieved party. The artist should not be forced to expend more money to hire yet another representative when also retaining the services of the manager to handle these concerns in the first place. Perhaps the artist could terminate the management agreement and retain the attorney or a new manager in lieu of the original manager-producer. Again, the artist incurs the transactional burdens of finding and educating a new representative. Furthermore, if conflicts with the manager-producer are the only potential, the client may not fully appreciate their gravity and not therefore elect to terminate what could be an established and successful partnership as a prophylactic measure.

This solution has a third wrinkle related to the distinction between emerging and established artists. While Garry Shandling might easily add another representative to his payroll and barely feel the financial impact, an impecunious artist may be in a completely different situation. Many problems surrounding these conflicts do not appear to strike as deeply into the lower strata of the entertainment hierarchy. If they do, those clients are in the most vulnerable position vis-à-vis their managers. If a manager advances an artist funds to underwrite the beginning of a career, the artist will be in no position to retain outside legal counsel to protect the artists interests when they diverge from the manager upon whom the artist relies so heavily.

### 2. The Don Pedro[326] Conflict: Artist v. Manager *qua* Titular Producer

In addition to simply leaving an artist without a zealous advocate for negotiations, the specter of producing creates different problems when the manager acts not only as an agent of the production entity, but also as a manager *qua* titular producer. One difficulty is the possibility the manager's quest for credit as a producer will corrupt the advice the manager gives the client regarding what opportunities that artist should select in building a career.

326. Don Pedro is the character in Shakespeare's *Much Ado About Nothing* who, dispatched to represent his lord's romantic overtures to a lover, ends up wooing her for himself.

A pivotal element of a manager's job is to advise artists on what kinds of job offers to accept. While agents may generate a number of offers of employment for the client, choices must ultimately be made. Many of the choices can have a profound effect on the success or failure of an artist's career.

When personal managers become, or seek to become, titular producers, they welcome a host of distortions into their decision making process with regard to the advice they supply to their clients. Producing creates a perverse incentive for those managers enamored of producing credits. Imagine, for example, an artist presented with two different job offers. The first is a deal in which the artist will receive one million dollars for services rendered. The manager will collect $250,000 of this fee in an arrangement with a typical twenty-five percent management commission. The second is a deal in which the artist will receive $500,000, and the manager will be awarded the highly coveted credit as a producer while being compensated in a producer's fee of $125,000. Regardless of the first offer's financial superiority for the client, any manager who is interested in capitalizing on the benefits of a producer's credit may be tempted to advise the artist to accept the second offer.

Granted, in reality these choices are far more complex. The two offers might be accompanied by very different reputational and professional benefits. One can easily imagine the benefits of a financially meager offer that includes the chance to work with a tremendous director, as contrasted with a lavish engagement that would entail risqué and career-threatening sex scenes. An artist could easily reject money as the controlling variable, and it is precisely the subjectivity of all the other factors that necessitates retaining an experienced industry expert like a personal manager to provide unadulterated advice in those situations.

Assuming the two offers are identical but for the financial variations, a manager may be tempted to render self-interested advice. If interested in becoming a producer, the manager may be willing to forgo $125,000 on the deal in order to receive the credit as a producer of the show. The producer's credit is not easily quantifiable in a pecuniary sense, but it is clearly an asset with future returns. The credit serves as an advertisement for the producer's functions and as a conduit to talent. In the first capacity, financiers or studios looking to find a producer for their own show will see the credit as a calling card, indicating whom to approach with an offer. In the second instance, those same underwriters will learn from the credit whom to contact as a representative of the actors, writers or director they may have admired on the show.

By taking a loss on one particular deal for one particular client, a manager may reap vast rewards in the advertising value of the producer's credit. The artist on that deal, however, sees very little benefit of the credit. Indeed, because many of the benefits will mature only at a later date, the artist may never see any of them. A manager who would be a producer can easily sully advice to a client by allowing the allure of credits to influence the value of a deal to the artist.

Managers point out that the entire industry of personal representation contains a certain degree of inherent conflicts of interest.[327] Talent agents will always have to grapple with conflicts when they represent more than one artist of a particular ilk. If a studio approaches an agent with a script in search of a director, for example, the agent must decide to whom he will first offer the project. Once the agent presents the script to one client, whether or not that agent has been tempted to give it to the highest commission-generating client, the question becomes whether the agent violated any fiduciary obligations of zealous representation to other directors on the agent's roster. If the agent was an attorney at a law firm, the answer would almost certainly be yes.

The fact that these conflicts exist in one sector of the entertainment industry does not excuse their proliferation elsewhere. Perhaps agents are not subject to enough scrutiny and the solution is to subject both agents and managers to a code of professional ethics similar to those of every state bar. As far as identifying the problem, however, suffice it to say adding more conflicts to the scenario is hardly the ideal answer.

The choice of job offers raises another fallacy in the typical personal manager's sales kit. Managers are fond of decorating their producing roles by arguing that it is in the artist's interest to have the managers also serve as producers. Moreover, it costs the client nothing. The first part of this sales pitch stems from the argument that an artist would be far better off having the producer of a film or television series be someone who also has an interest in the artist's career, rather than a completely disinterested party. The manager-producer will be a familiar conduit through whom the artist can complain about the production. Although it suffers from the same weakness, this argument replicates a prior argument that managers and artists have aligning interests, even when the managers produce. The second leg of the sales pitch, however, has not been previously discussed.

Managers claim serving as producers allows them to collect producer's fees from the studio or financier in lieu of a commission from

327. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

the artist. If a production company, for example, offers a one million dollar contract to an artist to act in a television show and also offers to pay the manager $250,000 to serve as an executive producer on the show, the artist will not be obligated to pay the manager anything on the deal. From an accounting perspective, that is certainly true. When the manager is acting as a producer in only a titular capacity, however, the production company is simply offering the producer's fee because that is the only way to acquire the artist. Many of these titular producers in fact add no value to the production as producers. In these instances the production company has budgeted a certain sum of money needed to acquire the artist's services, and has itself simply divided the amounts between the manager and artist. From the production company's perspective, there is no difference between this kind of deal and one that simply gives the artist $1,250,000 without retaining the manager as a producer. Studios and financiers of films and television shows are indifferent to the way in which their money is apportioned amongst stars and their representatives.

The only situations in which this may not be true are ones in which the managers do, in fact, add value to the production process by serving as true studio representatives. In those instances, the financiers may actually be compensating the manager for services as a producer, drawing from the sums allocated for producers' salaries. If the manager is capable of performing the tasks of a producer, the financier need not hire another person to perform those activities, and can therefore deliver the sum it has allocated for the artist entirely to the artist. From a financial perspective, these situations are clearly an ideal scenario for the production entities, managers and the artists. In a great deal of cases, however, the manager is a producer in name only—usually "executive producer"—and the financier still must retain the services of another person actually to produce the show.

Although managers can occasionally leverage their relationships with artists to become producers and effectively provide their clients management services for free on those deals, there is one problem: the more effective a manager is at producing, the greater the risk of conflicts of interest. If a manager is, in fact, acting as an agent of the production company by running the show as a producer, the manager is more likely to have interests that diverge from the artist's. Shandling's tutor situation is one such example. When managers act as producers in purely a cosmetic capacity, their interests are still largely vested in their clients, not in the production company for whom they work ostensibly. Thus, while those managers who do produce may offer their stars a great financial break by

eliminating the client's need to pay a commission, the decisions to do so estrange them from the artist's interests.

### a. Double-dipping

A truly egregious problem occasionally occurs when a manager agrees to accept a producer's fee on a client's show. Almost all management agreements stipulate a manager will not take a commission from an artist when that manager is producing the artist's work. The idea is the manager is compensated from a third-party by at least the amount of the commission the manager would receive from the client. Some managers, however, have been accused of accepting both a producer's fee and the client's commission. This practice is known as "double-dipping" and is a blatant violation of the management agreement and the manager's fiduciary obligations to the artist. Shandling accused his manager Brad Grey of such an impropriety.[328]

### b. Siphoning Talent

Shandling also accused Grey of siphoning talent.[329] When management firms develop sophisticated and variegated production arms, the partners of the firm are allowed to become executive producers on a large number of shows. Of course, the wider the net a producer casts, the greater the possible financial returns from producer's fees and returns on equity investments. Other non-monetary advantages of producing are similarly telescoped when managers expand their fiefdoms to include several television series or films. Unique problems may occur, however, when a manager produces several shows for various clients. The manager may direct artists away from some shows towards others and this redeployment can easily affect the fortunes of the different shows.

Shandling contented that Grey had hired a number of talented writers to work on *The Larry Sanders Show* and signed those writers to management agreements.[330] After doing so, Grey directed those writers to other shows he was producing in order to bolster the shows' success.[331] Naturally, the writers may have benefited from more lucrative contracts and Grey could have profited from multiple successful shows. This

328. *See* Plaintiff's Amended Complaint, Shandling v. Grey, BC 184316 (Cal. Super. Ct. June 23, 1998).

329. *See id.*

330. *See id.*

331. *See id.*

situation harmed Shandling, however, who alleged that Grey, through his activities, had breached his fiduciary duty.[332]

Although the Shandling lawsuit did not expose the alleged conflicts of interest to the glare of a trial, it generated a great deal of interest and served as a coming-out party for the less savory side of the artist-manager relationships. If managers continue to conduct business as usual, and agents continue to be successful in their bid to avoid regulations, more lawsuits will certainly be coming attractions.

## IV. A TAXONOMY OF POTENTIAL REMEDIES

*We have to be wary of solutions in search of a problem.*[333]

The range of problems created when managers act as producers and the diversity of casualties in this melée are far too complicated to be solved by any single panacea. The industry can, nevertheless, address various sorts of issues with different tools. This situation, like many disorderly legal scenarios, can be altered by the power of the state, the ability of the parties to contract privately, the influence of unions or any combination of these devices. Each of these mechanisms have a different role to play in the future governance of personal managers.

### *A. Public Law*

Public law currently wields a heavy hand in regulating the daily affairs of talent agents, but no regulation delineates the duties of personal managers.[334] The current drama afflicting the industry, however, is certain to bring this state of affairs to an abrupt halt. One legislator has already proposed to expand the scope of the TAA to regulate activities in which managers engage.[335] Yet, personal managers do not have much to fear from public law because the scope of the proposal is mild and unlikely to threaten their Edenic existence. Moreover, if this bill or a future one attempts to strike at the heart of managers' regulatory largesse, the controlling interests in Sacramento would almost certainly choke it in its

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332. *See id.*

333. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999).

334. Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, *in* COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 485 (PLI Pat. Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G-359, 1993).

335. *See* Nick Madigan, *Proposed Law Would Regulate Managers*, DAILY VARIETY, Jan. 28, 1999, at 5.

crib. Even if state regulations against managers could survive a treacherous gestation in the California Assembly, their tools are too dull and rigid to cut the knot of conflicts that are afflicting the industry.

### 1. The Kuehl Proposal

Almost inadvertently, Assemblywoman Sheila Kuehl initiated the most vocal debate to date concerning the fate of managers. In a coincidental turn of events, Kuehl proposed a bill to regulate managers just as the war between AMG and CAA was reaching its zenith.[336] Sacramento's interference was a zephyr of pure oxygen to Hollywood's incendiary manager bonfire. Managers have, for the first time, scurried to form a trade association to represent them in the state capital and successfully defended their interests.[337]

Santa Monica Democrat Sheila Kuehl is the California Assembly's Speaker Pro Tem and a former child actress.[338] When she performed under the name of Sheila James, Kuehl learned first hand of the potential abuse managers could perpetrate on child actors and their parents. The problems Kuehl witnessed then and still fears, however, are of a wholly different species than the taxonomy explored in this Article.[339]

#### a. Precipitating Factors

Each year, the Los Angeles District Attorney and City Attorney prosecute a large number of scam artists who pose as artists' managers in order to defraud the parents of young children.[340] The typical *modus operandi* of these individuals is to establish a business that claims to be either a talent agency or a management firm.[341] They then obtain lists of the names of young children in the Los Angeles area and write to the

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336. *See* Kirk Honeycutt, *Managers Licensing Bill Just Introduced,* BACK STAGE, Mar. 5, 1999, at 3.

337. *See* Galloway & Busch, *supra* note 36, at 1; Petrikin, *supra* note 36, at 5.

338. *See* Sheila Kuehl, *Commonly Asked Questions & Answers Regarding AB 884*, Press Release, Feb. 22, 1999.

339. *See* Nick Madigan, *Bill Guards Wanna-Be Child Stars,* DAILY VARIETY, August 31, 1999, at 5.

340. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999); Telephone Interview with Mark Lambert, Los Angeles Deputy City Attorney (Jan. 26, 1999).

341. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999); Telephone Interview with Mark Lambert, Los Angeles Deputy City Attorney (Jan. 26, 1999).

parents of those children inviting them to bring their child to an audition.[342] The letter usually states the child has been identified through school yearbooks as possessing the right look for a role and the audition could be the gateway to a successful acting career.[343] When the parents bring their child to the audition, the managers identify the child as a great potential talent and promise to find lucrative employment for the budding actor. All the parents need do is provide an initial investment, usually of several hundreds of dollars, to underwrite the creation of a photographic portfolio necessary to landing jobs. The photographs are wildly overpriced, and the agency never finds work for these children.[344] When parents are able to persuade the police or district attorney to investigate the operation, the fly-by-night business simply dissolves instantly, only to re-open under another name and a different set of offices.[345]

Kuehl proposed several revisions to the licensing provisions governing talent agencies that would establish statutory standards to regulate personal managers.[346] Her proposal, Assembly Bill 884 ("A.B. 884"), would have required that managers be licensed.[347] A.B. 884 was altered, however, and enacted in a substantially different form.[348] As enacted, the Bill requires all persons who charge a fee before the artist obtains artistic employment post a bond with the state, insert statutorily provided provisions to cancel a contract and guarantee the right to refund.[349] While the enacted Bill may affect managers it is narrowly drafted to reach fly-by-night "management" operations.[350] Kuehl, a Harvard-trained attorney, worked with the Los Angeles County District Attorney and the Los Angeles City Attorney—each of whom handled a number of cases involving fraudulent representations made to potential

342. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999); Telephone Interview with Mark Lambert, Los Angeles Deputy City Attorney (Jan. 26, 1999).

343. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999); Telephone Interview with Mark Lambert, Los Angeles Deputy City Attorney (Jan. 26, 1999).

344. *See* Telephone Interview with Mark Lambert, Los Angeles Deputy City Attorney (Jan. 26, 1999).

345. *See id.*

346. *See* A.B. 884, 1999-2000 Reg. Sess. (Cal. 1999) (as amended on Apr. 26, 1999).

347. *See id.*

348. Act of Oct. 5, 1999, ch. 626, §§ 1–2, 1999 Cal. Adv. Legis. Serv. 626 (Deering's) (to be codified at CAL. LABOR CODE §§ 1701–1701.20).

349. *See id.*

350. *See id.*

child actors by these operators—to draft the original bill.[351] Kuehl stated that her initial goal in creating a licensing process for managers was to ensure actors attempting to enter the business know whether they are dealing with a reputable manager who is licensed by the state.[352]

The problems Kuehl sought to remedy are of a different nature from the conflicts created by law-abiding personal managers who produce, but her proposal nevertheless threatened to affect that area significantly. Currently, personal managers operate almost entirely unregulated, except to the extent the TAA imposes a negative duty on them not to procure employment.[353] Once aware of the Kuehl bill, representatives from all of Hollywood's leading management firms met to form a coalition much like the Association of Talent Agents.[354] The representatives hired two prominent attorneys, Bertram Fields and Ron Olson, to represent their interests.[355]

Kuehl professed a certain degree of bewilderment over the managers' reaction to her bill because she claimed her proposals did not "alter the working relationships that exist among agents, managers, and their clients."[356] Despite Kuehl's protestations, the managers expressed at least two concerns with the bill.[357] First, they feared the new law would impose criminal sanctions, including possible jail time, on those who violated it. Kuehl's response to this concern was the bill's sole criminal penalty established a misdemeanor only when outright fraud is perpetrated.[358] This punishment was, in her words, aimed specifically at fly-by-night operators. The second concern held by managers was that the bill would have stripped them of their highly coveted right to produce. To this, Kuehl stated unequivocally that no such prohibition existed in the bill.[359]

In addition, Kuehl described her proposal as "an opening bid in bridge," one that could, and did, change as managers reacted to her ideas. Although the bill changed, this did not fully assuage managers' concerns

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351. *See* Telephone Interviews with Bethany Aseltine, Legislative Assistant to Assemblywoman Kuehl (Jan. 26, 1999 & Apr. 13, 1999).

352. *See* Telephone Interviews with Bethany Aseltine, Legislative Assistant to Assemblywoman Kuehl (Jan. 26, 1999 & Apr. 13, 1999).

353. *See* discussion *supra* Part II.E.

354. Galloway & Busch, *supra* note 36, at 1.

355. *See id.*

356. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999).

357. *See generally* Galloway & Busch, *supra* note 36.

358. James Bates & Claudia Eller, *Ovitz, Kuehl Rocking Boat for Agents, Managers*, L.A. TIMES, Feb. 23, 1999, at C1.

359. *See id.*

because it could have still evolved into something far more draconian. While agents might like to see managers more regulated in order to level the business playing field, few of them expressed delight with the legislature's review of the TAA. Just as the bill had expanded to strip managers of a greater number of their current freedoms, it could have also metastasized to outlaw the lucrative packaging fees agents now enjoy. Both managers and agents were uneasy about Kuehl's bill simply because it threatened to "have the government breathing down their necks."[360]

b. Consequences to the Management Industry

In its early incarnation, the Kuehl bill would not have had any effect on the way in which managers conduct their business. The proposal made no attempt to proscribe producing and would have had little effect on the industry beyond imposing a few bureaucratic hassles.[361] In establishing requirements to be licensed, to post bond and to use written agreements, Kuehl's original proposal tracked the correlated language for agents in the TAA.

Kuehl's bill did not address the problems of manager-producer conflicts of interest. Despite that deficiency, managers still protested it because it simply codified ineffectual hoop-jumping without addressing any serious issues. The bill was ostensibly motivated by a desire to stop fraudulent management firms from bilking citizens out of their money. Presumably, however, these scam artists could simply forge the documents that certify state licensure, as they have already cloaked themselves in all the other trappings of a legitimate business. Indeed, only the law-abiding firms, those firms with production arms taking advantage of high-profile clients would comply with this law, resulting in the legislative pellet's missing its mark, striking but bouncing feebly off heavily armored culprits. As long as Kuehl had no intention of addressing the management-producer issue and no likelihood of affecting the behavior of her targets, her proposal appeared to be mere legislative fluff.

Kuehl defended the bill for its treatment of criminal managers.[362] Rather than simply relying on a melange of general criminal provisions in the California Code, law enforcement officials would have been able to invoke a statute specifically crafted to punish fraudulent operations.

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360. *See id.*

361. *See generally* James Bates, *Managers Bill to Get Tighter Focus*, L.A. TIMES, Apr. 1, 1999, at C5.

362. *See* Sheila Kuehl, *Talent Agencies and Artist's Managers*, Legislative Counsel's Memorandum, Feb. 22, 1999.

### 2. Expanding the Kuehl Proposal to Ban Producing by Managers

While Kuehl's bill might not have been an answer to conflicts of interest created by managers who produce, variations upon it might well be. Kuehl's bill could have been widely expanded to impose a host of regulations upon managers, many of which would surely eliminate potential conflicts of interest with their clients. Using the indiscriminate armaments of public law for this task, however, creates an unacceptably high degree of collateral damage to this segment of the entertainment industry.

#### a. Considerations for Legislators

An advantage of state legislation in this area is its power to occupy the field completely. Unlike private contract or guild regulations, which must operate within the confines of state law and are necessarily limited by it, the California Assembly itself can operate with impunity to regulate managers. With this power comes the responsibility of crafting laws that accurately address the problems. If legislators err, they cannot use private actors to correct their mistakes, given the rigidity of the legislative process. The lawmakers should, therefore, be very clear about what problems they seek to correct and whether they are the proper mechanics for the job.

Confusion about the precise problem can cloud solutions. Legislators need to be wary of red herrings in their deliberative process. One such ruse may come from talent agents who are eager to see managers more strictly regulated. The motivation of these agents is not to solve problems caused by conflicts of interest but to level the playing field in the marketplace of artists' representation. Why legislators should care the agents currently face a competitive disadvantage is unclear. This disadvantage is largely due to private, not public, law because the ability to produce was voluntarily forfeited by agents in their negotiations with the entertainment guilds.

Agents will claim that the state is nevertheless responsible for under-enforcement of the TAA. Managers, they complain, are rampantly violating the TAA by operating as unlicensed agents. The under-enforcement of the TAA does not justify passing separate legislation to govern managers. Rather, agents need to make their complaints known to the executive, not the legislature. The Department of Labor monitors enforcement of the TAA. Whether or not the TAA is sufficiently enforced is an open question. While stories of managers procuring employment for their clients abound, the Act has a powerful self-enforcement mechanism that permits aggrieved parties to recoup all fees paid to errant

representatives. A lack of lawsuits under the TAA may indicate the absence of an aggrieved citizenry as much as the dilatory methods of the Department of Labor.

While the agents' protestations of simple unfairness may not rise to the level necessary to warrant passing new legislation, the inherent problems in the manager-producer role present a stronger case. In this context, the experience of agents seems more relevant. Because agents are prohibited from producing, they suffer from none of the vertical conflicts afflicting managers and their clients. Although they must still grapple with horizontal conflicts among their several clients, the industry has many imperfections not at issue here. A straightforward way to eliminate any possible conflicts with managers would be to expand Kuehl's legislation or to pass a separate amendment to the TAA imposing a blanket ban on producing by personal managers.

The legislature could effect this change by simply replicating the language found in the collective bargaining agreements between the entertainment guilds and agents. Kuehl devised a definition for personal managers in her legislation. That definition could easily be joined with the relevant language prohibiting agents from producing. While the TAA does not by its terms govern personal managers, it does seem to be the logical statutory home for any such proposal, and its name could be revised to what it was from 1959 to 1967, the Artists' Managers Act.[363] Before pursuing this solution to the conflicts problem, lawmakers must consider the detrimental side effects of their intervention.

### b. Consequences for Managers

Enacting a proscription upon managers equivalent to the one that prevents agents from producing would essentially provide a prophylactic barrier to all conflicts of interest created from the practice of managers owning any part of their clients' work. The rule would make impossible any situation where a personal manager divided loyalty between client interests and the manager's personal stake in the production. Managers would have the capacity only to advocate for their clients, not to receive a producer's fee or credit. In many ways, therefore, state legislation is an easy and comprehensive remedy to the problems currently afflicting the personal representative industry. Under such a law, Brad Grey could not have acted with the appearance of impropriety with regard to Shandling.

The Shandling case, however, also illustrates some of the shortcomings of such a proposal. When Shandling first created a television

363. *See* discussion *supra* Part II.C.2.

show, he was eager to see his manager invest in the project. Artists in their early years typically need financial and creative investors to bolster their shows when those artists are most vulnerable. Managers often provide their clients with funds to find their legs at the beginning of their careers, and any broad prohibition on ownership would eliminate a vital source of seed money to many aspiring artists. This rule, therefore, would have a disproportionate impact on those artists who are already in the most precarious positions. The conflicts of interest so dangerous in the Shandling situation existed only when both Shandling and Grey had gained enormous stature in the entertainment industry. At the beginning of an artist's career, having a manager invest usually aligns both parties interests more than it divides them.

Perhaps a financial cap could be imposed to restrict the extent of managers' ownership interest so that no manager could invest more than a certain dollar amount in any one client's career. This exemption would allow for the desirable germination of aspiring artists, while maintaining the focus of the legislation on the greatest source of conflicts: managers producing highly valued television shows and films. Politicians may find it very difficult to strike a balance between allowing a manager to provide enough support for a fledging venture without cleaving the manager's interests in the artist. The difficulty of such a task and the potential miscalculations may be better addressed by allowing those familiar with the industry, such as guild representatives, to calibrate the setting.

If legislators do choose to outlaw producing by managers, they need to remember the demographics of their constituencies. The universe of artists varies enormously, from the multi-millionaire superstars to the struggling and unemployed. This diversity makes it difficult to promulgate rules that benefit the entire pool. For the most vulnerable groups, blunt legislative remedies have the potential to inflict more harm than good.

Indeed, perhaps the greatest limitation of any legislative remedy to the conflicts of interest problem is that it is such a blunt tool. Because legislation acts with such a broad sweep, it must be painstakingly crafted to function precisely; yet, that precision is often simply impossible to achieve with public law. Legislative solutions to the conflicts of interest problems have the potential to misfire as did the Kuehl proposal. While Kuehl's Bill was aimed at fraudulent managers, its effects might have been felt most acutely by the law-abiding. Furthermore, while outlawing producing may target the largest management firms, its effects may be felt most by smaller management operations representing only struggling artists. Private law, with its greater flexibility, may provide a more precise instrument for remedying this problem. Indeed, the prohibitions preventing agents from

producing are created by guild regulations, not any law passed by the California Legislature.

Depending on one's view of the legislative process, state legislation may have one additional benefit. Because the issue of managers producing is so closely bound up with the current dispute between managers and agents, the entertainment industry's most powerful entities have some interest in the resolving this issue. The high profile of the dispute can easily warp open discussion. Even Hollywood's most powerful are reluctant to defy their important competitors. The industry is so fluid, with so many repeat players, few of its members are interested in drawing the ire of their colleagues by speaking against them. Legislators may very well be immune to these struggles; indeed, Kuehl herself has pointed to the intractability of the conflict between managers and agents, acknowledging "[o]ften, we are asked to make these hard decisions."[364] Of course, if one believes the legislative process is not immune to the influence of special interest groups, then Kuehl's confidence in the legislative detachment is overstated.

A final argument in favor of public law is the strength of its symbolic effect.[365] The common law currently provides remedies for breaches of fiduciary duties when managers take advantage of conflicts of interest and additional codified remedies could certainly add to a plaintiff's arsenal. When a legislature passes specific laws, courts often take judicial notice of the lawmakers' message and may accordingly grant relief on the basis of a precise legal justification rather than on general principles. Many regulations merely codify legal principles already established at common law, but to which legislators believe particular attention should be paid. Whether this totem is worth forging in the face of drawbacks with state laws is a separate issue.

### c. The Plausibility of State Regulation

An issue distinct from the merits of a public law solution is the likelihood of achieving such a solution. The California Assembly likely did not pass Kuehl's initial bill because it would have had such a large an impact on the finances of a major entertainment constituency. Furthermore, because conflicts of interest are often a latent problem, the potential victims are largely unaware of them. Celebrities can be among

364. David Robb, *Legislator Says Her Bill Will Focus on Fraud, Not Business*, HOLLYWOOD REP., Mar. 15, 1999, at 1 (citation omitted).

365. *See* Telephone Interview with Sheila Kuehl, California Assembly Speaker Pro Tem (Apr. 15, 1999).

the most powerful lobbyists in California, but despite their interest in this issue they may not weigh in on it very much at all. While artists are not delighted to have a bevy of representatives to maintain, they have only recently become aware of what can go wrong when managers produce. With more instances of lawsuits such as Shandling's, and more managers producing all the time, the issue will only gain prominence.

Managers have a history of successful lobbying efforts in Sacramento. Their joint forces would doom any pending legislation.[366] Gearing up for the battle over Kuehl's original bill, managers formed a coalition to protect their interests under the leadership of Hollywood's top lawyers, Ron Olson and Bertram Fields. Furthermore, agents have long relied on the ATA to speak for their interests.[367] While the two groups are at odds on this issue—many agents would be pleased to see managers' operations so cabined—the government is a common enemy.[368] Both of these groups have achieved success in the past by enlisting the help of persuasive celebrities on this issue and they could certainly muster a few satisfied customers to lean on lawmakers. Indeed, the rapid demise of the Kuehl bill as proposed was a testament to that clout.

Furthermore, if the Assembly prohibits producing by managers, it will insert itself further into the operations of the industry than ever before. The TAA does not restrict agents to this degree; this is the job of the guilds.[369] Additionally, managers and agents would not be left to fight this governmental expansion alone. In all likelihood, they would find an ally in the governor. Governor Gray Davis has close political connections to powerful managers and agents and would certainly be uncomfortable with open warfare between the two in the legislature.[370]

Any discussion of crafting a public law to regulate managers in the same fashion as agents, vis-à-vis the ability to produce, is preempted by the sheer implausibility of the California Assembly ever doing so. Such a law would constitute the legislature's greatest interference to date in one of the state's cash cow industries and would be vigorously contested by two powerful constituencies. But many good laws have survived the legislative gauntlet of detractors on all sides. Such a proposal, however, would probably not be a good law.

Even if such a bill could be crafted to target its effects on only the gravest offenders—major management firms with production arms—the

366. *See* Galloway & Busch, *supra* note 36, at 1; Petrikin, *supra* note 36, at 5.

367. *See* Galloway & Busch, *supra* note 36, at 1; Petrikin, *supra* note 36, at 5.

368. *See Rival Reps Ready, supra* note 1, at 1.

369. *See* discussion *supra* Part II.D.

370. *See generally Rival Reps Ready, supra* note 1.

heavy hand of public law is ill-suited to deal with an industry in which individual clients vary widely in their feelings on this issue. As a result of their ignorance or unique circumstances, many artists would rather have managers who could stay involved as producers in these productions. For those individuals, a state law outlawing the practice is too blunt an instrument. If more flexible and precise private mechanisms could be afforded by the same protections, then public law is not the solution.

### *B. Private Law*

At the opposite end of the remedial spectrum from state law is private law. The debate over whether more governmental intervention is preferable to a laissez-faire economy and legal regime is a tired one, but certain elements of it are pertinent to this discussion. Personal managers are understandably strong proponents of minimal governmental intervention in their domain, as those reaping profits almost always are. Abdicating a state-sponsored solution to the conflicts problems does not, however, necessarily translate into allowing the problems to proliferate unchecked. Indeed, in the case of these conflicts of interest, the ideal situation is a blend of two ingredients of private law: one a familiar staple, the other peculiar to the entertainment industry.

#### 1. Contract

An open market in which intelligent, well-informed and financially independent parties bargain freely for their interests is often an excellent way to achieve a mutually agreeable regime. The entertainment business features many of those necessary ingredients. Freedom of contract is a healthy component in any blueprint for private sovereignty, both financially and legally.

##### a. Arguments & Analysis

The parties involved in the most serious conflict of interest scenarios, established artists and sophisticated managers, are almost certainly rich. The sums at issue in these financial arrangements often run into the millions of dollars for each side.[371] These parties have an interest in protecting their considerable assets and the means to do so. These are not members of a disenfranchised lower class in need of state protection. Indeed, few sectors of the American economy feature such wealthy players on both sides of the transactions. In spite of the ostentatious wealth of

371. *See* Telephone Interview with Dan Cox, Reporter, *Variety* (Jan. 26, 1999).

many managers and their clients, legislators should avoid caricaturing the entire industry so glibly. Many participants in the conflict of interest problems are wealthy, but for every superstar celebrity there are hundreds of aspiring actors that remain unemployed for years. These actors still need representation.

The legislature cannot abandon the issue simply because of flashy stereotypes. Many artists do not fit the requirements of the ideal open market and need maximum protection from the government. In the case of conflicts of interest created by managers who produce their clients' films and television shows, however, low-profile artists typically do not need governmental guardianship. The conflicts almost always exist when the client's product is capable of generating funds sufficient to distort the manager's interests. Thus, while the market may not be homogeneously wealthy, those sectors imperiled by the conflicts problem almost always are.

Relying on contract rather than public law allows both sides to adjust the terms of their agreements to their specific needs. For many artists, having the producer of their enterprise be someone whom they trust, and who has represented them for years, is far preferable to an unknown agent of the production entity.[372] Savvy artists retain separate legal counsel to advise them in negotiations with their manager-turned-producer, rather than either forgoing protection or terminating their management agreements. For those individuals, a state prohibition against producing would paternalistically deprive them of what they consider their best career choices. In a wealthy market, there may be many artists who wish to pursue this option with the financial means to do so.

The advantages of an open regulatory scheme are achievable only when the artists are aware of the risks of potential conflicts. Even the very wealthy may not know to seek information. One purpose of artist representation is to relieve the client of the need to handle mundane issues. If the artist is unaware of potential problems, and the manager fails to inform him, then an unscrupulous manager can manipulate contracts to that manager's own advantage where the government has vacated the field. Although Garry Shandling is both wealthy and intelligent, he arguably did not protect himself through contract. Since the emergence of the Shandling case, the prominence of this issue has increased dramatically. Therefore, many artists today have information Shandling lacked.

372. *See* Telephone Interviews with Manya Klempner, Talent Manager, The Firm (Jan. 15, 1999 & Mar. 29, 1999).

An argument in favor of contract over state law is that enacting regulation, where it is not needed, serves only to undermine legislation and dilute regulatory capital in areas where it is needed most. Broadening the TAA to include superfluous provisions detracts from legislation in more important areas, such as where victims are not wealthy celebrities. Of course, that argument appears to suffer when even Garry Shandling has run into trouble without state protection.

Attorneys for Shandling, however, did not lament the absence of statutes under which to bring their suit against Grey.[373] Indeed, they chose not to bring suit under the existing legislation even though[374] the TAA could have added leverage to their settlement negotiations. Shandling's attorneys may not have challenged Grey under the TAA because they did not believe they had a colorable claim.

Before even reaching that question, however, one must acknowledge the TAA is an unsatisfying source of relief for Shandling. Suing under the Act and any legislation under the Labor Code would necessarily mean submitting to an administrative hearing under the Labor Commissioner's jurisdiction where damages would be limited to commissions paid. Shandling's attorneys were more interested in suing under common law causes of action,[375] which not only covered the gamut of their allegations against Grey, but also provided for far greater damages upon recovery. While a well-conceived regulatory scheme might address these concerns, it need not when sufficient alternatives already exist.

### b. Limitations of Laissez-faire

While the arguments in favor of private law are persuasive, such a laissez-faire regime is not without its limitations. Private law works best—and perhaps only—when both sides to a negotiation share a large degree of information. Even with wealthy players, that may not be the case. Regardless of whether an artist has the resources needed to retain independent counsel for negotiations with a manager-producer, those resources are all for naught without proper knowledge. Despite defects, public law can remedy problems private law cannot by legislating the transmission of information. Kuehl's proposal, for example, provided for particular recitations of artists' rights to be affixed to all personal

373. *See* Telephone Interview with William Isaacson, Attorney for Garry Shandling (Jan. 27, 1999).

374. *See* discussion *supra* Part III.B.

375. *See* discussion *supra* Part III.B.

management agreements.[376] Without such a mandatory rule, managers are free to leave the client to discover those rights for themselves. To cure this flaw of a wholly laissez-faire regime, a private law solution must attempt to replicate the informational disparity by borrowing ideas from the positive elements of public law. Attorneys and unions are great sources of information for artists who have them, but in a private law regime one pays for the system's benefits with a measure of insecurity. To patch these holes, the contract must be spackled with the benefits provided by the entertainment unions.

### c. Assessing Contract

A heavy-handed legislative involvement in this issue threatens to eliminate the ability of artists to protect themselves. Artists want a flexible business setting through the ability to freely contract. Of course, a state regulation has some benefits, but many of those advantages are achievable without deleterious side effects from a well-functioning market that capitalizes on the strengths of unions. The types of artists most likely to be afflicted by conflicts of interests with their managers are the wealthy and economically resilient, capable of drafting contracts to their own advantage. A completely laissez-faire legal regime, on the other hand, does not fully address the problems of managers using their greater information to take advantage of their clients. For these reasons, public law is a weapon too volatile to be used in these close quarters and the ability to freely contract alone cannot be the sole arrow in an artist's quiver.

## 2. Guild Regulations

The entertainment guilds provide vital missing ingredients to a recipe of artist protection by featuring free contract and common law remedies. The guilds possess two unique capabilities essential for filling the gaps between a clumsy public law regime and a minimalist free market: information and enforcement.[377] In the current debate simmering in Hollywood, the guilds have remained conspicuously silent.[378] There is an increasing need for the guilds to make a much more overt contribution to the dialogue in order to protect their members from the increasing number of managers producing television shows and films.

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376. *See* discussion *supra* Part IV.A.1.

377. *See generally* Chi, *supra* note 116.

378. *See* Telephone Interview with Nick Madigan, Reporter, *Variety* (Feb. 3, 1999).

### a. Information

Guilds are particularly well-situated to monitor the industry and to take account of trends within it. They are certainly aware of the conflicts of interest that arise when managers act as producers. This information alone is a valuable commodity to the members of the guilds, as long as those members receive information from some source. In the legal profession, one of the primary ways that conflicts of interest are addressed is by providing clients with information. When an attorney has a conflict of interest with a client, the attorney can address it by advising the client to seek independent counsel, or to sign a waiver of the conflict, after being educated about the possible conflicts.

While personal managers are not bound by a code of professional responsibility equivalent to that governing attorneys, artists can receive similar warnings and advice through their guilds. Indeed, a paradigm in which the clients are all linked by a common bond may work far more effectively than one in which the service providers are similarly linked. After all, clients have a greater interest in accumulating the information than attorneys and managers have in disseminating it.

Information alone is rarely a sufficient inoculation from systemic infections; however, the combination of information with artists' other resources provides the best solution in this case. Many of the artists most vulnerable to their managers conflicts are wealthy. They are very well situated to use the information to protect themselves. Learning that independent counsel is a vital line of defense in negotiations and possessing an awareness of double-dipping will enable a client to make an informed decision of whether to proceed with a manager-producer.

### b. Enforcement

In addition to simply providing intelligence to their members, guilds can take more interventionist steps to address the conflicts of interests with managers.[379] The most obvious step is to regulate managers in precisely the same fashion as agents. This would entail establishing a franchising mechanism for managers and promulgating regulations requiring guild members to retain the services of only franchised managers. Guilds could easily condition franchises on managers not producing or owning any of their client's products. Essentially, this regime would include managers in the agreement struck between SAG and the ATA in 1952.[380]

379. *See* discussion *supra* Part II.D.

380. *See supra* Part II.C.2.

Why have guilds not already done so? The guilds justify their inaction on the grounds that both managers and unions perceive a fundamental difference between managers and agents. Therefore, they conclude managers should be treated differently.[381] Yet while the differences between agents and managers are manifest, managers today increasingly resemble the agents of post-World War II Hollywood: not only representing talent but also controlling production. That very duet, and all its attendant complications, was what prompted a serious renovation in the architecture of personal representation.

The time is ripe for guilds to effect a similar intervention. Many commentators and participants have wondered aloud why they have not done so already. Richard Masur, head of SAG, has asserted that "managers should be able to produce as long as they are not acting as agents."[382] Of course, managers today are acting as agents did in the 1940's. Indeed, some would allege they are also acting as agents do today.

The guilds do not, however, need to enact the same blanket prohibition against managers as the one that currently prevents agents from acquiring ownership interests in their clients' products. Because managers become involved in their clients' careers at a very early stage, there is a greater need to be flexible in allowing managers to invest more heavily in an artist's career. A guild regulation should not treat all artists the same for the same reasons a state law should not.[383] Less established artists can benefit greatly from involving managers in their careers at an early stage. This benefit can be preserved, again, by providing for a cap on the amount a manager can invest in his client. The guilds are in the best position to determine what that cap should be, but they would need to ensure that such a restriction carefully navigates between being too low to benefit many struggling artists and too high to protect artists at risk from conflicted manager-producers.

Another way to protect artists would be for guilds to establish a rebuttable presumption against managers producing. To produce a client's project, a manager would have to petition the guild for permission. The

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381. *See* Telephone Interview with Richard Masur, Executive Director, Screen Actors Guild (Feb. 23, 1999).

382. *See* Telephone Interview with Richard Masur, Executive Director, Screen Actors Guild (Feb. 29, 1999).

383. The negotiations between the National Basketball Association Players Association and the league's owners during this season's lock-out suffered from problems endemic to guilds with a diverse membership. In the National Basketball Association, the "franchise" players are a wholly different species than the more prevalent "journeymen" athletes, and the divergence of their interests necessitated particular attention during these negotiations. *See generally* Mark Asher, *Stern Asks Players to Vote on Offer*, WASH. POST, Dec. 29, 1998, at D4.

process could be designed to provide the artist with a good deal of protection against making an ill-informed decision. If, after consultation with the guild, a client wishes to allow the manager to produce, the injunction against doing so could be lifted. This case-by-case method might impose a financial burden on the guilds to operate a screening process, but with so much to be gained from the privilege, managers would almost certainly be willing to pay a processing fee. The primary advantage to having the guilds, rather than the government, perform this function is their greater knowledge of the industry and the flexibility they bring to problems needing specially tailored solutions.

### c. Evaluating Guild Regulations

There are a variety of ways in which the guilds could protect their members from manager-producer conflicts. The guild's continuing inaction and silence on this issue is baffling.[384] Of course, every concession the guilds demand from other parties could mean forfeiting rights of their own.[385] Additionally, regulating managers will require substantial effort because the managers will resist, and no one wants to make an enemy of Michael Ovitz.

Nevertheless, personal managers have enjoyed a regulation-free existence for all too long. When manager's roles were limited to the primary function of providing career advice and personal attention, they had an appropriate amount of flexibility to boost a client's career by investing in the client's future. As managers have begun to produce on a large scale, however, they have wandered into the dangerously conflicted territory that worried the guilds fifty years ago.

Agents are pushing for the opposite outcome, to level the playing field by eliminating the restrictions upon their ability to produce and to partner with new media entities. Their motivations are obvious but their arguments are misplaced. If the playing field is not level, it is because managers enjoy the free reign that lead specifically to the breakup of MCA many decades ago. The agents are, in effect, arguing for a return to the days before the TAA, when fee-splitting and rampant conflicts drew the ire of the Department of Justice's Antitrust Division. The solution is not anarchy, but order.

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384. *Cf.* James Bates, *Directors Guild Backs Current Agent System*, L.A. TIMES, Mar. 9, 1999, at C9.

385. *See* Telephone Interview with Catherine York, Director of Government Relations, Screen Actors Guild (Feb. 3, 1999).

Again, waiting for the Assembly to act could result in guild members suffering if their representatives are regulated to a great degree. The unions need to act affirmatively. Protections are needed to ensure members can operate in a free market to their own advantage. Artists still need to avoid the risk of being taken advantage of by their managers. Guilds enjoy a particularly strategic vantage point in this skirmish and need to capitalize upon it to protect their members.

## V. CONCLUSION

*Our government could spend its time better than trying to determine whether to protect millionaire clients from their millionaire managers and agents.*[386]

A good personal manager is often an artist's most trusted advisor. A great personal manager and has no interests apart from those of the client. When managers become producers, however, they acquire their own interests, such as producer's fees and credits. These interests can conflict dramatically with their clients' interests. No representative can serve the dual role of employer and manager without suffering some degree of a conflict of interest. Garry Shandling claimed that these conflicts could expand to the realm of $100 million and filed suit against his long-time friend to prove it.[387]

While the rules governing the representation of artists have not changed in many years, the personal management industry has mutated radically within the past year. Managers have recently begun to leverage their freedom from state and guild regulations to produce a growing number of their clients' television shows and films. The enormous profitability of this addition to the usual repertoire of manager services has sparked a gold rush into the industry, led by none other than Hollywood legend Michael Ovitz. With the coming of Ovitz and his disciples, the entertainment industry can expect a commensurate rise in the instances of managers advancing their own interests at the expense of their clients.

If litigation like the Shandling affair ever proceeds to trial, and the manager is punished for his alleged wrongdoings, the industry may certainly take note and amend its behavior accordingly. Artists cannot, however, afford to rely upon one lawsuit and the message it may or may not send if they wish to protect themselves. The legislative machine has already begun to sputter to life in Sacramento. If the machine proceeds

386. Bates & Eller, *supra* note 358 (quoting a "top Hollywood manager").

387. *See* Lowry, *supra* note 22.

unchecked, it may produce a result that no one in the entertainment business will celebrate.

Artists and their guilds must act soon to help create a regulatory scheme that best addresses their concerns before the job is done for them by the blunt instrument of state regulation. In many ways, these conflicts may constitute only a spat among millionaires, but it is a spat that threatens to overhaul the entire paradigm of artist representation in Hollywood. While millionaires can almost always wrestle with one another fairly without the state refereeing, the entertainment guilds should play a unique role in this particular drama.

Guilds are experienced in dealing with quarrels amongst millionaires. They have been doing this since their inception. Now they need to awake from their hibernation and acknowledge that managers have become very much like the agents of the past, wielding too much power over artists by representing them and simultaneously owning their productions. Guilds should leave their members free to negotiate for what they want without the risk of blindly using their collective bargaining power to regulate the degree to which managers can produce. When even the artists' closest lines of defense become a hostile force, the unions must heed their duty to their members and earn their dues.