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## ***Beaten to "Submissions": Talent Agents Score a Victory over Managers on Submissions of Motion Picture Screenplays***

**Matthew H. Schwartz\***

The fervently contested boundaries in Hollywood's turf war between talent agents and talent managers have recently been fortified in favor of the former. According to a recent decision by the California Labor Commissioner, submissions of motion picture screenplays will most likely be deemed regulated activities under California's Talent Agencies Act ("Act").<sup>1</sup> Consequently, talent managers must now be extremely cautious as they attempt to advance the careers of their scribe clientele.

In 1982, the California State Legislature inaugurated the California Entertainment Commission ("Commission") to study the entertainment industry, and to ultimately propose a model bill for the licensure of professionals in this business.<sup>2</sup> After the Commission presented its report to state officials, the Legislature was quick to enact many of the recommendations therein. What resulted was a comprehensive 1986 amendment to the Talent Agencies Act which established strict licensing requirements for talent agents.<sup>3</sup> The unambiguous objective of this legislative enhancement was to protect the state's valuable community of artists who are considered characteristically susceptible to abuse by their business representatives.

The 1986 amendment also reflects the Legislature's resolve to govern the business of "talent agenting" in general. In fact, the Legislature took measures to regulate talent agents in their business almost as closely as it regulates attorneys in the practice of law. A few samples of strict talent agency regulations include bonding requirements;<sup>4</sup> prohibition of li-

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1. CAL. LAB. CODE § 1700 (West 1989).

2. CAL. LAB. CODE § 1702 (West 1982), *repealed by* 1984 Cal. Legis. Serv. 553 (West).

3. CAL. LAB. CODE §§ 1700.15-16 (West 1989).

4. CAL. LAB. CODE §§ 1700.15-.16 (West 1989).

cense assignments;<sup>5</sup> required approval from the Labor Commissioner for the form of contracts to be used with artists;<sup>6</sup> records maintenance requirements;<sup>7</sup> employment restrictions;<sup>8</sup> investigations and background checks to determine applicants' good characters;<sup>9</sup> and prohibitions against referral fees, division of fees and registration fees.<sup>10</sup>

The emergence of new and aggressive management companies in the entertainment industry ostensibly forces a blurring of the significant distinction between an artist's "agent" and an artist's "manager". Such managers seem to increasingly tread upon professional territory that is exclusively reserved for licensed talent agents. Unlike talent agents, talent managers are not regulated by any statutes at the present time. Their duties typically include advising, counseling, directing, and coordinating the development of an artists' career.<sup>11</sup> Furthermore, they may offer advice about business and personal matters, frequently lend money to artists, and may also serve as spokespersons for their clients.<sup>12</sup> However, sometimes managers attempt to obtain work for their clients in the entertainment industry. Whether they realize this or not, this is where they go too far. The Talent Agencies Act expressly prohibits anyone other than licensed talent agents from procuring (or even merely *attempting* to procure) employment for qualified artists.<sup>13</sup>

Although a violation of the Talent Agencies Act is not prosecuted as a crime, the consequences can be quite severe. All remuneration earned under a contract voided by a violation of the Act will be disgorged and returned to the aggrieved artist. This will be the result even where the act of procurement (or the attempt to procure employment) was merely incidental to a copious amount of managerial services otherwise rendered legitimately.<sup>14</sup> Any single act of procurement necessarily draws a person or entity within the domain governed by the Talent Agencies Act.<sup>15</sup> Nevertheless, there is one slight exception to the licensing requirements of the Talent Agencies Act. An unlicensed person is permit-

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5. CAL. LAB. CODE § 1700.20 (West 1989).

6. CAL. LAB. CODE § 1700.23 (West 1989).

7. CAL. LAB. CODE § 1700.26 (West 1989).

8. CAL. LAB. CODE § 1700.35 (West 1989).

9. CAL. LAB. CODE § 1700.7 (West 1989).

10. CAL. LAB. CODE §§ 1700.39-.40 (West 1989 & Supp. 2002).

11. *Park v. Deftones*, 84 Cal. Rptr. 2d 616, 618 (Cal. Ct. App. 1999).

12. *Park*, 84 Cal. Rptr. 2d at 618-19.

13. CAL. LAB. CODE § 1700.4(a) (West 1989).

14. *Park*, 84 Cal. Rptr. 2d at 619.

15. *Waisbren v. Peppercorn Prod., Inc.* 48 Cal. Rptr. 2d 437, 444-45 (Cal. Ct. App. 1995).

ted to work in concert with a licensed talent agent and may attempt to procure employment on behalf of a qualified artist provided that these procurement efforts are performed at the request of the licensed talent agent.<sup>16</sup> Another vexing issue for unlicensed managers concerns services that are rendered gratuitously. It has been adjudicated that it is irrelevant whether or not a manager receives compensation for a single, incidental act of unlicensed procurement efforts.<sup>17</sup> The management contract will nevertheless be deemed *void ab initio*.<sup>18</sup> Indeed, the report submitted by the Commission in 1985 specifically recounts how the Commission deliberated and rejected a proposal which would have exempted from the Act those who do not charge fees or commissions for procuring employment for artists.<sup>19</sup> It expressly concluded that "personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent, except in accordance with the present provisions of the Act."<sup>20</sup>

It should also be noted that one who violates the Act will not be permitted to avail him or herself of *quantum meruit*-type relief because a violation of the Act is *per se* illegal conduct, notwithstanding the lack of criminal prosecution.<sup>21</sup> It renders the perpetrators *in pari delicto*, and consequently deprives them of opportunities to invoke a court's equitable powers.<sup>22</sup> "[A] party cannot come into a court of law and ask to have his illegal objects carried out."<sup>23</sup> "[T]he courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act."<sup>24</sup> If a party cannot make a case against a defendant other than through the medium of an illegal transaction to which he is a party, no relief whatsoever will be afforded him.<sup>25</sup> By categorically refusing to give such contracts any tangential force or effect, the courts presumably succeed in dissuading parties from entering

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16. CAL. LAB. CODE § 1700.44 (West 1989).

17. *Park*, 84 Cal. Rptr. 2d at 619-20.

18. *Waisbren*, 48 Cal. Rptr. 2d at 446-47 (quoting REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION TO THE GOVERNOR AND LEGISLATURE 17 (1985) [hereinafter *Entertainment Commission Report*]).

19. *Entertainment Commission Report*, supra n.18 at 6.

20. *Id.*

21. *Waisbren*, 48 Cal. Rptr. 2d at 446-47.

22. *Id.*

23. *Lee On v. Long*, 234 P.2d 9, 11 (Cal. 1951) (citing 17 C.J.S. *Contracts* § 280 (1999) (previously § 272)).

24. *Lewis & Queen v. N.M. Ball Sons*, 308 P.2d 713, 719 (Cal. 1957).

25. *Wong v. Tenneco, Inc.*, 702 P.2d 570, 576 (Cal. 1985).

into illicit transactions.

Many uninformed entertainment professionals may be unclear about what actually constitutes an attempt to procure employment. Perceived ambiguity and naive wishful thinking may dangerously embolden their client service strategies. Over the last few years, the California Labor Commissioner has been forging a brighter line through this perceived fuzzy landscape. Hollywood neophytes are generally aware that conducting negotiations on behalf of qualified artists for the procurement of employment is a protected activity. However, even seasoned Hollywood professionals may be surprised to learn that a one-minute telephone call to arrange a simple social meeting between a qualified artist and a potential employer may implicate the Talent Agencies Act. This circumstance can be reasonably interpreted as an attempt to procure employment. Moreover, placing an advertisement in a trade magazine that promotes a qualified artist may also be construed as an "attempt" to procure employment for that artist. But what about the attempted sale of an artist's property? Would an unlicensed manager of screenwriters be risking all of their fees by simply calling a producer or a studio executive to arrange a "weekend read" of their client's screenplay? In a recent decision, the Labor Commissioner determined that absent a specific kind of compelling evidence, the mere submission of a motion picture screenplay by an unlicensed person or entity is a direct violation of the Talent Agencies Act.<sup>26</sup>

*Strouse v. Corner of the Sky, Inc.*<sup>27</sup> was a case of first impression before the Labor Commissioner. It presented the issue of whether the submission of a motion picture screenplay constitutes an attempt to procure employment for a writer.<sup>28</sup> In 1994, the Labor Commissioner faced a similar issue in *Davenport v. AFH Talent Agency*.<sup>29</sup> However, *Davenport* concerned the submission of a novel for the potential purchase of its publication rights.<sup>30</sup> Although motion picture screenwriters and television writers are expressly identified as qualified artists for the purposes of the Talent Agencies Act,<sup>31</sup> "novelists" are not considered as such. Consequently, the analysis in *Davenport* was irrelevant to the

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26. *Strouse v. Corner of the Sky, Inc.*, Cal. Labor Comm'n Case No. TAC 13-00 (Cal. 2001).

27. *Id.*

28. *Id.* at 4.

29. *Davenport v. AFH Talent Agency*, Cal. Labor Comm'n Case No. TAC 43-94 (Cal. 2001).

30. *Id.*

31. CAL. LABOR CODE § 1700.4(b) (West 1989).

*Strouse* case.

In *Strouse*, the Petitioner entered into oral and written agreements with Respondent for the rendition of talent manager services.<sup>32</sup> The written contract explicitly stated that Respondent would not attempt to procure employment for Petitioner. It provided a standard ten percent commission schedule on all properties sold by Petitioner during the term of the contract and its grace period. Petitioner claimed that she specifically negotiated the exclusion of all pre-existing screenplays from Respondent's commission schedule, and that only works created during the term of the management contract were subject to commissions. Respondent contended that all pre-existing screenplays were included in the commission schedule.

The contract was terminated two years into the parties' relationship. Shortly thereafter, Petitioner acquired a licensed talent agent who sold two of Petitioner's screenplays for a total of \$2.2 million. Both works were penned before Respondent contracted with Petitioner. Although the disputed contracts were formally terminated, the sales of the screenplays fell within the grace period during which commissions on sales would still be payable to Respondent. When Petitioner refused to pay Respondent a ten percent commission on each of the two pre-existing properties, Respondent filed suit against her in Superior Court seeking \$220,000 in damages.

During Respondent's deposition in the resulting lawsuit, Respondent testified that it submitted Petitioner's screenplays to over thirty producers and studios in the hopes that they would eventually be sold. No negotiation for the sale or option of these screenplays ever ensued from Respondent's unsuccessful submission campaign. Respondent also testified that if any genuine interest from a potential buyer would have surfaced from its submission campaign, it would have secured a licensed talent agent to conduct any resulting negotiations on behalf of Petitioner. Respondent explained that it was doing what it felt was necessary to advance the career of its client according to the written contract. Petitioner then stayed the litigation as she filed an action before the Labor Commissioner for a determination that the management contract violated the Talent Agencies Act.<sup>33</sup>

Respondent's argument was twofold. First, its mere submissions of

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32. *Strouse*, TAC 13-00 at 3-4.

33. *Id.* The California Labor Commissioner exercises original jurisdiction over such issues to the exclusion of the Superior Court. *Buchwald v. Superior Court of San Francisco*, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967).

motion picture screenplays to potential purchasers did not constitute attempts to sell the screenplays, because no negotiations ever resulted from this campaign;<sup>34</sup> and second, an attempted sale of intellectual property does not constitute an attempt to procure employment.<sup>35</sup>

The Labor Commissioner was not at all persuaded by the first argument.<sup>36</sup> The decision cites the literal definition of “attempt” as it is rendered in Merriam Webster’s Tenth Edition Dictionary.<sup>37</sup> An “attempt” is an “act or an instance of attempting”.<sup>38</sup> It is also defined as “an unsuccessful effort”.<sup>39</sup> By submitting a screenplay to a potential purchaser with the hope that it is consequently purchased, someone would literally be attempting to sell that screenplay. In this context, screenplay submissions are much like direct mail solicitations. They are, in fact, a form of direct marketing to a very select community of potential customers. Therefore, this conduct must be regarded as an “attempt” to sell a screenplay by any rational standard. Moreover, the Respondent’s self-serving testimony about how it would have involved a licensed talent agent if there was genuine interest from a prospective purchaser was not particularly helpful. The Labor Commissioner rejected the notion that it would be appropriate to speculate whether or not this was a true intent.<sup>40</sup> In any event, this contention blatantly runs afoul of the Talent Agencies Act, as Respondent’s submissions were not undertaken at the request of a licensed talent agent.<sup>41</sup>

The second argument was more intriguing. The Talent Agencies Act obviously restricts efforts to procure employment for qualified artists. However, it does not expressly apply to the sale of a qualified artist’s property – tangible or otherwise. Respondent may very well have analogized these circumstances to the sale of an artist’s automobile. Respondent simply explained that it was attempting to sell property, not services.<sup>42</sup> At first blush, its efforts did not seem to involve any issues of employment. However, Petitioner proffered uncontested expert testimony which impacted this analysis enough to expand the conventional reach of the Act.

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34. *Strouse*, TAC 13-00, at 4-5.

35. *Id.* at 5.

36. *Id.* at 4-5.

37. *Id.* at 4 n.2.

38. *Id.* (citing MERRIAM WEBSTER’S DICTIONARY 74 (10th ed. 1994)).

39. *Id.*

40. *Id.*

41. CAL. LABOR CODE § 1700.44 (West 1989).

42. *Strouse*, TAC 13-00, at 5.

Petitioner's expert was a movie producer who produced over twenty-five fairly well known feature films. Moreover, he personally negotiated hundreds of screenplay acquisition agreements as a buyer during his illustrious career which spans more than twenty years. He testified that every negotiation for the acquisition of a motion picture screenplay implicitly contemplates whether a writer will get hired to do a *rewrite*<sup>43</sup> or a *polish*<sup>44</sup> of the subject screenplay. Although Petitioner's expert did not testify that writers are always hired for future services, he did establish that the custom and practice in the state's motion picture industry is that both parties to such a negotiation fully anticipate discussions on possible future writing services. Of course, it is immaterial whether a rewrite or polish is actually procured, because the Act governs "attempts" in addition to actual procurements of employment. Therefore, if it was determined that Respondent attempted to sell a screenplay by way of a submission campaign, it would follow logically that Respondent implicitly attempted to procure future writing services as well.

However, despite its findings regarding the customs and practices of screenplay acquisitions, the Labor Commissioner did not go so far as to rule that every motion picture screenplay submission is a protected activity under the Act. Instead, the Labor Commissioner held that if an unlicensed manager can establish with compelling evidence that both rewrites and polishes were expressly excluded from any attempted sale of a motion picture screenplay, the submission itself will not be subject to the restrictions of the Act.<sup>45</sup> Therefore, a manager would have to overcome a fairly strong presumption that a screenplay submission is unlawful. For example, if an unlicensed manager proffers a written letter from his/her client indicating that the manager was encouraged to sell a screenplay but not authorized to negotiate for rewrites and polishes, the manager could probably prevent the disgorgement of his/her fees. Also, the attempted sale of a deceased writer's screenplay would presumably not violate the Act because no future services could possibly be rendered by that artist.

The decision in *Strouse* sets forth the new official policy of the Labor Commissioner regarding submissions of motion picture screenplays and teleplays. Since aggressive talent managers continue to perform more

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43. According to the Writer's Guild of America, a rewrite is the "writing of significant changes in plot, storyline or interrelationships of characters in a screenplay." Writer's Guild of America Theatrical and Television Basic Agreement, May 2, 1995, art. 1(B)(b)(7), at 17.

44. The Writer's Guild of America defines a polish as a "writing of changes to dialogue, narration and/or action, but not including a rewrite." *Id.*

45. *Strouse*, TAC 13-00, at 8.



talent agent services outside the aegis of intended regulation, *Strouse* emerged as a timely opportunity for the California Labor Commissioner to eliminate at least a portion of this problematic trend. Although it can be challenged in the courts, this approach will likely withstand further judicial scrutiny. Judges seem to harbor a fair amount of deference towards decisions by the Labor Commissioner that apply and interpret the Act, because the Commissioner is far more regularly involved with the customs and practices of the entertainment industry in California. Furthermore, from a purely factual perspective, proving that screenplay acquisition negotiations do not inherently implicate issues of future writing services would be a daunting endeavor. Finally, it is a well-established principle that the Talent Agencies Act will be liberally construed to effectuate its objects and suppress the mischief at which it is directed.<sup>46</sup>

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46. *Buchwald*, 62 Cal. Rptr. at 369.