

THE NEW YORK STATE BAR ASSOCIATION ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

MEMORANDUM IN SUPPORT

THE SECTION SUPPORTS THE INTRODUCTION AND ENACTMENT OF PROPOSED LEGISLATION TO EXEMPT ATTORNEYS FROM THE LICENSING REQUIREMENTS OF THEATRICAL EMPLOYMENT AGENCIES

INTRODUCTION

The Entertainment Arts and Sports Law Section (Section) of the New York State Bar Association, recommends the introduction and enactment of State legislation which amends the definition of “Theatrical Employment Agency” to specifically exempt attorneys duly licensed and actively practicing in the State of New York from these licensure requirements of the General Business Law and the Arts and Cultural Affairs Law. This proposed legislation will protect attorneys from additional regulatory requirements as well as potential civil and criminal sanctions in performing legal services for clients who are Artists as defined under the New York General Business Law §171.8-a. Such services may include procuring or attempting to procure employment or engagements for such Artists. The current language of General Business Law §171.8 and Arts and Cultural Affairs Law, §37.01.3 exempts personal managers from the license requirement if they only incidentally seek employment for their clients. This proposal would add a similar exemption for licensed attorneys at law.

CURRENT STATUTORY PROVISIONS

New York General Business Law, Art. 11, Section 171.8. defines “Theatrical Employment Agency” as “any person ... who procures or attempts to procure employment or engagements for an artist, but such term does not include the business of managing...the artists...where such business only incidentally involves the seeking of employment therefor.” The New York Arts and Cultural Affairs Law, Art. 37, §37.01.3 defines a “Theatrical Employment Agency” to include any person who procures or attempts to procure employment or engagements for an artist, except for those acting as a manager for artists “where such business only incidentally involves the seeking of employment therefor.” New York General Business Law, Art. 11, §171.8-a defines “Artist” as “actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors,

writers, cinematographers, composers, lyricists, arrangers, models and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.”

PROPOSED NEW LEGISLATION

The Section recommends that legislation be introduced and enacted that adds the following concluding sentence to both General Business Law, §171.8 and Arts and Cultural Affairs Law, §37.01.3.:

AN ACT to amend the definitions of “Theatrical Employment Agency” under the New York State General Business Law, Article 11, §171.8 and the New York Arts and Cultural Affairs Law, Article 37, §37.01.3, to exempt attorneys duly licensed in the State of New York from the requirement of securing an employment agency license to negotiate or otherwise assist in obtaining employment contracts for Artists.

- 1. Section 171.8 of the General Business Law is amended by adding the following concluding sentence:**

The provisions of this subdivision shall also not apply to persons duly engaged in and admitted to the practice of law in the State of New York, pursuant to the rules of the Court of Appeals of the State of New York and in good standing in accordance with the provisions of the New York State Judiciary Law, §468 and the rules of the Chief Administrator of the Courts.

- 2. Section 37.01.03 of the Arts and Cultural Affairs Law is amended by adding the following concluding sentence:**

The provisions of this subdivision shall also not apply to persons duly engaged in and admitted to the practice of law in the State of New York, pursuant to the rules of the Court of Appeals of the State of New York and in good standing in accordance with the provisions of the New York State Judiciary Law, §468 and the rules of the Chief Administrator of the Courts.

STATEMENT IN SUPPORT

Current New York laws recognize the realities of the entertainment industry and that personal managers may procure employment opportunities for new artists on an ancillary basis, even though their primary role is to advise, counsel and manage the career development of artists. However, no such similar exemption exists for attorneys from the definition of a “Theatrical Employment Agency”.¹ Although there is no case law on point that expressly states that an attorney negotiating an employment agreement for an Artist is a “theatrical employment agency” as defined in the statute, a representative of the New York City Department (“DCA”) of Consumer Affairs stated in response to a query at a recent New York City Bar Association program that it is possible that an attorney negotiating an employment agreement for an Artist could be found to be an unlicensed talent agency.² The DCA representative also pointed out that there were various regulatory hurdles for attorneys who even wanted to try to comply with the licensing regulations, that make compliance virtually impossible. In California, an attorney was found to violate a talent agency license requirement for negotiating an employment contract for an artist without a talent agency license.³ Though not binding upon the New York courts or regulatory agencies, such a finding may be followed by the New York administrative agencies or courts to impose civil or criminal sanctions or both against attorneys who may be found to violate the New York theatrical employment agency statutes while negotiating employment agreements on behalf of their artist clients. Violation of the New York statute is a misdemeanor.⁴

Attorneys are Licensed and Subject to Strict Discipline

Attorneys should be exempted from the theatrical employment agency license requirement in New York. Unlike personal managers, who are not licensed, not regulated and statutorily exempt when incidentally procuring employment for Artists, attorneys are licensed, regulated and are also held to high ethical standards.

The original purpose of the statute was to protect artists from unscrupulous individuals and firms that may engage in illegal or unethical activity. General Business Law §187 prohibits agents from placing artists with work assignments that involve “bad character, prostitutes, gamblers, procurers or intoxicated persons” or other illegal

¹See General Business Law, §171.8.; See also Arts and Cultural Affairs Law, §37.01.3.

² New York City Bar, Attorneys, Agents and Managers in the Entertainment Industry: Roles and Relationships, May 20, 2015 (Session 3).

³ Solis v. Blancarte, Ca. Lab. Comm. (Sept. 30, 2013).

⁴ See General Business Law, §190.

activities. This section also prohibits false or misleading advertisements and prevents agents from placing child artists with jobs that would violate compulsory education or labor laws. Sections 173 and 181 establish requirements for employment contracts and §177 establishes a bonding requirement for employment agencies. Other provisions provide further protections for artists by requiring that employment agencies undergo background checks, have sufficient experience in the employee placement business, and maintain specific records. While this statute established a regulatory framework for what was initially an unregulated class of business, attorneys are already held to even higher standards.

Unlike personal managers who may operate freely and require no formal training or licensure to become qualified, attorneys must graduate an accredited law school, pass a rigorous bar examination, undergo a character and fitness assessment including the submission of supporting character and legal employer affidavits, all for an *application* to become a licensed member of the bar. Further, once admitted to the bar, attorneys are required to regularly take continuing legal education classes, are bound by ethical obligations to their clients and others and are subject to disciplinary action by the Appellate Divisions for failure to act according to prescribed rules of conduct. Similar to personal managers, attorneys who represent artists provide guidance and representation (albeit from the legal perspective) in the development of an artist's career, which occasionally may include navigation of career/business decisions and lead to employment. Legal services provided in negotiation of business and employment contracts on behalf of the artist typically result in the employment of the artist. In all instances, however, the licensed attorney is subject to stringent requirements to ensure protection of potential or actual clients and the intent of the employment agency licensing requirement is satisfied through the attorney licensing and regulatory process, obviating the need for further licensure as a talent agent.

Personal managers have been exempted from the licensing requirements since 1917.⁵ All the reasons for the personal manager exemption apply to attorneys. In addition, given that attorneys are already held to stringent requirements to ensure protection of potential or actual clients, the intent of the employment agency licensing requirement is already satisfied through the attorney licensing process. Therefore there is no need for an additional and unnecessary licensing requirement for attorneys duly admitted in the State of New York.

⁵ Chapter 770, L. 1917.

Current Legal Interpretations

Although New York courts view procuring or attempting to procure employment as the critical element in defining a theatrical employment agency⁶, they also examine the primary engagement between the artist and the person procuring the employment opportunity when determining whether such person acted in violation of the employment agency license requirement. For instance, in Mandel v. Liebman, the Court of Appeals found that the attorney-plaintiff “who devot[ed] himself to the business of acting as personal representative, advisor and manager for persons engaged in the entertainment world,” and acted primarily as the defendant’s personal manager was within the statutory exception of the employment agency license requirement.⁷ Licensed attorneys who are not personal managers should be afforded a similar exemption. The role of the entertainment attorney is particularly unique in that the attorney’s primary role is to review and negotiate contracts in the best interest of the artist client. Entertainment attorneys generally understand the business and develop significant contacts in the entertainment industries that may prove beneficial for the artists they represent. Failure to exempt attorneys from the agency license requirement may prevent attorneys from fully advocating for or acting on behalf of their clients.

Other NYS Statutory Licensing Exemptions for Attorneys

Other provisions of New York State law, exempt attorneys from licensure and commission requirements because of their license to practice law in the State of New York. For instance, under the Real Property Law, attorneys are exempted from the requirement of obtaining a real estate broker license.⁸ In addition, attorneys do not need to take an exam, establish their moral character or provide proof of their education in order to serve as notaries public as non-attorneys must do.⁹ Attorneys who apply to serve as notaries public receive their commissions simply upon establishing their credentials as attorneys.

These attorney exemptions have applied to both of these forms of licenses for decades. There is little legislative history that provides a reason why attorneys have

⁶ See People v. Davan Executive Services, 97 Misc. 2d 437 (N.Y. City Crim. Ct., 1978).

⁷ Mandel v. Liebman, 303 N.Y. 88, 97 (1951); See also Esther Creative Group, LLC v. Gabel, 25 Misc. 3d 1219(A) ((N.Y. Sup. Ct. 2009), (dismissing defendant-artist’s motion to dismiss, finding that the plaintiff acted primarily as a manager who even hired a booking agent for defendant).

⁸ Real Property Law, Section 442-f.

⁹ Executive Law, Section 130.

been excluded from these statutes, but it has been implied from these exemptions that attorneys' credentials and qualifications to practice law suffice to exclude them from additional licensing requirements when they are performing the regular and traditional duties and responsibilities of their profession. Even though the current statutes pertaining to theatrical employment agencies do not specifically exclude attorneys, we believe that the licensure obligations were meant for non-attorneys who, while not held to the same professional, regulatory, and ethical standards imposed upon attorneys, must comply with some measure of requirements designed to protect the public. Therefore, we propose that the definitions of a "theatrical employment agency" be amended to exclude attorneys licensed in the State of New York from the employment agency license requirements, which would conform to other areas of New York law that exclude attorneys from licensure requirements.

Conclusion

The failure to explicitly exclude attorneys from the employment agency license requirements could expose attorneys practicing in the entertainment industries to civil and criminal sanctions in the course of their everyday work. This would negatively impact on the artists who rely on attorneys to negotiate their employment agreements and protect them from unsavory practices in the entertainment industry. To the extent that it limits what attorneys can do for their artist clients, the failure to exempt attorneys from the strict reading of the statutes is counterintuitive to the purpose for which the theatrical employment license requirement was first adopted.

For these reasons, the Entertainment, Arts and Sports Law Section of the New York State Bar Association strongly recommends the prompt enactment of this proposed legislation to exclude attorneys from being included within the definitions of a "Theatrical Employment Agency."

[Approved by the EASLS Executive Committee at its October 28, 2015 meeting.]

[Revisions & Edits by Steven H. Richman, Chair, Committee on Legislation – November 19, 2015.]