A LICENSE TO MANAGE
"State Licensing Requirements for Artist Managers"
by
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I. Introduction

Mystified by the sudden disappearance of the world-famous diva, Tandalaya Prsylbylski, the Royal Opera sends for her artist manager. The manager speeds off down the M-3 in her souped-up Astin Martin, armed with the latest in artist manager equipment: a mastery of the repertoire, marketing expertise, a photographer, a dozen roses, exploding toothpaste, the home phone number of the Production Manager at Lincoln Center, rocket launching press-packets, an evening gown, and critic-detonating cannons. But is our heroic artist manager driving into peril by being licensed to drive the Astin Martin, launch the press packets, and detonate the critics, but not licensed to book engagements for Madame Prsylbylski?

Many states, including California, New York, and New Jersey have statutes requiring anyone who seeks and books employment for others to be licensed. While such statutes are primarily directed at traditional employment agencies, the licensing requirement often includes theatrical agents who book engagements for artists. If artist managers also book engagements for their artists, then they, too, are often required to be licensed. While many artist managers have thoroughly investigated and researched the applicable licensing requirements in their states, others have given the issue varying degrees of attention over the years ranging from indifference to speculation to a conscious decision to ignore the issue and not ask for trouble.

In recent months, the licensing issue splattered itself onto many a manager's windshield on the occasion of a June 10, 2003 letter distributed by the American Guild of Musical Artists to its roster of solo artist members. The AGAMA letter states, in part:

> *Under New York law, every talent agent and agency doing business in New York must be licensed by the Department of Consumer Affairs. Our investigation has revealed that <u>many</u> of the major and minor New York-based agencies are <u>not</u> licensed. Without a license, agencies cannot legally charge you for an agent's commission and cannot enforce their contracts with you. There is also a distinct possibility that any given agent, regardless of the size of the agency or the number of years they have been in business, is <u>not licensed</u>. Agents <u>cannot</u> evade the licensing requirement by wrongfully claiming to be managers rather than agents. If the principal obligation of whoever represents you is to find work opportunities for you, rather than to manage your career, they are acting as an agent, not as a manager, and they must be licensed. (Original "over" emphasis).*

While this is an accurate, albeit overly embroidered, statement if the law, it obfuscates some crucial nuances and distinctions. Let us read between the lines:

> *Under New York law, every talent agent and agency doing business in New York must be licensed by the Department of Consumer Affairs.*

This is true.

Our investigation has revealed that many of the major and minor New York-based agencies are not licensed.

As AGMA's assertions are merely conclusory, it is impossibly to say whether they are accurate. However, it is apparent that AGMA is applying the term "agency" to any entity that books employment for artists. If so, it is, indeed, likely that many major and minor New York-based entities which book employment for artists are not, in fact, licensed—because they are not required to be licensed.

Without a license, agencies cannot legally charge you for an agent's commission and cannot enforce their contracts with you.

This is true, assuming that the "agency" is required to be licensed in the first place.

There is also a distinct possibility that any given agent, regardless of the size of the agency or the number of years they have been in business, is not licensed.

Once again, it is, indeed, likely that many of the major and minor New York-based entities which book employment for artists are not, in fact, licensed because they are not required to be licensed.

Agents cannot evade the licensing requirement by wrongfully claiming to be managers rather than agents.

While this is true, it is equally true that, at least in New York, agents who spend the majority of their time serving as artist managers are not required to be licensed. AGMA is correct in that it is the nature of services provided, and not the job title, that determines whether or not licensing is required.

If the principal obligation of whoever represents you is to find work opportunities for you, rather than to manage your career, they are acting as an agent, not as a manager, and they must be licensed.

This is absolutely true. However, if the principal obligation of whoever represents an artist is to manage the artist's career, rather than find work opportunities, they are acting as a manager, not as an agent, and they need not be licensed.

The licensing issue is far from simple and the circumstances necessary to trigger the licensing exception for managers are not easily definable. Moreover, the penalties for failing to be licensed, if a license is required, can be quite severe. This article seeks to provide an overview of the topic, shed some light, and provide some practical suggestions.

The various state statutes which require licensing for employment agencies range from California, which requires anyone who books employment for artists to be licensed and affords

no exception for artist managers, to New York, which has an artist manager an exception, albeit vaguely drafted, to New Jersey, which, like California, requires anyone who books artists to be licensed, but goes one step further by requiring out-of-state individuals who book engagements with New Jersey presenters to be licensed as well. A legal analysis of each state statute would constitute a treatise, not an overview. Accordingly, I focus primarily upon the New York statute, not just because of my fondness for bagels and Broadway, but because: (1) it was the focus of the AGMA memorandum; (2) the licensing requirements in New York are less clear than in other states where a manager who engages in any booking activities is required to be licensed; (3) the nature of the New York statute forces us to examine the distinctions between a theatrical agent and an artist manager; and (4) the nature of the consequences and penalties for violating the New York statute are consistent with those in other states.

Before I proceed, I need to clarify two other preliminary matters. First, I will not be addressing the licenses which may be required by various performing arts unions, such as Actor's Equity. An Equity license, or franchise, for example, is a license issued by the union under the union's rules and regulations. It does not carry the weight of law, it exists purely as the result of the contract between Equity and its members, and the failure to comply carries no legal penalties. Second, and you knew this was coming, **nothing contained in this article should be construed as legal advice!** I can only address generalities and broad applications of the law. Individual circumstances will differ just as individual statutes will vary from state to state. You need to consult with an attorney to review the specific business, state and local statutes applicable in your locale as well as your specific contracts, clients, and circumstances.

II. Licensing in New York State

Article 11, Section 172, of the New York State General Business Law addresses the licensing of employment agencies as follows:

> *No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefore as provided in this article. Such license shall be issued by the commissioner of labor, except that if the employment agency is to be conducted in the city of New York such license shall be issued by the commissioner of consumer affairs of such city.*

The statute defines the term "employment agency" to include "theatrical employment agency", which is defined in Article 11, Section 171, as follows:

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

In the simplest terms, this means that any person who books engagements for artists—whether for sopranos, violinists, actors, or nose-flute players—must obtain a license. This includes artist managers. However, artist managers who only book engagements as a small part of their overall managerial duties MAY be exempt from the licensing requirement. While this is frequently referred to as the "Artist Manager Exception," it is neither a blanket nor an automatic exception applicable to anyone who bears the title of artist manager. The colloquial term "Artist Manager Exception" has led many artist managers to believe, incorrectly, that merely being engaged as an artist manger, or bearing the title of artist manager, is enough to exempt them from the licensing requirement. This is not the case. In order to qualify for the exception, an artist manager must not only actually be engaged in managerial services, but any booking services performed must be incidental to managerial services. In other words, the bulk of your services must be managerial and not booking.

Naturally, this raises some important questions, the first of which blazing through your mind right about now is more than likely: "Why do I care?"

1. The Consequence of Failing to be Licensed

If you are an experienced artist manager with an esteemed and respected reputation for managing top artists with successful careers and no one has ever challenged your license, or lack thereof, you may, understandably, disregard the entire issue as much ado about nothing. You have enough to occupy your time without worrying about exasperating bureaucratic requirements and additional administrative burdens. However, this is much like running a red light at three o'clock in the morning when no one is looking. At some point, there may be consequences—if not an actual crash, then at least a ticket. For the risk adverse, it may be worth stopping and looking both ways, or, at the very least, slowing down.

The statutory consequences for an artist manager booking employment without a license include both civil and criminal penalties. **This is true in most states which have licensing requirements, not just in New York.** Pursuant to Article 11, Section 186, of the New York State General Business Law, contracts entered into by an unlicensed artist manager are unenforceable. Specifically, Section 186 states: "*Any employment agency which collects, receives or retains a fee or other payment contrary to or in excess of the provisions of this article, shall return the fee or the excess portion thereof within seven days after receiving demand therefore*." According to Freidkin v. Harry Walker, Inc., 90 Misc. 2d 680, 395 N.Y.S.2d 611 (Civil Court of the City of New York, 1977) this also means that "*A contract made in violation of such statute is unenforceable*." Thus, if an artist refused to pay commissions and the manager filed a lawsuit to enforce collection, the artist could defend on the ground that the manager was unlicensed. If a judge determined the artist was correct, then the manager's contract would be deemed unenforceable and no commissions would be due. Moreover, at the request of the artist, a judge could order the manager to return all prior commissions collected by the manager from the artist!

In addition, Article 11, Section 190, of the New York State General Business Law, states:

> *Any person who violates and the officers of a corporation and stockholders holding ten percent or more of the stock of a corporation which is not publicly traded, who knowingly permit the corporation to violate sections one hundred seventy-two [the section requiring a license], one hundred seventy-three [the section proscribing the application procedures for a license] …of this article shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed one thousand dollars, or imprisonment for not more than one year, or both, by any court of competent jurisdiction. The violation of any other provision of this article shall be punishable by a fine not to exceed one hundred dollars or imprisonment for not more than thirty days. Criminal proceedings based upon violations of these sections shall be instituted by the commissioner and may be instituted by any persons aggrieved by such violations.*

While the chances of an artist manager being sentenced to an actual jail term are slim, a misdemeanor conviction for operating without a license is not something someone wants to rush out and add to their resume.

Many artist managers take the position that the inability to enforce their contract is of little real consequence. Often, it is simply impractical to bring a breach of contract lawsuit against an artist who refuses to pay a commission because of the difficulty of collecting judgments. In other instances, such as with instrumentalists, the manager is paid directly by a presenter, the manager deducts the commission, and then pays the artist. (As of this writing, AGMA contracts prohibit opera companies from paying the manager directly. Whether AGMA will one day be amenable to amending this is a subject of much debate.)

I am the first to counsel clients against needless litigation. For both managers and artists alike, winning a lawsuit where the judgment is uncollectible, or where the legal fees and court costs exceed the amount of the judgment, or where there will be detrimental personal or professional ramifications that exceed the value of the judgment, is pointless. Nevertheless, there are occasions where legal action is both unavoidable and, even, advisable. It is far better to be able to choose not to bring a lawsuit or enforce a contract for business or professional reasons than to be legally precluded from having such an option for want of a license. More significantly, the failure to be licensed, where licensure is required, leaves an artist manager exposed to litigation as well as criminal prosecution from a disgruntled artist.

Imagine a scenario in which an unhappy artist decides to bring a lawsuit claiming that his or her manager acted unethically or unfairly or otherwise failed to earn the commissions paid. If such an artist can make a claim that his or her manager should have been licensed, and was not, they could sue for the return of commissions paid. Even worse, under the statute, criminal prosecutions for failure to be licensed "*may be instituted by any persons aggrieved by such violations."* This means that a truly disgruntled artist might not only file civil litigation, but could file criminal charges as well. Or, an artist sued by an unlicensed manager, could not only defend such a lawsuit on the grounds that the manager was unlicensed, but retaliate by filing criminal charges.

Unless you are confident that artists never commit irrational or self-destructive acts, I hope to have convinced you that this is neither an inconsequential issue nor an issue applicable only to

managers who deal with specific types of artists. The next question becomes how to determine which artist managers do and do not need to be licensed.

2. The Applicability of the Artist Manager Exception

Almost all artist mangers are involved in seeking employment and work opportunities for their artists. At the very least, an artist manager is crucial in creating such employment opportunities. The debate whether a musician who does not perform is still a musician or whether a singer who does not sing is still a singer is secondary to the over-arching fact that an unemployed artist cannot afford to be an artist—at least, not without also being employed as a waiter. Thus, it is absurd to suggest that employment is only "incidental" to being an artist.

Nevertheless, according to the statute, only those managers whose business "*only incidentally involves the seeking of employment*" are exempt from being licensed. The trouble, of course, is that the statute does not define the term "incidentally." Obviously, some degree of employment booking by artist managers is both anticipated and permissible as this is why the exception was created in the first place. But how much is too much? Does "incidental" mean that only 25% or less of a manger's services can be spent booking engagements? Or can an artist manager be exempt from licensing if as much as 50% of his or her time is spent booking? When does an artist manager cross the line and become, in the eyes of the law, a booking agent required to be licensed?

As it is the role of judges to interpret and apply statutes, the natural place to seek clarification of the term "incidentally" is to turn to case law to see how it has been interpreted and applied in court. Unfortunately, there is a dearth of case law interpreting this particular statute. The most recent case addressing this issue is Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 395 N.Y.S.2d 611 (Civil Court of the City of New York, 1977), in which a well-known film director, William Friedkin, sued his well-known, but unlicensed, New York-based manager for return of all commissions paid. Mr. Friedkin had hired the manager specifically to book speaking engagements and lectures for him. The case law does not tell us why the relationship soured, but Mr. Friedkin argued that his contract with his manager was void because the manager lacked a New York State license. While the manager argued that he was exempt from the licensing requirement because he was performing managerial services, the Court reviewed the alleged managerial contract between the parties and determined that the exception did not apply because the manager was, in fact, hired primarily to book speaking engagements for the director. Specifically, the Court stated:

> *The instant contract cannot be characterized as one of management: it is abundantly clear upon a reading that defendant's obligation is to solicit lecturing engagements for plaintiff, and that any other duties to be performed for plaintiff are incidental thereto…It plainly states defendant's obligation to act as plaintiff's "sole and exclusive agent to negotiate and secure engagements and book, manage, and arrange all [] lectures, talks and addresses." Moreover, defendant's characterization that the general contractual terms, which it drew, constitute a managerial contract cannot overcome the obvious overriding intent and purpose of the agreement and its factual setting securing the most profitable engagements for plaintiff…It is, therefore, clear that defendant's primary, if*

> *not sole, obligation was to secure lecture engagements for plaintiff. The fee billing and collection functions were incidental conveniences, perhaps for defendant's protection but in any event unrelated to the alleged personal management of plaintiff.*

The manager's position was further weakened, if not liquefied completely, by the disclosure that Mr. Friedkin had a personal manager in California who performed actual managerial services for him. Accordingly, the Court held that the New York manager's contract was illegal and, therefore, unenforceable, and ordered the manager to return all commissions. Ouch!

Far from being a case on point, the circumstances of Friedkin are unique and easily distinguishable from the majority of artist managers who do far more than merely provide booking services and whose clients rarely have multiple U.S. managers. Had the New York-based manager in Friedkin actually been performing managerial services, the outcome might have been entirely different. As it was, the Court never had to determine whether the booking services were "incidental" because those were the only services being performed. The Friedkin Court did explain, however, that: *The question whether defendant's business only incidentally involves the seeking of employment as corollary to being a personal manager of plaintiff would ordinarily be a matter of factual determination."* This is "judge-speak" for: "I will know it when I see it." While this case does not exactly give us the specific evidentiary standard we are looking for, it does suggest that it is the degree of actual managerial services being performed, not the degree of booking services, that will be key to the analysis.

The New York statute presumes that anyone who engages in any degree in booking employment for artists is a booking agent unless they can prove otherwise. For many of you, this might not be that hard to do. A booking agent does simply that: book engagements and performances. Nothing more. They do no preliminary work. They provide no advice to an artist as to which performances to accept. They do not help an artist select repertoire. They rarely even prepare publicity materials.

Artist managers, by contrast, perform and provide a myriad of services, including preparing biographies, press materials, flyers, and brochures for use in generating interest in the artist. They provide wardrobe and make-up advice for concerts and appearances, supervise photography sessions and media interviews, make hotel and travel arrangements, schmooze important critics and industry leaders, and help select appropriate repertoire for concerts, performances, and recordings. They design residency activities, schedule master classes, apply for grants and touring programs, cultivate future work, and advise an artist on which performances and engagements to accept in light of their career goals. They create opportunities for an artist to grow and expand his or her career. They also spend an inordinate amount of time providing hand holding, ego stroking, sympathy, emotional support, image building, guidance, feedback, and general advice regarding all of the many issues that can impact an artist's career. And this is by no means an exhaustive list. I am certain many of you can supplement this with much more.

According to the Oxford English Dictionary (with no apologies to Mr. Webster), the term "incidental" means "*Occurring or liable to occur in fortuitous or subordinate conjunction with*

something else of which it forms no essential part; casual." If one thinks of incidental music in a play, this is music which compliments and completes the performance, but is not an integral part of the performance or production itself. It is not key to the play. Regardless of how the term "incidental" is defined, when applied to the work of an artist manager, the actual time spent booking engagements compared with the time spent performing all of the other managerial services can only be seen as "incidental."

Like incidental music in a play, the booking services performed by an artist manager compliment and complete an artist—indeed, they are crucial to the artist if the artist is to survive—however, they are neither primary nor essential to the duties of an artist manager. But is this sufficient to claim the benefit of the licensing exception? Does this mean that anyone who is hired to be an artist manager can avoid licensing? The answer, in a typically evasive attorney-like fashion, is: it depends. If the artist manager is, in fact, engaged in the myriad of services described above and the manager can prove that such a wide range of services are regularly being performed, then it is safe to assume that no license will be required. If, on the other hand, the artist manager is primarily only providing booking services, then a license is required.

In practical terms, an artist manager who handles a young artist at the start of his or her career is less likely to be required to be licensed than a manager who represents a well-known, well-established artist who needs less career development and guidance and primarily needs only booking services. When the artist manager represents a mixed roster of both new and established artists, the analysis is much the same: are you spending most of your time booking or most of your time providing managerial services? Let me offer that, given the typical array of services performed by the average artist manager, most artist managers in New York will, more than likely, not be required to be licensed under the New York statute. That being said, artist managers who book engagements, and that is probably all of you, need to engage in a serious self-analysis of the type of work and services they perform in order to determine whether or not the license exception is applicable to them.

3. The Licensing Process

The discussion, thus far, has focused on claiming the license exception and avoiding the licensing process. However, this is based on the assumption that licensing itself is a tortuous, burdensome and horrific process beyond the capacity of any human to bear. While it is quite true that licensing will subject you to a heightened level of scrutiny, as well as to fees, expenses, and bureaucratic regulations, it's bark may be worse than it's bite.

The New York State General Business Law sets forth, in painstaking detail, the specific licensing procedures and regulations with which you will be required to comply. These are similar to the licensing procedures and regulations in most states which have such statutes. In addition, the Department of Labor and Commission of Consumer Affairs have established their own regulations implementing the statute. As a basic summary, the procedure for obtaining and maintaining a license is as follows:

• If you are based in New York City, the license application is filed with the Office of the New York City Commissioner of Consumer Affairs (otherwise, its filed with the New York State

Commissioner of Labor.) The application itself requires such information as the names of all of the officers of your company, your experience and background in the field of artistic management, and the type of clients you will be working with. Among other things, you will be required to establish that you are a person of good character or responsibility; that you have at least two (2) years experience in booking employment for artists or that you have other business experience which establishes your competence to direct and operate an employment agency; and that you have a suitable place for conducting business. You are also required to provide copies of all of the contracts and forms you will be requiring clients to execute. Each contract and form will need to be approved by the Commissioner. See Article 11, Section 173.

• Upon the receipt of an application, the Commissioner will post your name and address at the Commissioner's office. The Commissioner will also conduct an investigation of "the character and responsibility of the applicant" and arrange for an inspection of your office or principal place of business. All applicants will also be required to be fingerprinted. If anyone files an opposition to your application, the Commissioner will schedule and hold a hearing to review the opposition. See Article 11, Section 174.

• The minimum licensing fee ranges from $300 - $500. You will also be required to post a bond in the sum of $5,000. At any time, if the Commissioner believes you are financially irresponsible, you could be required to file additional bonds. The bond can be forfeited if you fail to pay any fines or judgments. See Article 11, Sections 177 and 178.

• You will be required to complete and maintain detailed financial records which include all of your clients, the commissions you receive, and the basis of such commissions. For those of you who already complete and maintain such records, this may or may not require you to do much more than you are already doing, except that you will be required to use the forms and record keeping procedures set forth by the Commissioner. For those of you who are adverse to paper work, this will be a considerable change. See Article 11, Section 179.

• You are required to give each client a copy of their signed managerial contracts as well as a copy of the state licensing laws and receipts and statements for all fees and commissions which you collect. See Article 11, Section 181.

• Commissions based on employment or engagements for orchestras and for employment or engagements in opera and concert fields cannot exceed 20% per each engagement. Commissions for all other artistic engagements is limited to 10%. See Article 11, Section 183.

• The Commissioner shall have the right to inspect your premises, contracts, books, and records as often as the Commissioner deems necessary, but at least once every 18 months. The Commissioner also has the right to subpoena records and witnesses and to conduct investigations. The Commissioner also has the right to impose fines, to revoke a license, and/or file criminal charges in response to any violations of the statute. See Article 11, Sections 189 and 190.

Burdensome? Yes. Tortuous and horrific? No. Many people successfully comply with these procedures and regulations every year. Like any other governmental obligation—tax filings,

work visas petitions, corporate filings, etc.—they add another level of expense and time to an already exhausted artist manager and they could restrict the fees you charge and other aspects of how you conduct business. However, for those of you whose ability to claim the licensing exception is only marginal, it may be worth considering. For those of you who clearly spend the majority of your time booking engagements, you may have no choice.

III. The Importance of Written Contracts

Suppose you have completed a thoughtful analysis of the services you perform for your artists and have determined to your satisfaction that you are not required to be licensed. It is tempting to put your feet up, relax, and think that you can now put the dodgy issue of licensing behind you. Not so fast!

Just because you decide you are not required to be licensed, an unhappy client could still raise your lack of a license as a defense to a lawsuit, as the basis of a lawsuit, or, heaven forbid, as a basis to file criminal charges. Even if your analysis that you are not required to be licensed is correct, you may still be challenged and required to prove such analysis in court. While clients and attorneys alike are not supposed to file frivolous lawsuits or threaten frivolous litigation, I have it on good authority that, believe or not, many do. Whether driven by greed, emotion, jealously, or mean-spiritedness, people can, and do, sue one another over the most trivial and ridiculous issues. Many times, the goal is simply to force you to pay a settlement and avoid the greater time and expense of having to disprove their allegations. While it may be impossible to avoid litigation and confrontation in all cases, you can at least arm yourself with the tools necessary to avoid losing such battles.

If your decision not to seek a license is challenged in court, you will be required to prove to a judge that any booking services you perform are, in fact, incidental to your overall managerial services. As we have already seen, there is little, if any, case law directing a judge how to determine what is and what is not "incidental." As a result, a judge will base his or her decision solely on your ability to present credible and convincing evidence as to the nature of your services and the relationship between your booking services versus managerial services.

There are two factors that could make this a significant challenge. First, whether due to a lack of public awareness or the result of a profession whose very nature is to stand in the shadows tirelessly pumping the wind beneath an artist's wings, few people, let alone a judge, have any real concept what an artist manager actually does. The judge will assume that your primary task is to book engagements and that anything else is simply a ruse to avoid being licensed. And do not expect your ex-client to correct this false perception. A disgruntled artist will most certainly take the stand and, with the dramatic conviction they lacked on stage, tearfully and sincerely testify that they only hired you to book engagements. It will then become your word against theirs, or, to put it another way: the evil, greedy manager against the innocent and helpless artist.

The second and even more difficult challenge is that, except for those few managers who charge retainers or hourly fees—and you happy few know who you are—most managers are only compensated through commissions on bookings. This looks bad. When then primary source of your income comes from something that is only supposed to be incidental to your overall duties,

it doesn't take Oliver Wendell Holmes to figure out a judge's likely decision. At this point, a judge could simply dismiss your explanation of the true breadth of your services as self-serving. Indeed, in Friedkin, the Court specifically stated:

> *Defendant's self-serving statements that it is a business representative and not an employment agency which gets job placements for a fee and the simple denial that it acted as an employment agency when representing plaintiff will not suffice…Defendant has failed to submit evidentiary facts with any probative value specifying or describing the performance of its alleged managerial activities.*

One critical piece of evidence in your arsenal would be actual time records showing the work you have performed. Even if you do not charge hourly fees, keeping a general record of the time spent on phone calls, drafting press releases, and performing other managerial services can help to show a judge you were doing a lot more than merely booking engagements. Such time records do not have to be in any particular format, but any contemporaneous record keeping could be quite valuable.

Your best tool, however, is a well-written contract that clearly describes the duties you are being hired to perform and specifies that seeking employment and bookings for your artist is only incidental to your overall services. The contract should also be quite explicit that your commission from bookings is compensation for your overall managerial duties and services. In Friedkin, the Court was able to determine that the New York-based manager was not, in fact, acting as Mr. Friedkin's manager because Mr. Friedkin was able to submit "*…an affidavit from his personal manager fully and clearly delineating his managerial functions and responsibilities on behalf of the plaintiff*." In an even earlier case, Nazarro v. Washington, 81 N.Y.S2d 769, 1948 N.Y. Misc. 2952 (1948), it was the manager's written contract that won the day. In Nazarro, the manager filed a lawsuit to enjoin his client, whom the court describes as "the well-known team of Buck and Bubbles", from breaching his contract. The Defendant claimed that the manager was merely hired to obtain employment, was unlicensed, and, therefore, the contract was unenforceable. The court reviewed the manager's written contract which specifically described that the manager was hired to do far more than merely book engagements. The court held:

> "*…section 171 excepts from its operation a contract in which the seeking of employment is only incidental. Clearly, the terms of this contract bring it within the exception."*

Unfortunately, Nazarro does not give us the specific language the manager used in his contract. However, the specific language you employ in a contract is not as important as making sure that the key concepts are conveyed fully and clearly. There are many different ways of conveying the same concepts. Purely by way of example, I suggest the following terms:

> *MANAGER'S SERVICES: Manager shall, during the term of this Agreement, provide and render such advice, guidance, counsel, direction, and services as Artist may reasonably require to further Artist's professional career. Manager's services shall include, but not be limited to: directing and advising Artist with regard to Artist's business interests, employment, and publicity; directing and advising Client with regard to Artist's continued training and education; directing and advising Artist on all matters pertaining*

> *to Artist's publicity, public relations, and advertising, as well as approving and authorizing any and all publicity and advertising; directing, approving, and authorizing the use, dissemination, reproduction, and publication of Artist's name, photograph, likeness, voice, sound effect, caricatures, and other identifying features and characteristics, as well as all artistic materials, for purposes of merchandising, tie-ins, sponsorships, advertising, and publicity and in the promotion and advertising of any and all products and services; directing and advising Artist on the engagement and discharge of theatrical agents, booking agents, employment agencies, attorneys, accountants, business managers, publicists, and other professionals who may be retained in connection with Artist's career, as well as the supervision and direction of such professionals; directing and advising artist with regard to the selection of literary, artistic, and musical materials as well as the selection of artistic talent to assist, accompany, or embellish Artist's artistic performances; supervising Artist's professional performances and engagements; consulting with Artist's employers and prospective employers so as to ensure the proper use and continued demand for Artist's services, and incidentally assisting Artist in procuring professional engagements and employment.*
>
> *MANAGER'S COMPENSATION: As compensation for all of Manager's managerial services as set forth in this Agreement, Manager is and shall be entitled to receive from Artist, in addition to any other fees which Artist may be obligated to pay, the following _____[insert commissions here]_____*

It is axiomatic that all managers should have written contracts with their clients. Surprisingly, many do not. As a wise law professor once told me: "*Oral contracts are not worth the paper they are printed on*." The reasons that people fail to have written contracts are many and varied. Allow me to debunk the most popular ones:

> MYTH #1: The artist/manager relationship is built on trust.
>
> THE REALITY: This is true, but should the relationship break down, allegations and attorneys will flood in where trust leaves a vacuum. Most people do not use contracts properly. They whip them out of a file, get everyone to sign them quickly, shove them back in a file, and then only pull them out again when they get breached. The truly value of a contract is to facilitate conversation between the parties over all aspects of their relationship: when payments are due, termination provisions, accounting provisions, fees, expectations, goals, etc. The contract affords you an opportunity to discuss and confirm what your client expects and for your client to find out what to expect of you. If done properly, the contract will enter the file and never see the light of day again because there will be no breaches. Far from sowing the seeds of doubt, a clear, well-written contract can be used to build trust and strengthen the relationship.
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> MYTH #2: If the artist chooses not to pay, it is very unlikely that the manager will seek to enforce a contract in court
>
> THE REALITY: As I discussed earlier, there are valid reasons for choosing not to enforce a contract. However, none justifies not having a contract in the first place. Just

because you know that you may only rarely enforce a contract in court, your clients do not know this. If the contract has strongly written terms, an artist might think twice about breaching it. Moreover, a contract affords you an opportunity to include collection and enforcement provisions such as attorney's fees, interest, and even arbitration requirements that could provide you with enforcement options you would not otherwise have.

MYTH #3: Written contracts contain confusing, difficult, and esoteric legal language that no one can understand.

THE REALITY: Wherefore the party of the first part (hereinafter "the Writer") acknowledges that this is true (hereinafter "truism"), the Writer hereinafter warrants, decrees, acknowledges, and affirms that said truism only applies to poorly drafted contracts. While there are certain words that have legal significance, such as the "assignment" of a copyright as opposed to a "license", contracts need only be written in plain, simple English—or, American, provided there is an English translation. A written contract is merely a memorialization of the terms two parties have agreed upon. While they could be written on vellum with wax seals, "heretofores" and "whereafters", those are no more effective than a sheet of notebook paper on which two parties have written out the terms and signed them.

MYTH #4: Contracts are expensive

THE REALITY: They don't have to be. While the most effective contracts will be those drafted by an attorney familiar with your business and who drafts a contract customized for your needs, once your forms are in place, you will, thereafter, be able to complete them and negotiate them without incurring additional expenses. Alternatively, you can draft a simple contract yourself. The important thing is to have something in writing. The failure to do so could be even far more expensive.

IV. Conclusion

In one degree or another, we are all involved in this industry—managers, presenters, agents, unions, and, yes, even arts attorneys—because of our passion and support for artists and the performing arts. The goal of exploring the artist manager licensing exception is not to "evade" accountability or responsibility, as some might suggest, but, rather, to facilitate the critical role that artist managers play in furthering the careers and success of their clients. It was in recognition of this unique role that licensing exceptions for artist managers were created in the first place. With or without a license, the longstanding commitment of artist managers to protecting artists from unscrupulous and unethical behavior remains fervent and unyielding. Anything that serves to divide, rather than unite, our community, harms us all.

Whether this article has introduced you to issues and concerns that could seriously affect the way you conduct your business or merely reaffirmed what you already knew, it has served its purpose. I urge you to take the time to conduct a critical analysis of your specific situation and circumstances and make an informed decision as to what further licensing actions, if any, are

required. At the very least, I urge you to begin using well-drafted contracts in the regular course of your business dealings.

BRIAN TAYLOR GOLDSTEIN, ESQ.

Listed as among the top Entertainment Lawyers by *Washingtonian Magazine*, Brian Taylor Goldstein is a partner in the New York City law firm of Goldstein & Guilliams PLC ("GG Arts Law") where his work concentrates on providing legal, consultation, and management services to clients in the fields of entertainment and the arts--including the performing arts, music, television, motion pictures, the fine arts, publishing, graphic design, and non-profit arts related organizations--with regard to such matters as copyright, trademark, rights and licenses, commissions and collaborations, recording, production, merchandising, distribution, promotion, touring, booking, arts and artist management, business formation and practices, contracts and negotiation, and the tax and immigration needs of foreign artists and performers. His clients include renowned artists, performers, and authors; nationally and internationally distinguished companies in the fields of opera, dance, and theatre; regional and off-Broadway theater companies; award-winning producers and directors; top-selling recording artists and producers; award-winning documentary and feature-length film makers; regional and national presenters and venues; and critically acclaimed fine-artists and designers. He also serves as general counsel for many national and internationally-based artist management companies and agencies, as well as Legal Affairs Advisor to NAPAMA (North American Performing Arts Managers and Agents), U.S. Legal Advisor to IAMA (International Artist Managers Association), and U.S. Legal Advisor to the Association of British Orchestras.

Mr. Goldstein is a highly sought after speaker and lecturer on a variety of subjects of importance to the arts and entertainment community, including entertainment law, intellectual property, artist and arts management, arts-based business and non-profit organization and management, new media and technology, emerging trends, arts advocacy, and immigration and tax issues for foreign artists. His speaking engagements have included teaching workshops and seminars for Volunteer Lawyers for the Arts, the Julliard School, New York University, Marlboro College, Brooklyn College, the International Dublin Theater Festival, Midwest Arts Conference, Western Arts Alliance, the Association of Performing Arts Presenters, Performing Arts Exchange, the American Symphony Orchestra League, Opera America, The North Carolina Presenters Consortium, The League of Historic American Theaters, Theatre Communications Group, the International Artist Managers Association, the District of Columbia Commission on the Arts, The Entertainment Law Committee of the District of Columbia Bar, the Brooklyn Arts Council, the American Choral Directors' Association, the American Association of Theater Educators, the United States Institute of Theater Technology, and the Kennedy Center Arts Management Fellowship Program. As a member of the Adjunct Faculty in the Masters in Arts Management program at George Mason University, Brian created the Legal Issues in The Arts curriculum.

Mr. Goldstein has been interviewed for numerous publications, including the *New York Times, Washington Post, Chicago Tribune, Boston Globe, Opera Now,* and *Inside Arts Magazine.* He is the author of *A License To Manage: State Licensing Requirements for Artist Managers,* the *Model Artist Management Contract* and *Model Performance Agreement*, published and distributed by NAPAMA, and a contributor to *Building and Managing Your Network,* published by Opera America, and the DanceUSA *Member Toolkit*. Brian has also written several articles for *CMA Matters*, a publication of Chamber Music America, including *An Inconvenient Truth* and *Copyrights...and Wrongs*, as well as articles for special editions of *Musical America*, America's oldest magazine on classical music and the performing arts. He is also a writer for the weekly blog *Law and Disorder: Performing Arts Unit* hosted by MusicalAmerica.com.

Mr. Goldstein received a B .A. (With Distinction and Recognition) in English and Theatre from George Mason University in 1988 and his J.D. from American University in 1991. He is a member of the Virginia State Bar; the New York State Bar; The Entertainment, Arts and Sports Law Section of the New York State Bar Association; and the American Immigration Lawyers Association. In addition to advising numerous arts organizations, he has served as a member of the Virginia Opera Statewide Board of Directors and Past-President of its Northern Virginia Board of Governors; a member of the Board of Directors of the Arts Council of Fairfax County, Virginia; Chair of the International Children's Festival at Wolf Trap National Park for the Performing Arts; and a member of the Arts at Mason Board of George Mason University

Prior to forming GG Arts Law, Mr. Goldstein was a Partner and Co-Founder of FTM Arts Law, a nationally and internationally recognized firm in the specialized field of visas and immigration issues for foreign artists and performers and one of the premiere law firms in the nation concentrating in the field of performing arts. In 2010, Mr. Goldstein and FTM Arts Law were honored to be selected by the Association of Performing Arts Presenters as the recipient of the 2010 Sidney R. Yates Advocacy Award for Outstanding Advocacy On Behalf of The Performing Arts. FTM Arts Law was selected for the award in recognition of its successful advocacy efforts to improve the process by which foreign artists and performers obtain visas and work authorization to enter the United States; its acclaimed workshops and seminars proving basic legal knowledge and business skills to artists and arts professionals; and the fundamental impact of its work on the arts industry. Mr. Goldstein is also the recipient of the Washington Area Lawyers for the Arts 2000 Educational Programs Award and was nominated for a 2003 Outstanding Entertainment Executive of the Year Award by Washington Area Music Association.

In addition to his legal practice, Mr. Goldstein serves as a Managing Director of Goldstein Guilliams International LLC, an artist management company which provides career management and advice together with artistic, business, legal, commercial, administrative, and financial services to meet the demands of highly successful and dynamic artists at the very top of their fields.

As an artist and performer, Mr. Goldstein's credits include numerous regional theater as well as film and television productions. He was also Founder and Artistic Director of Lord Foppington & Company, a theatrical production company dedicated to the performance of period and period-themed comedies. The company performed to critical acclaim throughout the United States, as well as in Europe, and wrote the scripts for and performed on *Colonial Fair*, a sound recording featuring music and stories inspired by the 18th Century which was awarded the "Best Children's Album of the Year" by the National Association of Libraries. Mr. Goldstein is the author of numerous original plays and songs produced and performed by the company.

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