Analysis of a Personal Management Agreement

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Finding a good personal manager, however necessary, can be a tricky business for musicians. Many new artists and "baby bands" have difficulty figuring out the right time to hire a manager and the right person to fill that role. Finding a manager with a lot of motivation (but little or no experience) is often easy, but such a manager may not have the requisite contacts, reputation, experience, or ability to do much good for the artist. But attracting a high-caliber manager can seem impossible. Established managers spend much of their time minding the business of their existing roster of clients, leaving little time to expend on a new group. Yet when musicians decide to part with some of their hard-won earnings, they understandably want to be a high priority for their professional advisors. Thus, artists may have to choose between being a big fish in a little pond or a little fish in a big pond.

Personal Managers

Personal managers supervise and coordinate the business and career activities of professional entertainers. They liaise with those who are in business with artists. Depending on their clients' needs, personal managers may motivate, direct, guide, counsel, market, make demands, and advise. Managers are involved in such issues as which employment to seek and accept; creation and coordination of their client's public mystiques and images; and the marketing and promotion of the artist's career. In most instances, communications with agents, attorneys, business managers, publicists, record companies, and music publishers are routed through personal managers.

Many artists are unwilling or unable to devote the time necessary to supervise and coordinate the many services required from those that build and maintain their careers.

From a common sense perspective, it is almost always better to have a third person promoting the talents and virtues of another, rather than doing it oneself. The artist as self-manager will always have a tough time handling all the business dealings inherent in a career. Virtually all successful recording artists have personal managers, as do many record producers and songwriters.

Some personal managers invest money, in addition to time, into the acts they represent. Their profession is risky and often costly.

Personal managers are generally considered to be independent contractors, meaning they operate independent businesses separate from the talent they manage, but they operate in a fiduciary capacity to the artist. Fundamentally, managers work for the client and are subject to the client's direction. They are in legal terms *agents* of the client. The client is the boss and calls all the shots and is not obligated to follow the will of the manager. Managers may know better and are hired because they have the requisite skills, but in the end they are advisors, just like accountants and lawyers, who similarly do not make the final decision on how a client shall act.

A manager also acts as *fiduciary,* one in whom a special trust is placed and who, consequently, owes special duties to the client. Like attorneys and accountants, personal managers must subordinate their own interests to those of their clients. The client's best interests always come first. At all times there must be complete disclosure of all material information, no side-dealing of any nature, and no secret profits. Thus, the artist is always boss—but has usually engaged the manager because of his or her superior knowledge of, and capabilities in, the business arena, as well as the manager's dependability and trustworthiness.

Personal managers are the eyes and ears of their clients and must completely disclose all business dealings involving the client. They must never obtain an unfair economic advantage with respect to their clients, exercise no undue influence over their affairs, and always operate with the highest standards of good faith and fair dealing. Personal managers must always use their best efforts to see that their clients have independent advice when necessary, as in a conflict-of-interest situation where a manager seeks to be an employer or partner with a client and thus may be biased when giving advice. To prevent such bias, personal managers should retain and consult their own attorneys, which in turn helps better serve the clients' needs.

Sometimes the same attorney will represent the artist and the manager when the management agreement is negotiated. In such instances, the parties will sign a conflict-of-interest waiver. Though legal, we do not recommend that an artist or manager agree to let the same lawyer act on behalf of both. It is safer for all

Industry Trade Groups

Personal managers have been poorly organized as far as being an effective lobbying group; artists are not organized and have no meaningful trade organization. However, managers should be aware of the following industry trade groups:

Music Managers Forum (MMF)

The quite active Music Managers Forum (MMF), based in the United Kingdom, was formed to further the interests of music industry managers and their artists, including the areas of live performance, recording, endorsements/merchandising, and music publishing. The MMF provides a platform for managers to discuss issues and problems they typically face in these areas.

www.themmf.net

National Conference of Personal Managers (NCOPM)

The National Conference of Personal Managers (NCOPM) is committed to the advancement of personal managers and their clients. Only a few *music* personal managers belong to this organization, with most members representing actors. But the membership engages in some lobbying and supporting legislative change more favorable to managers.

www.ncopm.com

Talent Managers Association, Inc. (TMA)

The West Coast–based Talent Managers Association (TMA) was founded in 1991 and grew out of the National Conference of Personal Managers, and then broke away. Its members represent actors for the most part.

www.talentmanagers.org

parties, including the lawyer, to see that each party has counsel or has been afforded the right to counsel.

Talent must be very wary of managers who seek an equity interest in their music publishing. Managers, by definition, are not music publishers. Some claim to have expertise in this area, but what services do they provide as music publishers that they would not otherwise perform as a manager? Does the manager seek income after the term of the agreement, pursuant to a music publishing arrangement, that he or she would not otherwise be entitled to under the personal management agreement? Almost invariably, yes. Such arrangements have been voided when the songwriter and client of the manager did not have independent advice (see *Parsons v. Tickner* (1995) - 31 Cal. App. 4th 1513).

Musicians must be careful and wary of signing away not just music publishing rights but *any* equity interest the manager might seek a portion of; for example, interests in sound recordings, ownership of a copyright, or an interest in a trademark. Managers ordinarily are not record companies. Talent must always ask why it is that the manager should get more than what is ordinarily and traditionally the norm for compensation (see the sample Personal Management Agreement with commentary at the end of this chapter). If the manager is making a substantial economic investment, that may be an important consideration in granting an equity interest in a project, copyright, or other avenue stream.

In short, the intelligent musician always has an independent attorney (one unaffiliated with the manager) to review the management agreement and all important deals with any third party.

The personal manager relationship is the business equivalent of a marriage. It must be entered into with sobriety, intelligence, and forethought. Successful artists understand, appreciate, and supervise the myriad duties of their personal managers. They understand and fulfill their own obligations in those relationships. Many artists incorrectly perceive that a manager will be the answer to all of their problems and that appointing a manager will allow them to abdicate any knowledge of their business affairs. Nothing can be more dangerous to an artist's financial affairs than to willfully ignore his or her own business. Successful artists know the ins and outs of their business deals, discuss them at length with management, and empower management to carry out their wishes. Doing business any other way can seriously hamper an artist's goals of financial success and independence.

In recent years, mergers of multinational corporations have greatly reduced the number of major record companies and thus significantly decreased the number of available record deals for artists. Additionally, the proliferation of illegal file sharing and digital download sites has reduced legitimate sales of recordings, putting further pressure on major record companies. The end

360 Deals and Television Talent Shows

The Internet has been a boon for artists, who can now easily distribute their music worldwide. But that ability has caused a tremendous decrease in record companies' traditional income. To compensate for this decrease, record companies invented so-called *360 deals*, or multiple rights, and demand artists now sign these 360 deals. The result is the record company participates in all the artist's income, including publishing, merchandising, fan club, live appearances, and non-music industry related, ancillary income from endeavors such as acting and fashion modeling. The traditional model has changed, and the requirement that an artist agree is virtually non-negotiable. The result of these deals, particularly relevant to personal managers, is that these recording agreements effectively allow the record company to assume managerial control over the artists' careers.

An inherent conflict of interest is then obviously created. Who will advocate for the artist when the record company controls every aspect of employment and marketing? These deals can sometimes be negotiated more favorably for an artist who breaks out and achieves substantial success, but the fact remains that in today's deals, the record companies have changed the model so that they control the careers of talent on a far more onerous level than ever before.

Finally, with the rise of reality TV competition talent programs such as *The Voice*, *America's Got Talent*, and *The X Factor*, new talent is required to sign what effectively is a 360 deal, with the same attendant problems as with a traditional record company. We have seen a contract that required contestants to vote to hire one of three lawyers presented by the production company to negotiate on behalf of all talent. Whether such a forced hiring would withstand court scrutiny is unclear and is one example of the oppressive strictures sometimes forced upon talent.

result is that many artists who would have been eligible for major record deals in years past are either been passed over for deal consideration or even dropped from major label rosters. As if writing, recording, and performing music were not enough to do, artists must now set up websites to promote themselves. More often than not, artists must also sign up with digital companies to sell their music directly to the public. With increasing regularity, artists are demanding that their managers handle these added tasks on their behalf.

Managers of today thus find themselves acting like record companies of earlier eras, as they are placed in charge of music sales on their clients' behalf. Additionally, the reduction of record deals has resulted in a plethora of independent artists, meaning managers must really hustle to create additional income for such clients. At the time of this book's publication, the recording industry had shrunk from an annual income of $26.6 billion in 1999 to $15 billion in 2015. Whereas in the past sound recording sales and music publishing income would constitute most of an artist's revenue, today's artists typically make the bulk of their income from live performances and merchandising. Good managers maximize their clients' income, from T-shirt and other licensed merchandise deals, placements for the artists' music in films and television programs (see box story "360 Deals and Television Talent Shows"), video games, commercial advertising, and other creative methods. But trying to obtain work for an artist can be ruinous for a manager.

Managers in Peril

Although the personal manager is the chief executive responsible for promoting and marketing an artist, procuring labor for a musician is a difficult and treacherous area for all personal managers who operate in California (and also New York). California's Labor Code sections 1700–1700.47, called the Talent Agencies Act, regulate the offer, promise, procurement, or attempted procurement of employment for entertainers. This law has spawned much controversy over the years. Under the Act, personal managers are not allowed to operate as a talent agency without a state license, except for procuring recording agreements. Most personal managers have refused to obtain such licenses because of various state rules that, for example, may require a bond be obtained, and union regulations that, for example, require the obtaining of work within certain time frames. Many managers cannot operate within these strictures.

California's Labor Commissioner has jurisdiction to hear any dispute arising under the Talent Agencies Act; any such case must first be brought before the commissioner in an administrative hearing. After a decision, either party can elect to proceed to California Superior Court and have a trial *de novo*—a new trial—as if there were no underlying decision.

However, the U.S. Supreme Court ruled in *Preston v. Ferrer* (552 U.S. 346 2008) that managers can require arbitration outside the California Labor Commissioner's jurisdiction. Many managers have such clauses in their agreements because

they perceive that the Labor Commissioner is biased against unlicensed persons.

Sporadic attempts over the last four decades to produce a workable arrangement satisfactory to all parties have yet to be resolved and are unlikely to be. A personal manager operating in California may not solicit a live engagement or any other engagement (except a record deal) for an entertainer unless he or she possesses a talent agency license. The main difficulty between the law and reality is that the law restricts managers from doing the core tasks most artists need them to do! Early in the artist–management relationship, many artists are perfectly willing to turn a blind eye to their managers' actions that are outside the law. However, when a dispute arises between artist and manager, resulting in the artist wanting to terminate the management agreement, artists generally have no reservation with empowering their attorney to allege the manager violated this law. Most talent agencies and established personal managers are not interested in musical acts that don't have record agreements with major labels. Thus, personal managers representing talent in that position are effectively required to seek such employment and deal with offers that come in, even if doing so may violate state law. Even if the manager takes no commission, his or her conduct is unlawful. Personal managers are allowed to solicit recording agreements, but without the opportunity to solicit live engagements to secure showcases and build the act, they are hamstrung.

New York law allows managers to book gigs if they do so incidentally, as a minor part of their overall managerial services. Managers who have an act that can maintain a claim under the Talent Agencies Act in California are vulnerable, so beware if you are an out-of-state manager and seek employment for your acts in the Golden State. Despite the *Marathon* case, cited below in "Landmark Cases," it is still best to either be licensed in California if you plan on performing any talent agent related activities, or to ensure that a licensed talent agent is responsible for all your negotiations and dealings.

Remember the other moral of the *Deftones* case, cited below, if you seek loyalty in the entertainment business, get a dog. Managers must watch their backs at all times.

Landmark Cases

Be forewarned! We have seen many cases where managers were unceremoniously fired once a deal was obtained and a "heavy" manager was willing to come on board. If you are an artist manager, do not count on artist loyalty. Few managers have found it to exist. For example, in the case *Park v. Deftones,* 71 Cal. App. 4th 1465 (1999), the former manager of Deftones alleged in a lawsuit the band fired him even though he successfully solicited a major recording contract for them when they were playing to empty clubs. However, the group successfully argued that the former manager, notwithstanding his hard work, had violated the California Talent Agencies Act by obtaining live engagements for them when no talent agent would consider booking them, even though he took no commission.

Similar stories abound with artists such as Green Day, Aerosmith, Jewel, and countless others. The actress, Connie Stevens, was permitted to walk out of her management agreement in *Styne v. Stevens,* 26 Cal. 4th 42 (2001), because her manager had solicited work. Another manager on the losing end involving a former member of The Platters is found in *Yoo v. Robi,* 126 Cal. App. 4th 1089 (2005).

In the California Supreme Court case of *Marathon Entertainment Inc. v. Blasi,* 42 Cal. 4th 974 (2008), a manager engaged in unlicensed talent agent activities by obtaining engagements for his artist. However, he was still permitted to recover commissions from the portion of the contract that was lawfully performed based on the legal theory of contract *severability.* The manager provided professional and personal advice and other services not regulated by the Talent Agencies Act, so the court was willing to divide the contract and permit recovery for these lawful activities. In *Dwight Yoakum v. The Fitzgerald Harley Co.*, Lab. Comm'r Case No. TAC 8774 (2010), the singer tried to terminate his agreement with his manager and won a split decision, with the Labor Commissioner allowing the manager to keep recording commissions, *but not* those for directing and songwriting services and some live engagements.

Singer Kesha likewise tried to get out of her agreement with her New York based manager. The court found that securing the recording agreement was appropriate, but not the music publishing agreement, as that activity was not exempted from the Act. The court also found the manager was wrong to have pitched Kesha to write and perform for some television shows. The wrongful conduct was *severed,* and thereafter Kesha had to pay 55% of the monies due the manager *(Kesha Rose Sebert v. DAS Communications, Ltd.*, Lab. Comm'r Case No. TAC 19800 [2012]).

Managers of record producers are also at risk. In *Steve Lindsey v. Lisa Marie,* Lab. Comm'r TAC 28811 (2014), a record producer terminated his agreement with his manager who had secured deals with a band to produce the producer's recordings and obtained a publishing agreement for the producer. These agreements were voided as unlawful procurements of labor.

Personal Management Agreement

Note: The following example of a personal management agreement contains author commentary and explanations in *italics.*

1. Term

Manager is hereby engaged as Artist's exclusive personal manager and advisor. The agreement (hereinafter "Agreement") shall continue for three (3) years (hereinafter the "initial term") from the date thereof, and shall be renewed for one (l) year periods (hereinafter "renewal period[s]") automatically unless either party shall give written notice of termination to the other not later than thirty (30) days prior to the expiration of the initial term or the then current renewal period, as applicable, subject to the terms and conditions hereof.

Many personal management agreements have a short, initial term of one to three years, although some can last up to five years, at the manager's discretion. Since a manager's earnings are on a percentage/commission basis, managers (not artists) have the option to renew the agreement for up to six years. A deal that a manager obtains for an artist may take several years to become profitable. Therefore, the theory is that if the manager plants the seeds for the artist, the manager should be around to reap the harvest. Artists sometimes insert provisions that provide for a minimum of earnings that the artist must earn during the period before any option period may be exercised. Most personal management agreements with newer acts provide that if a recording agreement is not secured within a period of up to 18 months after commencement of the term, then either party may terminate the management agreement. What "secured" means should be specified. If the personal manager is in negotiation with a record company but a recording agreement has not actually been signed, the agreement should not be terminated if the material terms of an agreement have been negotiated and agreed upon. Additionally, the artist could be prohibited from signing to such label for an additional period of time after the end of the term of the personal management agreement, or would otherwise have to pay a management commission.

2. Services

(a) Manager agrees during the term thereof to guide, advise, counsel, and assist Artist in connection with all matters relating to Artist's career in all branches of the entertainment industry, including, without limitation, the following:

(i) The selection of literary, artistic, and musical material;

(ii) Matters pertaining to publicity, promotion, public relations, and advertising;

(iii) The adoption of proper formats for the presentation of Artist's artistic talents and in determination of the proper style, mood, setting, business, and characterization in keeping with Artist's talents;

(iv) The selection of artistic talent to assist, accompany, or embellish Artist's artistic presentation, with regard to general practices in the entertainment industries;

(v) Such matters as Manager may have knowledge concerning compensation and privileges extended for similar artistic values;

(vi) Agreements, documents, and contracts for Artist's services, talents, and/or artistic, literary, and musical materials, or otherwise;

(vii) The selection, supervision, and coordination of those persons, firms, and corporations that may counsel, advise, procure employment, or otherwise render services to or on behalf of Artist, such as accountants, attorneys, business managers, publicists, and talent agents; and

(b) Manager shall be required only to render reasonable services, which are called for by this Agreement as and when reasonably requested by Artist. Manager shall not be required to travel or meet with Artist at any particular place or places, except in Manager's sole discretion and following arrangements for cost and expenses of such travel, with such arrangements to be mutually agreed upon by Artist and Manager.

The foregoing section details what services managers provide to artists. Travel requirements should be negotiated on a case-by-case basis. An artist might resist paying for travel and long-distance phone charges when the manager chooses to live in a location remote from the residence of the artist. Travel should be necessary and the cost reasonable. An artist may also require an allocation of costs if the manager, when traveling, does other business unrelated to the artist.

As far as "guidance, advice, and counsel," although it is a vague job description, this is as far as most agreements go. Further, it is difficult to articulate the efforts that may be required.

Some artists find it frustrating that the manager's obligations are so vaguely defined. An artist can require the manager to specify in further detail the services required. For example, artists could require that their manager not represent a certain number of other acts and that their manager meet with them in person, on a regular basis, to create or present strategies and goals for the artist. An artist should require that all material information about his or her business be provided as soon as it is obtained or learned.

There should be a specific provision where the manager acknowledges that a fiduciary relationship (one of special trust) exists. An artist should never agree that no such relationship exists.

What are the obligations of the manager after the term of the agreement? One of our cases involved a manager who claimed to own music publishing rights of the artist. We had to sue him to get him to turn over all documents relating to the same. Thus, the artist should insert provisions that require the manager to keep the artist informed at all times of all activities of the manager and of all rights in which the manager claims an interest, and certainly upon request by the artist or the artist's representative. It is also common to insert a sunset clause, also known as a post-term compensation clause, into management agreements. The sunset clause discusses and defines the manager's commission after the end of the contract for deals which artist enters into during the contract. For the manager, the clause encourages the manager to continue to seek deals for the artist up to the end of the agreement, as there is a chance for compensation afterward. For the artist, the sunset clause allows the artist to afford to hire and pay a new manager, while preventing a lag in deals (and income therefrom) as the end of the original management contract approaches.

3. Authority of Manager

Manager is hereby appointed Artist's exclusive, true, and lawful attorney-in-fact, to do any or all of the following, for or on behalf of Artist, during the term of this Agreement:

(a) Approve and authorize any and all publicity and advertising, subject to Artist's previous approval;

Artists will want to have written approval; managers will want a reasonable time for approval, such as seventy-two hours after delivery to the artist.

(b) Approve and authorize the use of Artist's name, photograph, likeness, voice, sound effects, caricatures, and literary, artistic, and musical materials for the purpose of advertising any and all products and services, subject to Artist's previous approval;

(c) Execute, in Artist's name, American Federation of Musicians (AFM) contracts for Artist's personal appearances as a live entertainer, subject to Artist's previous consent to the material terms thereof; and

(d) Without in any way limiting the foregoing, generally do, execute, and perform any other act, deed, matter, or thing whatsoever that ought to be done on behalf of the Artist by a personal manager.

The key words "subject to Artist's written approval" should be inserted at the end of subparagraph 3(d), even though managers will likely balk at the "written" aspect as being too restricting and impractical. But in this age of instant digital communications, such as e-mail, there is no reason why the artist should not approve and supervise the manager in all aspects. However, the manager should not be micromanaged. Trust is an integral aspect

of this team effort, and each member must be allowed to perform his or her job without too much interference. An artist will usually want to delete any clause that gives the manager the right to execute agreements on behalf of the artist. Intelligent artists always supervise and understand their contractual relations. Any manager with unchecked freedom to bind the artist has too much control—and the possibility for abuse. Managers should only be appointed to execute AFM agreements as noted in subparagraph 3(c) and only when the artist is reasonably not available to do so.

4. Commissions

(a) Since the nature and extent of the success or failure of Artist's career cannot be predetermined, it is the desire of the parties hereto that Manager's compensation shall be determined in such a manner as will permit Manager to accept the risk of failure as well as the benefit of Artist's success. Therefore, as compensation for Manager's services, Artist shall pay Manager, throughout the full term hereof, as when received by Artist, the following percentages of Artist's gross monies or other considerations (hereinafter referred to as the "Commission"):

(i) Fifteen percent (15%) of Artist's gross monies or other considerations received in connection with Artist providing his or her services as a recording artist for the recording of master recordings to be manufactured and marketed as sound recordings during the term hereof. Manager shall receive said Commission in perpetuity on the sale of those master recordings recorded during the term hereof. In no event shall the term "gross monies or other considerations" be deemed to include payments to third parties (which are not owned or controlled substantially or entirely by Artist), in connection with the recordings of master recordings prior to or during the term hereof;

Managers in the music business usually take a 15% to 20% commission of an artist's earnings. The specific amount of commission depends on the relative strength of the parties to the negotiation. If a new manager is being hired to represent an established artist who already has achieved significant sales and success, the lower commission percentage is appropriate. If on the other hand new talent is hiring an established manager and wishes the manager to use not only her contacts and reputation but her financial resources to assist the artist, the higher commission percentage is appropriate.

(ii) Fifteen percent (15%) of the Artist's gross monies or other considerations from live performances;

The artist should seek to, and generally does, limit the manager's compensation on live engagements to the artist's "net" derived from such engagements; that is, after the deductions of travel, lights, and other out-of-pocket payments that an artist makes to third parties, including agents and musicians. Being paid on "net" is the norm for managers. We have seen situations where the manager was paid on gross, the tour was in deficit, yet the manager earned a fortune. We believe the manager should be compensated only when there are profits, though legitimate expenses, such as travel, can be reimbursed.

(iii) Fifteen percent (15%) of the Artist's gross monies or other considerations derived from any and all of Artist's activities in connection with music publishing, or the licensing or assignment of any compositions composed by Artist alone or in collaboration with others (it being understood that no commissions shall be taken with respect to any compositions that are the subject of any separate music publishing agreement between Artist and Manager).

Some managers seek to administer and/or own the compositions of their artists and/or take a higher percentage from music publishing royalties. Although nothing is inherently wrong with such practices, the personal manager will likely be subjected to extra scrutiny in court as to the fairness of the agreements unless the artist has had independent advice or the circumstances otherwise dictate that the arrangement is fair. Publishing can be very lucrative, and the resulting royalties are something the artist should usually maintain for him- or herself. See discussion after paragraph 12.

(b) The term "gross monies or other considerations" as used herein shall mean and include any and all gross monies or other consideration which Artist may receive, acquire, become entitled to, or which may be payable to Artist, or on Artist's behalf, directly or indirectly (without any exclusion or deduction) as a result of Artist's activities in the music industry, whether as a performer, writer, singer, musician, composer, publisher, or artist.

Note that virtually all aspects of entertainment are covered. Artists can and do limit the authority and compensation of a manager in certain areas, on a case-by-case basis. For example, if an artist has a thriving jingle or soundtrack business or is an established actor, then the artist may desire to exclude these areas from the manager's commission. Further, the manager will want to ensure that "other consideration" includes stock and any other inducements that may be offered to the artist. If the artist is offered the opportunity to participate in deals, then the manager should have a pro rata right to likewise participate.

(c) Manager shall be entitled to receive his full Commission as provided herein on Artist's gross monies or other considerations derived from any agreements entered into during the term of this Agreement, notwithstanding the prior termination of this Agreement for any reason. Artist also agrees to pay Manager the Commission following the term hereof upon and with respect to all of Artist's gross monies or other considerations received after the expiration of the term hereof but derived from any and all employments, engagements, contracts, agreements, and activities negotiated, entered into, commenced, or performed during the term hereof relating to any of the foregoing, and upon any and all extensions, renewals, and substitutions thereof and therefore, and upon any resumptions of such employments, engagements, contracts, agreements, and activities which may have been discontinued during the term hereof and resumed within one (l) year thereafter;

Alternatively, there could be a post-term compensation, or "sunset" clause, for example:

Notwithstanding anything to the contrary contained in this Agreement, Manager's Commission in respect of gross monies or other considerations generated in connection with commissionable products or services which is received *after* the term hereof shall be as follows:

Fifteen (15%) percent during the first year following the end of the Term;
Ten (10%) percent during the second year following the end of the Term;
Five (5%) percent during the third year following the end of the Term;
Three (3%) percent during the fourth year following the end of the Term; and
Zero (0%) percent after the expiration of the fourth year following the end of the Term.

Commission percentages are a tricky area, and there are valid arguments on both sides. In the music business, many personal managers are limited to a commission derived from activities performed during the term of the agreement, and not with respect to activities performed after the personal management agreement but pursuant to agreements that were entered into during the term of the management agreement. For example, should the manager get a commission on records recorded after the management term pursuant to a record deal entered into during the term? There are two views. Managers will argue that if they are responsible for building up the career of an artist, the fruits of the their labor should be enjoyed for as long as that "contractual tree" bears fruit and it would not be fair to build up an artist's career over a five-album period, so that the artist was about to "break" on a major scale, only to be excised from the deal on the next album when the artist achieves major success. The manager will want a provision that provides for payment "in perpetuity"—forever—and not just on creations made during the term but also those created after the term but pursuant to deals entered into during the term.

The artist will attempt to limit the compensation to only employment activity by the artist rendered to third parties during the term of the management agreement. Artists will argue that they will be forced to pay

two commissions: one to the previous manager and one to a new manager, which would be unduly onerous. Moreover, what if the failure to achieve success theretofore was in some part the previous manager's fault? Possible compromises are a reduced percentage for the manager or an override that extends for a limited period, or that the parties will negotiate a fee or override at the end of the term, and if they cannot agree, a third party can decide a fair buyout.

There was major litigation and a trial in 1994 over the relationship between the personal manager of blues great Willie Dixon and his estate. The personal manager helped Dixon obtain reversions of various copyrights and was paid up to one-third of the revenue stream earned from various compositions, all written before the commencement of the personal management agreement. Such work is generally outside the traditional artist-manager relationship, but if the contract is not specific enough, the personal manager might be entitled to share in such revenues. The same manager was later successfully sued by bluesman Buddy Guy for taking excessive commissions and other fiduciary breaches.

Some managers are so "heavy" they operate without written agreements. We recommend against any oral agreements. It can be difficult to establish and prove an oral contract in a court of law.

"Negotiated" could use more definition, and most times the parties will agree that this terminology includes that the material (basic) terms have been agreed upon and the final contract is executed within 90 days after the expiration of the term of the management agreement.

(d) Manager is hereby authorized to receive, on Artist's behalf, all "gross monies and other considerations" and to deposit all such funds into a separate trust account in a bank or savings and loan association. Manager shall have the right to withdraw from such account all expenses and commissions to which Manager is entitled hereunder and shall remit the balance to Artist or as Artist shall direct. Notwithstanding the foregoing, Artist may, at any time, require all "gross monies or other considerations" to be paid to a third party, provided that such party shall irrevocably be directed in writing to pay Manager all expenses and commissions due hereunder.

This subject is near and dear to both parties. The manager wants to be assured of getting paid; the artist needs to be sure of a fair count. In the early days of a career, when little money is made, most managers collect and disburse revenue. Any artist who becomes successful should have an accountant or business manager to supervise the financial activities of the artist. The artist must have the absolute right to audit the books of the manager at reasonable intervals. As soon as serious money starts to be made, the artist should have it collected by a third party who will then disburse the funds. Sometimes we see manager agreements where the manager and artist agree they will mutually select such third party, often referred to as the "business manager."

Having the manager acknowledge a fiduciary relationship to the artist is also a good idea, particularly with respect to the financial aspects of the relationship. (The penalties are much stronger for one who violates a fiduciary relationship, as opposed to a mere contractual relationship. If a fiduciary breaches a relationship, punitive or exemplary damages may be claimed; they may not in an ordinary breach of contract situation. Most managers, however, will balk at such a provision, even though that is the true nature of the agreement.)

(e) Each party to this Agreement shall keep and maintain accurate books and records of account, and shall make these books and records available to the other party upon reasonable request. Accounting by either shall be made biweekly, or a shorter time period as necessary and agreed upon. The parties have to have the right to see the other's relevant books and business records whenever necessary.

(f) The term "gross monies or other considerations" as used herein shall include, without limitation, salaries; earnings; fees; royalties; gifts; bonuses; share of profit and other participations; shares of stock; partnership interests; and percentages of music-related income, earned or received directly or indirectly by Artist or Artist's heirs, executors, administrators, or assigns, or by any other person, firm, or corporation on Artist's behalf. Should Artist be required to make any payment for such

interest, Manager will pay Manager's percentage share of such payment, unless Manager elects not to acquire Manager's percentage thereof.

Sometimes artists are offered deals that, for example, would include a stock purchase at a reduced price in return for services. The manager may want to—and should have the right to—get in on the deal.

(g) Notwithstanding the above, "gross monies or other considerations" shall not include:
Any fees, royalties, or advances paid by Artist or on Artist's behalf for the services of any third-party producers, mixers, directors, or engineers engaged by or on behalf of Artist in connection with recordings or audiovisual works subject to this Agreement;
Video production costs paid by Artist or on Artist's behalf in connection with audiovisual works subject to this Agreement;
Income from Artist's "passive investments" (e.g., real estate investments, stocks, bonds, and other properties or investments where Artist renders neither entertainment services nor authorizes the usage of Artist's name or likeness);
Tour Support and/or Independent Promotion monies, as such terms are understood and known throughout the entertainment industry, for Artist's initial full length, nationally distributed commercially released CD; or
Sums paid to Artist which Artist is in turn required to pay to a third party for the creation of commissionable product or services hereunder.

These are all commonsense provisions talent should require. The monies here are not profit but go toward promoting and marketing the intellectual property created. If money is left over in a recording budget after payment of out-of-pocket costs to third parties, the manager can rightfully ask for a share of those monies.

5. Loans and Advances

Manager will make loans or advances to Artist or for Artist's account and incur some expenses on Artist's behalf for the furtherance of Artist's career in amounts to be determined solely by Manager in Manager's best, good faith business judgment. Artist hereby authorizes Manager to recoup and retain the amount of any such loans, advances, and/or expenses, including, without limitation, transportation and living expenses while traveling, promotion and publicity expenses, and all other reasonable and necessary expenses, from any sums Manager may receive on behalf of Artist. Artist shall reimburse Manager for any expenses incurred by Manager on behalf of Artist, including, without limitation, long-distance calls, travel expenses, messenger services, and postage and delivery costs. Notwithstanding the foregoing, no travel expenses and no single expense in excess of two hundred fifty dollars ($250.00) shall be incurred by Manager without the prior approval of Artist. Manager shall provide Artist with monthly statements of all expenses incurred hereunder and Manager shall be reimbursed by Artist within fourteen (14) days of receipt by Artist of any such statement. Notwithstanding the foregoing, any loans, advances, or payment of expenses by Manager hereunder shall not be recoupable by Manager hereunder until Artist has earned revenue in the entertainment industry and there is sufficient such revenue to so recoup, repay, and compensate Manager without causing Artist hardship or leaving insufficient funds for Artist to pursue his or her career.

Loans and advances are another area of controversy. Artists must be careful that the manager does not send them to the poorhouse. A cap on expenses, such as $250 per transaction, is the best type of insurance. It does cost money to promote and further the career of an artist, however, so it makes sense that managers should be reimbursed for their out-of-pocket expenses occurred on behalf of an artist. Most publicists, attorneys, accountants, and business managers charge and obtain reimbursement for out-of-pocket expenses.

We've seen a nasty situation where the manager invested substantial monies, spending in excess of what was in the best interests of the band and effectively bankrupting them, as well as claiming equity interests in and control of their intellectual property. Not only was the manager's improper action the cause of a lawsuit and

substantial liability, it effectively broke up a successful touring group and also drove several individual band members into personal bankruptcy.

6. Nonexclusivity

Manager's services hereunder are not exclusive. Manager shall at all times be free to perform the same or similar services for others, as well as to engage in any and all other business activities.

The artist may wish to insert a clause that guarantees that the manager will have sufficient time to devote to the career of the artist or a "key person" clause that guarantees that the manager, not some employee, will be primarily rendering day-to-day services to and on behalf of the artist.

7. Artist's Career

Artist agrees at all times to pursue Artist's career in a manner consistent with Artist's values, goals, philosophy, and disposition and to do all things necessary and desirable to promote such career and earnings therefrom. Artist shall at all times utilize proper theatrical and other employment agencies to obtain engagements and employment for Artist. Artist shall consult with Manager regarding all offers-of-employment inquiries concerning Artist's services. Artist shall not, without Manager's prior written approval, engage any other person, firm, or corporation to render any services of the kind required of Manager hereunder or which Manager is permitted to perform hereunder.

The manager/artist relationship is built on trust and mutual agreement. All major decisions should be mutually agreed upon, especially concerning those who will work closely with the manager and artist.

8. Advertising

During the term hereof, Manager shall have the exclusive right to advertise and publicize Manager as Artist's personal manager and representative with respect to the music industry.

Managers have businesses too, which may benefit from promotion. Artists will want to approve any advertising or publicity in which their names are used.

9. Agent

Artist understands that Manager is not licensed as a "talent agency" and that this Agreement shall remain in full force and effect subject to any applicable regulations established by the Labor Commissioner of California, and Artist agrees to modify this Agreement to the extent necessary to comply with any such laws.

See the section "Managers in Peril" earlier in this chapter.

10. Entire Agreement

This constitutes the entire Agreement between Artist and Manager relating to the subject matter hereof. This Agreement shall be subject to and construed in accordance with the laws of the State of California applicable to agreements entered into and fully performed therein. A waiver by either party hereto or a breach of any provision herein shall not be deemed a waiver of any subsequent breach, nor a permanent modification of such provision. Each party acknowledges that no statement, promise, or inducement has been made to such party, except as expressly provided for herein. This Agreement may not be changed or modified, or any covenant or provision hereof waived, except by an agreement in writing, signed by the party against whom enforcement of the change, modification, or waiver is sought. As used in this Agreement, the word "Artist" shall include any corporation owned (partially or wholly) or controlled (directly or indirectly) by Artist, and Artist agrees to cause any such corporation to enter into an agreement with Manager on the same terms and conditions contained herein.

11. Legality

Nothing contained in this Agreement shall be construed to require the commission of any act contrary

to law. Whenever there is any conflict between any provision of this Agreement and any material law, contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provisions of this Agreement affected shall be curtailed and restricted only to the extent necessary to bring them within such legal requirements, and only during the time such conflict exists.

12. Conflicting Interests

From time to time during the term of this Agreement, acting alone or in association with others, Manager may package an entertainment program in which the Artist is employed as an artist, or Manager may act as the entrepreneur or promoter of an entertainment program in which Artist is employed by Manager, or Manager may employ Artist in connection with the production of sound recordings or as a songwriter, composer, or arranger. Such activity on Manager's part shall not be deemed to be a breach of this Agreement or of Manager's obligations and duties to Artist. However, Manager shall not be entitled to the commission in connection with any gross monies or other considerations derived by Artist from any employment or agreement whereunder Artist is employed by Manager, or by the firm, person, or corporation represented by Manager as the package agent for the entertainment program in which Artist is so employed; and Manager shall not be entitled to the commission in connection with any gross monies or other considerations derived by Artist from the sale, license, or grant of any literary rights to Manager or any person, firm, or corporation owned or controlled by Manager. Nothing in this Agreement shall be construed to excuse Artist from the payment of the Commission upon gross monies or other considerations derived by Artist from Artist's employment or sale, license, or grant of rights in connections with any entertainment program, sound recording, or other matter, merely because Manager is also employed in connections therewith as a producer, director, or conductor, or in some other management or supervisory capacity, but not as Artist's employer, grantee, or licensee.

Many managers also act as producers or packagers of television shows and live concerts or operate production companies, record companies, or music publishing companies. For this reason, a manager might be in a partnership with a client, or the employer of a client. There is nothing inherently wrong with this, but because the manager may have control in excess of that ordinarily granted to him or her in the management agreement, or greater compensations than ordinarily would be paid in his or her capacity as manager, it is incumbent upon the manager to ensure that the artist is provided for fairly. First, the manager should not obtain "double commissions"; that is, a fee and percentage as a producer or employer, in addition to a management commission from the artist from the same activity for which the manager is compensated as an employer or partner. Actor/comedian Garry Shandling was embroiled in ugly litigation with his personal manager, Brad Grey, in 1999, over the manager's participation as a manager and producer in the television show in which Shandling starred. Shandling claimed various conflicts of interests occurred by Grey, including that he favored himself in various deals emanating therefrom.

Second, an independent third party should negotiate the artist's participation. Sometimes, the artist and manager will have the same attorney. This kind of situation can create conflicts, so artists should hire their own attorneys. Further, managers expose themselves to risk if they do not see to it that their client has independent counsel. Overall, talent must be careful to ensure that the manager does not have too much power over the business being done.

13. Group Members

This Agreement shall apply to each member of Artist, individually and collectively. In the event that any individual member of Artist engages in any activity in the Entertainment Industry separate and apart from the Group, this Agreement shall nonetheless apply, and all of the terms and conditions of this Agreement shall be applicable to such activities. Artist shall use Artist's best efforts to ensure that any future member of Artist shall execute this Agreement immediately upon becoming a member of Artist.

Consider situations where the manager is signing a group. Is the management agreement in the best interest of each member of the group? A lead singer, for example, may wish to have an independent career and break away from the group. What happens then? Any attorney negotiating an agreement for more than one person to be managed must make clear who the attorney represents, such as the band as a whole and not each member individually, and recommend that each member obtain independent counsel. The individual may also wish to have separate managers for his/her various, unrelated group or other activities.

14. Group Name

During the Term, Manager shall have the non-exclusive right to use any trademark, service mark, or trade name of Artist for the purpose of promotion, advertising, and similar management purposes. Artist shall have the exclusive right to use any trademark, service mark, or trade name for appearances, recordings, and similar artistic purposes. After the expiration of this Agreement, Manager shall not use the trade name without the prior approval of Artist, such approval not to be unreasonably withheld. Artist currently is performing as "_____". It is hereby agreed that Artist is vested with the ownership of the trade name, trademark, and/or service mark of the individual "stage name" and/or "group name" as listed above or as amended. The provisions of this Paragraph shall survive this Agreement.

This issue is extremely important. We've seen a case where the manager trademarked the name of the act and never told the act!

15. Artist Representations and Warranties

ARTIST UNDERSTANDS THAT THIS IS AN IMPORTANT LEGAL DOCUMENT PURSUANT TO WHICH PRODUCER GRANTS TO MANAGER CERTAIN RIGHTS FOR A PERIOD OF YEARS SPECIFIED HEREIN. ARTIST HEREBY REPRESENTS AND WARRANTS THAT S/HE HAS BEEN ADVISED OF HIS/HER RIGHT TO RETAIN INDEPENDENT LEGAL COUNSEL IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT AND THAT ARTIST HAS EITHER RETAINED AND HAS BEEN REPRESENTED BY SUCH LEGAL COUNSEL OR HAS KNOWINGLY AND VOLUNTARILY WAIVED HIS/HER RIGHT TO SUCH LEGAL COUNSEL AND DESIRES TO ENTER INTO THIS AGREEMENT WITHOUT THE BENEFIT OF INDEPENDENT LEGAL REPRESENTATION. ARTIST FURTHER ACKNOWLEDGES THAT S/HE HAS READ THE TERMS AND CONDITIONS OF THIS AGREEMENT AND THAT S/HE BELIEVES THAT IT IS IN HIS/HER BEST INTERESTS TO EXECUTE SAID AGREEMENT.

This provision protects the manager if the artist later claims he or she was duped into signing the agreement. In the case of an established artist hiring a new or inexperienced manager, it might make sense to revise this paragraph to make it mutual. It is generally foolish for managers to try and act as employers and managers, as inherent conflicts of interest are created. Managers who sign artists to their own production companies and music publishing companies will have a hard time arguing that as artists' managers they fought hard for the artists against the managers' own interests. Clint Black was in a very expensive and unpleasant litigation in the mid-1990s over this very issue; the case ultimately settled.

In the last few years, we have been embroiled in several lawsuits concerning managers that claim to represent a "group" and take positions adverse to a particular member of that group, including even terminating a musician or partner/member. From an artist's perspective, this is very troubling—any artist should demand that any personal manager and any lawyer for the group not be allowed to take sides should such problems develop.

16. Scope

This agreement shall not be construed to create a partnership between the parties. Each party is acting hereunder as an independent contractor. Manager may appoint or engage any other persons, firms, or corporations, throughout the world, in Manager's discretion, to perform any of the services which Manager has agreed to perform hereunder except that Manager may delegate all of his or

her duties only with Artist's written consent. Manager's services hereunder are not exclusive to Artist, and Manager shall at all times be free to perform the same or similar services for others as well as to engage in any and all other business activities. Manager shall only be required to render reasonable services that are provided for herein as and when reasonably requested by Artist. Manager shall not be deemed to be in breach of this agreement unless and until Artist shall first have given Manager written notice describing the exact service that Artist requires on Manager's part and then only if Manager is in fact required to render such services hereunder, and if Manager shall thereafter have failed for a period of thirty (30) consecutive days to commence the rendition of the particular service required.

This provision has important tax ramifications. The artist may need to consult with not only an attorney, but also an accountant, prior to signing a management contract with such a provision to ensure that a true independent contractor is created so that the artist is not required to treat the manager as an employee for tax purposes, which would entail withholding income to comply with tax codes.

17. Cure

In order to make specific and definite or to eliminate, if possible, any controversy which may arise between the parties, Artist and Manager agree that if at any time either believes the terms of this Agreement are not being fully and faithfully performed by the other, the complaining party shall notify the other in writing of the specific nature of such claim, and the party receiving such notice shall have thirty (30) days to cure such claimed breach.

This provision is generally fair; however, the Artist should state that the provision is inapplicable in cases where the transgression cannot be corrected.

18. Assignment

Manager shall have the right to assign this Agreement to any and all of Manager's rights hereunder, or delegate any and all of Manager's duties to any individual, firm, or corporation with the written approval of Artist, and this agreement shall inure to the benefit of Manager's successors and assigns, provided that Manager shall always be primarily responsible for rendering of managerial services, and may not delegate all duties without Artist's written consent. Artist shall not have the right to assign his or her rights under this Agreement without the prior written consent of Manager, provided that Artist may assign his or her rights to a corporation or limited liability company, where Artist owns a majority of such corporation's shares.

The artist will want the manager to be always personally responsible and liable, notwithstanding any assignment or delegation of any rights and duties, and as noted previously, this responsibility can and should be provided. The manager—artist relationship is very personal. For this reason, the artist may want a "key man clause" that the contract can be voided if the manager no longer provides directly such personal services and is not readily available to the artist at all times.

20. Notices

All notices to be given to any of the parties hereto shall be addressed to the respective party at the applicable address as follows:

("Artist") _____ and _____ ("Manager")

All notices shall be in writing and shall be served by certified mail or an overnight delivery service with receipt obtained, all charges prepaid. The date of mailing shall be deemed the date such notice is effective.

21. Artist Warranties

Artist is over the age of eighteen (18), free to enter into this Agreement, and has not heretofore made and will not hereafter enter into or accept any engagement, commitment, or agreement with any

person, firm, or corporation which will, can, or may interfere with the full and faithful performance by Artist of the covenants, terms, and conditions of this agreement to be performed by Artist or interfere with Manager's full enjoyment of Manager's rights and privileges hereunder. Artist warrants that Artist has, as of the date hereof, no commitment, engagement, or agreement requiring Artist to render services or preventing Artist from rendering services (including, but not limited to, restrictions on specific musical compositions) or respecting the disposition of any rights which Artist has or may hereafter acquire in any musical composition or creation, and acknowledges that Artist's talents and abilities are exceptional, extraordinary, and unique, the loss of which cannot be compensated for by money.

22. Arbitration

In the event of any dispute under or relating to the terms of this Agreement or any breach thereof, it is agreed that the same shall be submitted to arbitration by an arbitrator in Los Angeles, California, and judgment upon any award rendered by be entered in any court having jurisdiction thereof. Any arbitration shall be held in Los Angeles County, California. The arbitrator shall decide what discovery may be conducted. In the event of arbitration arising from or out of this Agreement or the relationship of the parties created hereby, the trier thereof may award to any party any reasonable attorneys' fees and other costs incurred in connection therewith. Any litigation by Manager or Artist arising from or out of this Agreement shall be brought in Los Angeles County, California.

Arbitration is a private court proceeding, and personal managers probably would be desirous of such a requirement, and it avoids a proceeding by the Labor Commissioner, who many personal managers believe to be biased. Litigation via the courts is expensive and time consuming. A typical case in the Superior Court of California may take two to three years and cost hundreds of thousands of dollars. Arbitration is private, swift, and overall generally less expensive than our court trial system, but many people do not like these programs because they believe that the best form of justice is that meted out in the court system, and there is no right to appeal an arbitration. Further, arbitrators generally charge what lawyers do on an hourly basis, and the fees to them can be prohibitive. The American Arbitration Association (AAA) charges a filing fee depending on the size of the claim, which, for example, is $7,700 for a dispute claiming $1 million to $10 million in damages. This is on top of the fees to be paid to the arbitrator, so it may be wise to pick an arbitration administrator other than AAA, as other entities do not similarly charge.

The parties may want to specify in the agreement what "discovery"—information and documents—can be obtained in connection with the arbitration. The parties can also agree that the matter will be heard by a "referee," that is, an arbitrator, but that his or her decision can be appealed through the legal system. If the parties do not have a provision that provides for attorneys fees, then generally they cannot be collected. The cost of litigation can be prohibitive. Counsel who otherwise might be willing pursue a matter may be disinclined if the "pot" is not big enough at the conclusion of the matter. Litigation costs can be more than the monies at stake. We think talent and managers should have such clauses because we think such parties should bet on themselves to have done the "right thing" should litigation ensue.

IN WITNESS WHEREOF, the parties hereto have signed this agreement as of the date herein above set forth.

_____ ("Artist")

_____ ("Manager")