Meting Out Penalties Without Statutory Authority: The Mis-Enforcement of the California Talent Agencies Act

rick siegel, University of Pittsburgh - Main Campus
Two guys walk into a bar. One buys a six-pack, leaves, then gets arrested for buying alcohol against the prohibition statutes.

“Wait,” he says, “Prohibition ended in 1932.”

“Not on my watch,” replies the policeman.

It takes almost a year to get a hearing on the alleged infraction, a hearing conducted by and the adjudication made by the same policeman that entwined him into the six-pack controversy in the same place.

Almost another year goes by, and finally the policeman provides the ruling – guilty – despite the laws being stricken from the books 78 years before.

Such a thing would never happen in California... or could it? Could the California Labor Commission be embroiling talent representatives into Talent Agencies Act (“TAA”) controversies and impairing contracts though any statutory authority they had to do so was rescinded almost thirty years ago?

Per the legislative history of the Talent Agencies Act (“TAA”) as delineated in Marathon Entertainment, Inc. v. Rosa Blasi (2008) 42 Cal. 3d 604,

“In 1982, the Legislature provisionally amended the Act to impose a one-year statute of limitations, eliminate criminal sanctions for violations of the Act, and establish a “safe harbor” for managers to procure employment if they did so in conjunction with a licensed agent. (Former § 1700.44, as enacted by Stats. 1982, ch. 682, § 3, p. 2815; Entertainment Com. Rep., supra, at pp. 8, 38-39.) It subjected these changes to a sunset provision and established the 10-person California Entertainment Commission (Entertainment Commission), consisting of agents, managers, artists, and the Labor Commissioner, to evaluate the Act and “recommend to the Legislature a model bill.” (Former §§ 1701-1704, added by Stats. 1982, ch. 682, § 6, p. 2816, repealed by its own terms Jan. 1, 1986.)

Any doubt that the Legislature intended to remove the Commission’s statutory authority to penalize is silenced by examination of the CEC’s 1986 Report. Specifically speaking to whether the temporary removal of the sanctions be reinstated, “The Commission recommends that the criminal sanctions which were removed by AB 997, not be restored to the Act,” basing its decision on their conclusion “that the industry would be best served without the imposition of civil or criminal sanctions of the Act.”

The Report’s discussion explains the Commission’s reasoning for their recommendation for the permanent removal of penalties, that there is…

“an inherent inequity—and some question of constitutional due process—in subjecting one to criminal sanctions in violation of a law which is so unclear and ambiguous as to leave reasonable persons in doubt about the meaning of the language or whether a violation has occurred. [¶] ‘Procure employment’ is just such a phrase. While a majority of the Commission believes that there should be no unlicensed activity, … the uncertainty of knowing when such activity may or may not have occurred at pain of criminal punishment has left the personal manager uncertain and highly apprehensive about the permissible parameters of their daily activity.” (Id. at p. 25; bolding added.)

To repeat for clarity: finding that there were clear issues of substantive due process in enforcing penalties for
violations that reasonable people where "in doubt" as to "whether a violation had occurred," the 1982 CA. Entertainment Commission recommended that the conditionally removed penalties for unlicensed procurement be permanently extinguished, and as noted by the Marathon Court, their recommendation was adopted and implemented with the passage of Assembly Bill No. 3649 and the bill remains today devoid of a penalty provision.

Without a statute of penalty to cite, the question then becomes whether the Labor Commission has the right to penalize without a penalty provision? A litany of well-established law points to an answer of no.

"Where a statute fails to provide a penalty it has been uniformly held that it is beyond the power of the court to prescribe a penalty." (State of New Jersey v. Fair Lawn Service Center, Inc. (N.J. 1956) 120 A.2d 233, 236.)

"Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." (Wolff v. Fox (1977) 68 Cal. App. 3d 280 citing Lambert v. California (1957) 355 U.S. 225, 228.)

"Elementary notions of fairness enshrined in this Court’s constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." (BMW of America v. Gore (1995) 517 U.S. 559, 574.)

Trying to assign a penalty without statutory guideposts "is a task outside the bounds of judicial interpretation" and can be solved only by Congressional action. "We could do no more that make speculation law." (U.S. v. Evans (1948) 333 U.S. 483, 495.)
Evans had been indicted “for concealing and harboring five named aliens in alleged violation of 8. Before trial appellee moved that the indictment be dismissed on the ground that it did not charge a punishable offense. He argued that although the statute provided for two different crimes, one landing or bringing in unauthorized aliens, and the other concealing or harboring such aliens, punishment was prescribed in terms only for the former crime. The District Court accepted this argument and granted the motion to dismiss.” (Id.)

The dilemma: despite all parties’ agreeing that Congress meant to make criminal and to punish acts of concealing and harboring” illegal aliens, trying to penalize without statutory direction “is a task of judicial interpretation” and therefore affirmed the lower court’s determination that no penalty can be meted out: “It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.” (Id.)

Part of the Evans’ Court’s dilemma was that “the legislative history is neither clear nor greatly helpful in ascertaining which of the possibilities calling for punishment was the one Congress contemplated.”

As noted above, the Talent Agencies Act’s legislative history has no such ambiguities. And far from the CEC’s recommendations taken surreptitiously or over his objections, then-State Labor Commissioner C. Robert Simpson, Jr. was one of the ten members of the CA. Entertainment Commission.

Yet despite seemingly knowing that these legislative actions took away their statutory authority to embroil anyone into a controversy, no less mete out punishments or disturb contractual rights, the California Labor Commission
continues to first infuse talent representatives into Talent Agencies Act (“TAA”) controversies for procuring employment for artists without a talent agency license, and when efforts to procure employment opportunities for their clients without having a talent agency license were found to violate CA. Lab. Code Sections 1700.4 and 1700.5, void ab initio dozens of talent representative/artist contracts worth over $100,000,000 in otherwise owed commissions.

The Labor Commission’s position, subsequently adopted by courts,\(^1\) is that §§1700.4(a) and 1700.5\(^2\) demand anyone engaging in the activity of procuring employment for artists must have a talent agency license. The law as written, however, does not support this interpretation.

While some of California occupational licensing Acts schemes regulate activity, similar to the Labor Commission’s enforcement of §§1700.4(a) and 1700.5, the other schemes with verbiage similar to the TAA’s only limit the use of the occupational titles to those who have gone through the educational, testing and/or experience required to be certified as licensed specialists.


\(^2\) 1700.4. (a) "Talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

1700.5. No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. The license shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency. Licenses issued for talent agencies prior to the effective date of this chapter shall not be invalidated thereby, but renewals of those licenses shall be obtained in the manner prescribed by this chapter.
In wording mirroring §1700.5, CA. Business and Professions Code ("BPC") §2903 decrees: "No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter."

The statute then defines the "practice of psychology" as "rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior." But teachers, salespeople, motivational speakers, life coaches and the like from using psychological principles to influence behavior without worry of punishment, as long as they do not also claim to be licensed psychologists.

Lawn maintenance servicers and landscape designers exclusively engage in the defined conduct a landscape architect (BPC §5615: "a person who offers of performs professional services for the purpose of landscape preservation, development and enhancement.") All do so lawfully, as long as they do not in any way hold themselves out to be a landscape architect.

Per BPC §5051, anyone who "reviews financial transactions and accounting records (5051(c)), creates books, records, balance sheets §5051(d)), renders professional services to clients for compensation in any and all matters relating to accounting procedure (§5051(e)), or among other activities, keeps books, makes trial balances or has a bookkeeping operation (§5051(f)" "shall be deemed to be engaged in the practice of public accountancy."

Yet no license is required to engage in any of the above activities. (See Moore v California State Board of Accountancy (1992) 2 Cal.4th 999.)
The State Accountancy Act protects those who have satisfied the expertise and educational requirements to become licensed accountants, not the activity of accounting. (See Id., p. 1004.) Similarly, the education and certification needed to obtain the title of landscape architect or licensed psychologist informs those who choose to engage those licensees of getting the expertise of a specialist in those fields, but unlicensed gardeners or life coached can legally engage in efforts to accomplish the similar respective objectives.

The TAA is most often compared to another licensing scheme where found violators also lose their right to contract, the Contractors’ State Licensing Law (“CSLL”). Similar to the TAA and all the aforementioned occupational licensing schemes, the CSLL (Business and Professions Code (“BPC”) §7000 et seq.,) defines contractors through the activities in which contractors engage.

However, the CSLL specifically (BPC §§7027 – 7028) speaks to the need for the applicable license and often-added certification to lawfully engage in these defined activities. And unlike the TAA and the other above schemes, BPC §7031 states that an individual or company found to engage in the defined activities of a contractor without the proper license has no right to contract.”

TAA is devoid of any similar statutory notice providing that the defined activity of a talent agent is limited to licensees. Nor does it have anything similar to BPC §1270(a), the statute requiring one to acquire a cytotechnologist license before performing cytological slide examinations; or BPC §6980.10, which restricts the activities of a locksmith to holders of valid locksmith licenses, or BPC §2050, which makes it a crime to prescribe drugs or render treatment without a “physician’s and surgeon’s certificate,” or BPC §4320, which criminalizes
the dispensation of pharmaceuticals if done by unlicensed persons. These schemes are clear: the activities of the profession are limited to those with the applicable occupational licenses.

Under *Ejusdem generis*, the doctrine whereby a court is to determine the meaning by reference to and using an interpretation that uniformly treats items similar in nature and scope the same way (see Moore Supra, citing *People v. Rogers* (1971) 5 Cal. 3d 129; *Armenta v. Churchill* (1954) 42 Cal. 2d 448, 454; see generally, 2A Sutherland, Statutory Construction (4th ed. 1984)), the TAA should be enforced like the other schemes that share the same statutory construction. As the Act’s verbiage matches the occupational schemes where violations are not hinged upon activity but rather on wrongfully holding oneself out as a licensee, the TAA should be similarly interpreted. It is not.

If specific notice is needed so California’s citizenry knows exactly what can and cannot be done without locksmith, contractors, lab technicians, doctors, attorneys and pharmacists’ licenses, there must also be statutory guidelines so those who represent artists without talent agency licenses, be they personal managers, publicists or attorneys, know what they can or cannot do.

"Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies." *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231.

"[W]hatever is necessarily implied in a statute is as much a part of it as that which is expressed." *(Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86], italics added.) "But an intention to legislate by implication is not to be presumed. [Citation.]" *(First M. E. Church v. Los Angeles*
"Although in years past it may have been necessary for courts to read into a statute provisions not specifically expressed by the Legislature, the modern rule of construction disfavors such practice." (Woodland Joint Unified School Dist. v. Commission on Professional Competence, (1992) Supra quoting San Diego Service Authority for Freeway Emergencies v. Superior Court (1988) 198 Cal.App.3d 1466, 1472 [244 Cal.Rptr. 440].)

Just as noted in the Report of the CA. Entertainment Commission, the dearth of explanation currently in the Act leaves reasonable people unable to discern when or whether a violation has occurred. "Statutes, regardless whether criminal or civil in nature, must be sufficiently clear as to provide adequate notice of the prohibited conduct as well as to establish a standard of conduct which can be uniformly interpreted by the judiciary and administrative agencies." Hall v. Bureau of Employment Agencies (1976) 64 Cal.App.3d 482, 491, emphasis added, citing Morrison v. State Board of Education, supra.

"It is well settled that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' (Citations.) This principle applies not only to statutes of a penal nature but also to those prescribing a standard of conduct that is the subject of administrative regulation. (Citations.) The language used in such legislation 'must be definite enough to provide a standard of conduct' for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith (Citation.)" (McMurtry v. State Board of Medical Examiners (1960) 180 Cal.App.2d 760, 766.)
It can easily be argued that California’s legislature did want to limit the procurement of artist employment to licensees. But just as it is not good enough for a high school student to have “intended to hand in their homework,” it actually had to be handed in, it cannot be enough for the Legislature to have “intended to prohibit engaging in a defining activity of a licensed occupation by non-licensees.” Lawmakers must memorialize such an intention by creating a statute or statutes that provide notice of such prohibitions.

With the exception of the TAA, Courts and the Labor Commission uniformly view the defined activity of a licensed occupation as prohibited only when specific statutes give notice of the proscription and the penalty if one engages in the prohibited activity. The Labor Commission has literally given the artists, the people who hire and supervise their representatives, the choice whether, after receiving the benefit of the representative’s work, to pay them. The 13th amendment of the United States Constitution does not state, “All men must be paid for their labors... unless they are personal managers living or working in the State of California.” Thus, it is time for this wrongful enforcement to end.