

# Survey

## SPORTS AGENTS: ETHICAL REPRESENTATIVES OR OVERLY AGGRESSIVE ADVERSARIES?

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### I. INTRODUCTION

*“Of particular importance in individual negotiations between agents and clubs are three aspects of bargaining. The first is bargaining in which the agent is seeking as large an economic reward for the player’s services as possible. The more the agent receives for the player the less is left over for the club. In contrast is a second aspect of bargaining in which the negotiators engage in joint problem solving to come up with solutions that benefit both sides. A third aspect of individual contract negotiation is structuring the bargaining environment or ambiance so as to smooth the path toward agreement.”<sup>1</sup>*

#### A. Definition and Qualifications of a Sports Agent

Though sports agents can, and often do, perform almost every service for their clients, most “sports agent” definitions focus only on the bare-bones agent responsibilities. Degree Directory defines a sports agent as someone who “handles contract negotiations, public relations issues and finances, and he or she will often procure additional sources of income for the athlete (such as endorsements).”<sup>2</sup> These definitions do not reflect the extent to which ath-

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1. Paul D. Staudohar, *So You Want to Be a Sports Agent*, 57 LAB. L.J. 4, 251 (2006) available at <http://www.allbusiness.com/human-resources/employee-benefits-benefits/4063876-1.html>.

2. Degree Directory, Sports Agent: Career Definition, Occupational Outlook, and Education Prerequisites, [http://degreedirectory.org/articles/Sports\\_Agent\\_Career\\_Definition\\_Occupational\\_Outlook\\_and\\_Education\\_Prerequisites.html](http://degreedirectory.org/articles/Sports_Agent_Career_Definition_Occupational_Outlook_and_Education_Prerequisites.html) (last visited Oct. 31, 2009).

letes often become dependent on their agents or that the agents become deeply entrenched in their clients' personal lives. For example, clients may look to their agent for guidance in personal business matters, such as how to invest their money and make other financial decisions.<sup>3</sup> Similarly, most sports agents definitions do not indicate the vast skill base that agents must possess in order to effectively represent their clients. Though there are many important agenting skills, knowing how to effectively negotiate is perhaps the most important skill that a sports agent can possess.<sup>4</sup> Negotiating a good contract directly affects an agents' salary, because an agent receives a commission that is usually based on between two and five percent of the contract and with additional percentage for any endorsement contracts.<sup>5</sup>

Many sports agents have a legal background, enabling them to competently navigate complex contract provisions. It could be argued that attorney-agents receive valuable training in law school that non-attorney agents never learn, including ethical training. For this reason, many argue that an attorney-agent is more beneficial to a client than a non-attorney-agent.<sup>6</sup> Yet, clients still channel their inner Rod Tidwell, yelling, "Show me the money!" regardless of the agents' skill set.<sup>7</sup> This paper advocates that these arguably shortsighted athletes need to pay more attention to the educational backgrounds of their agents and less attention to the almighty dollar.

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3. See Tiger Woods Foundation, Career Exploration: Sports Agent, [http://www.tigerwoodsfoundation.org/file/Sports\\_Agent.pdf](http://www.tigerwoodsfoundation.org/file/Sports_Agent.pdf) (last visited Oct. 31, 2009) ("[A]gents often assist their clients in planning their spending and investments. Agents know that clients thrive at work when their personal lives are secure, so good agents offer financial guidance based on lessons they've learned watching other pro players.").

4. See Marc D. Schneider, *The Sports Agent in the 90's: A Behind the Scenes Look*, <http://www.esportsinstruction.com/derrickfox2.html> (last visited Oct. 31, 2009) ("Derrick Fox, an agent with . . . Ultimate Sports Associates, . . . feels that the art of negotiation can be broken down into three categories: acquisition of information, power established with the: information, and defining time restraints.").

5. See KENNETH L. SHROPSHIRE AND TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 5 (University of Pennsylvania Press 2d ed. 2008) ("The self-interest of sports agents is the right to receive approximately 2 to 5 percent of multimillion-dollar athlete contracts coupled with up to 30 percent of multimillion-dollar endorsement deals.").

6. See Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative than an Agent? Ask Grant Hill*, 9 SETON HALL J. SPORT L. 431, 440 (1999) (arguing that attorneys are better suited to represent athletes than non-attorney agents because attorneys unlike non-attorneys are held to Model Rules of Professional Conduct).

7. JERRY MAGUIRE (Gracie Films 1996) (quoting Rod Tidwell, played by Cuba Gooding, Jr.).

Athletes should take note that attorneys are trained in contracts, negotiation, anti-trust, and agency law.<sup>8</sup> This set of skills and additional education allows an agent to help his or her client obtain the best possible contract. Moreover, a player can rest easy knowing that an attorney-agent is held to a strict code of ethics and may face severe penalties if he or she is found to act unethically or illegally.<sup>9</sup> Unfortunately, players are often swayed by agents who claim they can obtain the most lucrative deal for a client rather than paying attention to who is the most qualified to negotiate.<sup>10</sup>

This article will analyze the ever-expanding role of agents in professional sports. It will then touch upon the ethical issues plaguing today's sports agents and compare the different styles of contract negotiation. Examination of these various negotiation styles will show that stricter ethical regulation in sports would benefit agents, players and leagues alike, and that often the most successful sports agents/negotiators are those who work collaboratively. Furthermore, though attorney-agents are no more or less likely to work collaboratively than non-attorney agents, this paper argues that having a broader skill set makes collaboration and negotiating easier. Although there may be many attributes that can comprise the ideal agent or negotiating tactic, athletes would be wise to educate themselves about their agent options.<sup>11</sup>

## B. Public Opinion of Sports Agents and Sports Agents' Regulation

The term "sports agent" often brings about images of sleazy, money hungry individuals.<sup>12</sup> Many people perceive agents as "serpents . . . poised to strike at the wealth professional athletes earn in such plenty."<sup>13</sup> Former Chicago Bears General Manager Jerry

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8. See Stacey M. Nahrwold, *supra* note 6, at 451 (listing courses typically taken by attorney-agents in law school).

9. See Melissa Steedle Bogad, *Maybe Jerry Maguire Should Have Stuck with Law School: How the Sports Agent Responsibility and Trust Act Implements Lawyer-Like Rules for Sports Agents*, 27 CARDOZO L. REV. 1889, 1893 (2006) (indicating that attorneys are subject to ethical codes and that violations can lead to sanctions).

10. See Staudohar, *supra* note 1, at 251 (identifying fickle nature and money-driven attitude of athletes).

11. See Robert H. Ruxin, AN ATHLETE'S GUIDE TO AGENTS 30-35 (The Stephen Greene Press 2d. ed. 1989) (1982) (listing criteria that should be considered when choosing agents and highlighting importance of careful agent selection).

12. See Craig Neff, *Den of Vipers, A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 76, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1066585/1/index.htm> (conveying generally negative reputation of agents).

13. *Id.* (describing sports agents according to popular perception).

Vainisi even referred to agents as “parasites.”<sup>14</sup> Additionally, many team owners and fans believe that player greed, encouraged by agents, is ruining professional sports.<sup>15</sup> Efforts have been made to enact federal legislation to regulate sports agents, but such legislation is not binding on states.<sup>16</sup> Each professional league and players’ union is left to ensure that agents meet an ethical standard and that they act in a manner that is in the best interest of sports.<sup>17</sup>

## II. THE EVOLUTION OF SPORTS AGENTS IN PLAYER NEGOTIATIONS

### A. History

Today’s agents need to be creative when negotiating player bonuses, no-trade clauses, guaranteed contracts and multi-year deals. The career of each athlete is relatively short, and players rely on agents to get the most money possible in order to ensure financial security for the future.<sup>18</sup> In this atmosphere, agents must walk a fine line of being as hardnosed as possible, while still considering the best long term strategy for their clients and actual producing an ethically viable deal. In the short-term working with teams concerned about the bottom line may prove difficult, but in the long run this strategy will probably yield the best return for the players. Additionally, through negotiation methods like “Final Offer Arbitration,” agents may negotiate for intangible and interest-based benefits such as single occupancy rooms during road trips, higher food allowances, and the use of private jets, which will reward the player for his hard work and skills without bleeding a league dry.<sup>19</sup>

14. See *id.* (stating Vainisi’s opinion of agents).

15. See *Are Agents Ruining Sports?*, <http://penaltyflagdown.wordpress.com/2008/04/24/are-agents-ruining-sports/> (Apr. 24, 2008, 1:45) (noticing declining skill level in NBA and attributing it to money-hungry attitude of players and agents).

16. See Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining “Unauthorized Practice of Law” Could Take the “Lawyer” Out of “Lawyer-Agent” Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L.J. 225, 234 (2008) (describing legislation that would standardize reporting, registration, and record keeping for agents). States are not bound by this legislation and may adopt it at their discretion. See *id.*

17. See NFL Players’ Association Agent Regulations, <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=233&pid=0&type=1> (last visited Oct. 31, 2009) (listing requirements for NFL agents established by player’s union).

18. See *In Defense of Pro Athletes*, ROCHESTER CITY NEWSPAPER, Dec. 8, 2004, available at <http://www.rochestercitynewspaper.com/archives/2004/12/In-defense-of-pro-athletes/> (discussing that average NFL career lasts just four years). “The pro athlete has to get everything he can during the short amount of time he can play.” *Id.*

19. Brien M. Wassner, *Major League Baseball’s Answer to Salary Disputes and the Strike: Final Offer Arbitration: A Negotiation Tool Facilitating Adversary Agreement*, 6

Because contemporary deals are often legally complex, there is an ever-increasing need for competent, reliable and trust-worthy sports agents. Nevertheless, this modern framework is perhaps not emphasized enough to athletes, whose sports contracts can potentially involve millions of dollars. These provisions have not always been so lucrative, partly due to the fact that players in the past commonly negotiated their own contracts.<sup>20</sup> These athletes did not possess the knowledge to negotiate their own contracts and could not hire people with the proper knowledge to help them.<sup>21</sup> Players in every sport had to fight in order to win the right to negotiate contracts and obtain agent representation.<sup>22</sup> Baseball players were among the first to use agents, and other sports leagues slowly caught onto the trend.<sup>23</sup> By looking at examples from the past, one can see just how valuable good agents are and why collaborative negotiations often yield greater long-term return than adversarial negotiations.

## B. Specific Examples of Past Player-League Negotiations

Major League Baseball (“MLB”) player and Hall of Fame inductee Ralph Kiner played during the 1940s and 1950s, when there were no agents or attorneys to assist players in negotiating contracts.<sup>24</sup> Negotiations took place strictly between a player and his team’s general manager.<sup>25</sup> In that era, a player signed a baseball

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VAND. J. ENT. L. & PRAC. 5, 11 (2003) (“In negotiation for settlement agreements, the parties can fashion creative solutions . . . . Players are more inclined to settle because they can contract to secure benefits such as bonuses, no trade clauses, guaranteed contracts, multi-year deals, or other more imaginative clauses including single occupancy rooms on road trips or initial payment of hotel charges rather than reimbursement.”).

20. See SHROPSHIRE & DAVIS, *supra* note 5, at 24 (proposing possible drawbacks to self-representation). Early examples of athletes negotiating for themselves include: Danny Ainge of the Boston Celtics, Alan Trammell of the Detroit Tigers, and Mike Singletary of the Chicago Bears. *See id.*

21. *See* Ralph Kiner, *The Role of Unions and Arbitration in Professional Baseball*, 17 HOFSTRA LAB. & EMP. L.J. 159, 161 (1999) (describing lack of agent or attorney involvement in player contract negotiations).

22. *See id.* (explaining that Curt Flood led way for free agency in Major League Baseball).

23. *See id.* (stating that in 1952, Mr. Kiner did not have ability to use sports agent). Negotiations took place solely between the player and team ownership, with the ownership holding most of the control. *See id.*

24. *See* Kiner, *supra* note 21, at 161 (providing example where attorneys or agents were absent in contract negotiations). Ralph Kiner was a professional baseball player for the Pittsburgh Pirates in the 1950s. *See id.* at 160. He was inducted into the Major League Baseball Hall of Fame in 1975. *See id.* at 159.

25. *See id.* at 161 (illustrating that no one else was allowed into contract negotiation meetings between player and general manager).

contract for life and not for a specified period of time.<sup>26</sup> Because no-trade clauses did not yet exist, a player had three choices – agree to the contract, be traded, or not play baseball.<sup>27</sup>

In 1952, Kiner challenged these norms by arriving to a MLB Executive Council meeting with his attorney.<sup>28</sup> However, at the meeting the Executive Council prohibited the attorney from becoming involved in the negotiation.<sup>29</sup> Kiner responded by walking out of the room, and a lengthy bargaining impasse soon followed.<sup>30</sup> This “take it or leave it” style of negotiating created a lack of player autonomy, and eventually in 1966, baseball players formed the MLB Players’ Association in order to protect the rights to their careers.<sup>31</sup> In 1970, the Players’ Association negotiated for its players to the right to select the agents that could represent them during their individual contract negotiations.<sup>32</sup>

Other leagues slowly followed, as Baseball was not the only sport in which professional players needed a sports agent.<sup>33</sup> One example of this is Billy Cannon, an All-American football player at Louisiana State University in the late 1950s.<sup>34</sup> Cannon entered the 1960 NFL draft and was drafted by the Los Angeles Rams.<sup>35</sup> After Cannon signed three standard player contracts with the Rams, a representative from the Houston Oilers, a team in the rival American Football League (“AFL”) contacted him about playing for their

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26. *See id.* (pointing out that baseball 1950s baseball contracts were for life); *see also* Jack F. Williams & Jack A. Chambless, *Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball*, 52 U. MIAMI L. REV. 461, 473 (1997) (stating that contracts bound players for life).

27. *See Kiner, supra* note 21, at 161 (describing lack of flexibility in 1950s baseball contracts).

28. *See id.* at 162.

29. *See id.*

30. *See id.* (indicating bargaining impasse after unwillingness of manager to negotiate with attorney).

31. *See* MLBPA Official Site, History of the Major League Baseball Players’ Association, <http://www.mlb.com/pa/info/history.jsp> (last visited Oct. 31, 2009) (documenting that MLBPA successfully formed into labor union in late 1960s).

32. *See* Maury Brown, *Let’s Talk: A Look at Player Agents*, THE HARDBALL TIMES, Jan. 2, 2006, available at <http://www.hardballtimes.com/main/article/lets-talk-a-look-at-player-agents-part-1-legends/> (discussing success of negotiations for players to have agent representation).

33. *See* Sports Lawyers Association, *History of the SLA*, [www.sportslaw.org/history.cfm](http://www.sportslaw.org/history.cfm) (last visited Oct. 31, 2009) (establishing basic history of agents and their involvement in sports).

34. *See* L.A. Rams Football Club v. Cannon, 185 F. Supp. 717, 719 (S.D. Cal. 1960) (providing background information about Cannon).

35. *See id.* After winning a tiebreaker for first draft choice, the Rams chose Cannon as the overall number one draft pick. *See* My NFL Draft.com, First Overall NFL Draft Picks, <http://www.mynfldraft.com/NFL-First-Overall-Draft-Picks> (last visited Oct. 29, 2009).

team.<sup>36</sup> Following a meeting with the Oilers' management, Cannon sent a letter to the Rams stating he no longer wished to remain a Ram and returned the money he had been given.<sup>37</sup> The Rams sought an injunction to prevent Cannon from playing in the AFL.<sup>38</sup> The Court allowed Cannon to breach his contract, stating that because he was "without counsel or advice and the whole transaction . . . was completed in less than 48 hours," the actions of Cannon and the Rams did not create a binding contract.<sup>39</sup> The Southern District of California found that "amateur athletes need agent representation in order to protect their interests and match the negotiating skill of a general manager or member of a professional team."<sup>40</sup>

Historically, coaches and sports leagues have been wary of working with sports agents, perhaps because sports agents empower their players, helping them get more money and benefits than the leagues would like to give.<sup>41</sup> For example, Jim Ringo, a 1960s all-pro center for the National Football League's ("NFL") Green Bay Packers needed to negotiate a new contract early in his career.<sup>42</sup> Ringo brought an agent with him to a 1963 meeting with legendary Packer's coach Vince Lombardi.<sup>43</sup> According to Packer's legend, Coach Lombardi left the room and phoned the Philadelphia Eagles to make a trade.<sup>44</sup> At the time, Lombardi probably refused to negotiate with the agent, because agents had a bad reputation and were not widely utilized in the league.<sup>45</sup>

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36. See Cannon, 185 F. Supp. at 719-20 (discussing contact between Cannon and Oilers' owner).

37. See *id.* at 720 (describing Cannon's actions following meeting with Oilers' management).

38. See *id.* at 718 (stating Rams' desire for injunctive relief against Cannon to prevent him from playing for another team).

39. See *id.* at 726-27 (setting forth reasons for invalidating contract).

40. See *id.* at 719.

41. See Chris Jenkins, *Hall of Fame Center Jim Ringo Dead at 75*, USA TODAY, Nov. 19, 2007, available at [http://www.usatoday.com/sports/football/2007-11-19-1249147646\\_x.htm](http://www.usatoday.com/sports/football/2007-11-19-1249147646_x.htm) (documenting that Ringo played for Packers until his 1963 contract dispute).

42. See *id.*

43. See Robert B. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor, or Contract Representative?*, 1 VILL. SPORTS & ENT. L.J. 11, 39-40 (1994) (indicating that Ringo took agent to meeting with Lombardi).

44. See *id.* (detailing Lombardi's actions after Ringo arrived with agent).

45. See Jenkins, *supra* note 41 (explaining why Lombardi would be uncomfortable negotiating with agents). According to former Packers teammate Willie Davis, "Jim was probably not out of place . . . But at that point, Lombardi was not prepared to have an intermediary. Agents, of course, now are an accepted part of the

Though teams may not like dealing with agents, agents are now a usual and essential part of any professional athlete's life. Nevertheless, there exists a potential for agents to earn large commissions at the expense of their clients and against the interest of the player's team. The only possible solution is to better train agents in collaborative negotiations and to create a code of strict ethical regulations, which will force agents to work more with sports leagues instead of against them.

### C. The Expanding Role of Sports Agents and Their Questionable Ethical Practices

#### 1. *Sports Agent Training and Responsibilities*

Competition among sports agents has created an intense pressure to successfully negotiate contracts for big-name athletes.<sup>46</sup> Although, the original function of sports agents was to negotiate contracts for players, the role of the agent has greatly expanded.<sup>47</sup> Many agents now serve as financial managers, public relations specialists, investment as well as tax experts, and legal counsel, all of which require agents to perform specific functions, including the following:

Sports agents provide a variety of functions on behalf of players, including (1) Determining the value of a player's services; (2) Negotiation of the player's contract with the club, including salary, incentives, bonuses, guarantees, no-trade clauses, and length of contract; (3) Soliciting and arranging product endorsements, speaking engagements, and other uses of the player's name and image for commercial purposes; (4) Promoting the athlete's career through public relations, media coverage, and charitable activities; (5) Providing financial management services; (6) Resolving conflicts that arise concerning areas such as enforcement of employment contracts, and behavioral problems such as substance abuse; (7) Representing players in salary or grievance arbitration matters;

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today's game, something Davis said Lombardi would have struggled with." *See id.* (internal quotations omitted).

46. *See* Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1227 (2004) ("The competition for these athletes has intensified to the extent that many agents have become willing to do whatever it takes to corral college athletes into signing an agency contract before they have finished college or officially declared themselves professionals").

47. *See* Staudohar, *supra* note 1, at 248-49 (explaining how role of agent has expanded).

(8) Arranging for movement of the player in the labor market; (9) Counseling a player about his post-career years, etc.<sup>48</sup>

With these expanded roles, there are several values to attending law school prior to becoming an agent. These attributes including the chance to develop a “trained eye to catch small but important contract details that might not be in the best interests of your client.”<sup>49</sup> More specifically, and agent with legal training as a transactional attorney may benefit pro athletes with “property sales and purchases, investment oversight, formulation of trust, wills, and LLCs, prenuptials, and other needs that high-income earners may have.”<sup>50</sup> The non-attorney-agent may not possess the same skill set to help safeguard the athlete’s assets.<sup>51</sup> Too often, there are stories of athletes who made millions of dollars and squandered the money before the end of their careers, because these athletes didn’t have the instruction of a trained professional to help them make better financial and life choices and any agent in their life may not taken the appropriate steps to help them.<sup>52</sup>

Another big problem with non-attorney agents is that outside of passing a licensing test, sports agents licensing requires little to no requirements or background checks. This problem, in turn, creates the problem of inability to seek redress against negligent non-attorney agents. Agent licensing does not provide training sessions or specific ethical instructions. Unlike state bar associations that conduct rigorous background and character checks on each lawyer before admitting them, a players’ association may not take the time or resources to conduct a comprehensive investigation.<sup>53</sup> Similarly,

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48. *Id.* (“However, a single person rarely provides all of the functions. It is not uncommon for the agency function to be bifurcated into a single agent handling all aspects of negotiations on behalf of players . . . while another agent or firm handles financial management and planning tasks.”).

49. Jack Bechta, *Two Paths to Becoming an Agent*, NAT’L FOOTBALL POST, June 30, 2009, available at <http://www.nationalfootballpost.com/Two-paths-to-becoming-an-agent.html>.

50. *Id.*

51. *See id.* (“If you want to become an agent, law school is not a must but will definitely help your cause and give you some credibility with players and their families.”).

52. *See* Lawrence Delevingne, *10 Ways Sports Stars Destroy Their Finances*, BUS. INSIDER, Sept. 18, 2009, available at <http://www.businessinsider.com/10-ways-sports-stars-destroy-their-finances-2009-9> (listing ways professional athletes squander money).

53. *See* Marc J. Kessler, *Who Can Best Represent Professional Athletes: Lawyer vs. Non-Lawyer*, COLUMBUS BAR BRIEFS, Spring 2005, at 20, available at <http://www.hahnloeser.com/references/308.pdf> (“[E]ven though the players associations have taken great steps forward to protect their members, the industry of sports agency is devoid of systematically enforceable regulations, which truly dictate minimum levels of professional expertise or accountability.”).

agent licensing does not include any assessment of skill level or character. Last, because of the sparse standards and nominal set expectations for non-attorney agents, is that it is more difficult to sue a non-attorney agent. If no expectations are set, it becomes hard to prove a non-attorney agent did not perform an adequate job.

Conversely, attorneys have strict codes of professional conduct. A professional athlete may have greater redress against an attorney-agent in a malpractice action than against a non-attorney-agent.<sup>54</sup> Thus, for the time being, athletes can better protect themselves by hiring attorney agents, so that they can seek redress if something goes wrong in their negotiations. As this paper will later argue, such a step would remain unnecessary if an overarching sports code was created that would sanction inappropriate agent behavior and protect athletes regardless of whether their agent was or was not an attorney.

## 2. *The Unethical Side of Sports Agenting*

Ethics play a large part in the agent industry.<sup>55</sup> Unfortunately, for clients with “non-attorney” agents, there are no mandated ethical codes of conduct.<sup>56</sup> Furthermore, there is dispute among attorney-agents as to whether they should be held to the Model Rules of Professional Responsibility when their non-attorney agent counterparts are not.<sup>57</sup> This view, however, has not been shared by some courts, which have held that “[a]s long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity.”<sup>58</sup> This

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54. See generally Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 805 (2006) (“Because of their status as attorneys, these agents are subject to attorney disciplinary rules and standards of professional conduct governing attorneys, such as the Model Rules of Professional Conduct. A violation of these standards may result in a state bar disciplinary body taking action against attorneys.”).

55. See generally SHROPSHIRE & DAVIS, *supra* note 5, at 88-98 (discussing role of ethics in sports agent industry).

56. See *id.* at 89 (describing ethical code to which attorney-agents are held). Non-attorney agents are subject to general principles of agency law, but the disciplinary rules that govern attorneys do not apply. See *id.*

57. See *id.* at 91 (contrasting treatment between attorney agents and non-attorney agents). In theory, a sports agent is engaging in the practice of law by negotiating contracts. See *id.* at 91-92. However, a non-attorney agent is not held to an ethical code. See *id.* Thus, attorney agents argue that the act of contract negotiation in sports is not, in fact, engaging in the practice of law, and thus an equal set of rules should apply to both the attorney and non-attorney agent. See *id.*

58. *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1977).

standard may place attorney-agents at a marketplace disadvantage to their “non-attorney-agent counterparts” who are not held to such ethical rules.<sup>59</sup>

The amount of money typically made by professional athletes has caused several agents to go to unscrupulous measures to make the most money possible.<sup>60</sup> In some instances, agents are not interested in the best possible playing scenario for their client, but instead, how they personally can make the most money.<sup>61</sup> Depending on the collective bargaining agreement of the league, agents stand to make anywhere from two to five percent commission on a player’s negotiated contract.<sup>62</sup> For example, Scott Boras could have made \$14 million on the 2008 deal he negotiated for the Yankees’ Alex Rodriguez.<sup>63</sup>

Besides the general perils of negotiation and agent-league relations, collective bargaining agreements present another potential contractual hindrance for players and agents.<sup>64</sup> In a typical collective bargaining agreement, an individual player gives up the free-

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59. See Geisel, *supra* note 16, at 226 (observing that attorney-agents are held to higher standard than non-attorney agents).

60. See Bryan Couch, *How Agent Competition and Corruption Affects Sports and the Athlete-Agent Relationship and What Can Be Done to Control It*, 10 SETON HALL J. SPORT L. 111, 118 (2000) (“The only concern was the almighty dollar, both for the player and the agent, which turns athletics into a business full of overpaid egomaniacs more concerned with the best contract or endorsement deal than with the game itself.”). Because of limits on the amount of an agent’s commission, some agents resort to lies and exaggeration in order to steal clients from other agents. See *id.* at 119-20.

61. See generally *id.* at 112, 124-29 (discussing agent greed at expense of interests of client).

62. See SHROPSHIRE & DAVIS, *supra* note 5, at 5 (stating percentage of contract agents typically receive).

63. See Jerry Crasnick, *Boras Took a Hit, But He’ll Survive*, ESPN.COM, Nov.19, 2007, [http://sports.espn.go.com/mlb/columns/story?columnist=crasnick\\_jerry&id=3117686](http://sports.espn.go.com/mlb/columns/story?columnist=crasnick_jerry&id=3117686) (speculating that with added incentives, Rodriguez’s deal could total up to \$300 million).

64. See Walter T. Champion, Jr., *Center for Continuing Legal Education: Self Study Article and Self Assessment Test, Sports Law*, <http://www.cce-mcle.com/tests/s6004.htm> (last visited Oct. 31, 2009) (discussing collective bargaining in sports).

Collective bargaining agreements express the complete range of relationships between management and their athlete employees. This document will specify the scope of the union-management agreement and will prohibit the use of either strikes or lockouts. Although the collective bargaining agreement will vary with the sport, it will cover at a minimum the following: club discipline, non-injury grievances, commissioner discipline, injury grievances, the SPK, college draft, option clauses, waivers, base salaries, access to personnel files, medical rights, retirement, insurance and the duration of the [collective bargaining agreement].

*Id.*

dom to contract for him or herself “for the good of the group.”<sup>65</sup> Salary terms and other conditions of employment bind all members of the collective bargaining unit under the terms of one contract.<sup>66</sup> Therefore, an existing collective bargaining agreement constrains the ability of an agent to negotiate for an individual player, and thus, they can create tensions between one player and the rest of the team, since additional money given to one player takes money away from his teammates.<sup>67</sup> An example of one such constraint is the NFL’s rookie pool.<sup>68</sup> In the NFL rookie pool, the NFL establishes an amount of money that may be used for first-year players.<sup>69</sup> In this rookie pool, while agents are helpful in negotiating roster or signing bonuses, the collective bargaining agreement uses a de facto slotted pay scale.<sup>70</sup> This scale “involves paying draft choices the same amount of money received by the player drafted in the same position or slot in the previous draft, plus a percentage raise to reflect inflation.”<sup>71</sup> An agent who touts that he or she can get an NFL draftee the most amount of money is not being entirely truthful with the client, because the funds are coming from a finite pool that is largely predetermined based on draft number; perhaps the agent could negotiate for a contract that offered more than the team originally intended, but each team still has a salary cap.<sup>72</sup> These situations can become tense, as agents try to wrestle more

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65. See Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 321 (1998) (explaining that collective bargaining agreements are meant to get best terms for all group members).

66. See *id.* at 320 (listing items typically covered by collective bargaining agreements).

67. See *id.* (highlighting that when majority of employees, or players, chooses to be represented by union, that union becomes exclusive bargaining representative for all employees in that unit).

68. See *id.* at 324-35. (explaining rookie pool pay scale).

69. See *id.* at 322 (describing salary cap).

70. See generally Scott R. Rosner, 11 UCLA ENT. L. REV. 193, 244-45 (2004).

71. *Id.* ESPN analyst Len Pasquarelli described the pool as follows:

The rookie pool is essentially a cap within a cap. It represents the maximum amount that each franchise can spend, in terms of total cap dollars, on its first-year players. A team’s rookie allocation pool is part of, not in addition to, the league’s overall spending limit of about \$127 million per franchise. The formula for arriving at each team’s rookie pool is viewed as somewhat Byzantine by even the most astute number-crunchers in the NFL. It is basically a function of how many overall choices each club makes and where those picks are slotted in each round.

Len Pasquarelli, *Lions Lead in Rookie Allocation Money*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=4111513> (last visited Oct. 31, 2009).

72. See Associated Press, *NFL Cap Rises \$12 Million to \$128 Million for 2009*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=4169590> (last visited Oct. 31, 2009) (showing 2009 NFL season set salary cap per team at \$128 million).

money away from the league and the team. Additionally, agents in these situations may resort to adversarial or deceptive tactics to try get as much money as possible in the short-term for their clients and also to make the client think that all money and benefits received were solely because of his negotiating. Agents need to be held accountable for all unethical practices that arise in these situations, and this paper suggests that perhaps the best way to hold agents accountable would be by developing an industry-wide sports agent's ethical code.<sup>73</sup> Below are specific examples of other ethical problems that have already arisen in the sports arena.

One questionable practice of agents is encouraging clients to opt out of contracts that they didn't negotiate in favor of new contracts in which the agent would collect a hefty commission.<sup>74</sup> One situation in which this arguably occurred was with football player Terrell Owens and his acquired agent, Drew Rosenhaus.<sup>75</sup> In 2005, Terrell Owens was a star wide receiver for the Philadelphia Eagles.<sup>76</sup> Attorney Drew Rosenhaus became Owens' agent in the middle of his contract and, as a result, did not collect any commission from that deal.<sup>77</sup> Rosenhaus convinced Owens he was not being paid fair market value in order to entice him to holdout until a new contract was offered.<sup>78</sup> The Eagles refused to renegotiate the contract, and Owens and Rosenhaus' actions proved to be a major distraction to the team.<sup>79</sup> After a colorful season, the Eagle suspended Owens for

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73. For a further discussion of ethical codes applied to agents, see *infra*, notes 285-309 and accompanying text.

74. See Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should be the "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 769 (2006) (remarking that Terrell Owens' reputation was damaged as result of Drew Rosenhaus' attempt to "renegotiate Terrell's existing contract, insisting that his client was not being paid fair market value.").

75. See Ta-Nehisi Paul Coates, *Agent of Agitation*, TIME, Nov. 13, 2005, available at <http://www.time.com/time/magazine/article/0,9171,1129560,00.html> (describing how after Rosenhaus began representing Owens in middle of his contract, Owens surprisingly began negotiating for new contract with higher salary and inferring that this was no coincidence).

76. See Profile of Terrell Owens, <http://www.nfl.com/players/terrelleowens/profile?id=OWE755129> (last visited Oct. 31, 2009) (providing statistics about Owens and his career). In the first seven games of the 2005 season with the Eagles, Owens had 47 receptions for 763 yards and six touchdowns. See *id.*

77. See Coates, *supra* note 75 (discussing when Drew Rosenhaus relationship with Terrell Owens began).

78. See Eric Schmeltzer, *Ralph Nader: Attention Whore*, THE HUFFINGTON POST, Nov. 11, 2005, [http://www.huffingtonpost.com/eric-schmeltzer/ralph-nader-attention-who\\_b\\_10463.html](http://www.huffingtonpost.com/eric-schmeltzer/ralph-nader-attention-who_b_10463.html) (describing how Rosenhaus persuaded Owens that he deserved better contract).

79. See *id.* (stating that Eagles would not renegotiate Owens' contract and describing altercations between Owens and Eagles' players and coaches). Owens yelled at coaches, made rude remarks to teammates, and even got into a physical

four games, and at the end of the season, he was unable to obtain a new contract.<sup>80</sup> He ultimately signed with the Dallas Cowboys, and earned Rosenhaus a beneficial commission.<sup>81</sup>

### 3. *How Necessary Is a Sports Agent?*

Players are constantly expecting more from their agents, but many do not realize that a contract has very little to do with the agent's negotiating talents.<sup>82</sup> It is the player's success on the field, court, or ice, rather, that leads to a more lucrative contract.<sup>83</sup> Certified baseball and basketball agent Keith Kreiter commented, "Every contract is just a form agreement. My plummer [sic] could negotiate a first-round pick's contract as good as the next negotiator in the country can."<sup>84</sup> On the other hand, some players and coaches feel that they don't have the required business acumen to negotiate their own contract.<sup>85</sup> As University of Iowa football coach Kirk Ferentz said, "All I know is football. I know coaching a little bit. But I

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altercation in the locker room with a former player. *See id.* ("Owens . . . yelled at his Head Coach Andy Reid to 'shut up,' told his offensive coordinator not to talk to him 'unless I talk to you first,' implied that Donovan McNabb was dogging it in the Super Bowl, said McNabb was a 'hypocrite,' and refused to take part in a scheduled autograph session with other players.").

80. *See* Len Pasquarelli, *Eagles Suspend T.O. Indefinitely for Comments*, ESPN.COM, [http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli\\_len&id=2214754](http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=2214754) (last visited Oct. 31, 2009) (recording suspension of Terrell Owens by Philadelphia Eagles "for conduct detrimental to his team" after another public outburst). *See also Reid: T.O Will Not Play for Eagles This Season*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=2216703> (last visited Oct. 31, 2009) (disclosing that Terrell Owens would not return to play for Philadelphia Eagles following suspension).

81. *See A Star is Born: Owens Signs with the Cowboys*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=2374189> (last visited Oct. 31, 2009) (relaying Terrell Owens' new position with Dallas Cowboys). Owens has since changed teams and currently plays for the Buffalo Bills. *See Owens Inks 1-Year, \$6.5M deal with Bills*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=3960653> (last visited Oct. 31, 2009) ("Owens, 35, caught 69 passes for 1,052 yards and 10 touchdowns last season with Dallas. But the Cowboys were looking to improve the atmosphere in the locker room and decided they would be better off without him.").

82. *See* Lock, *supra* note 65, at 336 (stating that negotiations are fueled by player abilities rather than those of agent).

83. *See id.* at 337 ("Negotiations for veteran players are driven by a number of factors, including teams' evaluations of a player's skills, individual team needs, and the availability of other players of equal or greater ability at the same position.").

84. SHROPSHIRE & DAVIS, *supra* note 5, at 28.

85. *See* Michael McCarthy & Steve Wieberg, *Reviled or Loved, Agents Get Results*, USA TODAY, Nov. 17, 2006, [http://www.usatoday.com/sports/college/football/2006-11-17-coaches-agents\\_x.htm](http://www.usatoday.com/sports/college/football/2006-11-17-coaches-agents_x.htm) (reflecting that some coaches do not feel comfortable negotiating without agent).

have zero knowledge when it comes to the business aspect of things.”<sup>86</sup>

Mostly, the market for an athlete in a sports league is largely a result of team needs and how a team views the free-agent marketplace.<sup>87</sup> However, agents sometimes misread the marketplace, at great costs to their clients.<sup>88</sup> For example, baseball player Manny Ramirez overestimated the demand for his skills and damaged his prospects as a result.<sup>89</sup> In 1998, he turned down several lucrative short-term offers based on the advice of his agent Scott Boras, who was convinced that Manny could get a four-or-five year contract.<sup>90</sup> As of February 2009, with Manny unsigned, it became clear that he would not receive the massive contract he initially sought.<sup>91</sup> Subsequently in March 2009, Ramirez signed a two-year, \$45 million contract with the Los Angeles Dodgers, including a whopping \$25 million of deferred monies.<sup>92</sup>

Though, it is important to note that while an athlete’s skills are the most important factor in the athlete’s contractual power, athletes still need advice on the legal matters involved in creating those contracts.<sup>93</sup> As NBA superstar LeBron James discovered, agents

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86. *Id.*

87. See generally Pat Kirwan, *Examining the Factors that Went into Some Teams’ Draft Decisions*, NFL.COM, <http://www.nfl.com/draft/story?id=09000d5d80813f4c&template=with-video&confirm=true> (last visited Oct. 31, 2009) (articulating factors some teams use when deciding which players to draft in football). See also John Keim, *Free Agent or Draft Pick?*, THE EXAMINER, Feb. 28, 2008, [http://www.examiner.com/a-1247197~Free\\_agent\\_or\\_draft\\_pick\\_.html](http://www.examiner.com/a-1247197~Free_agent_or_draft_pick_.html) (discussing whether Washington Redskins should rely on draft picks or free-agent prospects).

88. See Bill Plaschke, *Manny Ramirez’s Lesson in Leverage*, L.A. TIMES, Mar. 5, 2009, available at <http://articles.latimes.com/2009/mar/05/sports/sp-plaschke-manny-ramirez5> (insinuating Manny Ramirez’s agent Scott Boras misread baseball market by failing to sign with Dodgers while other teams were not showing interest).

89. See *id.* (describing damage to Ramirez’s reputation from holding out on signing contract).

90. See Manny Ramirez Tops the List of Free Agents Demanding Huge Contracts, <http://www.faniq.com/blog/Manny-Ramirez-Tops-The-List-Of-Free-Agents-Demanding-Huge-Contracts-Blog-13321> (last visited Oct. 31, 2009) (stating that Ramirez turned down short term deal in favor of longer one).

91. See Plaschke, *supra* note 88 (indicating that Ramirez signed with Dodgers and implying that Ramirez did so because he realized he would not get contract he wanted).

92. See *id.* (stating terms of Ramirez’s contract with Dodgers). See also Jon Heyman, *Boras Tells Dodgers Manny Will Accept \$45 Million Deal with Deferrals*, SI.COM, Feb. 27, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/27/manny.dodgers/index.html> (explaining more about Ramirez’s contract terms).

93. See Liz Mullen, *Can Maverick Carter Prove Critics Wrong?*, SPORTS BUS. J., Oct. 24, 2005, <http://www.sportsbusinessjournal.com/article/47508> (reporting that after LeBron fired his agent and hired his close friends, he still retained attorney to assist with legal matters).

need to be available to athletes to make sure the athletes' contracts and finances are protected and soundly invested.<sup>94</sup> In 2005, LeBron James shocked the league when he fired his agent and hired three friends to take over management duties.<sup>95</sup> As one of the most popular, lucrative, and visible athletes in the world, NBA management was worried about how three highly inexperienced young men would manage James's career.<sup>96</sup> At the time, LeBron said that he "wanted to give his friends a chance to create a professional legacy beyond being flunkies and hangers-on."<sup>97</sup> James, however, who has companies fighting for his signature on sponsorship deals, soon realized the need for an attorney-agent.<sup>98</sup> In addition to the team of legal, financial, and public relations professionals associated with LeBron's friend-run marketing empire, he has now retained the services of Leon Rose, a well-known attorney-agent.<sup>99</sup> When hundreds of millions of dollars are on the line, a professional athlete's affairs cannot be left to inexperience, chance and friendship.<sup>100</sup>

Also illustrating the need for an attorney-agent in the contract negotiation process is baseball superstar Gary Sheffield.<sup>101</sup> In 2003, he fired his agent Scott Boras, referring to Boras as a "bad per-

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94. See *id.* (discussing James's attorney's involvement in contract negotiation and business matters).

95. See Darren Rovell, *LeBron Fires Agents, Possibly in Favor of Friend*, ESPN.COM, <http://sports.espn.go.com/nba/news/story?id=2057125> (last visited Oct. 31, 2009) (dissecting LeBron's decision to fire his agent and hire his closest friend, as well as his road manager). See also *The Incredible Drive of LeBron James*, 60 MINUTES, Mar. 29, 2009, [http://www.cbsnews.com/stories/2009/03/26/60minutes/main4895042\\_page4.shtml](http://www.cbsnews.com/stories/2009/03/26/60minutes/main4895042_page4.shtml) ("Two of his partners, Richard Paul and Randy Mimms, had no business background at all. And the then 23-year-old CEO Maverick Carter had only a marketing course and an internship at Nike to draw on. A lot of people, including the commissioner of the NBA, worried that it might be a recipe for disaster.").

96. See *The Incredible Drive of LeBron James*, *supra* note 95 (discussing worry of NBA commissioner).

97. Tim Arango, *LeBron Inc.: The Building of a Billion-Dollar Athlete*, CNN MONEY, Nov. 28, 2007, available at [http://money.cnn.com/2007/11/28/news/news\\_makers/lebron\\_james.fortune/index.htm](http://money.cnn.com/2007/11/28/news/news_makers/lebron_james.fortune/index.htm).

98. See Mullen, *supra* note 93 (mentioning LeBron hired noted attorney Leon Rose to handle legal matters).

99. See *id.* (describing professionals working with James and adding Rose to team).

100. See *id.* (expressing uncertainty regarding LeBron's friends having prominent role in his management).

101. See Jack Curry & David Picker, *The Yankees Deal Sheffield to the Tigers for Prospects*, N.Y. TIMES, Nov. 11, 2006, available at [http://query.nytimes.com/gst/fullpage.html?res=9501E4D61F3FF932A25752C1A9609C8B63&sec=&spn=&page\\_wanted=all](http://query.nytimes.com/gst/fullpage.html?res=9501E4D61F3FF932A25752C1A9609C8B63&sec=&spn=&page_wanted=all) (reporting that Sheffield acts as his own agent).

son.”<sup>102</sup> Sheffield decided that rather than hire a new agent, he would serve as his own agent.<sup>103</sup> In doing so, Sheffield potentially left millions of dollars on the table and in his new contract he failed to negotiate a no-trade clause for himself.<sup>104</sup> Without this clause, a team signing Sheffield could trade him at any time without his consent, which is exactly what the New York Yankees did in 2006.<sup>105</sup>

All of these examples show that, even though a player's skill is his best selling point, agents are still necessary to ensure that the player is protected, compensated and remains in the sport as long as possible. Though agents often overestimate and overstate their power in contract negotiation to their clients, they still have value and are necessary to athletes to explain legal, contractual, financial and other concepts. Players should be aware of all of this in order to choose the best agent and make the best career choices. In fact, a competent agent, among other things would most likely explain this to his client and would not “hide the ball” in regard to important decisions.

#### 4. *Current Hindrances to Proper Agent Conduct*

The best agents “can and should be able not only to provide the player with the information necessary to evaluate and reject a low offer but also to push the team to its upper limit or highest offer.”<sup>106</sup> However, on another level involving ethical dealings, many agents seek to foster a sense of dependency in their clients: “They don't want players to be able to think for themselves. It's sort of like an addiction to drugs. A lot of things that normal people do in the course of life, they never experience because they have somebody doing it for them.”<sup>107</sup> As a result, agents who adhere to an ethical code risk being pushed out of the business by more unethical or nefarious agents, and thus risk losing their clients to other

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102. See *Sheffield: Ex-Agent Boras Is a Bad Person*, THE SPORTING NEWS, Feb. 21, 2008, [www.sportingnews.com/mlb/article/2008-02-21/sheffield-ex-agent-boras-bad-per-person](http://www.sportingnews.com/mlb/article/2008-02-21/sheffield-ex-agent-boras-bad-per-person) (claiming that Boras was going after money from Sheffield that he did not deserve).

103. See *id.* (indicating Sheffield would represent himself).

104. See Curry & Picker, *supra* note 101 (reporting trade of Sheffield to Tigers and disclosing lack of no-trade clause).

105. See *Tigers Deal Three Pitchers to Yankees for Sheffield*, ESPN.COM, <http://sports.espn.go.com/mlb/news/story?id=2656847> (last visited Oct. 31, 2009) (stating that Yankees traded Sheffield to Detroit Tigers in exchange for right-handed pitchers Humberto Sanchez, Kevin Whelan and Anthony Claggett).

106. Lock, *supra* note 65, at 341.

107. JERRY CRASNICK, LICENSE TO DEAL: A SEASON ON THE RUN WITH A MAVERICK BASEBALL AGENT 29 (Rodale Books 2005).

agents.<sup>108</sup> This situation is yet another ethical problem which needs further evaluation and which could be solved through standard industry ethical rules. The current system provides no protection or incentive for agents who follow the “rules,” that is those who act ethically even in the absence of established ethical rules.

In the current system, even though stealing clients could potentially form the basis of a tort claim for interference with contractual relations, these suits are not usually brought, because “stealing clients” has become industry standard.<sup>109</sup> In *Speakers of Sport, Inc. v. Proserv, Inc.*, the Seventh Circuit stated, “There is in general nothing wrong with one sports agent trying to take a client from another if this can be done without precipitating a breach of contract.”<sup>110</sup> The circuit court noted that fierce competitiveness is the cornerstone of the free market economy.<sup>111</sup> Except in extreme circumstances, agents are not disciplined for soliciting another agent’s clients.<sup>112</sup> Even if a court or players union tries to bring charges against a poaching agent, these are difficult to prove, and players have little incentive to complain about an unethical agent.<sup>113</sup> Often, “players have no interest in testifying against their current agent who improperly solicited and stole them from their previous agent,” especially when the poaching agent has treated them to fancy dinners and lavish gifts.<sup>114</sup>

However, an agent’s peers would have an incentive to report their fellow agents who have been stealing clients from them. However, this seldom happens because agents are hesitant to “rat” on each other. But when agents do report each other, it can have devastating effects, as it did with agent David Dunn. The example of Dunn shows how implementing a devastating rule governing client stealing would dissuade agents from engaging in such action and would therefore provide greater protection for athletes.

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108. See SHROPSHIRE & DAVIS, *supra* note 5, at 103 (discussing case law involving agents attempting to take clients from each other in competition).

109. Lock, *supra* note 65, at 336.

110. *Speakers of Sport, Inc. v. Proserv, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999). “Despite its recognition of the competitive nature of the business, the court noted an important limitation: the competitor’s privilege does not validate inducing clients by way of fraud.” SHROPSHIRE & DAVIS, *supra* note 5, at 103

111. See *Speakers of Sport*, 178 F.3d at 865 (indicating nature of market).

112. See Karcher, *supra* note 74, at 762 (identifying disincentives of reporting instances of “stealing” clients). It is not always clear whether the agent solicited the client or the other way around, so these situations often go unpunished without an egregious violation. See *id.*

113. See *id.* (stating that players do not desire burden of lawsuit in which they would have to testify against their current agents).

114. *Id.*

In 2003, the NFL Players Association suspended NFL attorney-agent David Dunn for two years for trying to steal clients from his former partner, Leigh Steinberg.<sup>115</sup> Dunn left Steinberg's agency, Steinberg, Moorad and Dunn Inc., to launch a competing firm, Athletes First, and took approximately fifty NFL players in the process.<sup>116</sup> In doing so, he destroyed the firm that dominated pro football for 20 years.<sup>117</sup> Steinberg sued and won \$44.6 million in damages.<sup>118</sup> When the NFLPA suspended Dunn, he filed for personal bankruptcy, halting all administrative actions against him.<sup>119</sup> This lawsuit had a devastating financial effect on Dunn, and put his ability to represent players in the future in jeopardy.<sup>120</sup>

### III. CURRENT AGENT REGULATIONS

In 1983, as a result of NFLPA action, the NFL became the first professional sports league to regulate agents.<sup>121</sup> Under the agreement, Teams can only negotiate a player's contract with certified agents.<sup>122</sup> Any Individual seeking certification as an NFL contract

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115. See Liz Mullen, *NFLPA Hasn't Given up on Disciplining Dunn*, SPORTS BUS. J., Jan. 30, 2006, available at <http://www.sportsbusinessjournal.com/article/49103> (reporting punishment of David Dunn for stealing clients from his former partner).

116. See Mark Hyman, *Superagent Leigh Steinberg: Pro Football's Wild Man*, BUS. WEEK, Nov. 25, 2002, available at [http://www.businessweek.com/magazine/content/02\\_47/b3809126.htm](http://www.businessweek.com/magazine/content/02_47/b3809126.htm) (establishing facts of situation between Dunn and Steinberg).

117. See *id.* (describing consequences of decision to leave agency and launch competing firm).

118. Liz Mullen, *NFLPA Committee Votes To Suspend David Dunn For Two Years*, SPORTS BUS. J., Nov. 27, 2006, available at <http://www.sportsbusinessdaily.com/article/106669> (discussing fallout from trial testimony). This decision was later overturned based on trial errors, and Dunn's suspension was put on hold while he handled bankruptcy issues. See *id.* (elaborating upon trial aftermath).

119. See *id.* (discussing NFLPA decision to suspend Dunn, and Dunn's subsequent file for Chapter 11 Bankruptcy).

120. See Darren Heitner, *Agent Spotlight: David Dunn*, SPORTS AGENT BLOG, <http://www.sportsagentblog.com/2006/01/31/agent-spotlight-david-dunn/> (Jan. 31, 2006) (stressing negative effects of verdict against sports agent and stressing that while some people had accused sports agent Drew Rosenhaus of stealing clients, no players had filed actual claims against him).

121. See Melissa Neiman, *FAIR GAME: ETHICAL CONSIDERATIONS IN NEGOTIATION BY SPORTS AGENTS*, at 6, (Aug. 2007), available at [http://works.bepress.com/melissa\\_neiman/3](http://works.bepress.com/melissa_neiman/3) (follow "download the paper" hyperlink) (naming NFLPA as first association to regulate activities of agents).

122. See NFL PLAYERS ASSOCIATION, *NFLPA Regulations Governing Contract Advisors*, at 7-9, available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=233&pid=0&type=1> (follow "download a PDF version of the regulations" hyperlink) (establishing rules governing negotiations between teams and agents).

advisor must take a test and fulfill other essential requirements.<sup>123</sup> The test has questions based on the collective bargaining agreement, the salary cap and the free agency system.<sup>124</sup> Potential agents who fail this exam may be suspended or decertified by the NFL Players Association.<sup>125</sup>

In addition to NFL, some states have agent regulation acts aimed at protecting student-athletes.<sup>126</sup> Many rookie athletes are too trusting and vulnerable when negotiating their first contract with an agent.<sup>127</sup> One problem is that if an agent is not an attorney, a player cannot bring suit against the agent for malpractice.<sup>128</sup> Although, a players union may require an agent to carry professional liability insurance, the NFL Players' Association is the only player's union to require an agent to carry malpractice insurance.<sup>129</sup> The National Collegiate Athletic Association's ("NCAA") guidelines specify that a student-athlete may receive advice from an attorney regarding a proposed professional contract, but that attorney may not represent the athlete in negotiation.<sup>130</sup>

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123. *See id.* at 10-14 (providing requirements for becoming NFL agent). Individuals wishing to be certified as NFL agents must now have a master's degree. *Id.* Other certification requirements include: a \$1,650.00 application fee, passing the NFLPA test, attendance at a two (2) day seminar in Washington, DC, and successful completion of a written, proctored examination. *Id.* Following successfully passing the exam, the agent must obtain professional liability insurance from an approved carrier. *Id.*; *see also* The Sports Law Professor, *The Problem with NFL Player Agents*, <http://thesportslawprofessor.blogspot.com/2007/10/problem-with-nfl-player-agents.html> (last visited Oct. 31, 2009) (exemplifying that moving toward greater education is one way NFL tries to protect its players).

124. *See* NFL PLAYERS ASSOCIATION, *supra* note 122, at Appendix A (outlining test for sports agent certification).

125. *See id.* at 2-11 (discussing when agent may be deleted from NFLPA registry).

126. *See* SHROPSHIRE & DAVIS, *supra* note 5, at 139; *see also* NCAA, *Uniform Athlete Agents Act (UAAA) History and Status*, <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/legislation+and+governance/eligibility+and+recruiting/agents+and+amateurism/uaaa/history.html> (last visited Oct. 31, 2009) (including support for nationwide use of Uniform Athletes Agent Act).

127. *See* Alabama Crimson Tide, *Making the Selection* (last visited Oct. 31, 2009), [www.rolltide.com/datadump/fls\\_files/files/files/14859.pdf](http://www.rolltide.com/datadump/fls_files/files/files/14859.pdf) (offering helpful procedures for rookie athletes signing first contract).

128. *See* SHROPSHIRE & DAVIS, *supra* note 5, at 24 (addressing course of redress for athletes with attorney agents compared to athletes with non-attorney athletes).

129. *See* Karcher, *supra* note 74 (explaining that NFLPA requires malpractice insurance with minimum annual premium of \$2,500).

130. *See* The National Collegiate Athletic Association, *2009-10 NCAA Division I Manual*, NCAA PUBLICATIONS, Aug. 1, 2009, at 69, *available at* [http://www.ncaapublications.com/Uploads/PDF/D1\\_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf](http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf) (quoting "12.3.2 Legal Counsel. Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the individual in negotiations for such a contract").

## A. Issues Involving Conflicts of Interest

1. *Agents Representing Multiple Clients*

A conflict of interest occurs when a duty owed to one party is “compromised by a separate interest or agreement with a third party.”<sup>131</sup> Conflicts of interest may arise if an agent represents multiple players who play the same position, or play for the same team, and both are trying to negotiate contracts.<sup>132</sup> In 1996, attorney-agent David Falk faced this problem when he represented top basketball player Juwan Howard and tried to negotiate a deal with the NBA’s Miami Heat.<sup>133</sup> When the deal fell through, Falk secured a contract for Howard with the Washington Bullets.<sup>134</sup> In doing so, Falk neglected one of his average players, Rex Chapman, who wanted to re-sign with the Miami Heat and was unable to do so.<sup>135</sup> If an agent gets a higher contract for one player, it may cause a rift in his or her relationship with another player, or may slight the average player in favor of the superstar client.<sup>136</sup>

In the case of rookie NFL players, an agent may try to negotiate two or more contracts from a finite pool of money, because when one player takes up more salary cap room less money is available for the other player.<sup>137</sup> Such an example occurred in 2006 when quarterback Jay Cutler entered the NFL draft from Vanderbilt University.<sup>138</sup> He hired James “Bus” Cook, a licensed attorney, to represent him.<sup>139</sup> Cutler and his family told Cook that they did not want Cook to represent another top quarterback, a reasonable request for a player desiring his agent to look out for his best inter-

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131. SHROPSHIRE & DAVIS, *supra* note 5, at 79.

132. *See id.* at 81-84 (discussing conditions giving rise to conflicts of interest).

133. *See* Lynn Hirschberg, *The Big Man Can Deal*, N.Y. TIMES, Nov. 17, 1996, available at <http://www.nytimes.com/1996/11/17/magazine/the-big-man-can-deal.html?pagewanted=all> (raising agent’s problems with representing multiple players).

134. *See id.* (detailing history of player’s search for team).

135. *See id.* (discussing fallout of agent’s negotiations and conflicts of interest).

136. *See id.* (discussing repercussions arising out of conflicts of interests).

137. *See* Neiman, *supra* note 121, at 8-15 (identifying ethical obligations and considerations for agents representing multiple players).

138. *See History of the NFL*, NFL.COM <http://www.nfl.com/draft/history/fulldraft?season=2006> (last visited Oct. 31, 2009) (detailing 2006 NFL draft class); *See also* Liz Mullen, “Big 3” Shake Up the Agent Signing Process, SPORTS BUS. J., Jan. 16, 2006, available at <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=article.preview&articleID=48835> (discussing effect of three uniquely talented players entering NFL draft).

139. *See* Mullen, *supra* note 138 (depicting player’s selection of agent).

ests.<sup>140</sup> Despite the request, Cook signed University of Texas quarterback Vince Young to a client representation agreement.<sup>141</sup> The Tennessee Titans drafted Young third overall, while the Denver Broncos drafted Cutler eleventh overall.<sup>142</sup> It is unclear how Cook could effectively represent both players, as they were vying to be drafted from the same pool of teams.<sup>143</sup>

Moreover, in another situation involving conflicts, David Dunn committed another unethical action in the representation of his clients in addition to poaching them from his former partner. Here, Dunn egregiously ignored the interests of his client, Kellen Clemens.<sup>144</sup> In the 2006 NFL Draft, the New York Jets selected Clemens in the second round.<sup>145</sup> In three seasons with the team, Clemens had yet to permanently procure the starting quarterback job.<sup>146</sup> After serving as the backup to veteran quarterbacks Chad Pennington and then Brett Favre, it seemed that 2009 would finally be Clemens' opportunity to become the Jets regular starter.<sup>147</sup> Then, on April 25, 2009, the New York Jets made a trade with the Cleveland Browns in order to secure the fifth overall pick in the NFL Draft.<sup>148</sup> With that selection, the Jets drafted, quarterback, Mark Sanchez.<sup>149</sup> Interestingly, Sanchez and Clemens are both represented by the same attorney-agent, David Dunn, "that could [create] a potentially sticky situation when Dunn is negotiating Sanchez's contract, playing one client against the other."<sup>150</sup>

140. *See id.* (noting specific requests and rationales of agent by player.)

141. *See id.* (elaborating on possible conflicts of interests for agent representing multiple players).

142. *See* NFL.com, *supra* note 138 (detailing 2006 NFL draft class).

143. *See generally*, Neiman, *supra* note 121, at 11 (discussing ethical difficulties experienced by agents representing multiple players).

144. *See* Darren Heitner, *David Dunn Of Athletes First Speaks To SBR*, SPORTS AGENT BLOG, May 8, 2009, <http://www.sportsagentblog.com/2009/05/08/david-dunn-of-athletes-first-speaks-to-sbr/> (demonstrating how agent was confronted with and "dodged" questions about conflict of interest).

145. *See* NFL.com, *supra* note 138 (detailing 2006 NFL draft class).

146. *See* NewYorkJets.com, *New York Jets Kellen Clemens Team Roster*, <http://www.newyorkjets.com/team/player/1073-kellen-clemens> (last visited Oct. 31, 2009) (showing that Kellen Clemens has played in fourteen games for New York Jets, three of which, he started).

147. *See* Mark Cannizzaro, *Clemens Can't Catch Break With Jets*, N.Y. POST, May 8, 2009, *available at* [http://www.nypost.com/p/sports/jets/clemens\\_can\\_catch\\_break\\_with\\_jets\\_awDBgx4GtvZH9IAPzGBSZP](http://www.nypost.com/p/sports/jets/clemens_can_catch_break_with_jets_awDBgx4GtvZH9IAPzGBSZP) (chronicling troubles of professional quarter-back).

148. *See id.* (detailing draft day moves of New York Jets in 2009).

149. *See id.* (discussing New York Jets selection of rookie quarterback).

150. *See* Associated Press, *Clemens Appreciated Sanchez Gesture*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=4150065> (last visited Oct. 31, 2009) (sug-

Furthermore, it is part of an agent's job to ensure that a client is drafted as high as possible.<sup>151</sup> An agent helps develop the buzz around a player.<sup>152</sup> The higher the player is drafted, the more lucrative his contract.<sup>153</sup> In the Clemens-Sanchez instance, not only is one agent representing two clients on the same roster, but also two quarterback clients who are vying to be the starter!<sup>154</sup> When does representing one client take away from zealous advocacy on behalf of another? Not only are players contracted through a finite pool of money, but also, in this instance, only one of the players can win the starting quarterback job.<sup>155</sup>

In conclusion, there are many situations in which an agent cannot adequately represent two clients, because the interests of the clients are directly adverse. In these situations, the clients would benefit from an ethical rule similar to the attorney ethical conflict rule that forbids an agent to act in these situations. Such a rule should be created to best protect professional athletes.

## 2. *The Importance of Trust In Agent-Client Relationships*

The relationship between athlete and agent is based on trust.<sup>156</sup> Most athletes spend a great deal of time evaluating representatives in attempting choose the right one.<sup>157</sup> Unfortunately,

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gesting possibility of David Dunn playing one client against another when negotiating Sanchez's contract).

151. See generally Paul D. Staudohar, *So You Want To Be a Sports Agent*, LAB. L.J. (2006) available at <http://www.allbusiness.com/human-resources/employee-benefits-benefits/4063876-1.html> (discussing general goals of sports agents when representing clients).

152. See *id.* (noting that functions of sports agents, in general, include promoting athletes career through media coverage and public relations).

153. See NFL.com, *Signing Status of 2009 NFL Draft First-Round Picks*, <http://www.nfl.com/draft/story?id=09000d5d810d9ec2&template=with-video-with-comments&confirm=true> (last visited Oct. 31, 2009) (providing details of contracts signed by 2009 NFL first round draft picks).

154. See *id.* (asserting challenges and potential conflicts associated with representing two similar clients).

155. See Neiman, *supra* note 121, at 11 (discussing conflict arising when agents represent clients competing for "finite" resources).

156. See ROBERT H. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 126 (Ind. Univ. Press 4th ed. 2004) (noting that successful client-agent relationships involve client placing trust in agent, and agent earning trust).

157. See NCAA.org, *Questions to Ask Prospective Agents*, [http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/legislation+and+governance/eligibility+and+recruiting/agents+and+amateurism/resources/agent\\_questions.html](http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/legislation+and+governance/eligibility+and+recruiting/agents+and+amateurism/resources/agent_questions.html) (last visited Oct. 31, 2009) (posing useful questions to ask agent during selection process).

sometimes vetting is not enough and athletes often find themselves misguided, misled and defrauded.<sup>158</sup>

Picking the wrong agent can adversely affect the rest of an athlete's life, wasting the athlete's life's work and earnings and threatening his family's welfare. For example, one agent named Richard Sorkin who could not properly manage his clients' affairs greatly damaged their careers and finances. Sorkin was a sportswriter turned non-attorney agent who represented more than fifty NHL and NBA players in the 1970s.<sup>159</sup> Sorkin "squandered an estimated \$1.2 million of his clients' money, much of it on his own gambling and stock market ventures."<sup>160</sup> In 1978, Sorkin pleaded guilty to seven counts of grand larceny and was sentenced to three years in prison.<sup>161</sup> Sorkin is not alone, as he is just one among a number of agents who have utilized a position of trust with their clients in order to bilk millions of dollars from the client.<sup>162</sup>

In other cases, conflicts with agents result in lawsuits, as was the case with late Hall of Fame NFL player, Reggie White, who spent eight years as a defensive end for the Philadelphia Eagles.<sup>163</sup> During his time with the Eagles, non-attorney agent Patrick Forte represented White.<sup>164</sup> While Forte was negotiating a new contract between White and the Eagles, he was also negotiating on his own behalf to become an assistant to Eagles' president, Harry Gamble.<sup>165</sup> White filed suit in U.S. District Court seeking \$1.5 million from Forte.<sup>166</sup> White alleged Forte neglected to tell him about an

158. See Associated Press, *Legislature Aims to Protect Student Athletes*, ESPN.COM, <http://sports.espn.go.com/espn/news/story?id=1878699> (last visited Oct. 31, 2009) (outlining government actions taken to combat unscrupulous agent activity).

159. See Neff, *supra* note 12 (highlighting financial distress between agents and clients).

160. See *id.* (advising legal troubles of agent who misused clients' money). Additionally, investigations revealed that Sorkin spent \$100,000 per week to bet on baseball, football, and horse races. *Id.*

161. See *id.* (disclosing legal ramifications of agents' actions).

162. See *id.* (revealing that illegal activities of agents have become more commonplace and less "shocking" over time).

163. See SHROPSHIRE & DAVIS, *supra* note 5, at 79 (discussing player's lawsuit against agent); see also Pro Football Hall of Fame, *Reggie White*, [http://www.profootballhof.com/hof/member.aspx?PLAYER\\_ID=257](http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=257) (last visited Oct. 31, 2009) (listing Reggie White statistics and career highlights).

164. See SHROPSHIRE & DAVIS, *supra* note 5, at 79 (laying foundation of lawsuit).

165. See *id.* at 79-80. (addressing possible conflicts of interest precipitating lawsuit).

166. See RAY DIDINGER AND ROBERT S. LYONS, *THE EAGLES ENCYCLOPEDIA* 95 (Temple Univ. Press 2005) (documenting history of player's lawsuit against agent).

option year on his contract.<sup>167</sup> White charged that Forte “pursued his [Forte’s] employment with the Eagles at the same time that he was ostensibly representing the best interests of White.”<sup>168</sup> The suit was later dropped after White was able to come to a contract agreement with the Eagles, but his relationship with the team was irreparably cracked.<sup>169</sup> In 1993, this fissure came to a head when White left the Eagles as a free agent to join the Green Bay Packers.<sup>170</sup>

William “Tank” Black is another example of a non-attorney sports agent who allowed greed and unethical behavior to interfere with the job he was hired to perform.<sup>171</sup> Black was certified as a player-agent with both the NFL and NBA.<sup>172</sup> Yet, he misappropriated more than \$14 million from his clients.<sup>173</sup> Black was convicted in Florida of fraud, conspiracy, and obstruction of justice charges, for which he spent five years in prison.<sup>174</sup> One of Black’s clients, Fred Taylor, was drafted ninth by the Jacksonville Jaguars in the 1998 NFL Draft.<sup>175</sup> Taylor selected Black because of his ability to work with people and foster personal relationships.<sup>176</sup> At Black’s trial, Taylor, who had been swindled out of his \$5 million signing bonus, sat on the witness stand crying, “I agreed with everything he said . . . I trusted him with my life, with my daughter’s life.”<sup>177</sup> Black abused the position of trust and confidence that he enjoyed with his clients and acted as an unregistered investment adviser and unregistered broker-dealer, in violation of regulations promulgated by the Securities and Exchange Commission.<sup>178</sup>

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167. See *id.* (noting allegations involved in player’s lawsuit against agent).

168. *Id.*

169. See Associated Press, *Sports People: Football; Pact For White*, N.Y. TIMES, Aug. 22, 1989, at B10 available at <http://www.nytimes.com/1989/08/22/sports/sports-people-football-pact-for-white.html> (discussing effect lawsuit had on player’s relationship with team).

170. See SHROPSHIRE & DAVIS, *supra* note 5, at 79 (discussing career moves of player); see also Pro Football Hall of Fame, *supra* note 163 (listing Reggie White’s career highlights).

171. See Staudohar, *supra* note 151 (highlighting highly publicized cases of agent misconduct).

172. See *id.* (mentioning William “Tank” Black’s qualifications as agent).

173. See Davis, *supra* note 54, at 784 (referencing cases of agent misconduct).

174. See *id.* (providing result of criminal charges).

175. See Gene Collier, *Gene Therapy: Tank’s For the Bad Memory*, PITTSBURGH POST GAZETTE, May 3, 2002, available at <http://www.post-gazette.com/sports/columnists/20020503gene4.asp>. (developing professional relationship between Fred Taylor and William “Tank” Black).

176. See *id.* (suggesting William “Tank” Black was also highly regarded financial investor).

177. *Id.*

178. See *United States v. William H. Black, et al.*, Release No. 17511, No. 1:00CR15 SPM (N.D. Fla., May 8, 2002) available at <http://www.sec.gov/litigation/>

If consistent professional rules of conduct were in place for sports agents, there would be set ethical standards to which every player representative would be held.<sup>179</sup> With sports being a multi-billion dollar industry, agents must be held more accountable in order to protect athletes' best interests.<sup>180</sup> Bad business advice may leave an athlete unprepared to wisely invest the money he or she has earned during his or her playing days, money that in many cases must last for the duration of the athlete's life.<sup>181</sup> Several states have passed legislation to require agent registration.<sup>182</sup> Enforcement by states, however, has been "uneven and unpredictable."<sup>183</sup> Agent regulation continues to be a business and legal battleground.<sup>184</sup>

### B. Negotiating Styles, Nice vs. Ruthless

Although attorney-agents are arguably held to a higher standard than non attorney-agents, because of their mandatory adherence to the ABA's ethics code, there are still two very distinct approaches when lawyer-agents represent athletes. Both yield results, but only one approach actively seeks long-term collaborative relationships between agents and teams. The other is a more aggressive short-term, adversarial approach. In this section, these two approaches are contrasted. After analyzing these two styles, one can see why professional sports all need an overarching set of ethical rules to regulate their agents and arguably, why these rules should perhaps be even more extensive than attorney ethical rules.

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litreleases/Ir17511.htm (detailing sentencing and restitution orders against William "Tank" Black as punishment for investment schemes).

179. See SHROPSHIRE & DAVIS, *supra* note 5, at 144-48 (discussing options for regulating sports agents).

180. See *id.* (stressing need to hold agents accountable for actions).

181. See Delevingne, *supra* note 52 (discussing ways athletes mis-use money without proper guidance).

182. See DOYCE COTTON AND JOHN T. WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS 657 (Kendall Hunt Publ'g Co. 2003) (listing regulations imposed by states). A number of states now regulate the activities of sports agent. *Id.* A problem arises; however, because most state regulations are vague and vary considerably from state to state. *Id.* This lack of uniformity has limited the number of sports agents who actually register in each state. *Id.* An agent who intends to do business in a large number of states may find himself trying to comply with 30 different sets of registration requirements and regulatory schemes. *Id.*

183. See SHROPSHIRE & DAVIS, *supra* note 5, at 142 (addressing impact of agency statutes and problems with regulation). Major problems with agency regulation include a "pervasive lack of enforcement in some states," and "apathy toward the lack of registration by popular sports agents." *Id.*

184. See *id.* at vii (discussing business and legal "aspects that impact sports agents.").

The examples below will show that even though attorneys have professional rules, there are cases where attorney-agents act unethically in the sports arena and there is no on-point rule that sanctions them. Therefore, even though attorney-agents are more regulated than non-attorney agents, greater steps need to be taken to create sports-focused regulations.

1. *Ron Shapiro: The Power of Nice*

Ron Shapiro, a cum laude graduate of Harvard Law School, has been a sports agent for more than thirty years.<sup>185</sup> In 1995, he founded the Shapiro Negotiations Institute, designed to teach the art of negotiation, how to deal with difficult people, and how to enhance listening skills.<sup>186</sup> Shapiro has represented a number of Hall of Fame MLB clients, including Eddie Murray, Jim Palmer, Kirby Puckett, Cal Ripken, Jr., and Brooks Robinson.<sup>187</sup>

Unlike some of his fellow agents, Shapiro does not go into contract negotiations looking to go to war.<sup>188</sup> He has been successful because of his “be nice without being soft” negotiating style.<sup>189</sup> In 1999, when MLB umpires were uncomfortable with the hardball tactics employed by their union leaders, they turned to Shapiro for help.<sup>190</sup> In addition, Shapiro was contacted when the San Antonio Spurs, a National Basketball Association team, encountered difficult contract negotiations with players.<sup>191</sup> Shapiro feels there is a benefit to building long-lasting relationships and helping both sides achieve what they want.<sup>192</sup>

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185. See Ronald M. Shapiro Biography, <http://www.shapironegotiations.com/bioShapiro.html> (last visited Oct. 31, 2009) (outlining agent’s qualifications and experience).

186. See *id.* (detailing agent’s skills and experience).

187. See RONALD M. SHAPIRO & MARK A. JANKOWSKI, *THE POWER OF NICE. HOW TO NEGOTIATE SO EVERYONE WINS – ESPECIALLY YOU!* (John Wiley & Sons, Inc. 1998) (discussing negotiating style and listing clients).

188. See *id.* at 230 (discussing disadvantages to aggressive negotiating).

189. Jeff Barker, *Negotiations Training Is Agent’s Secret*, BALT. SUN, Oct. 10, 2005, at D1.

190. See Murray Chass, *Phillips’s Opponents Plan a Replacement Union for Umpires*, N.Y. TIMES, Oct. 13, 1999, at D4, available at <http://www.nytimes.com/1999/10/13/sports/baseball-phillips-s-opponents-plan-a-replacement-union-for-umpires.html?partner=rssnyt&emc=rss> (explaining that Ron Shapiro will negotiate new labor agreement with Major League Baseball if Richie Phillips is replaced); see also Barker, *supra* note 189 (stating umpires summoned Shapiro to find remedy in labor agreement).

191. See Barker, *supra* note 189 (discussing when Shapiro was used to face difficult player contracts by San Antonio Spurs).

192. See SHAPIRO & JANKOWSKI, *supra* note 187, at 229-31 (explaining that building relationships is necessary for superior negotiating).

In addition, Shapiro goes to the negotiating table prepared and able to support his contract requests. In negotiating a contract between Brooks Robinson and the Baltimore Orioles, Shapiro read, dug, scoured, researched, referenced, and cross-referenced in order to learn everything he could about the Orioles.<sup>193</sup> Shapiro believes that with preparation, it is possible for both sides to emerge from negotiations as winners, and has stated that, “If all you have in your toolbox is a hammer, then every problem looks like a nail. The same holds true for negotiation. More tools enable you to solve more problems.”<sup>194</sup>

Further, when an agent is able to build a long-term relationship with team management, the two sides are likely to return to the negotiating table with other athletes.<sup>195</sup> Shapiro believes that effective negotiating develops relationships, which will lead to more deals. “If you burn bridges, destroy the other side, squeeze the last buck out, ‘take no prisoners,’ you can’t expect the other party to want to do business with you again. They’ll run from the negotiating table, let alone consider returning to it.”<sup>196</sup> To Shapiro, negotiation is not a zero sum game, in which one side has to win and the other side loses.<sup>197</sup> “The success rate [for win-lose negotiations] is about as good as that of war – seldom and rarely long-lasting. . . .”<sup>198</sup>

Similarly, Shapiro believes that if you have gradually developed a relationship with the other party, you are going to look for ways to move beyond a deadlock.<sup>199</sup> If you reach an impasse with a party, with whom you do not have a relationship, however, you are “more

193. *See id.* at 69-75 (portraying negotiating strategy used to help Brooks Robinson).

194. *See id.* at 5 (identifying tools necessary in negotiating).

195. *See id.* at 229-31 (detailing why building relationships works when negotiating).

196. *Id.* at 230.

197. *See id.* at 27 (analyzing why win-lose negotiations do not work during sports agent negotiations); *see also Game Theory*, ECONOMIST.COM, Nov. 24, 2008, [http://www.economist.com/businessfinance/management/displaystory.cfm?story\\_id=12669299](http://www.economist.com/businessfinance/management/displaystory.cfm?story_id=12669299) (discussing game theory, a form of business negotiations based on economic theories which focus on consequences of choices).

“Zero sum” situations are those where . . . [T]here is no incentive to co-operate with opponents because every inch given to them is an inch lost. The idea of the zero-sum game is modified by the introduction of the possibility of change in the nature of the game while it is being played. Hence, for instance, companies that are fighting for market share are playing a zero-sum game if they see that market as fixed. But if the market is continually . . . the players are playing a game in which they can have a declining share of a bigger cake and still see their businesses grow.

*Id.*

198. SHAPIRO & JANKOWSKI, *supra* note 187, at 27.

199. *See id.* at 231 (explaining importance of relationships and bonding).

likely to let the impasse stand.”<sup>200</sup> “Every negotiation takes place in an environment. . . . It means the feelings, sensitivities, tensions, fears, and hopes that comprise the atmosphere of negotiation. They make up the environment as much, or moreso, [sic] than the four walls, table, and chairs.”<sup>201</sup> Strong, respectful relationships can accomplish what mere acquaintanceships cannot.

Shapiro’s relationship with his client, Cal Ripken, has lasted since Ripken was a teenager because Shapiro treats Ripken with consideration, and tries to meet his real needs.<sup>202</sup> When Cal Ripken was an up-and-coming baseball player, at the young age of eighteen, many agents sought to represent him.<sup>203</sup> These agents promised Ripken that they could get him to the big leagues faster, get him more endorsements, or get him more money.<sup>204</sup> They took him to fancy dinners and drove him around in limousines in order to try to persuade Ripken to hire them.<sup>205</sup> Ron Shapiro’s approach with Ripken differed from that of the other agents.<sup>206</sup> Rather than trying to catch his eye with expensive gifts and a fancy lifestyle, Shapiro merely invited Ripken to his office.<sup>207</sup> Instead of promising him the moon, Shapiro listened to what Ripken wanted and needed.<sup>208</sup> Ripken, in turn, has spoken quite highly of Shapiro, saying that with an agent like Shapiro, “[m]ake no mistake, you’ll out-negotiate the other side.”<sup>209</sup> While Ripken acknowledges that many agents are “sharks,” he proudly stands behind Ron Shapiro, proclaiming that he is not one of those agents.<sup>210</sup>

Shapiro’s negotiating techniques and treatment of his clients demonstrate that treating your client like an equal and a friend can win more clients than treating him like a prize to be won, and that treating your opponent as an equal, as opposed to an opponent in

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200. *Id.*

201. *Id.*

202. *See id.* at v (explaining genesis of Ripken’s relationship with Shapiro at the time when Ripken first started playing baseball).

203. *See id.* at v (discussing typical agents and tactics they use to recruit clients).

204. *See id.* (describing what agents would typically offer Ripken to persuade him to be represented by them).

205. *See id.* at v-vi (listing tactics that agents would use to recruit clients).

206. *See id.* at vi (saying how Shapiro differs from other agents because he does not use glitz and glamour to attract clients).

207. *See id.* (mentioning how Shapiro began his relationship with Ripken at his office).

208. *See id.* (distinguishing Shapiro from other agents based on his ability to listen to clients).

209. *Id.* at v-vi (stereotyping agents).

210. *See id.* at v (detailing Ripken’s views on Shapiro).

war, helps establish relationships with clients.<sup>211</sup> In a “money talks,” everything-is-a-sales-pitch world, Shapiro’s techniques indicate that the money, glitz, and glamour are not everything.<sup>212</sup> He shows that personal relationships, respect, and money and career management are the key to success and longevity in a usually fleeting profession.<sup>213</sup>

## 2. *Drew Rosenhaus: Proud to Be a Shark*

Smarmy, arrogant, deceitful, a “cancer, a low life” these are some of the adjectives that have been used to describe NFL attorney-agent Drew Rosenhaus.<sup>214</sup> As a twenty-two-year-old graduate of the Duke University School of Law, Rosenhaus became the youngest certified NFL agent.<sup>215</sup> He works tirelessly for his clients.<sup>216</sup> He has negotiated over one billion dollars in player contracts.<sup>217</sup> Other sports agents, however, are irritated that “Rosenhaus is the brash public face of the business.”<sup>218</sup>

Unlike Shapiro, Rosenhaus’s professional success has resulted from employing a take-no-prisoners negotiation style.<sup>219</sup> Rosenhaus openly describe himself as a shark, and he even owns and keeps a pet shark in his office.<sup>220</sup> The agent described the association between his style and the nature of sharks, saying, “A shark is a relentless predator that is goal-oriented and focused on its objective around the clock. . . . It never rests, it never wavers, it is always on the clock. That’s how we are.”<sup>221</sup>

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211. For a further discussion about Shapiro’s practices, see *supra* notes 193-201 and accompanying text.

212. See SHAPIRO & JANKOWSKI, *supra* note 187, at v-vii (discussing relationship between Ripken and Shapiro).

213. See *id.* (discussing Shapiro’s successful relationship with Ripken).

214. See Allen Wilson, *Agent Provocateur*, BUFFALO NEWS, Oct. 4, 2003, at D1, available at <http://www.prosportsgroup.com/SportsAgentNews/Oct2003/News/rosenhaus.htm> (discussing how people perceive Drew Rosenhaus’s negotiating style); see also Coates *supra* note 75 (discussing perception of Rosenhaus); see also *HBO Real Sports With Bryant Gumble: Drew Rosenhaus (Revisited)* (HBO television broadcast July 26, 2005) (updating profile of Rosenhaus, with respect to controversy with Philadelphia Eagles and Terrell Owens).

215. See Rosenhaus Sports, Recent News, <http://www.rosenhausports.com/home.php> (last visited Oct. 31, 2009) (providing background of Drew Rosenhaus).

216. See *id.* (discussing services Rosenhaus offers).

217. See *id.* (explaining that Rosenhaus works tirelessly to show clients “the money”).

218. See Coates, *supra* note 75 (quoting other agents’ opinions of Rosenhaus).

219. See Wilson, *supra* note 214 (discussing negotiation approach of Rosenhaus).

220. See *id.* (discussing negotiating style of Rosenhaus).

221. *Id.* (internal quotations omitted).

Rosenhaus has been accused of falsifying information and lying to improve his negotiation position; however, the NFL has never investigated Rosenhaus.<sup>222</sup> Former NFL attorney-agent Tim Irwin has said on separate occasions that “There is a cancer growing in our profession . . .” and that he would not permit Rosenhaus to represent his son.<sup>223</sup> Veteran NFL attorney-agent David Ware has also derided Rosenhaus’ tactics, stating that “Drew tells a player that he’s worth more money, that his agent is not doing enough for him, that he’s better than the guy starting in front of him. Now the player is not only mad at his agent, he’s mad at the team management. He sees the guy sitting in front of him as a co-conspirator.”<sup>224</sup>

Rosenhaus would do almost anything to gain a competitive advantage over his fellow agents.<sup>225</sup> One of Rosenhaus’s more criticized stunts came during the 2003 NFL draft with University of Miami running back Willis McGahee.<sup>226</sup> McGahee was projected as a top-five draft pick before tearing knee ligaments in the Fiesta Bowl.<sup>227</sup> With McGahee’s draft prospects quickly slipping, and before a national television audience, McGahee’s phone rang shortly before the end of the first round.<sup>228</sup> Rosenhaus was on the other end of the line, not a member of an NFL team intent on drafting McGahee.<sup>229</sup> This was a ploy to make teams believe that other teams were interested in McGahee. Since all of the other

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222. *See id.* (discussing allegations raised against Rosenhaus but never investigated).

223. *See id.* (discussing Irwin’s perception of Rosenhaus).

224. Michael Bamberger & Don Yaeger, *So, Sue Me! His No-Hold-Barred Tactics Infuriate NFL Executives, But Drew Rosenhaus, the Self-Styled Dark Knight of Sports Agents, Isn’t About to Apologize*, SPORTS ILLUSTRATED, July 15, 1996, at 84.

225. *See Wilson, supra* note 214 (discussing business style of Rosenhaus). Rosenhaus, for his part, believes that his aggressive business style garners him attention because it is so successful. *See id.*

226. *See* Associate Press, *Rosenhaus Admits to McGahee-Related Media Manipulation*, SPORTSILLUSTRATED.COM, Apr. 28, 2003, [http://sportsillustrated.cnn.com/football/2003/draft/news/2003/04/27/mcgahee\\_agent\\_ap/](http://sportsillustrated.cnn.com/football/2003/draft/news/2003/04/27/mcgahee_agent_ap/) (discussing Rosenhaus’s stunt to get Willis McGahee drafted).

227. *See id.* (explaining background on Willis McGahee); *see also* Charlie Nobles, *After Surgery, McGahee Opts for the N.F.L. Draft*, N.Y. TIMES, Jan. 15, 2003, at D2, *available at* <http://www.nytimes.com/2003/01/15/sports/pro-football-after-surgery-mcgahee-opts-for-the-nfl-draft.html> (mentioning McGahee as top-five draft pick); *see also* Damon Hack, *McGahee Hopes to Allay Concerns Before Draft*, N.Y. TIMES, Apr. 22, 2003 at D1, *available at* <http://www.nytimes.com/2003/04/22/sports/pro-football-mcgahee-hopes-to-allay-concerns-before-draft.html> (discussing McGahee’s need to prove his health after injury to NFL teams).

228. *See* Associated Press, *supra* note 226 (discussing events of draft including phone call).

229. *See id.* (discussing Rosenhaus’s use of draft day tactics to boost McGahee’s prospects).

team administrations saw McGahee take the call they assumed another team was calling him.<sup>230</sup> McGahee was selected by the Buffalo Bills with the twenty-third pick of the draft.<sup>231</sup> Rosenhaus's adversaries said "such tactics destroy an agent's credibility . . . the best deals are made on mutual trust, not deception."<sup>232</sup> Rosenhaus, however, claims that "[t]he perception was manipulated to help Willis as much as I could."<sup>233</sup>

Still, Rosenhaus prides himself on the personal touch and devotion he offers all his clients.<sup>234</sup> He does not think there is anything wrong with the way he represents his clients, and there are no rules that forbid most of the representation tactics he uses. He does not employ a secretary and Rosenhaus personally or his brother Jason, who is also a certified NFL agent, always answers his phones.<sup>235</sup> He is ready to play hardball at a moment's notice; as he has two cell phones on him at all times and the numbers of all NFL general managers on speed dial.<sup>236</sup> He works seven days a week, nineteen hours per day.<sup>237</sup> He is not married, has no children, and does not take vacations.<sup>238</sup> According to former Buffalo Bills' offensive guard Jamie Nails, "Drew treats his clients in a first-class fashion . . . . He cares and he's always there when you need him."<sup>239</sup>

Rosenhaus has, however, received criticism for encouraging players to hold out of training camp when trying to renegotiate a

230. *See id.* (stating reasoning for Rosenhaus's phone call).

231. *See id.* (stating draft day events and noting position where Willis McGahee was drafted).

232. Wilson, *supra* note 214 (discussing negative perception of Rosenhaus by other agents in response to draft day tactics).

233. Associated Press, *supra* note 226.

234. *See* Rosenhaus Sports, *supra* note 215 (stating commitment Rosenhaus has for his clients).

235. *See* Greg Garber, *Rosenhaus' Success Draws Cries of Foul Play*, ESPN.COM, June 7, 2005, [http://sports.espn.go.com/nfl/columns/story?columnist=garber\\_greg&id=2072819&num=0](http://sports.espn.go.com/nfl/columns/story?columnist=garber_greg&id=2072819&num=0) (discussing Rosenhaus' style of negotiation and of running his business).

236. *See* Clifton Brown, *The Agent Nonplayers Love to Hate*, N.Y. TIMES, May 24, 2005, at D1, *available at* <http://www.nytimes.com/2005/05/24/sports/football/24rosenhaus.html?pagewanted=print> (discussing Rosenhaus's business style).

237. *See id.* (discussing Rosenhaus's dedication and work ethic); *see also* Mark Maske, *Owens's Agent Is A Paper Tiger: Rosenhaus Wants To Change NFL*, WASH. POST, Aug. 1, 2005, at E1, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/01/AR2005080100013.html> (noting Rosenhaus's daily work hours). Rosenhaus' days are not only long, but frenetic; he is constantly juggling phone calls and negotiations. *Id.*

238. *See* Brown, *supra* note 236 (discussing Rosenhaus's personal life).

239. Wilson, *supra* note 214.

contract.<sup>240</sup> According to Rosenhaus, “When a player outperforms his contract, why is it not okay for him to get a readjustment in his favor?”<sup>241</sup> In his view, since a team can cut a player at any time and not owe him the remainder of his contract, a player should be able to better his financial position after good performance.<sup>242</sup> Rosenhaus does not see himself as a difficult negotiator, and has stated, “I want to be viewed as a guy who can make a deal. Once I get what’s fair, I pull the trigger.”<sup>243</sup> Rosenhaus thinks that teams can play hardball as well as an agent can. His portfolio of contracts shows that his negotiation tactics, while not always admired, do yield results.

However, for all the success Rosenhaus has enjoyed in his career, his brash negotiation tactics have caused him to have great missteps. One of his clients, Errict Rhett, was a running back for the Tampa Bay Buccaneers.<sup>244</sup> He was unhappy with the \$336,000 he was set to earn during the 1996 NFL season.<sup>245</sup> Under Rosenhaus’s advice, Rhett sat out the first ninety-three days of the season, hoping to secure a more lucrative contract from the Buccaneers.<sup>246</sup> During training camp he rejected a six-year, \$14.1 million contract.<sup>247</sup> When Rhett finally ended his holdout, rather than have a new contract, he had a bill for \$5,000 per day in fines; this came out to \$465,000.<sup>248</sup> Instead of being paid to play, Rhett found himself owing the Buccaneers \$129,000.<sup>249</sup> Rosenhaus lost a client, and Rhett irreparably damaged his career and reputation.

In conclusion, while Rosenhaus’ brash negotiation tactics with his opponents often get his clients what they want, team administrations and the teams themselves often leave these negotiations with negative feelings toward the player.<sup>250</sup> Unlike Shapiro, who brings

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240. See ROBERT H. RUXIN, *AN ATHLETE’S GUIDE TO AGENTS* 84 (Indiana University Press 2004) (1982) (discussing generally process of holding out in contract negotiations).

241. Maske, *supra* note 237, at 3.

242. See *id.* (explaining Rosenhaus’s reasoning regarding outperformance).

243. Brown, *supra* note 236.

244. See Bryan Burwell, *Rhett’s Holdout Turns Out to Be Big Bucks Mistake*, USA TODAY, Oct. 25, 1996, at C12 (stating background on Errict Rhett).

245. See *id.* (explaining reason for new contract negotiation).

246. See *id.* (discussing tactic used in negotiation).

247. See *id.* (mentioning what contracts he rejected that caused him to sit out).

248. See *id.* (noting fines entailed with sitting out).

249. See *id.* (explaining result of Errict Rhett sitting out).

250. See Garber, *supra* note 235. Quoting a Rosenhaus associate as saying: He’s left a bloody swath of hurt feelings in his path . . . . Sure, he works his ass off, but he’s crossed the line. A year ago, he decided his ambition

teams together, Rosenhaus tears them apart by making players the opponents of their coaches and fellow players, pulling money away from other players or separating his player from the other players through preferential treatment, etc.<sup>251</sup> Rosenhaus automatically brings an environment of animosity with him when he steps into any negotiating room, an animosity he either consciously or subconsciously passes onto his clients.<sup>252</sup> Besides creating tension amongst teams, Rosenhaus' tactics are often risky, sometimes leaving his promising clients with nothing.<sup>253</sup> Unfortunately, when these players are left with no money and no career prospects, they are often left with the bad reputation that Rosenhaus has passed onto them.<sup>254</sup>

Therefore, while Rosenhaus can get his "big" clients the "big" money, he carries with him the potential to ruin an athlete's career and reputation.<sup>255</sup> His tactics are extreme and create extreme results of either getting the most possible or getting nothing.<sup>256</sup> He does not have the consistency that men such as Shapiro have, and this is his one big weakness.<sup>257</sup> For all of his strength and successes, he fails to deliver to all of his clients the services that he promised them.<sup>258</sup> Rosenhaus' negotiating style prevents him from doing an-

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would know no bounds - that he'd target every star in his grasp. As the practice grew, he said to himself, I'm going for it. I'm going to be the king. He's Colonel Kurtz stepping off his boat in *Heart of Darkness*. He's become megalomaniacal, consumed by greed.

*Id.* (quotations omitted).

251. *See id.* (stating that Rosenhaus' dealings with Terrell Owens while receiver for Philadelphia Eagles and Javon Walker while receiver for Green Bay Packers have "caused friction" with their respective teams after both players missed off-season camps to renegotiate contracts).

252. *See id.* (describing Rosenhaus as "both admired and resented" because many agents lose clients to him).

253. *See id.* (quoting general manager of the Tennessee Titans, Floyd Reese who says Rosenhaus is "not afraid to let his players try free agency, because he's confident he can get them a good deal" even though can be risky) (internal quotations omitted).

254. *See Maske, supra* note 237 (explaining how public perceives players, such as Terrell Owens, who already have contracts but want to renegotiate for more money).

255. *See Burwell, supra* note 244 (describing Tampa Bay Buccaneer Errict Rhett's 93-day hold-out after rejecting \$14.1 million, six-year contract as "really big, gigantic, jumbo, super-sized mistake" influenced by Rosenhaus) (emphasis deleted).

256. *See id.* (noting that after hold-out, Rhett was left owing Buccaneers \$129,000 in fines).

257. For a further discussion of Shapiro's approach as agent, see *supra* notes 185-213 and accompanying text.

258. *See Burwell, supra* note 244 ("unless Rosenhaus lands Rhett a substantially better deal than was previously negotiated last summer, Rhett wasted his time

anything else, however he risks the consequences of his miscalculations and poor behavior.<sup>259</sup>

#### IV. THE CONSEQUENCES OF AGENT MISCALCULATIONS AND POOR BEHAVIOR

Many athletes blindly accept their agents' advice, thinking that the agent is only looking out for their best interests, not realizing the agents other possible self concerns such as pride, image and money. These clients are often young and do not realize the possible damage that an agent can do. Additionally, many athletes act in the moment, not anticipating the possible future repercussions or rash or selfish behavior.

For a young and inexperienced athlete, an agent is a key figure in the transition from being an amateur to a professional.<sup>260</sup> "The athlete-agent relationship is typically one of unequal power: the agent dominates the athlete, who is completely dependent on the agent for business advice."<sup>261</sup> A young athlete is unprepared to make his own negotiations and often makes decisions about who will represent him based on nothing more than faith because he is unable to distinguish one agent's abilities from another's.<sup>262</sup>

National Association for Stock Car Auto Racing ("NASCAR") driver Kyle Busch learned a tough lesson at a young age that not all agents are sufficiently forthright with their clients.<sup>263</sup> Busch was negotiating a contract extension with Hendrick Motorsports.<sup>264</sup> His attorney-agent, Allen Miller, "kept him in the dark" about how the negotiation process was going, while the process was going badly.<sup>265</sup> Before he knew it, Busch was pushed out of Hendrick Motorsports

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sitting out . . . [s]omewhat, though, I suspect Rosenhaus will still get his commission.").

259. See Maske, *supra* note 237 (saying that Rosenhaus "isn't married and has no hobbies"); Clifton Brown, *supra* note 236 ("I literally work seven days a week, I'm not married, I have no kids, I don't take vacations.").

260. See Edward Vincent King, Jr., *Views of Sport: Do Agents Help or Hurt?; Dependency Leads to Abuse*, N.Y. TIMES, Mar. 5, 1989, sec. 8 at 9, available at <http://www.nytimes.com/1989/03/05/sports/views-of-sport-do-agents-help-or-hurt-dependency-leads-to-abuse.html> (explaining how athletes' need for agents makes them vulnerable).

261. *Id.*

262. See *id.* (stating that reasons athletes rely on agents are same reasons agents can take advantage of athletes).

263. See David Newton, *Agent Keeps Kyle Busch in Dark During Contract Extension Talks*, ESPN.COM, June 15, 2007, <http://sports.espn.go.com/rpm/news/story?seriesId=2&id=2905784> (discussing Busch being kept in dark during negotiations).

264. See *id.* (providing background of Kyle Busch's contract negotiations).

265. See *id.* (discussing how Kyle Bush felt of his agent's style of negotiating his contract).

in favor of fellow driver Dale Earnhardt, Jr.<sup>266</sup> His agent diminished the number of racing groups that were interested in Busch's services through his hardball tactics and left Busch "very ignorant"; now not only did Busch not have a contract but he also had no clue what was going on.<sup>267</sup>

Another possible example of bad agent advice and negotiating involves former MLB player Juan Gonzalez.<sup>268</sup> In 2000, Gonzalez turned down an eight-year, \$140 million contract with the Detroit Tigers.<sup>269</sup> Once known as "Juan Gone" for his power hitting, fans and commentators were left asking "where has Juan Gone?"<sup>270</sup> Whether it was the team, contract terms, or some other variable that led Gonzalez to reject the Tigers' offer, only Gonzalez knows. After turning down the Detroit contract, Gonzalez signed a one-year deal with the Cleveland Indians to prove he was still one of baseball's best players.<sup>271</sup> After a string of injuries and bad luck, Gonzalez never again played to his potential and he never came close to achieving a \$140 million deal.<sup>272</sup> Perhaps Gonzalez did not like Detroit and did not like the direction of the team. Gonzalez's attorney-agent, Scott Boras, said that Juan Gonzalez will turn down money in order to play in a place he wants to be, and he risk a lot to do so.<sup>273</sup>

In 2007, New York Yankees third baseman, Alex Rodriguez, infuriated fans, coaches, fellow players, and MLB executives when, under the advisement of agent Scott Boras, he opted out of his Yankees contract during the pivotal Game Four of the World Series.<sup>274</sup> By using the championship-clinching game to announce his

266. *See id.* (explaining events that took place in negotiations).

267. *See id.* (showing result caused by agent).

268. *See* Jorge L. Ortiz, *At 37, Juan Gonzalez Is Still Searching For One More Shot at the Major Leagues*, USA TODAY, Feb. 8, 2007, available at [http://www.usatoday.com/sports/baseball/2007-02-07-juan\\_x.htm](http://www.usatoday.com/sports/baseball/2007-02-07-juan_x.htm) (describing Gonzalez's ongoing contract negotiations).

269. *See id.* (stating that Gonzalez turned down contract and has no regrets).

270. *See id.* (discussing current perception of Juan Gonzalez after missing large number of games).

271. *See* Associated Press, *Gonzalez, Indians Reach 1 Year Deal*, PITTSBURGH POST GAZETTE, Jan. 10, 2001 at C3 (describing one-year deal with Cleveland Indians).

272. *See* Juan Gonzalez, Baseball Reference.com, <http://www.baseball-reference.com/players/g/gonzaju03.shtml> (last visited Oct. 31, 2009) (displaying Gonzalez's statistics which illustrate he was not as successful as in 1990s and showing Gonzalez's salary each season which was never higher than \$13,000,000).

273. *See* Juan Gonzalez Signs with Indians, Rangerfans.com <http://www.rangerfans.com/archives/2001/01/juan-gonzalez-signs-with-india.html> (last visited Oct. 31, 2009) (discussing Boras' impression of Gonzalez).

274. *See* Associated Press, *A-Rod's Mid-Game Opt-Out Angers MLB*, NBC SPORTS ONLINE, Oct. 29, 2007, <http://nbcsports.msnbc.com/id/21495045/> (explaining

intentions, Rodriguez “put his selfish interests and that of one individual player above the overall good of the game.”<sup>275</sup> The fallout from the Boras-advised publicity stunt left Rodriguez feeling foolish and questioning the relationship with his longtime agent.<sup>276</sup> Rodriguez decided that he ultimately wanted to return to the Yankees and headed to the negotiating table solo.<sup>277</sup> Rodriguez was able to negotiate a new contract with the Yankees for ten years and \$275 million.<sup>278</sup>

Because of the fears associated with agents, some athletes are again meeting with management one-on-one in order to get the best possible deal.<sup>279</sup> Negotiating for oneself also eliminates the hefty commissions paid to agents. Former University of Maryland basketball great Len Elmore noted:

In an environment where agents must constantly restate their value proposition, a majority of agents are going to be hard-pressed to prove fairly and comparatively how they enhance a player’s bottom line or his overall career . . . . The day has come when superstars can meet face-to-face with an activist owner and without an agent reach the basics of an agreement.<sup>280</sup>

However, this perspective seems too drastic, as it ignores the possible benefits an agent can bring to an athlete. Perhaps a better solution is hiring an attorney on an hourly basis, instead on the

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timing of announcement detracted from focus that should have been on Boston Red Sox and Colorado Rockies who were playing in World Series).

275. *Id.*

276. See Kate Kelly & Dana Cimilluca, *Alex Rodriguez Gets a Surprise Assist From a Fan in Omaha*, WALL ST. J., Nov. 17, 2007, available at <http://online.wsj.com/article/SB119526835344296733.html> (explaining Rodriguez wanted to remain with Yankees and risked negative results with Union by “sidestepping Mr. Boras”).

277. See *id.* (discussing Alex Rodriguez’s contract negotiations which involved assistance from billionaire Warren Buffett and two executives from Goldman Sachs in order to get back into Yankees’ good graces).

278. See Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive For Steroids in 2003*, SPORTSILLUSTRATED.COM, Feb. 9, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids/> (explaining terms between Alex Rodriguez and New York Yankees). Rodriguez’s contract has the ability to reach \$305 million if he meets certain milestones. See *id.* Rodriguez can earn a six million dollar bonus when he passes Willie Mays, Babe Ruth, Hank Aaron and Barry Bonds on the all-time home runs list. See *id.* If Rodriguez breaks Barry Bonds’ all-time home run record, he earns an additional six million dollar. See *id.* In order to collect the bonus money, Rodriguez must make extra promotional appearances and sign memorabilia for the Yankees as part of a marketing plan. See *id.*

279. See Len Elmore, *Turn Out the Lights, Agents’ Party Is Over*, SPORTS BUS J., July 9, 2001, available at <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=article.preview&articleID=7539> (discussing hardships for agents today as players negotiate on their own).

280. Karcher, *supra* note 74 (citing Elmore, *supra* note 279).

basis of commission. Prominent players such as NBA basketball greats Tim Duncan and Grant Hill hire attorneys on an hourly basis to negotiate contracts, paying thousands of dollars, instead of millions for legal services.<sup>281</sup> Grant Hill's attorney, Lon Babby, charged him \$100,000 to negotiate his first contract.<sup>282</sup> Had he paid the standard agent commission, Hill would have expended \$1.8 million.<sup>283</sup> As Boston Celtic Ray Allen noted, hiring an attorney on an hourly basis is "merely a good business decision."<sup>284</sup> This solution appears to be a good one, and agents would be wise to note that their careers may be in danger unless they change their ways and begin to act ethically. An ethical code could help them do this.

## V. RECOMMENDATIONS

The sports agent industry is largely "devoid of systematically enforceable regulations, which truly dictate minimum levels of professional expertise or accountability."<sup>285</sup> Sports leagues should enact a uniform regulation system, such as the American Bar Association Model Rules of Professional Conduct ("Model Rules").<sup>286</sup> With no strict guidelines, the leagues essentially give sports agents unrestricted power in the way they operate.<sup>287</sup> Leagues could also benefit by enacting a continuing education program to ensure that agents are current with regard to the laws and practices of each league.<sup>288</sup> Players would be well advised to understand the differ-

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281. See SHROPSHIRE & DAVIS, *supra* note 5, at 22 (discussing alternatives to contingent based agents, including hiring non-agent attorneys who are paid hourly rate to review contracts).

282. See *id.* at 23 (noting terms to negotiate first contract for Hill).

283. See *id.* (illustrating cost effectiveness of hourly paid agents).

284. See *id.* at 22 (internal quotation marks omitted) (showing that some athletes believe hiring hourly paid agents is "a good business decision").

285. Marc J. Kessler, *Who Can Best Represent Professional Athletes: Lawyer vs. Non-Lawyer*, COLUMBUS BAR ASS'N J. (2005), available at <http://www.peoplesbar.org/legalresources/Articles/AthleteRepresentation.pdf>.

286. See MODEL RULES OF PROFESSIONAL CONDUCT (2009), [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) (listing Model Rules); see also Kessler, *supra* note 285 (contrasting attorney-agents, who are held to profession's ethical standards, with non-attorney-agents, who are not).

287. See Kessler, *supra* note 285 ("Although regulatory standards may exist within a particular players association and there is a certification process, the players associations do not have the resources . . . to conduct comprehensive moral character investigations or background checks").

288. See Paul T. Dee, *Ethical Aspects of Representing Professional Athletes*, 3 MARQ. SPORTS L.J. 111, 115 (1992) (listing competence as one of elements regulated by professional codes, player's associations and state laws).

ence between attorney and non-attorney representatives.<sup>289</sup> The NFL now requires a graduate degree before an individual will be certified as a player agent.<sup>290</sup> This added emphasis on education should serve as a wake-up call to the professional athlete.

Attorneys have the educational background to have a better understanding of contracts, labor laws and tax ramifications.<sup>291</sup> An attorney-agent is bound by the Model Rules, and failure to comply with this code of ethics may result in disciplinary action.<sup>292</sup> This is not the case for the non-attorney agent. If attorney-agents were held to the Model Rules when participating in a field traditionally outside the bounds of law, a client would be better protected with respect to conflicts of interest.<sup>293</sup>

Under Model Rule 1.7, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”<sup>294</sup> However, an agent may represent two clients with competing interests if the client consents, the representation is not prohibited by law, the parties are not against each other, and the attorney reasonably believes that neither client’s interests will be compromised as a result of the dual representation.<sup>295</sup> This would prevent agents such as David Dunn from representing more than one player, at one position, on the same team.<sup>296</sup>

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289. See Kessler, *supra* note 285 (advising athletes to consider differences between attorney-agents and non-attorney agents, including education, ethical standards, and financial security).

290. See Agent Regulations, NFL Players Association, <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=233&pid=0&type=1> (last visited Oct. 31, 2009) (stating criteria for NFL agents, including graduate degree); see also Agent Application, National Basketball Player’s Association, <http://www.nbpa.com/documents/NBPAAgentApplication.pdf> (last visited Oct. 31, 2009) (allowing applicants to list negotiating experience if they have no undergraduate degree).

291. See Kessler, *supra* note 285 (stating lawyers better able to understand complex collective bargaining agreements).

292. See generally MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 286 (listing rules that must be followed). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 Disciplinary Authority; Choice Of Law, [http://www.abanet.org/cpr/mrpc/rule\\_8\\_5.html](http://www.abanet.org/cpr/mrpc/rule_8_5.html) (last visited Oct. 31, 2009) (showing authority for disciplinary action).

293. See Kessler, *supra* note 285 (explaining that athletes can bring malpractice action against attorney-agents who fail to comply with Model Rules); see also Dee, *supra* note 288, at 113 (calling application of professional ethical codes to professionals acting as sports agents “good policy”).

294. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 (2009), [http://www.abanet.org/cpr/mrpc/rule\\_1\\_7.html](http://www.abanet.org/cpr/mrpc/rule_1_7.html) (last visited Oct. 31, 2009).

295. See *id.* (explaining when conflict of interests may arise).

296. See Darren Heitner, *David Dunn of Athletes First Speaks to SBR*, SPORTSAGENTBLOG.COM, May 8, 2009, <http://www.sportsagentblog.com/2009/05/08/david-dunn-of-athletes-first-speaks-to-sbr/> (noting conflict of interest based on

Since the same standard of ethics is not applied to the non-attorney agent as the attorney-agent, attorneys may be quick to cite unfairness in imposing one standard to them and another to their non-attorney counterparts.<sup>297</sup> At the time of this article, few courts have addressed whether an attorney acting as a sports agent is held to the Model Rules or any other ethical standards that would apply to an attorney in a traditional legal role.<sup>298</sup> “It may also be argued that the activities of a sports agent or an attorney may be indistinguishable, for which reason it is appropriate to adopt a policy which supports the application of the ethical code regardless of form.”<sup>299</sup>

In the absence of an established agents’ ethical code, players may also be wise to retain licensed attorneys on a set fee instead of unlicensed representatives on a contingent fee.<sup>300</sup> While this may not be a popular approach with the certified sports agent, a player with a limited shelf life should welcome the opportunity to save millions of dollars.<sup>301</sup> Moreover, while the player may not longer receive the lavishing expensive gifts such as cars from their agents, the reality is, that with the millions of dollars saved by athletes utilizing an attorney on an hourly basis, the athlete can go out and buy ten cars.<sup>302303</sup> Additionally, for tasks that an athlete feels he or she cannot handle on his/her own (such as travel arrangements, personal appearances, etc), the athlete can hire a personal assistant or manager at a fee far less than the commission on a contract.<sup>304</sup>

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Dunn’s representation of Mark Sanchez and Kellen Clemens, both quarterbacks for Jets).

297. See Kessler, *supra* note 285 (stating that lawyers are regulated by Model Rules while non-lawyers are not).

298. See Dee, *supra* note 288, at 113 (pointing to *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1978), which held that Model Code applied to attorney acting as financial advisor).

299. *Id.* at 112.

300. See SHROPSHIRE & DAVIS, *supra* note 5, at 22 (describing benefits of contingency fees).

301. See *id.* at 23 (analyzing amount of money that athlete can save by hiring attorney at hourly rate).

302. See Couch, *supra* note 60, at 120-21 (naming Norby Walters and Lloyd Bloom as example of agents who have given large gifts, such as “clothing and airline tickets,” to athletes).

303. See SHROPSHIRE & DAVIS, *supra* note 5, at 25-26 (giving example that one athlete’s use of attorney saved him \$1.8 million dollars).

304. See Couch, *supra* note 60, at 112 (listing many roles agents take on for clients).

## VI. CONCLUSIONS

A sports agent's job should be to "vigorously safeguard and advance his client's interest with the undying loyalty of a fiduciary."<sup>305</sup> Also players, who have a short professional career, need to have an idea of how to successfully move on with their life. However, agents, who are often more sophisticated in business, usually cultivate the dependency of the naïve young athlete.<sup>306</sup> For many agents, once a client's playing career is over, the agent has no inclination to help a client with their mundane life activities.<sup>307</sup>

Although most agents do not like Drew Rosenhaus, many recognize his tremendous talent for negotiating.<sup>308</sup> For example, NFL attorney-agent Mark Bloom filed a grievance with the NFL Players Association against Rosenhaus for interfering with clients.<sup>309</sup> Nonetheless, Bloom said, "I can't say I'd necessarily do things the way he does, but he gets results. His drive and his work ethic is real."<sup>310</sup> This fact, however, highlights that being a good negotiator alone is not always enough. Though Rosenhaus has often won success for his clients, he has also failed others. Rosenhaus may not have the "huge" successes that he has now if he worked more collaboratively and more ethically, but he would more effectively represent *all* of his clients instead of just a select group. Agents like Rosenhaus should be harnessed with ethical rules specific to sports in order to better protect all athletes and not just the best of the best. Otherwise, when agents participate in deceptive tactics, such as Rosenhaus's ploy with Willis McGahee, this approach "leaves too many clubs feeling vanquished rather than gratified, which is not the way an equal partner in negotiation should feel."<sup>311</sup> For some

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305. *See id.* at 137 (discussing what responsibilities agents should have).

306. *See King, supra* note 260 (explaining inability of young athletes to make their own decisions or choose agent correctly).

307. *See SHROPSHIRE & DAVIS, supra* note 5, at 28 (listing all of the tasks which one agent has performed for their clients, many of which are management oriented; some of tasks are following: handling rape case, helping client move, etc.).

308. *See Burwell, supra* note 244 (calling Rosenhaus "the most hated man in football," nickname given to Rosenhaus by *Sports Illustrated*); Maske, *supra* note 237 (stating that other agents accuse Rosenhaus of stealing their clients).

309. *See Brown, supra* note 236 (discussing allegations brought against Rosenhaus).

310. *Id.* (discussing his view on Rosenhaus).

311. Crasnick, *supra* note 63 (discussing results that may occur because of aggressive negotiation styles).

team executives in the NFL, hearing that Rosenhaus is a player's agent may cause a collective groan and negative impression.<sup>312</sup>

It is undeniable that both Drew Rosenhaus and Ronald Shapiro have been incredibly successful in their respective roles as NFL and MLB agent.<sup>313</sup> It would seem, however, that the Shapiro method of negotiation is a more welcome and sustainable one, as it emphasizes the importance of long-term relationships and mutual-ity in contracts.<sup>314</sup> This has been proven by the large number of MLB teams that seem to have no hesitation in negotiating with Shapiro because of his reputation.<sup>315</sup> While hiring Rosenhaus as an agent may not be an absolute deterrent to dealing with a player, some teams may hesitate when deciding whether or not to enter contract negotiations with "The Shark."

Negotiation is based on relationships.<sup>316</sup> Agents who pursue contracts that have the potential to lead to other contracts yield a larger return-on-effort.<sup>317</sup> Nonetheless, many negotiators approach a contract as a one-time deal; "Go in, score, get out."<sup>318</sup> Shapiro believes the most effective negotiating comes when you help the other side to achieve at least some of what they want.<sup>319</sup> This helps build relationships that can lead to an infinite number of future deals.<sup>320</sup> Consequently, although Rosenhaus has made millions with his negotiating techniques so far, his position at the top of his game may start to slip if his relationships with teams have been soured.<sup>321</sup>

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312. *See, e.g.*, Brown, *supra* note 236 (stating that Rosenhaus' relationship with players such as Javon Walker and Terrell Owens has created tension between players and teammates).

313. *See* Brown, *supra* note 236 (stating that Rosenhaus represents more N.F.L. players than any other agent).

314. *See generally* Shapiro & Jankowsky, *supra* note 187.

315. *See* Barker, *supra* note 189 (describing how MLB umpires called on Shapiro to help them deal with union leaders).

316. *See* Shapiro & Jankowsky, *supra* note 187, at 229 (explaining that building relationships is necessary for superior negotiating).

317. *See id.*

318. *See id.* at 230 (explaining what negotiation style does not lead to good long term results).

319. *See id.* at 230-31 (discussing what works in negotiating).

320. *See id.* at 231 (discussing what may result by using property negotiating technique).

321. *See, e.g.*, Associated Press, *supra* note 274 (showing anger Rosenhaus' behavior caused New York Yankees, Boston Red Sox, and Colorado Rockies); *see also* Burwell, *supra* note 244 (describing how Tampa Bay Buccaneers fined Rosenhaus' client, Errict Rhett \$465,000 for 93 day hold-out).

Players and owners generally agree that there is a problem in the player representation business.<sup>322</sup> “Lack of competence, client stealing, and overly aggressive negotiating tactics are all common . . . . [E]veryone, including players, heads of the players associations, and even many agents, universally agrees that such behavior is a problem.”<sup>323</sup> NFL Hall of Fame player Kellen Winslow Sr. said that anyone paying a three percent commission to his agent is being ripped off: “They have decided [to sign with an agent] because agents have sold them a bag of goods of what they can do for them.”<sup>324</sup> This should remain as a word of caution to professional athletes to remain smart when deciding on their representation.<sup>325</sup> While acting as an agent, like anything else, is a business, agents need to remember that they are hired as a fiduciary and as an advocate for their clients.<sup>326</sup>

In the growing era of “show me the money,” it would be wise for athletes to hire an attorney to help them maximize their potential earnings. However, this attorney cannot be just any attorney. He must be a well educated, well trained and ethical, and most importantly, he must seek to promote his client and not himself. As the late attorney-agent Mark McCormack – founder of IMG and the representative for Jack Nicklaus, Gary Player, Greg Norman, and Annika Sorenstam, among many others – once said: “The client is the story, not the agent . . . . We make money by helping the client make money. The second you become more important than the client you represent is the moment you need to get out of this business.”<sup>327</sup>

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322. See Karcher, *supra* note 74, at 739 (introducing current problems in player representation business).

323. *Id.*

324. Liz Mullen, *Winslow Sr.'s Advice: Don't Sign Quickly, Don't Pay 3% Negotiation Fee*, SPORTS BUS. J., (Jan. 19, 2004) (explaining views of certain professional athletes).

325. See Kessler, *supra* note 285 (listing reasons why choosing representation is difficult but important).

326. See Couch, *supra* note 60, at 137 (describing fiduciary duty of agent to “advance his client’s interest”).

327. Betsy Nagelson McCormack & Steve Eubanks, *Golf's Ultimate CEO: Mark McCormack was the World's First Super-Agent, and His Methods Stand Up Today*, GOLF DIGEST, Oct. 2006, at 35 (explaining role of agents).

