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# Articles

## WHAT'S A "CLEAN" AGENT TO DO? THE CASE FOR A CAUSE OF ACTION AGAINST A PLAYER'S ASSOCIATION

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### I. INTRODUCTION

Three days prior to the 2009 Sugar Bowl, featuring sixth-ranked University of Utah versus fourth-ranked University of Ala-

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bama, Alabama announced that its star left tackle Andre Smith was suspended from the game due to having contact with an agent in violation of team rules.[1] A few months later the Alabama Attorney General's office stated Smith broke no laws in this situation.[2] Smith eventually hired thirty-year-old Alvin Keels, a single practitioner firm, as his agent, whose clients list included cornerback DeAngelo Hall and safety Gibril Wilson. After a troubling performance at the February 2010 NFL Combine in which Smith appeared badly out of shape, Smith fired the controversial Keels and hired attorney Rick Smith of Priority Sports, a full-service firm with a strong reputation since its inception in 1985.[3]

It was alleged that the reputable Rick Smith, hired three days before the 2009 NFL Draft, was brought in to provide credibility to the shaken draft status of Andre Smith, whose character was facing serious questions.[4] The move seemed to work, as Smith was chosen as the sixth overall pick by the Cincinnati Bengals.[5] Just weeks after the draft, however, Andre Smith fired Rick Smith and rehired Keels, despite the advice of Bengals' officials who advocated that he remain with Rick Smith.[6] The Bengals' pleas failed and Priority Sports issued a statement questioning Andre Smith's character.[7]

Did Keels do anything wrong? It is difficult to know. As the saying goes, often times where there is smoke there is fire, and

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1. *See* Tony Barnhart, *Smith's Suspension Will Be Good for Alabama*, ATLANTA J. & CONST. (Dec. 30, 2008, 8:23 AM), http://www.ajc.com/blogs/content/shared-blogs/ajc/cfb/entries/2008/1-2/30/smiths_suspensi.html (discussing suspension and outlook for Alabama).

2. *See* Gentry Estes, *AG: No Agent Wrongdoing in Smith Case*, HUNTSVILLE TIMES, June 11, 2009, at 5D (describing lack of probable cause to prosecute under Alabama Sports Agent statutes).

3. *See* Aaron Wilson, *Andre Smith Back With Alvin Keels*, (May 19, 2009, 8:50 PM), http://profootballtalk.nbcsports.com/2009/05/19/source-andre-smith-back-with-alvin-keels/ (recounting reasons for Andre Smith's hiring of Rick Smith); *Priority Sports:About Us*, PRIORITY SPORTS, http://www.prioritybasketball.biz/football/about_us.html (last visited Oct. 23, 2010) (describing firm background and noting superior reputation of firm).

4. *See* Wilson, *supra* note 4 (explaining that Smith was suspended, bolted out of combine without informing officials, and was out of shape for workout).

5. *See* Joe Reedy, *Agents' Status Still in Flux*, CINCINNATI ENQ., May 14, 2009, at 1C (adding that Smith was selected in first round draft by Cincinnati Bengals).

6. *See* Wilson, supra note 4 (explaining Smith's switch to Keels); Mike Florio, *Smith is Getting Pulled in Many Directions* (May 13, 2009, 11:40 AM ET), http://profootballtalk.nbcspo-rts.com/2009/05/13/andre-smith-is-getting-pulled-in-many-directions/ (commenting on Smith's controversial switch to Priority Sports).

7. *See* Mike Florio, *Priority Sports Slams Andre Smith*, PROFOOTBALLTALK.COM (May 21, 2009, 2:42 PM ET), http://profootballtalk.nbcsports.com/2009/05/21/priority-sports-slams-andre-smith/ (quoting Priority Sports' statement that Smith was distracting to company and did not match character of clients Priority represents).

there are athlete-agents walking all over the place surrounded by smoldering black clouds. The unscrupulous conduct of agents has been well documented, ranging from breaches of fiduciary duties, fraud, conflicts of interests, unethical behavior, tortious interference with contractual relations and many more questionable activities.[8] The Fall of 2010 provided a plethora of examples.[9] Yet,

8. *See, e.g.,* Lankford v. Irby, 2006 WL 2828548 (D.N.J. September 29, 2006) (discussing breach of fiduciary duty); In re Ekuban, 2004 WL 1088340 (Bankr. N.D. Tex. 2004) (discussing fraud and false representation); Hillard v. Black, 125 F.Supp. 2d 1071 (N.D. Fla. 2000) (discussing breach of fiduciary duty); Jones v. Childers, 18 F.3d 874, 899 (11th Cir. 1994) (disussing fraud); Brown v. Woolf, 554 F. Supp. 1206 (S.D. Ind. 1983) (discussing fraud and breach of fiduciary duty); *see also* Cuyahoga County Bar Ass'n v. Glenn, 649 N.E.2d 1213 (Ohio 1995) (discussing fraud); Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984) (discussing breach of fiduciary duty based on fraud and misrepresentation); Poston v. NFLPA, 2002 WL 31190142 (E.D.Va., August 26, 2002) (discussing violation of agency rules); Steinberg, Moorad & Dunn, Inc. v. Dunn, 136 Fed. Appx. 6 (9th Cir. 2005) (discussing contractual violations); Smith v. IMG Worldwide, Inc., 360 F.Supp. 2d 681 (E.D. Pa. 2005); Walters v. Fullwood, 675 F.Supp. 155 (S.D.N.Y. 1987) (discussing breach of agency agreement). *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 (2000) (discussing negative effect of agents' unfair competition); Liz Mullen, *Brian Bosworth Files Suit Against NFL Agent Gary Wichard* (Apr. 29, 2010), www.sportsbusinessdaily.com/article/138611 (pointing out New York case involving breach of fiduciary duties); David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31 (2003) (discussing ethical practices in sport agency sector); Melissa Neiman, *Fair Game: Ethical Considerations in Negotiations by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123 (2007) (explaining that agent fees are often unethically high); Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be The "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 759 (2006) ("The agent business is fraught with conflicts of interest at all sorts of levels"); Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193 (2004) (listing situations in which conflicts of interest arise); Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91 (2010) (writing about specific individuals who have shown unethical conduct; Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781 (2006) (stating that clients are increasingly suing agents for tortious interference with contractual relations);

9. *See* Joe Schad & Pat Forde, *Pouncey denies accepting money*, ESPN.COM (July 22, 2010, 12:23 PM), http://sports.espn.go.com/ncf/news/story?id=5398414 (recounting NCAA's investigation into allegations that Florida lineman Maurkice Pouncey received $100,000 from agent while still playing at Florida). The NCAA was concerned about whether Maurkice's twin brother, Mike, still a lineman at Florida, may have also received improper benefits. *See id.* (noting both brothers "provided phone, bank and credit card records that do not show any large payments"). *See also* Stewart Mandel, *NCAA Turning up Heat on Agent-Player Relations with More Probes*, SPORTSILLUSTRATED.COM (July 19, 2010), http://sportsillustrated.cnn.co-m/2010/writers/stewart_mandel/07/19/ncaa.agents/index.html (outlining NCAA's investigation into whether several players from Universities of North Carolina, South Carolina, Georgia and Alabama may have improperly attended party hosted by agent in Miami); Ivan Maisel & Mark Schlabach, *Dareus May Have Attended Agent's Party*, ESPN.COM, (July 22, 2010), http://sports.espn.go.com/ncf/news/story?id=5396236 ("The NCAA is trying to determine who paid for

despite what universities, legislators, coaches and the general public might think, not all agents are engaged in immoral, impermissible or illegal behavior.

While there are several layers of legislation and regulation for athlete-agents, enforcement is severely lacking.[10] Consequently, agents that believe in carrying on their profession in an honest and legal manner ("clean agents") are left at a significant competitive disadvantage.[11] Seemingly betrayed by the very schemes they willingly obey, this article will make the case for a cause of action by agents against their preeminent regulator, the player unions.

In each of the "Big 4" sports leagues, the National Football League ("NFL"), Major League Baseball ("MLB"), National Basketball Association ("NBA") and National Hockey League ("NHL"),

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the players' transportation to Miami, and lodging, food and entertainment while they were there."). Agent Gary Wichard was fingered for possible wrongdoing in the investigations. *See* Mike Florio, *NCAA Investigation Could Result in NFLPA Suspension of Wichard*, PROFOOTBALLTALK.COM (Sept. 30, 2010, 6:37 PM ET), http://profootballtalk.nbcsports.co-m/2010/09/30/ncaa-investigation-could-result-in-nflpa-suspension-of-wichard/ (noting Wichard's financial connections to players).

10. *See* Associated Press, *Report: State Agent Laws Unenforced*, ESPN.COM (Aug. 17, 2010), http://sports.espn.go.com/ncaa/news/story?id=5470067 (stating that "more than half of 42 states with sports agent laws have yet to revoke or suspend a single license, or invoke penalties of any sort). The Federal Trade Commission has likewise never revoked a single license or invoked a penalty. *See id.* (adding that Federal Trade Commission was granted authority to oversee state sports agents in 2004). *See also* Telephone interview with Robert Boland, Ass. Prof. of Sports Management, Preston Robert Tisch Center for Hospitality, Tourism, and Sports Management, New York University (Mar. 11, 2010) (claiming rules are "shield laws" instead of enforcement acts). Professor Boland was formerly an NFLPA Certified Contract Advisor and writes about the business of football for www.nationalfootballpost.com. *See also*, Telephone interview with Robert H. Lattinville, Chairman, Sports Law Practice Group, Stinson Morrison Hecker LLP (Mar. 11, 2010) (discussing lack of resources to properly enforce rules). Mr. Lattinville has been an NFLPA Certified Contract Advisor since 1990 and is also a sports law professor. *See also*, Telephone interview with Eugene Parker, Maximum Sports Management (Mar. 25, 2010) (condemning lack of informed player decisions). Mr. Parker is an NFLPA Certified Contract Advisor whose clients include Hines Ward, Richard Seymour, Emmitt Smith, Larry Fitzgerald, Steven Jackson, Michael Crabtree and Dez Bryant. *See also*, E-mail from Adam Paget, NHLPA Certified Player Agent, PuckAgency LLC (Mar. 30, 2010, 12:14 PM EDT) (on file with author) (discussing lack of enforcement of agency rules); Telephone interview with Joshua Golka, Attorney, Law Office of Joshua P. Golka (Mar. 29, 2010) (attributing problem to lack of prosecution and investigation). Mr. Golka regularly represents agents, athletes and athletic organizations and is the creator and moderator of Golka's Athlete Agent Regulation Blog.

11. Telephone interview with Robert Boland, *supra* note 10 (noting enforcement acts only solve narrow range of problems); Telephone interview with Robert H. Lattinville, *supra* note 10 (emphasizing benefits of transparency in recruiting); Telephone interview with Eugene Parker, *supra* note 10 (noting effects of lure and excitement of business and potential financial gain); E-mail from Paget, *supra* note 10 (describing competitive disadvantage agents claim to face); Telephone interview with Joshua Golka, *supra* note 10 (promoting agent self-regulation).

there exists a corresponding players union or players association ("PA") that represents the players pursuant to labor law: the National Football League Players Association ("NFLPA"), Major League Baseball Players Association ("MLBPA"), National Basketball Players Association ("NBPA") and National Hockey League Players Association ("NHLPA"). While this article will consider the agent industry as it applies to each of the "Big 4" leagues and unions, the focus will primarily be on the NFL and NFLPA, where agent competition is arguably its fiercest: as of the 2010 NFL season, there were 773 agents certified by the NFLPA, but only 338 (43.7%) of them had clients.[12]

This article will first examine the current regulatory schemes and the problems therein, and will be followed by an examination of possible solutions to problems in the agent industry. Finally, this article will conclude by explaining that private enforcement by agents is necessary to prevent the further deterioration of the athlete-agent industry.

## II. CURRENT AGENT REGULATION SCHEMES

### A. State Legislation

#### 1. *Uniform Athlete Agents Act ("UAAA")*

As of March 2010, the Uniform Athlete Agents Act ("UAAA") has been adopted in thirty-nine states.[13] The UAAA is, to each state that has passed it, the primary piece of legislation in the regulation and punishment of unscrupulous athlete-agents. In 1997, at the request of the NCAA and several major academic institutions, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") agreed to draft a model law to be adopted by each state which would regulate athlete-agents.[14] The legislation was first

12. *See* E-mail from Caitlin Reddinger, Administrative Assistant, Salary Cap & Agent Administration, NFLPA (Mar. 23, 2010, 1:57 PM. EDT) (on file with author) (noting number of certified agents); NFLPA Player-Agent Report (on file with NFLPA) (discussing agent competition).

13. *See* NCAA, Latest News, *Contact Information for States that Passed the Uniform Athlete Agents Act* (July 29, 2010), http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/late-st+news/2010+news+stories/july+latest+news/contact+information+for+states+that+passed+the+uniform+athlete+agents+act#pa (listing states that have passed UAAA and providing contact information for authority in each state); Joshua Golka, GOLKA'S ATHLETE AGENT REGULATION BLOG, http://www.gaarb.com/ (last visited Oct. 22, 2010) (noting adoption of UAAA).

14. *See* Kenneth L. Shropshire, *NCAA Materials on Agents and NCAA-Regulated Student-Athletes*, SM009 A.L.I. – A.B.A. 121 (2007) (describing model law). The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a contingency of more than 300 legislators, judges, lawyers and professors (known as commissioners) who "study and review the law of the states to determine which

presented in the fall of 2000 and was quickly passed in several states.[15]

Section 2 of the UAAA, Definitions, defines "athlete agent" as "[a]n individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract."[16] Agents, however, have the important task of reviewing each state statute, which may define an athlete agent or student-athlete differently, and often more broadly, than the UAAA.[17] Furthermore, one needs to recognize that under these broad definitions, nearly everyone attempting to create a professional relationship with an athlete may be considered an agent, including the largely unregulated and unknown population of agent "runners."[18] The term "runner" generally describes someone employed by an agent, typically a young person, whose job is to become friendly with the student-athlete, providing the student-athlete with cash, meals, clothes or other gifts and ultimately steering the student-athlete towards the employing agent.[19] Because runners operate in a shady world of independent contractual relationships, enforcement bodies face difficulties in tracking runners down and associating them and their illegal actions with specific agents.[20]

Section 3 of the UAAA submits athlete agents to the jurisdiction of the state in which he or she is acting as an agent, and appoints the Secretary of State in that state as his or her agent for service of process in related civil actions.[21] What constitutes "acting" in the state is a personal jurisdiction issue outside the scope of

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areas of law should be uniform." *National Conference of Commissioners on Uniform State Laws*, UNIF. LAW COMMISSION, http://www.nccusl.org/Update/ (last visited Oct. 23, 2010). "The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable." *Id.*

15. *See* UNIF. ATHLETE AGENT'S ACT § 2(2) (2000), *available at* www.law.upenn.edu/bll/arch-ives/ulc/uaaa/aaa1130.htm [hereinafter UAAA] (defining athlete agent).

16. *Id.* "The term includes an individual who represents to the public that the individual is an athlete agent."*Id.*

17. *See* E-mail from Mike Powell, Managing Attorney, Office of the Texas Secretary of State, *Athlete Agent Legislation Enforcement* (Apr. 4, 2010, 12:22 p.m. EDT) (on file with author) (noting differences between state statutes and UAAA).

18. Interview with Jared Fox, NFLPA Certified Contract Advisor, Sportstars, Inc. (Apr. 13, 2010) (providing definition and purpose of "runners").

19. *See id.* (providing duties of "runners").

20. *See id.* (noting difficulties of prosecution).

21. *See* UAAA §3(a) (explaining procedures for agent jurisdiction and service of process). The comment to Section 3 recognizes "that the appropriate state office to administer [the UAAA] may vary from State to State." *Id.* § 3 cmt.

this article.[22] Important to the regulations of agent is knowing who these agents are: Sections 4 through 9 require agents to register with the Secretary of State, set the fees and conditions of registration and establish the right of the Secretary of State to deny, suspend, revoke or refuse to renew the agent's registration.[23]

Section 10 controls the form and content of the representation contract agents sign with athletes, in particular student-athletes.[24] Notably, this section provides that every contract must contain the following words as a "conspicuous notice in boldface type in capital letters stating:"

> WARNING TO STUDENT-ATHLETE
>
> IF YOU SIGN THIS CONTRACT:
>
> (1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;
>
> (2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, OR BEFORE THE NEXT SCHEDULED ATHLETIC EVENT IN WHICH YOU MAY PARTICIPATE, WHICHEVER OCCURS FIRST, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR; AND
>
> (3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.[25]

Furthermore, Sections 11 and 12 require the agent to give notice to the educational institution within seventy-two hours and reiterates the athlete's right to cancel the contract.[26] Section 14 lists Prohibited Acts, Section 15 provides for Criminal Penalties, and Section 16 provides for a civil remedy by the academic institution

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22. *See, e.g.,* Asahi Metal Industry Co., Ltd. v. Super. Ct. of Cal., Solano County, 480 U.S. 102 (1987) (holding exercise of jurisdiction would be unreasonable due to burden and lack of sufficient state interests); *see also* Hanson v. Denckla, 357 U.S. 235 (1958) (noting lack of personal jurisdiction); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding proper assertion of in personam jurisdiction based on sufficient in-state interest).

23. *See* UAAA §§ 4-9 (describing requirements for agent athletes).

24. *See id.* § 10 (describing specifics of representation contracts).

25. *Id.*

26. *See id.* §§ 11-12 (reiterating agents' requirements and athletes' rights).

against an agent should the institution incur any damages as a result of the agent's actions.[27]

The UAAA states that its primary purpose "is to protect student-athletes and educational institutions from athlete agents who engage in unsavory and, oftentimes, illegal practices."[28] Although the UAAA states that one of its purposes is to "provide a system that allows states to honor the registration of athlete agents from states with similar laws," there is no indication that the UAAA was passed with any direct intention to protect clean agents in their profession.[29] Accordingly, if a state were to enact and effectively enforce the UAAA, clean agents would be protected. The UAAA boasts of its "strong penalties for violators" which would seem to effectuate the primary goal of the legislation.[30]

On its face, the UAAA is the antidote for what ails the agency industry. In practice, the UAAA has been toothless and ineffective.[31] Several, if not most of the sections of the UAAA are not complied with and not enforced.[32] Most agents have been forced to register in each state they are "doing business," and Section 14 (b)1 prohibits "initiat[ing] contact with a student-athlete unless registered under [the UAAA]."[33] The regular practice of agents, however, includes recruitment of players in states where the agents are not registered and do not register unless and until they believe they are going to sign the player.[34]

One reason agents do this is the failure of the only provision in the UAAA meant to help agents, whereby states would "honor" the registration of an agent in another state with similar legislation. Presently, only Alabama, Arizona, Oregon, Pennsylvania and South

27. *See id.* §§ 14-16 (describing further sections of UAAA).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* Telephone Interview with Boland, *supra* note 10 (noting agent's notions on UAAA); Telephone Interview with Lattinville, *supra* note 10 (detailing Lattinville's theories on UAAA); Telephone Interview with Golka, *supra* note 10 (describing agents' thoughts on UAAA). *See also*, e-mail from Rick Karcher, Director, Florida Coastal School of Law Center for Law and Sports (Apr. 8, 2008, 10:41 AM EDT) (on file with author) (discussing Karcher's view on UAAA). *See also* Associated Press, *supra* note 11 (finding under-enforcement of state sports agency laws).

32. *See* Telephone Interview with Boland, *supra* note 10 (discussing compliance and enforcement of UAAA); Telephone Interview with Lattinville, *supra* note 10 (addressing compliance and enforcement of UAAA); Telephone Interview with Golka, *supra* note 10 (describing compliance and enforcement of UAAA).

33. UAAA § 14(b)1 (2000).

34. *See* Telephone Interview with Lattinville, *supra* note 10 (explaining regular practice of agents).

Dakota offer any kind of discount in registration for agents who have previously registered with another state.[35] With annual or bi-annual registration fees generally costing a few hundred dollars in addition to expensive bonding requirements, states most likely see agent registration as an easy revenue source and an effective way to track and limit agents practicing in their respective states.[36]

Reciprocal registration is not the only issue where the states are not sufficiently cooperating. The comment to Section 6 of the UAAA states that Secretaries of State ought to "exchange information about [the] denial, suspension, revocation or refusal to renew registration of athlete agents."[37] The stated purpose of such an exchange would be to "reduce the expense of administering [the] act and provide for more effective enforcement."[38] However, to date, there is no agreement among the states to share information about athlete agents.[39]

Furthermore, pursuant to the UAAA, probably almost every agent-athlete contract is voidable by the player.[40] Section 10(c) requires agents to give the conspicuous, boldface, capital letter statement copied above.[41] Section 10(d) states that if this provision is not in the contract, the contract is then voidable by the student-athlete.[42] As will be discussed in more detail below, each of the PAs in the Big Four has regulations governing agent registration and conduct.[43] These regulations also provide a required standard

35. *See* Telephone Interview with Golka, *supra* note 10 (listing states that offer discount).

36. *See* Telephone Interview with Boland, *supra* note 10 (discussing agent registration in states); Telephone Interview with Lattinville, *supra* note 10 (addressing registration of agents within states); Telephone Interview with Golka, *supra* note 10 ((describing states' views of agent registration); Telephone Interview with Golka, *supra* note 10 (noting state agent registration views). The actual fees for each state can be viewed by visiting the website for each Secretary of State. *See e.g.*, Florida Department of Business & Professional Regulation, *Athlete Agent Licensure Application*, https://www.myfloridalicense.com/CheckListDetail.asp?SID=&xactCode=1030&clientCode=6001&XACT_DEFN_ID=6183 (last visited Oct. 17, 2010) (requiring $1,255 fee); Tennessee Department of State, *Athlete Agent Licensing*, http://tenn-essee.gov/sos/sportsagent.htm (last visited Oct.11, 2010) (providing link to athlete agent application, requiring filing fee of $500).

37. UAAA § 6 cmt.

38. *Id.*

39. *See* Email from Powell, *supra* note 17(describing lack of existing agreements between states).

40. *See* UAAA §10 (explaining student-athlete's ability to void contracts).

41. *See id.* (reviewing standard agreement).

42. *See id.* (expounding on student-athlete's right to void contracts).

43. *See The NFLPA Regulations Governing Contract Advisors*, NFL PLAYERS ASSOCIATION, http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf (last visited Oct. 23, 2010) (noting

agreement to be used between the agent and the athlete.[44] None of these standard agreements contain the language required by the UAAA, yet an agent in violation of this provision would probably argue that using the standard PA agreement is sufficient for satisfying the UAAA. While possible that agents execute side agreements with the players to comply with the UAAA, this is highly unlikely.

2. *Other State Laws*

California, Michigan and Ohio have not passed the UAAA but have otherwise passed state laws designed to regulate athlete agents.[45] These laws provide varying degrees of regulation, by listing prohibited conduct, possible penalties and, in the cases of California and Ohio, requirements of registration.[46] In addition, states are free to investigate and prosecute agents under criminal laws. The most realistic crimes an agent might be charged with are bribery, embezzlement and criminal fraud.[47] Criminal prosecutions of athlete-agents, however have been rare.[48]

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that NBPA Regulations Governing Player Agents, MLBPA Regulations Governing Player Agents and NHLPA Regulations Governing Player Agents [Hereinafter NFLPA Regulations, NBPA Regulations, MLBPA Regulations and NHLPA Regulations]are not readily available). They can be obtained by contacting their offices via their respective websites or through membership with the Sports Lawyers Association. *See* www.nbpa.com; mlbplayers.com; nhlpa.com; www.sportslaw.org (setting forth contact information for Associations).

44. *See id.* (discussing various aspects of regulations governing agents).

45. *See* Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE §§ 18895-18897.97 (1997) (noting states that have passed UAAA); MICH. COMP. LAWS § 750.411e (1988) (setting forth athlete agent regulations); OHIO REV. CODE ANN. §§ 4771.01-02 (1988) (setting forth athlete agent regulations); *see also* Robert P. Baker, *The Unintended Consequences of the Miller-Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation*, 12 UCLA ENT. L. REV. 267 (2005) (contrasting California's law with UAAA).

46. *See* Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE §§ 18895-18897.97 (noting California athlete regulation provisions); MICH. COMP. LAWS § 750.411e (setting forth Michigan regulations); OHIO REV. CODE ANN. §§ 4771.01-02. (specifying Ohio agent regulations)

47. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "bribery" as "[t]he corrupt payment, receipt, or solicitation of a private favor for official action," defining "embezzlement" as "[t]he fraudulent taking of personal property with which one has been entrusted, especially as a fiduciary," and defining "fraud" as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment," and adding that "[c]riminal fraud is fraud that has been made illegal by statute"); *see also* MODEL PENAL CODE § 240.1 (proscribing bribery).

48. *See* Darren Heitner, *A Year and a Day Behind Bars for Andrew Moss*, http://www.sportsagentblog.com/2009/10/26/a-year-and-a-day-behind-bars-for-andrew-moss/ (last updated Oct. 26, 2009) (contrasting sentence agent received with maximum available); Michael O'Keeffe, *Agent of Change, Tank Black Is Out of Jail and Out to Prove in New Book That He Didn't Defraud Sports Stars*, DAILY NEWS, at 82 (Sept. 13, 2009) (outlining charges of fraud levied against agent); United States v. Wal-

Lastly, agents, like anyone else, are subject to potential liability under state common and civil laws. In this regard, agents could potentially be liable to a large number of claimants, including the athlete, a college, a business partner, the state or anyone else injured by the agent's conduct.[49] For example, Section 16 of the UAAA provides for a right of action against an athlete agent by an educational institution.[50] Additionally, Section 17 proposes to allow the Secretary of State to assess civil penalties against agents.[51]

Despite all these criminal and civil remedies, a law is only as effective as its enforcement. Unfortunately, a person with knowledge of the sports and agent industries do not think the UAAA or any other state laws are being actively and effectively enforced. Consequently, athlete-agents have acted with relative impunity from state law.

### B. Federal Legislation: Sports Agent Responsibility and Trust Act ("SPARTA")

In twenty-five years as the head coach of the Nebraska football team, Tom Osborne won three national championships and was widely regarded as a symbol of class in college football, even though his teams had their share of unsavory characters and were twice subjected to NCAA sanctions during his tenure.[52] In 2000, three years after he retired from coaching, Osborne was elected to be the U.S. House of Representative from Nebraska.[53] As a member of Congress, Osborne was instrumental in the passing of the Sports Agent Responsibility and Trust Act ("SPARTA") in 2004.[54]

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ters and Bloom, 913 F.2d 388 (7th Cir. 1990) (finding reversible error by lower court); People v. Sorkin, 407 N.Y.S.2d 772 (N.Y. App. Div 1978).

49. *See, e.g., Agent Ducks Charges, Pays School*, S.F. CHRON., June 3, 1988, at D5 (discussing agent's liability to school).

50. *See* UAAA §16 (2000) (describing schools' right to sue athlete agents).

51. *See id.* § 17 (dictating Secretary of State's right to assess civil penalties against athlete agents).

52. *See Osborne: It's Time to Go*, N.Y. POST, (Dec. 11, 1997) (discussing legacy of Osbourne).

53. *See* Homestead National Monument of America, http://www.nps.gov/home/historycult-ure/upload/OsborneBi0.pdf (last visited Oct. 11, 2010) (summarizing Osbourne's tenure in football and political career).

54. *See* Sports Agent Responsibility and Trust Act, 15 U.S.C.S. §§ 7801-7807 (2004) (regulating agents' activities). *See also Sports Agent Responsibility and Trust Act: Hearing on H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. 4 (2003) (noting that Osborne made prepared statement to subcommittee and was witness during hearing); John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, n.3 (2006) ("SPARTA was sponsored by Rep. Bart Bordon . . . and was created in conjunction with Rep. Tim Osborne . . . former University of Nebraska, Lincoln, head football coach.").

The heart of the act lists the unlawful activity covered under the act, including soliciting clients with misleading information, making false promises, providing anything of value as an inducement or neglecting to provide a required disclosure statement warning the student-athlete that he or she may lose his or her eligibility.[55] This statutory format is nearly identical to Section 10 of the UAAA described earlier.[56] SPARTA deems any violation to be an "unfair or deceptive act or practice" within the jurisdiction of the Federal Trade Commission (FTC).[57] In addition, SPARTA provides for civil causes of action by states and educational institutions against agents in the same manner as the UAAA.[58]

Like the UAAA, SPARTA provides the legislative framework to end unethical and illegal behavior by agents.[59] However, to date, the FTC has not brought an action against any agent and some members of its staff were generally unaware that the statute existed.[60]

### C. NCAA Rules and Bylaws

On the collegiate level there are two relevant sets of regulations: first, the NCAA Bylaws and second, the rules of each individual member institution. As a "voluntary organization through which the nation's colleges and universities govern their athletic programs," the NCAA has no jurisdiction over agents.[61] The NCAA consists of over a thousand member institutions, all of which participate in the creation of NCAA rules and voluntarily submit to its authority.[62] As a private organization not subject to the scrutiny of a state actor the NCAA can only exercise plenary power over its mem-

55. *See* 15 U.S.C. § 7802 (2004) (describing unlawful conduct SPARTA is designed to combat).

56. *See* UAAA § 10 (2000).

57. 15 U.S.C. § 7803.

58. *See* 15 U.S.C. §§ 7804-7805 (2004) (providing for civil action by states and educational institutions).

59. *See* 15 U.S.C. §§ 7802-7805 (consisting of legislation on unethical behavior and causes of action thereunder).

60. *See* E-mail from Henry Buckmon, Program Support Specialist, Office Bureau of Consumer Protection, Federal Trade Commission (Mar. 19, 2010, 1:11 PM EDT) (on file with author) (noting that no action has been levied against any agent); E-mail from James Reilly Dolan, Assistant Director for Financial Practices, Federal Trade Commission (Mar. 22, 2010, 1:29 PM EDT) (on file with author) (discussing application of SPARTA).

61. *NCAA President Position Description*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaa-home?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/association-wide/ncaa_president_description, (last visited Oct. 23, 2010).

62. *See id.* (denoting membership among colleges and universities).

ber institutions, their employees and their student-athletes.[63] Consequently, while the NCAA has extensive regulations concerning contact with agents, the NCAA can only enforce punishment against the member institution, its employees and student-athletes.[64] One of the most common situations where regulation is involved is when a student-athlete loses eligibility for receiving a gift of some kind from an agent.[65] If the student-athlete has already moved on to his professional career, however, the school often faces the penalties alone because the student is no longer within the "jurisdiction" of the NCAA.[66]

The NCAA's enforcement of these bylaws has probably made discovering agent misconduct more difficult. Prior to the 2008 season, the NCAA suspended Oregon tackle Fenuki Tupou for one game after he received a meal and $100 from an agent.[67] Tupou had met the agent for lunch to discuss future representation, as is customary among senior student-athletes.[68] When the meal was over, the agent, Tim Norling of LMM Sports Management, allegedly paid for the meal and gave Tupou $100 in a handshake, de-

63. *See* NCAA v. Tarkanian, 488 U.S. 179 (1988) (discussing scope of NCAA's power).

64. *See* National Collegiate Athletic Association, 2009-10 NCAA DIVISION I MANUAL (2009), *available at* http://www.ncaapublications.com/p-4180-2010-2011-ncaa-division-i-manual.aspx, (speaking about rules and punishments); Bylaws 10.1, 11.1.4, 12.1.2, 12.2.4.3 and 12.3 (covering member institutions, employees and student-athletes).

65. *See* Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004) (upholding NCAA bylaws despite special circumstances surrounding student-athlete's situation as professional skier); Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976) (providing rational basis review for NCAA rule); Barnhart, *supra* note 2 (discussing repercussions of student-athlete accepting gift from agent); Oliver v. NCAA, 920 N.E.2d 203 (Ohio Com. Pl. 2009) (noting scope of NCAA power); *Dez Reportedly Hires Parker Football Former OSU Receiver's New Agent a Longtime Deion Associate* , THE OKLAHOMAN, Jan. 11, 2010, at 14B (mentioning punishable offenses); Eddie Timanus, *Williams Can't Return to USC*, USA TODAY, Aug. 27, 2004 at 1C (discussing impact of violations on college football programs);.

66. *See* Gary Klein, *USC Meets with NCAA; Trojans Finally Face Music; Allegations Regarding Bush and Mayo Are the Centerpiece of Hearing in Front of Infractions Committee*, L.A. TIMES, Feb. 18, 2010, at C6 (describing scandal involving USC and Reggie Bush); Michael Dobie, *Red-Flagged, NCAA May Have Strong Case to Sanction St. John's*, NEWSDAY), Mar. 26, 2000, at C03 (noting that schools are left to pick up pieces after student-athletes leave for professional career after breaking NCAA rules while enrolled in school); Lisa Olson, *Camby Has Felt Both Bark and Bite from NCAA*, DAILY NEWS (New York), Mar. 16, 2000, at 80 (showing that sometimes student-athletes that turn professional are held liable for monetary damages).

67. *See* John Hunt, *UO Football Player Tupou Incident Probed by NFL Players Union*, THE OREGONIAN, Sept. 4, 2008 at D04 (mentioning that university unsuccessfully attempted to return money and highlighting that NCAA rules are sometimes broken unintentionally).

68. *See id.* (stating agent denied giving Tupou $100 and said he did not intentionally pay for Tupou's meal).

spite Tupou's repeated refusals to take the money.[69] Tupou told Oregon's director of compliance about the situation, who then reported the incident to the NCAA.[70] While many would argue that the NCAA should commend Tupou for trying to do the right thing and reporting the incident in a timely fashion, the NCAA instead suspended Tupou.[71] Apparently, the NCAA regards violations of its amateurism regulations as strict liability offenses despite the obviously chilling effect that such a suspension will have on players reporting violations in the future.

Although the NCAA has no direct jurisdiction over agents, as described earlier, the UAAA does empower educational institutions with certain regulatory powers and the ability to file civil suits.[72] Many NCAA member institutions require each agent wishing to recruit a player at that school to also register with the school's athletic department or compliance office.[73] The majority of agents, however, do not comply.[74] Educational institutions have the best resources and incentives to enforce the UAAA. Schools know or can reasonably find out which agents their athletes have signed with and then determine whether the agent has met the requirements of the school's athletic department and the UAAA, most notably Section 11, which requires notice to the educational institution within seventy-two hours of the agency contract.[75]

NCAA Bylaws also permit member institutions to use Professional Sports Counseling Panels ("PSCPs") to aid student-athletes

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69. *See* Mike Florio, *Topou Blows Whistle on Agent*, PROFOOTBALLTALK.COM (Sept. 2, 2008, 10:59 AM ET), http://collegefootballtalk.nbcsports.com/2008/09/02/topou-blows-whistle-on-agent/ (noting that many athletes are put in same situation and pocket money without saying anything).

70. *See* Hunt, *supra* note 67 (recognizing that Tupou apologized for putting himself in situation).

71. *See* Florio, *supra* note 69 (admiring Tupou for doing right thing); *see also* Associated Press, *Tupou Will Return to Ducks Following One-Game Suspension*, ESPN.COM, (Sept. 3, 2008) (reporting that Tupou will return after one-game suspension for receiving improper benefits from representative of management company).

72. *See* UAAA §§ 15, 17 (2000) (explaining that violations of parts of act prohibiting certain conduct may result in criminal and administrative punishments).

73. *See* Telephone Interview with Boland, *supra* note 10 (summarizing agent registration at schools); Telephone Interview with Lattinville, *supra* note 10 (describing agent registration at schools).

74. *See* Telephone Interview with Boland, *supra* note 10 (noting compliance of agents); Telephone Interview with Lattinville, *supra* note 10 (discussing agent's compliance with regulatons).

75. *See* UAAA § 11 (addressing seventy two hour policy).

during the agent-hiring process.[76] PSCPs generally consist of coaches, athletic department representatives and members of the school's faculty or administration. While registration with the school and the use of PSCPs is meant to protect the student-athlete and allow the school to closely monitor agent activity with its student-athletes, the PSCPs can also create conflicts of interest.[77] PSCPs can be used as a way of excluding certain agents, pushing student-athletes towards other agents (such as those representing the school's coaches), and extracting additional (generally permissible) benefits from the agent on behalf of the student-athlete, such as training costs, stipends or favorable commission arrangements.[78]

In addition, due to the increasing complexities of the agent selection process, some schools have begun hiring consulting services to handle the process.[79] Such relationships inevitably come with more accusations of conflicts of interest and favoritism, as the consultants are hired by the school and might have the school's best interests in mind rather than the student-athlete's.[80]

Although the NCAA often acts demonstrably and decisively in dealing with its own members, the NCAA has no authority over agents.[81] Conversely, NCAA member institutions have some au-

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76. *See* 2009-10 NCAA DIVISION I MANUAL, *supra* note 66, Bylaw 11.1.4 (explaining that when coaches contact agents or sports team on behalf of athlete, no compensation may be received).

77. *See* Telephone Interview with Boland, *supra* note 10 (detailing conflicts of interest); Telephone Interview with Lattinville, *supra* note 10 (describing how PSCPs creates conflicts of interest).

78. *See* Telephone Interview with Boland, *supra* note 10 (discussing student athletes); Telephone Interview with Lattinville, *supra* note 10 (noting PSCP's involvement with student athletes). *See also* Interview with Jon Perzley, NFLPA Certified Contract Advisor, Sportstars, Inc. (Mar. 23, 2010) (detailing agent and student athlete relationships).

79. *See* Liz Mullen, *Some Agents Question Former NFL Exec's Role with Schools,* SPORTSBUSINESS JOURNAL (Aug. 24, 2009), http://www.sportsbusinessjournal.com/article/63356 (noting that these services are used within guidelines of NCAA to assist universities in "pre-NFL combine training"); *see also* CORNERSTONE SPORTS CONSULTING, http://cornerstonesports.co-m/about.html (last visited Oct. 23, 2010) (addressing program designed to educate and prepare student athletes and their families for NFL career opportunities).

80. *See* Mullen, *supra* note 81 (citing unidentified agent's report that conflicts of interest existed when NFL executive previously worked at major NFL representation firm).

81. *See* Glenn Wong et al., *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter,* 9 VA. SPORTS & ENT. L.J. 47, 48 (2009) (detailing NCAA's interdisciplinary process). *See also* Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases,* 37 SETON HALL L. REV. 749, 753-54 (2007) (explaining how NCAA deals with infractions); Rob Remis & Diane Sudia, *Escaping Athlete Agent Statutory Regulation: Loopholes and Constitutional Defectiveness Based on Tri-Parte Classification of Athletes,* 9 SETON HALL J. SPORT L. 1, 45 n.165 (1999) (citing Rob Remis, *Analysis of Civil and Criminal Penalties in*

thority over athletes; however, enforcement is still relatively lacking.[82] While NCAA member institutions and their compliance staffs work diligently to ensure that they will not face any NCAA sanctions, they are understandably less interested in what the student-athlete does once the athlete's eligibility has been exhausted, perhaps explaining their indifference to Section 11 of the UAAA.[83]

### D. Bar Association Ethics Rules

Approximately half of the NFLPA's certified agents have a law degree.[84] Presumably most of them followed up their J.D. by becoming a licensed attorney in one of the 50 states.[85] If so, those agents are subject to the ethics rules of each state's bar association in which the agent-attorney is licensed to practice.[86]

The Model Rules of Professional Conduct ("MRPC") lists a plethora of rules that could be implicated by some of the wrongful behavior of agents.[87] For example, Rule 1.1 requires "competent" representation, Rule 1.7 governs conflicts of interest, Rule 1.15 strictly directs how a lawyer is to handle client money and Rule 5.3 holds attorneys liable for the conduct of non-lawyer employees, such as "runners."[88] In addition, Rule 7.1 prohibits false or misleading communications about a lawyer's services, Rule 7.2 prohibits a lawyer from giving anything of value to a person for

*Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability Upon Athletes*, 8 SETON HALL J. SPORT L. 1, 8-12, 53-59 (1998) (mentioning that NCAA is "voluntary organization comprised of institutional members, and does not have authority to impose sanctions against agents")).

82. *See* Remis & Sudia, *supra* note 83, at 9 (describing how NCAA can control student-athletes by forcing member institutions to declare student-athlete ineligible).

83. *See id.* at 53-54 (suggesting that member institutions stand to lose significant revenue if student-athletes are deemed ineligible); *see also* Gray, *supra* note 54, at 148 (explaining Section 11 of the UAAA prevents member institutions from facing sanctions or penalties while student-athlete is ineligible).

84. *See* Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 73 n.134 (2003) (specifying that 412 out of 844 certified NFLPA contract advisors held law degree as of April 3, 2003).

85. *See id.* at 73 ("If these [attorney-agents] were to abide by the rules set out by their state bars, and non-attorney agents were forced to follow similar regulations set out by the NFLPA, it is clear that the industry would be headed in the right direction.").

86. *See id.* (noting if non-attorneys had similar provisions to follow under NFLPA, "the industry would be headed in the right direction").

87. *See* MODEL RULES OF PROF'L CONDUCT, (6th ed. 2006), *available at* http://-www.abanet.org/cpr/mrpc/mrpc_toc.html (stating these new rules were adopted to serve as model of law governing legal profession).

88. *See id.* (addressing other rules governing agent behavior); *see also* Interview with Fox, *supra* note 18 (detailing role of "runners").

recommending the lawyer's services and Rule 7.3 limits a lawyer's ability to solicit clients.[89]

As in nearly all of these agent situations, evidence of wrongful behavior is difficult to obtain or verify.[90] Nevertheless, attorney-agents arguably have the most interest in seeing bar ethics rules enforced against their fellow attorney-agents. Rule 8.3 specifically requires attorneys to report a known violation of the MRPC.[91] Although there is generally not a requirement to report suspected violations, agent-attorneys should report the unethical conduct of other agent-lawyers to their respective bar associations.[92] Reliable evidence is difficult to find, but agent-attorneys who desire a clean industry must self-police the industry.[93] Bar association reporting requirements are implemented irrespective of any arbitration procedure that a PA may use to settle disputes between agents, as will be discussed in more detail below.[94]

Bar association ethic rules have no jurisdiction over agents who are not attorneys, thereby creating a regulatory disparity.[95] To remedy this, some have argued that the business of being an athlete-agent should be considered the "practice of law," thereby requiring all agents to be attorneys.[96] Complicating the matter even further,

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89. *See* MODEL RULES OF PROF'L CONDUCT (outlining various violations).

90. *See* Doman, *supra* note84, at 45 (noting athlete representation leads to problematic behavior under "legal ethics rules, case law, and interpretations").

91. *See* MODEL RULES OF PROF'L CONDUCT, R. 8.3 (stating that lawyers "shall inform the appropriate professional authority" when they know of another lawyer's violation of rule "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").

92. *See* Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 788 (2009) (pointing out lack of current requirements that attorneys report on colleagues and lack of ethical infrastructures); Caroline P. Jacobson, *Academic Misconduct and Bar Admissions: A Proposal for a Revised Standard*, 20 GEO. J. LEGAL ETHICS 739, 754 (2007) (proposing changes to Code of Recommended Standards, which deal with academic misconduct).

93. *See* Melissa Steedle Bogad, *Maybe Jerry Maguire Should Have Stuck With Law School: How the Sports Agent Responsibility and Trust Act Implements Law-Like Rules for Sports Agents*, 27 CARDOZO L. REV. 1889, 1918 n.170 (2006) (explaining "crucial competitor," the attorney-agent, might be most effective way to force legal compliance and self-policing of industry).

94. For a further discussion of arbitration procedures for PAs, see *infra* notes 171-76, and accompanying text.

95. *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. REV. 225, 227 (2007) (discussing differences between attorney and non-attorney agents, and disparities between how acts of each group is governed).

96. *See id.* at 245-46 (proposing changes to MRPC Rule 5.5 and others to give attorneys more leeway to participate in other professions); *see also* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed*

the MRPC does not define the practice of law, instead the code only prohibit the "unauthorized practice of law."[97] What constitutes the practice of law is left to the broad interpretations of state courts and state bar associations.[98] Thus, the practice of law includes a variety of services, such as litigating cases in court, preparing documents to bring about various transactions, and advising clients on legal questions.[99] When analyzing an agent's time, it is difficult to classify the bulk of it as the practice of law. Much of an agent's time is spent representing the athlete in his or her relationships with the team, league, media, sponsors or fans. Contract negotiation is not exclusively a legal skill and agents rarely do any substantive legal analysis.

### E. Player Association (PA) Regulations

On a daily basis, the most important regulatory scheme that agents must deal with is the PA. Pursuant to §9(a) of the National Labor Relations Act ("NLRA") the PAs, as the approved representative of the player-employees by the National Labor Relations Board ("NLRB"), are the *exclusive* representative of the player-employees for purposes of collective bargaining.[100] As the representative of the players, a union's main role is to negotiate the terms and conditions of employment with the league in a collective bargaining

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*Practice of Law*, 2007 UTAH L. REV. 87, 128 (2007) (explaining by participating in contract negotiations, lay agents practice law).

97. MODEL RULES OF PROF'L CONDUCT R. 5.5.

98. *See* Geisel, *supra* note 97, at 226-27 (showing various courts have "broadly defined unauthorized practice of law") (citation omitted); *see also* Michael S. Knowles, *Keep Your Friends Close and the Layman Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification System*, 43 CREIGHTON L. REV. 885 (2010) (explaining that state bar associations develop licensing requirements and regulate lawyers).

99. *See* BLACK'S LAW DICTIONARY, 1210 (8th ed. 2004) (defining "practice of law"); *see also* Birbrower, Montalbano, Condon & Frank v. Super. Ct., 949 P.2d 1, 5 (Cal. 1998) (citing People v. Merchs. Protective Corp., 209 P. 363, 365 (Cal. 1922), and holding practice of law involves "the doing and performing services in a court of justice in any matter depending therein throughout its various states and in conformity with the adopted rules of procedure").

100. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

> Any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: providing further, that the bargaining representative has been given opportunity to be present at such adjustment.

*Id.*

agreement ("CBA").[101] In any labor situation, as the exclusive representative of employees, unions can designate agents to represent employees in dealings with an individual employer, such as a team.[102] Each of the CBAs between the "Big 4" leagues and its respective PA recognizes the PA's exclusive jurisdiction over player agents.[103]

As restrictions on player movement lessened and free agency became a reality in the 1970s and beyond, the use of player agents proliferated.[104] Player salaries increased along with player movement, attracting more people to the player representation industry, which necessitated regulation.[105] In 1982, the NFLPA became the first PA to certify and regulate player agents with other leagues soon to follow.[106] The NBPA has not updated their regulations since 1991, the MLBPA since 1997 and the NHLPA since 2008.[107]

The NFLPA updates their regulations every few years, most recently in 2007, as the NFL agent industry seems to be the most competitive.[108] The competition arises for a variety of reasons, including the fact that there are almost 1,700 roster spots in the NFL, about the same as the MLB, the NBA and the NHL combined,

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101. *See id.* § 159(a) (saying designated representatives are exclusive representatives for purposes of collective bargaining issues).

102. *See* Magic Pan, Inc. v. NLRB, 627 F.2d 105, 109-10 (7th Cir. 1980) (citing General Electric Co. v. NLRB, 412 F.2d 512, 520 n.6 (2nd Cir. 1969) (explaining relationship between unions and agents)); Minnesota Mining & Mfg. Co. v. NLRB, 415 F.2d 174, 178 (8th Cir. 1969); Standard Oil Co. v. NLRB, 322 F.2d 40, 44 (6th Cir. 1963). *See also* Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV 355, 359 n. 7 (2007) (describing player contract negotiations)).

103. *See* NFL Collective Bargaining Agreement (2006-2012), Art. VI, *available at* http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012 (noting [Hereinafter NFL CBA]; MLB Collective Bargaining Agreement (2007-2011), Arts. II & IV, *available at* www.mlbplayers.com (discussing recognition, approval and negotiation of contracts) [Hereinafter MLB CBA]; National Hockey League Collective Bargaining Agreement (2005-2011), Art. VI, *available at* http://www.nhl.com/cba/2005-CBA.pdf (explaining NFLPA agent certification); National Basketball Association Collective Bargaining Agreement, Art. XXXIV, *available at* www.nbpa.com (illustrating recognition clause) [Hereinafter NBA CBA].

104. *See* KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, THE BUSINESS OF SPORTS AGENTS 10-11 (University of Pennsylvania Press 2002) (explaining demise of "extensive use of reserve and option clauses in standard player contracts" allowed for athletes to take their contracts to open market).

105. *See id.* at 11 (detailing drastic increases in athlete salaries, resulting from competition from newly created leagues in football, hockey and basketball).

106. *See NFLPA History*, NFL PLAYERS ASSOCIATION http://www.nflpa.org/about-us/History/ (last visited Oct. 23, 2010) (noting first regulation in 1982).

107. *See* NFLPA Regulations, *supra* note 43 (detailing dates of modification of each agreement).

108. *See id.* (showing last update to agreement in 2007).

and there are no established minor leagues, where an agent might have to financially support a player.[109] In addition, the NFLPA has a stringent registration process, requiring an application fee of $1,650, a postgraduate degree and successful completion of a written examination covering the CBA and agent regulations.[110]

The agent regulations of the respective PAs are very similar in their construction. In all of them, Section 3(B) outlines prohibited conduct, including providing anything of value as an inducement to obtain a client, providing materially false or misleading information to a prospective client, holding a financial interest in a team, engaging in any conflict of interest and engaging in unlawful conduct, dishonesty, fraud or deceit.[111] Only the NFLPA specifically prohibits borrowing money from a player or soliciting clients who already have agents.[112] In addition, Section 5 of all the regulations requires any dispute between the agent and the PA or another agent to be arbitrated.[113] Since 1994, the NFLPA has designated the same arbitrator, Roger Kaplan, for every arbitration hearing, calling into question the fairness of the arbitration process, discussed in further detail herein.[114]

The PAs have the most direct interest, knowledge and resources necessary for proper regulation and enforcement of agent

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109. *See NFL Teams*, NFL.COM, http://www.nfl.com/teams (last visited Oct. 11, 2010) (showing thirty-two NFL teams, each with fifty-three roster spots, totaling 1,696 players); *MLBPA Info*, MLB.COM, http://mlb.mlb.com/pa/info/faq.jsp#roster (last visited Oct. 11, 2010) (explaining during regular season, each of thirty teams is allowed twenty-five man roster, totaling 750 players); *NHL Teams*, NHL.COM, http://www.nhl.com/ice/teams.htm#?nav-tms-main (last visited Oct. 11, 2010) (detailing thirty NHL teams, each with twenty-three players, totaling 690 players); *NBA Teams*, NBA.COM, http://www.nba.com/teams/teamIndividualLinks.html?title=Te-am%20Roster&file=roster (last visited Aug. 28, 2010) (showing thirty teams, each with fifteen man rosters, totaling 450 players).

110. *See* NFLPA Regulations, *supra* note 45 (describing agent qualifications).

111. *See* NFLPA Regulations, *supra* note 45 §3(B) (setting forth conduct prohibited in NFL); NBPA Regulations, *supra* note 45 §3(B) (setting forth conduct prohibited in NBA); MLBPA Regulations, *supra* note 45 §3(B) (setting forth conduct prohibited in MLB); NHLPA Regulations, *supra* note 45 §3(B) (setting forth conduct prohibited in NHL).

112. *See* NFLPA Regulations, *supra* note 45 §3(B)(6), (21) (describing unique NFL regulation).

113. *See* NFLPA Regulations, *supra* note 45 §5 (setting forth type of legal recourse available between agents or agent and PA in NFL); NBAPA Regulations, *supra* note 43 §5 (setting forth type of legal recourse available between agents or agent and PA in NBA); MLBPA Regulations, *supra* note 43 §5 (setting forth type of legal recourse available between agents or agent and PA in MLB); NHLPA Regulations, *supra* note 43 §5 (setting forth type of legal recourse available between agents or agent and PA in MLB).

114. *See* Karcher, *supra* note 8 (stating role of Roger Kaplan as NFLPA's designated arbitrator).

behavior. There are still however significant questions about the strength and consistency of the PAs' enforcement.[115] As discussed earlier, the states have a difficult administrative task in enforcing their athlete-agent laws, which is made even more difficult by the PAs failure to communicate with the states regarding agent activity.[116] Perhaps the most abused rule is the provision against providing inducements.[117] While offering student-athletes cash or other benefits before they are your clients is obviously in violation of the rules, agents customarily give players money after they have signed. The money may be called a "signing bonus" or a stipend or guaranteed marketing income, but the end result is the same, no matter how the money is classified the act of giving the money is unethical.

In the 2008 NFL Draft, thirty players chosen in the first three rounds were juniors.[118] Agents were not allowed, however, to actively recruit them because of the so-called "Junior Rule" which prohibited agents from having any contact with players not yet eligible for the NFL Draft until January 15.[119] In the NFL, a player is not eligible for the draft until three NFL seasons have elapsed since his high school graduation, generally after his junior year of college.[120] The rule only ended up benefiting the agents who ignored the rule and reached oral agreements with juniors before the permissible date.[121] Thus, the rule was amended after the 2008 season to per-

115. *See* Telephone Interview with Boland, *supra* note 10 (explaining issues resulting from non-regulation); Telephone Interview with Parker, *supra* note 10 (detailing problems with interpretation of rules).

116. *See* E-Mail from Powell, *supra* note 17 (documenting state enforcement problems).

117. *See* NFLPA Regulations, *supra* note 43 § 3(B)(2) (stating rule against inducements).

118. *See 2008 NFL Draft*, NFL.COM http://www.nfl.com/draft/2008 (last visited Oct. 11, 2010) (listing players drafted in each round of 2008 NFL Draft).

119. *See* Mike Florio, *Underclassmen Can Talk to Agents on Monday*, PROFOOTBALLTALK.COM (Jan. 16, 2009, 10:16 AM ET), http://profootballtalk.nbcsports.com/2009/01/16/underclassmen-can-talk-to-agents-on-monday/ (explaining interactions between agents and underclassmen); Telephone Interview with Parker, *supra* note 10 (illustrating "junior rule").

120. *See* NFL CBA, *supra* note 103, Art. XVI, § 2(b) (prohibiting player from entering draft until at least "three regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier"). Prior to the 2006 extension of the CBA, this rule was not specifically in the CBA but only in the NFL Bylaws and Constitution. *See* Clarett v. National Football League, 369 F.3d 124, 126 (2d Cir. 2004) ("Despite the collective bargaining agreement's comprehensiveness with respect to, *inter alia*, the manner in which the NFL clubs select rookies through the draft and the scheme by which rookie compensation is determined, the eligibility rules for the draft do not appear in the agreement.").

121. *See* Mike Florio, *More on the "Mockery" Some Agents Have Made of the Junior Rule*, PROFOOTBALLTALK.COM (Jan. 17, 2009, 5:23 PM ET), http://profootballtalk.

mit agents to have contact with juniors at the latest of the student-athlete's final regular season game, bowl game or the first day in December.[122]

In any case, the fact remains that many people interested in obtaining a financial benefit from association with a future NFL player can and do contact the student-athletes long before they declare for the draft. To combat this and other problems, the NFLPA began regulating and requiring the registration of Financial Advisors in 2002.[123] This program has not been without issues, and now the perception is that the regulations only empower other non-agents and non-financial advisors who are not prohibited from gaining access to the student-athletes, such as marketing representatives.[124]

## III. POSSIBLE SOLUTIONS

In the face of a complex and multi-tiered regulatory environment, agent misconduct might be worse than ever.[125] Ideally, enforcement on the state and federal levels would improve substantially. For a state or federal government, however, arming itself with a staff of investigators and lawyers to find and prosecute

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nbcspo-rts.com/2009/01/17/more-on-the-mockery-some-agents-have-made-of-the-junior-rule/ (discussing potential mockery of "Junior Rule" by players working out at API Training Institute which requires agent representation before date on which agents are allowed to speak to players).

122. *See* Mike Florio, *NFLPA Tweaks Junior Rule, But Doesn't Go Far Enough*, PROFOOTBALLTALK.COM (Mar. 18, 2009, 10:50 AM ET), http://profootballtalk.nbcsports.co-m/2009/03/18/nflpa-tweaks-junior-rule-but-doesnt-go-far-enough/ (discussing possibility of new rule in which agents may communicate with underclassmen upon latest of three dates: their final regular-season game, their bowl game, and first day in December).

123. *See NFL Players Bilked of $42M*, NEWSDAY, Feb. 2, 2002, at C17 (describing program launched NFLPA to regulate players' financial advisors in response to alleged defrauding of players); *See also* Hillard v. Black, 125 F. Supp. 2d 1071, 1074 (N.D. Fla. 2000) (detailing how players sued sports agents alleging financial scam); *see also Financial Advisor FAQs*, NFL PLAYERS ASSOCIATION, http://www.nflplayers.com/about-us/FAQs/Financial-Advisor-FAQs/ (last visited Oct. 23, 2010) (answering questions related to regulation of financial advisors).

124. *See* Mike Florio, *Marketing reps mix it up in Indy*, PROFOOTBALLTALK.COM (Feb. 27, 2010, 11:32 AM ET), http://profootballtalk.nbcsports.com/2010/02/27/marketing-reps-mix-it-up-in-indy/ (depicting bar fight between marketing representatives and stating that they are not regulated by NFL even though receiving larger commissions than contract agents); Scott Wolf, *Settlement in Bush's Civil Lawsuit Reached*, DAILY NEWS, L.A., Apr. 22, 2010 at C7 (describing Reggie Bush's civil case against a would-be sports marketer); *see also* Atwater v. NFL Players Ass'n, 2009 WL 3254925 (N.D. Ga. Mar. 27, 2009) (describing how several NFL players alleged that NFL negligently performed background checks on certain financial advisors).

125. *See* Telephone Interview with Parker, *supra* note 10 (describing current state of sports agent actions).

possible violations would be quite costly. The financial support for such a high level of enforcement would most likely have to come in the form of increased registration fees for agents.[126] Increased costs, however, already serve as a significant barrier to the entry of many aspiring agents into the athletic arena.[127] As a result, there has been considerable consolidation in the industry, giving larger agencies a significant marginal cost advantage, at the potential detriment to players.[128]

Considering the relative complexity of the work and the potential for fairly large commissions, a shortage of educated people interested in representing athletes anytime soon is unlikely. In such a competitive environment, with a general lack of enforcement, agents who choose to follow the rules are at a competitive disadvantage.[129] Such agents are left with few options and mostly litigious ones at that. Holding student and professional athletes more accountable for their own wrongdoing could potentially clean up some of the problems, and a clean agent's best option may be to sue other agents, the government and/or the PA.

### A. Hold Athletes Accountable

Len Elmore was an All-American at the University of Maryland and then continued with a ten-year NBA career.[130] Following his retirement from the NBA in 1984, Elmore graduated from Harvard

126. *See* Telephone Interview with Boland, *supra* note 10(noting effect of increased enforcement of regulations); Telephone Interview with Lattinville, *supra* note 10 (discussing increased enforcement of regulations); Telephone Interview with Golka, *supra* note 10 (listing one effect of increasing enforcement of regulations).

127. *See* Lloyd Zane Remick & Christopher Joseph Cabott, *Keeping Out the Little Guy: An Older Contract Advisor's Concern, a Younger Contract Advisor's Lament*, 12 VILL. SPORTS & ENT. L.J. 1, 10 (2005) (discussing high costs and fees associated with entering athlete agency industry).

128. *See* Telephone Interview with Boland, *supra* note 10 (explaining effects of increasing barriers to agents looking to enter industry); *see also* William Rothstein, *The Business of Sports Representation: Agent Evolution in the "Industry"*, 9 VA. SPORTS & ENT. L.J. 19, 21-25 (2009) (explaining evolution of sports agency industry and current concerns); Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193 (2004) (describing history and strategy of consolidation in sports agency industry and efficacy of current business model); Jason Gershwin, *Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents*, 5 U. PA. J. LAB. & EMP. L. 585 (2003) (analyzing effects of non-compete agreements in agents' contracts on sports agency industry).

129. *See* Email from Paget, *supra* note 10 (opining clean agents are at competitive disadvantage).

130. *See CBS Sports TV Team, Len Elmore Biography*, CBSSPORTS.COM, http://www.cbssp-orts.com/cbssports/team/lelmore (last visited Oct. 23, 2010) (summarizing biography of Len Elmore). Elmore played for eight years with NBA teams

Law School and served as an Assistant District Attorney in Brooklyn, N.Y.[131] Elmore is well known to the public as an announcer of college basketball games but is eminently regarded in the sports law world. During an Agent Regulation panel at the 2009 Sports Lawyers Association Conference, Elmore expressed disappointment in the role of student-athletes in agent scandals and suggested there be a way to hold them accountable.[132]

As explained above, an NCAA student-athlete will most likely lose eligibility or be suspended if the athlete has dealt with an agent in violation of NCAA rules.[133] However, often times the student-athlete has moved on to the professional ranks, leaving the school as the only party punished under NCAA rules.[134] If the PAs were serious about preventing undesirable situations and transactions with agents, they could agree, in conjunction with their respective leagues, to suspend or otherwise punish players for conduct arising out of their involvement with an unethical agent. The league would have to argue jurisdiction over the issue because the player's participation in the professional league would necessarily be involved. However, this would be a peculiar and unlikely provision, however, if the NFL or any other league grew sufficiently tired of their players being viewed in an unfavorable light as a result of alleged or actual misconduct while student-athletes, and requested such authority in a CBA.

Thirty four of the thirty nine states that have passed some form of the UAAA provide for the state or educational institution to recover from student-athletes who intentionally or knowingly commit NCAA violations or otherwise are complicit in illegal activity.[135]

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but played his first two seasons with the Indiana Pacers before they entered the NBA. *See id.* (explaining Elmore's career path).

131. *See id.* (documenting Elmore's post-basketball career).

132. *See* Len Elmore, *Question, Ethics – Agent Regulation* (Sports Lawyers Association Annual Conference, Chi., IL, May 15, 2009) (noting Elmore's participation in Conference). Conference Brochure *available at* www.sportslaw.org > Conference Info > 2009 Annual Conference.

133. *See* Timanus, *supra* note 67 (explaining student violations of NCAA regulations).

134. *See* Klein, *supra* note 68 (explaining reality of punishment for violating NCAA rules).

135. *See* ARIZ. REV. STAT. ANN. § 15-1775 (2001) ("An educational institution may bring a cause of action against an athlete agent or a former student athlete for damages caused by a violation of [Arizona's athlete agent laws]"); ARK. CODE. ANN. §17-16-116 (2001) (providing "a right of action against an athlete agent or former student-athlete for damages caused by a violation" of Arkansas' athlete agent laws); COLO. REV. STAT. § 23-16-215 (2008); CONN GEN. STAT. § 20-5590 (2005); DEL. CODE ANN. tit. 24 § 5416 (2002); D.C. CODE § 47-2887.15 (2002); GA. CODE ANN. § 43-4A-18 (2010); HAW. REV. STAT. § 481E-15 (2008); IDAHO CODE ANN. § 54-4816

Schools and states cannot consider the student-athletes as blameless and should seek to recover from them when appropriate. Nearly every student-athlete is a legal adult, capable of signing contracts, making purchases on credit or serving in the military. To absolve them of all responsibility in every case is factually erroneous and does not serve to end the evil intended by the regulations.

### B. Sue Other Agents

Despite the requirement of the PA regulations that agents submit their grievances against other agents to arbitration, agents have also resorted to suing each other.[136] Many of the litigated cases between agents involve one agent leaving a firm and taking his clients with him, invoking claims of breach of contract, tortious interference with contract, and/or unfair competition.[137] In one of the most high-profile cases, longtime NFL agent Leigh Steinberg won a multi-million dollar judgment against his protégé David Dunn

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(2001); 225 ILL. COMP. STAT. 401/185 (eff. Jan. 1, 2011); IND. CODE § 25-5.2-2-13(2010); IOWA CODE § 9A.116 (2009); KAN. STAT. ANN. § 44-1530 (2003); KY. REV. STAT. ANN. § 164.6929 (West 2010); MD. CODE ANN., BUS. REG. § 4-415 (West 2003); MINN. STAT. § 81A.16 (2002); MISS. CODE ANN. § 73-42-31 (2001); MO. REV. STAT. § 436.260 (1992); NEV. REV. STAT. § 398.490 (2001); N.H. REV. STAT. ANN. § 332-J:14 (2007); N.C. GEN. STAT. § 78C-100 (2003); N.D. CENT. CODE § 9-15.1-15 (2003); OKLA. STAT. tit. 70, § 821.96 (2003); OR. REV. STAT. § 702.057 (2008); 5 PA. CONS. STAT. § 3314 (2008); R.I. GEN. LAWS § 5-74.1-16 (2008); S.C. CODE ANN. § 59-102-160 (2004); S.D. CODIFIED LAWS § 59-10-16 (2006); TENN. CODE ANN. § 49-7-2137 (2001); TEX. OCC. CODE ANN. § 2051.551 (Vernon 2004); UTAH CODE ANN. § 15-9-116 (2001); WASH. REV. CODE § 19.225.120 (2007); W.VA. CODE § 30-39-16 (2001); and WYO. STAT. ANN. § 33-44-113 (2005). Of the thirty-nine states that have adopted the UAAA, only Florida, Louisiana, New York, Ohio and Wisconsin do not provide for a cause of action against the student-athlete. *See* FLA. STAT. § 468.451 et seq. (1995); LA. REV. STAT. ANN. 4:420 et seq. (2003); N.Y. GEN. BUS. § 899 et seq. (McKinney 2003); OHIO REV. CODE ANN. § 4771.01 et seq. (West 2000); WIS. STAT. § 440.99 et seq. (2005). Agent legislation in California (West's Ann.Cal.Bus. & Prof.Code § 18895 et seq.) and Michigan (M.C.L.A. 750.411e) also does not provide for a cause of action against the student-athlete. *See* CAL. BUS. & PROF. CODE § 18895 et seq. (West 2008) (noting lack of cause of action for student athlete in California); MICH. COMP. LAWS ANN. § 750.411e (West 2004) (noting lack of cause of action for student athlete in California).

136. For a discussion of lawsuits by agents against other agents, see *infra* notes 137-54 and accompanying text.

137. *See* Complaint and Jury Demand, Athletes Premier Int'l, Inc., v. Hendricks Sports Mgmt., LP., No.1:10cv10074, 2010 WL 890621 at *3 (D. Mass. Jan. 20, 2010) (alleging tortious interference with contract); Brief for Plaintiff-Respondent, Wilhelmina Models, Inc. v. Fleisher and Davidoff & Malito, LLP, No. 5597, 2005 WL 55455570 at *3 (N.Y. App. Div. Mar. 2, 2005) (alleging, inter alia, tortious interference with contract); Second Amended Complaint, Beverly Hills Sports Council, Inc. v. Leventhal, No. BC303157, 2004 WL 2962171 (Cal. Super. Ct. Mar. 8, 2004) (alleging unfair competition).

which was partially reversed on appeal.[138] The case became complicated when Dunn filed for bankruptcy, but this did not prevent Dunn from establishing his own agency, Athletes First.[139] Dunn was suspended by the NFLPA for eighteen months though there was substantial speculation that he was continuing to operate as an agent behind the scenes.[140] Nevertheless, this suspension did not prevented Athletes First from becoming one of the top agencies in the NFL.[141]

One of the chief complaints by one agent against another involves client poaching.[142] Client poaching violates the prohibition on soliciting a represented player under NFLPA regulations.[143] The viability of such a claim faced a potentially serious blow in the 1999 case of *Speakers of Sport, Inc. v. ProServ, Inc.*[144] In *Speakers of*

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138. *See* Steinberg, Moorad & Dunn, Inc. v. Dunn, 136 F. App'x. 6, 9 (9th Cir. 2005) (reversing part of judgment against Dunn).

139. *See* Mike Wise, *Pro Football; These Drafts Come and Go, and So Do Agents' Fortunes*, N.Y. TIMES, Apr. 26, 2003, at D3 (detailing Dunn's dispute with Steinberg and subsequent bankruptcy).

140. *See* Mike Florio, *NFLPA Looking Into Dunn's Text Messages*, PROFOOTBALLTALK.COM, Dec. 10, 2007, 11:54 PM ET), http://archive.profootballtalk.com/12-9-07through12-19-07.htm (detailing NFLPA investigation into Dunn); Mike Florio, *Get Out of Jail Free Card for Dunn, Branion?,* PROFOOTBALLTALK.COM (Nov. 6, 2007, 10:12 PM ET), http://archive.profo-otballtalk.com/11-3-07through11-7-07.htm (describing addition of new agent to Athlete's First despite Dunn's suspension).

141. *See* Liz Mullen, *Athletes First adds another star-studded class for NFL Draft*, SPORTSBUSINESS J. at 11, Jan. 25, 2010, *available at* http://www.sportsbusinessjournal.com/art-icle/64680 (listing Athlete's First signings, including Texas quarterback Colt McCoy); *SBJ's Top 20 Most Influential Sports Agents; Johnson is Tops,* SPORTSBUSINESS J., Apr.20, 2004, *available at* http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.main&storyID=SBD2004042-027 (ranking Dun as twentieth most influential sports agent).

142. *See* Bauer v. Interpublic Group of Cos., Inc., 255 F. Supp. 2d 1086, 1087 (N.D. Cal. 2003) (alleging claims for intentional interference with contract and unfair competition). The court granted summary judgment for defendants Octagon and agent Mike Sullivan in the case brought against them by agent Frank Bauer for tortious interference with contract and unfair competition. *See id.* at 1096 (discussing grant of summary judgment). The case arose in 2002 when the NFL's #1 overall draft pick, Quarterback David Carr of Fresno State, signed a representation agreement with Bauer, but then terminated it and signed shortly thereafter with the defendants. *See id.* at 1088-89(describing events giving rise to case). The court concluded that there was insufficient evidence to sustain the claim that the defendants actually induced Carr to terminate his contract with Bauer. *See id.* at 1095 (noting courts' conclusion).

143. *See* NFLPA Regulations, *supra* note 43 § 3(B)(21)(a) (prohibiting Contract Advisors from "[i]nitiating any communication, directly or indirectly, with a player who has entered into a Standard Representation Agreement with another Contract Advisor . . . .").

144. *See* Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 868 (7th Cir. 1999) (granting ProServ summary judgment in its defense against Speakers of Sport's tortious interference with business relationship suit).

*Sport*, MLB agency ProServ convinced the budding star catcher of the Texas Rangers, Ivan Rodriguez, to fire his agents, Speakers of Sport, and to be represented by ProServ.[145] Part of ProServ's inducement was a promise that they would obtain $2 million to $4 million annually in endorsements for Rodriguez.[146] When ProServ failed to do so, Rodriguez fired them, signed with another agent and eventually signed a five-year, $42 million contract with the Rangers.[147]

Speakers sued ProServ for tortious interference with business relationship, including inducing a breach of a contract.[148] The Northern District of Illinois granted ProServ's motion for summary judgment and the esteemed Judge Posner of the Seventh Circuit affirmed.[149] The eminent antitrust jurist Judge Posner 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. That is the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system.[150]

Judge Posner did not think that ProServ's promise to Rodriguez was sufficiently fraudulent to rise to the level of unfair competition.[151] Furthermore, Judge Posner dismissed the relevance of the MLBPA regulation forbidding misrepresentations to prospective players, stating that the rule is meant to protect players, not

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145. *See id.* at 864 (detailing recruitment of Rodgriguez).

146. *See id.* (detailing ProServ's offer to Rodriguez as part of its expansion in representing baseball players).

147. *See id.* (stating Rodriguez's new agent obtained five-year, $42 million contract for him with Rangers).

148. *See id.* at 865 (noting that Speakers could not have sued ProServ for inducing breach of contract because Rodriguez had not breached his contract, which was terminable at will).

> But Speakers did have a contract with Rodriguez, and inducing the termination of a contract, even when the termination is not a breach because the contract is terminable at will, can still be actionable under the tort law of Illinois, either as interference with prospective economic advantage . . . or as an interference with the contract at will itself.

*Id.* (citations omitted).

149. *See id.* at 864, 868 (affirming grant of summary judgment).

150. *Id.* at 865.

151. *See id.* at 867 ("But even if it was a promise (or a warranty), it cannot be the basis for a finding of fraud because it was not part of a scheme to defraud evidenced by more than the allegedly fraudulent promise itself.").

agents.[152] Although Speakers may not have sought the appropriate damages in the case (asking for the commission on the $42 million deal that ProServ did not negotiate), the case reflects the failure of the courts to understand the realities of the agent industry.[153] Instead, Judge Posner championed the player's choice in picking an agent and espoused the notion that agent competition is good for the player.[154]

Whether cutthroat competition and the resulting unethical behavior among agents are good for the players is highly dubious. While players may be able to shop around and find an agent willing to provide services for a lower commission, agents who are weary of being fired are also more likely to accept contracts that might be below the player's maximum value to secure the commission. In addition, Judge Posner's approach ignores the value to the player of having proper counsel over a longer period of time.[155] An agent who poaches clients by offering discounts on commissions is probably not the type of agent who is going to act ethically, competently and loyally during the representation of the athlete. Promoting the solicitation of clients with existing representation is bad for the agent industry, the PAs and many other involved parties. The *Speakers of Sport* decision serves a chilling effect on agents' attempts to enforce ethical restraints on other agents through litigation.

### C. Sue the State and/or Federal Government

Attempts to sue either the state or federal government or any of their agencies generally fail due to sovereign immunity, whereby a government cannot be sued without its consent.[156] Nevertheless, some agents may be tempted to sue the government for its failure to effectively enforce the respective statutes. The Federal Tort

152. *See id.* (holding that even if MLBPA rules established norm enforceable by law, Speakers would not be able to invoke this because norm is not designed for Speakers' protection).

153. *See id.* at 868 (holding that Speakers could not establish a damages entitlement to agent's fee on Rodriguez's contract because that contract was negotiated years after Rodriguez left Speakers, and by another agent).

154. *See id.* ("Allowing Speakers to prevail would hurt consumers by reducing the vigor of competition between sports agents. The Rodriguezes of this world would be disserved . . . ").

155. *See id.* (suggesting that competition between sports agents benefits consumers).

156. *See* Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (holding sovereign immunity protects federal government from suit unless it waves that protection) (citing FDIC v. Meyer, 510 U.S. 471, 475 (1994)); *see also* United States v. Sherwood, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued.") (citations omitted).

Claims Act ("FTCA") allows the United States government to be sued for tort causes of action in the same manner as private individuals.[157] The FTCA, however, grants an exception to government agencies and employees who exercise due care or a discretionary function, regardless of whether the discretion involved is abused.[158] Enforcement of a statute and prosecution thereunder could be considered a discretionary function.[159]

Furthermore, the FTCA only imposes liability on the government where a private person would also be liable.[160] Even if "a person suffers money damages or other injuries as a result of the negligent or wrongful act or omission of a government employee acting within the scope of employment," that alone is insufficient to sustain a claim under the FTCA.[161] Consequently, because an agent can not sustain a cause of action against a private individual for failure to enforce a statute, he will be unable to sustain a cause of action against the FTC and the federal government for failure to enforce SPARTA.

State governments also hold sovereign immunity, limited to the state's consent.[162] In addition, many states have statutes or other laws stating that the government is not liable for any injuries caused by the failure to enforce a law.[163] Therefore, any suit

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157. *See* Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-80 (West 2000).

158. *See id.* § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

159. *See id.* § 2680(a) (West 2006) (outlining exceptions to tort claims procedure). This provision notes that the FTCA does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused . . .

*Id.*

160. *See id.* § 2674 (limiting tort liability of United States to claims of "a private individual under like circumstances").

161. *Id.* § 2675.

162. *See* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001) ("Sovereign immunity, unless waived, protects the State from lawsuits for damages."); *see also* Fiala v. Voight, 286 N.W.2d 824, 827 (Wis. 1980) ("[S]ince the legislature and this court have not overturned or restricted the doctrine of sovereign immunity, we hold the state cannot be sued without its consent.").

163. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 10/2-205 (West 1965) ("A public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law."); O'Connor v. City of N.Y., 447 N.E.2d 33, 34-35 (N.Y. 1983) (holding municipality not liable for failing to enforce

against a state government for failure to enforce its form of the UAAA would most likely fail.[164]

### D. Possible Bases for a Cause of Action by an Agent Against a Union

As stated earlier, the PAs are the body best suited to monitor agent behavior and react appropriately. The perception remains, however, that they are doing so inadequately.[165] While an agent's efforts to sue the government for failure to enforce its laws are likely to fail, there is potentially a cause of action against the PA.

#### 1. *Labor Law*

Under federal labor law, a union has several duties to its members, most notably a duty of fair representation: to represent all employees within the bargaining unit, without hostile discrimination, fairly and impartially, and in good faith.[166] The duty of fair representation extends to all union activities, including grievance filings and collective bargaining negotiations.[167] Agents are not members of the bargaining unit, and consequently there is no duty of fair representation owed to the agent.[168] In virtually no context outside

statute absent special relationship creating municipal duty) (citing Sanchez v. Vill. of Liberty, 36 N.E.2d 870, 877-78 (N.Y. Ct. App. 1977)).

164. *See O'Connor*, 477 N.E.2d at 36 ("[I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation.")*;* Baumgardner v. Sw. Va. Mental Health Inst., 442 S.E.2d 400, 402 (Va. 1994) ("[T]he immunity of the Commonwealth, unlike that of its employees, is absolute unless waived").

165. For a further discussion of the development of PA regulations, see *supra* notes 100-24.

166. *See* Steele v. Louisville & N.R. Co., 323 U.S. 192, 204 (1944) (requiring labor unions under Railway Labor Act to represent non-union and minority union members in collective bargaining and contracting).

167. *See* Peterson v. Kennedy, 771 F.2d 1244, 1253-54 (9th Cir. 1985) (stating union may have acted arbitrarily so as to give rise to breach of duty claim when ignoring grievance); Sharpe v. Nat'l Football League Players Ass'n, 941 F. Supp. 8, 10 (D.D.C. 1996) ("A suit against an employer alleging a breach of the collective bargaining agreement and a suit against the union for breach of the union's duty of fair representation are 'inextricably interdependent . . . .'"). The Court added that "to prevail on either claim, an employee-union member must prove a violation of the employment contract and demonstrate the union's breach of duty." *Id.* (citing DelCostello v. Int'l Bhd. Of Teamsters, 462 U.S. 151, 164 (1983)). *See also* Air Line Pilots Ass'n, Int'l. v. O'Neill, 499 U.S. 65, 77 (1991) (holding union's duty of fair representation extends to negotiations).

168. *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co, Chem. Div. 404 U.S. 157, 182 n. 20 (1971) (holding union is not required to take into account interests of non-bargaining unit members when making decisions on behalf of union members).

professional sports or entertainment would a union member have an agent. Thus, the union owes no duty to an agent of a union member.

The NLRA permits anyone injured as a result of an unfair labor practice to bring suit.[169] None of the unfair labor practices described under the NLRA, however, could foreseeably injure the agent of a union member.[170] Ultimately, agent are unlikely to find a plausible cause of action against a PA under federal labor law.

2. *Arbitration Law*

As mentioned above, all of the PA regulations contain provisions requiring agents to consent to arbitration in any dispute with another agent, a player as it relates to the agent's services for that player and any other activities of the agent within the scope of the regulations.[171] Several agents have unsuccessfully sued the NFLPA challenging the fairness of the arbitration procedures and alleging wrongful conduct by the union in carrying out the arbitration process.[172] The uproar earned those agents a hearing before the Administrative and Commercial Law Subcommittee of the House Judiciary Committee in December 2006, though nothing was changed.[173]

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169. *See* Labor Management Relations Act, 29 U.S.C.A. § 187(b) (West 1959) (explaining that those injured may sue). The Act states:

> Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

*Id.*

170. *See id.* § 158(b) (delineating what constitutes unfair labor practices).

171. *See id.* § 171(b) (West 1947) (stating purpose of NLRA is to promote voluntary arbitration to settle disputes).

172. *See* Poston v. Nat'l Football League Players Ass'n,, No. 02CV871, 2002 WL 31190142, at *3-6 (E.D.Va. Aug. 26, 2002) (declining to vacate arbitrator's opinion because decision did not manifest evident partiality, arbitrator did not exceed authority, and arbitrator did not manifestly disregard law); Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1, 6 (D.D.C. 2000) (rejecting plaintiff's challenge of impartiality of arbitrator on basis that plaintiff "freely agreed to the arbitration terms contained in the regulations.").

173. *See* Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV 355, 401 (2007) ("On December 7, 2006, the Administrative and Commercial Law Subcommittee of the House Judiciary Committee held a hearing to evaluate the NFLPA's arbitration process.").

The Federal Arbitration Act ("FAA")[174] governs the arbitration clauses in the PA regulations.[175] There is a strong public policy in American jurisprudence towards the use of arbitration, and the FAA directs the invalidation of arbitration clauses only when they are unconscionable under general contract law.[176] Consequently, any action by an agent against a PA concerning the arbitration clause would be limited to the enforceability of the arbitration clause and could not address the PA's potential liability for failure to enforce its agent regulations.

3. *Agency Law*

A principal-agent relationship exists where one person, the "principal," manifests assent to another person, the "agent," establishing that the agent shall act on the principal's behalf and subject to the principal's control, while the agent manifests assent or otherwise consents so to act.[177] An agency relationship requires that the parties consent to their association with each other, which can be shown through written or spoken words or other conduct.[178]

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174. 9 U.S.C.A. §§ 1-14 (West 1954).

175. *See* Karcher, *supra* note 9, at 358 ("[T]he Federal Arbitration Act. . . governs the arbitration process set forth in union agent regulations.").

176. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475 (1989) ("[Q]uestions of arbitrability in contracts subject to the FAA [Federal Arbitration Act] must be resolved with a healthy regard for the federal policy favoring arbitration."); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (holding Federal Arbitration Act establishes federal policy favoring arbitration ) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); Southland Corp. v. Keating, 104 S.Ct. 852 (1984) (465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act [Federal Arbitration Act], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *see also* 9 U.S.C.A. § 2 (West 1947) (stating an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

177. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (explaining agency relationship). The Restatement notes that

> As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent.

*Id.*

178. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. d (2006) (providing basic definition of agency); RESTATEMENT (THIRD) OF AGENCY § 1.03 (2006) (explaining what type of conduct can signal association between player and agent).

Therefore, an agency relationship can be created by a contract, so long as all the elements of a principal-agent relationship exist.[179]

Appendix A of the NFLPA Regulations contains the Application for Certification to become an NFLPA Contract Advisor.[180] Page 2 of the application specifically states that the Regulations "shall constitute a contract between the NFLPA and [the agent]."[181] All of the other regulations and/or applications for certification contain provisions in which the agent agrees to perform certain activities and refrain from others, creating a contractual relationship between the agent and the PA.[182]

Furthermore, as explained earlier, a union can designate agents to perform its duties, and through the CBA and their regulations the PAs have explicitly designated certified agents as agents of the union for a variety of functions, most notably contract negotiations.[183] The elements of a principal-agent relationship are present; the PA, through the certification process and regulations assents to have agents act on its behalf subject to the PA's regulations, and the agent agrees to the regulations in contract. Therefore, a principal-agent relationship can be established either through contract or the common law elements.

An agency relationship creates a fiduciary relationship, whereby the agent must act in the principal's best interests as well as on the principal's behalf.[184] The agent has many duties to the principal, including loyalty, care, good faith, competence and dili-

179. *See* Chemtool, Inc. v. Lubrication Technologies, Inc., 148 F.3d 742, 475 (7th Cir. 1998) (explaining that certain conduct along with contract creates agency relationship); Barbara Oil Co. v. Kansas Gas Supply Corp., 827 P.2d 24, 26 (Kan. 1992) (defining agency as express or implied contract); Lewis v. Davis, 410 N.E.2d 1363, 1366 (Ind. Ct. App. 1980) (stating that agency arises out of contractual agreement between consenting parties); Esmond Mills v. Commissioner of Internal Revenue, 132 F.2d 753, 755 (1st Cir. 1943) (explaining that existence of agency rests on a contract). *But see* Burkhalter v. Ford Motor Co., 116 S.E. 333, 337 (Ga.App. 1923) (finding that contract does not create agency relationship); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining what conduct creates agency).

180. *See* NFLPA regulations, *supra* note 43 (showing contract application for advisors).

181. *Id.* at A-2.

182. *See* NFLPA Regulations, *supra* note 43 (containing certification which delineates contractual relationship between agent and PA).

183. *See* National Labor Relations Act, *supra* note 100 (allowing unions to appoint agents). *See also* Karcher, *supra* note 9, at 358-59 (explaining that power to negotiate contracts is delegated to third party agents).

184. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. e (2006) (stating that agency relationship creates fiduciary duty of agent as matter of law).

gence[185] An agency relationship also creates duties for the principal to the agent.[186] If there is a duty created by contract, the principal must act in accordance with the express and implied terms of any contract between the principal and the agent.[187] Although the certification process and regulations create a contract between the PA and the agent, nothing in any PA document purports to create an express duty obliging the PA to enforce the regulations.[188]

The principal also owes a duty to the agent to deal with the agent fairly and in good faith.[189] This duty also requires the principal to provide the agent with information about risks of physical harm or pecuniary loss that the principal knows, has reason to know or should know are present in the agent's work but are unknown to the agent.[190]

Agents in all sports are required to submit a detailed personal application and agree to rigid standards of conduct while paying thousands of dollars in fees to be licensed by the PA each year.[191] The NFLPA also requires agents to have an advanced degree and pass a written examination.[192] Thus, the duty to enforce the regulations promulgated is logically encompassed by the PAs' duty to deal in good faith. Additionally, a principal owes a duty to protect the agent from foreseeable harm.[193] Failure to properly enforce the

185. *See id.* § 8.03, cmt. d (describing agent's duty of undivided loyalty); *id.* § 8.08 (2006) (explaining agent's duty to act with care, competence and diligence of agents in similar circumstances); *id.* § 8.10 (stating that agent has duty "to refrain from conduct that is likely to damage the principal's enterprise").

186. *See id.* §§ 8.13 - 8.15 (summarizing duties principal owes to agent).

187. *See id.* § 8.13 (stating that principal has duty to act in accordance with implied and express terms of contract).

188. *See* NFLPA Regulations, *supra* note 43 (describing NFL Players Association policies).

189. *See* RESTATEMENT (THIRD) OF AGENCY § 8.15 (stating that principal must treat agent fairly and act in good faith).

190. *See id.* (explaining duty of principal to notify agent of possible physical harm or pecuniary injury).

191. *See Agent Certification FAQs*, NFL Player's Association, http://www.nflplayers.co-m/about-us/FAQs/Agent-Certification-FAQs/ (last visited Oct. 23, 2010) The NFLPA annual fee is $1,200 if you have less than 10 active players and $1,700 if you have 10 or more. *Id.* (setting forth annual fee arrangements). The NHLPA annual fee is $2,100. *See* ROBERT H. RUXIN WITH CONTRIBUTIONS FROM DARREN HEITNER, AN ATHLETE'S GUIDE TO AGENTS 230 (Shoshanna Goldberg ed., Jones & Bartlett Publishers 2010) (1982)(providing prospective of agents to athlete).

192. *See* NFLPA Regulations, *supra* note 43 § 2(C) (describing league policies); *Agent Certification FAQs*, *supra* note 191 (describing requirements of NFL agent certification).

193. *See* Petersen v. U.S. Reduction Co., 641 N.E.2d 845, 848 (Ill. App. Ct. 1994) (stating that principal must warn agent of unreasonable risk of harm related

agent regulations creates the foreseeable harm that clean agents will suffer in their profession.

Furthermore, the principal has the duty to inform the agent of any risks of any known pecuniary harm.[194] If the PAs were diligently and competently enforcing their agent regulations, they would be far more aware of the improper conduct that is believed to be occurring on a regular basis. The duty does not require actual knowledge of potential pecuniary loss; instead, only a duty on the principal to alert the agent about risks of which it has reason to know is imposed.

A gift for gab is among the most important characteristics of a successful agent. Additionally, there are few topics about which agents like to discuss more than the alleged wrongdoings of their competitors. The PAs and their employees are present in all situations where large numbers of agents are likely to congregate including playoff or championships games, pre-draft combines, drafts, all-star games, college all-star games and more. The discussions and rumors occurring at these locations are more than enough to impute knowledge of potential wrongdoing on the PA and obligate the PA to properly investigate the rumors or accusations. An agent's most difficult task in bringing suit based on a breach of good faith and fair dealing is in gathering reliable evidence of another agent's wrongdoing. In an ideal case, however, an agent may be aware of misconduct that the PA does not adequately investigate or provide warning to other agents that rise to the level of a breach of the principal's duty to deal fairly and in good faith.

Having established a breach, an agent would have to show damages and causation, meaning a link between the breach identified and the injury.[195] In other words, the clean agent must show that the PA knew or should have known about the agent misconduct and that the failure to enforce the regulations and to let other agents know of the misconduct was a reasonably foreseeable cause of the injury to the clean agent. The most foreseeable injury that an agent could suffer would be the loss of commission on a player's

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to agency); Montgomery Ward & Co. v. Tackett, 323 N.E.2d 242, 246 (Ind. Ct. App. 1975) (explaining that principal must prevent agent from suffering harm during prosecution of agency enterprise); Lawrence Warehouse Co. v. Twohig, 224 F.2d 493, 497 (8th Cir. 1955) (describing how principal must use care to prevent harm coming to agent in prosecution of enterprise and must disclose facts which, if unknown, would be likely to subject agent to pecuniary loss).

194. *See* RESTATEMENT (THIRD) OF AGENCY § 8.15 (defining principal's duty to disclose knowledge of pecuniary harm).

195. *See id.* §§ 26-29 (2005) (summarizing how plaintiff can establish breach).

future contract as a result of having lost the client to a rival agent because of the rival agent's misconduct. If a new contract was already offered to the clean agent's client prior to the client's departure, damage are easy to determine. If the player is a rookie, a person could look at rookie contracts from prior drafts establish a proper range for the alleged damages. The agent would then have to draw a link from losing the commission to the PA's failure to properly enforce the regulations, constituting a breach of the duty to deal fairly and in good faith. This link is difficult but not impossible.

## IV. CONCLUSION

There are many clean agents - far more than the average person believes. These clean agents share some of the blame for the enforcement problems because of their unwillingness to report possible violations, whether to the state bar association, the state or federal government or their PA. Agents are fearful of being perceived as whistle-blowers and trouble-makers in the eyes of current and prospective clients. More than a handful of student-athletes have broken NCAA regulations in their dealings with agents and they generally do not want to attract attention to themselves or their former institutions.[196]

In addition, agents could help create a fairer system by putting away their silver tongues and collaborating with one another. Agents in the NFL were effective in organizing a united front that prevented their allowable commissions from being dropped to two percent (2%) from three percent (3%) in 2005.[197] Agents, albeit an eternally unpopular group, could collectively and effectively lobby the PAs, the NCAA, the government and any other body that would listen for more effective enforcement of the rules and laws that apply to the agent industry.

An agent who can clear the many costly administrative and regulatory hurdles is deserving of competing on a level playing field.

196. For a further discussion of student-athletes violating NCAA regulations, see *supra* notes 69-77 and accompanying text.

197. *See* Davis, *supra* note 8, at n.266 (citing Liz Mullen, *NFLPA Looks at Cutting Agent Fees*, SPORTS BUS. J., May 30, 2005, at 4, *available at* http://www.sports busines-sjournal.com/article/45482); Rick Karcher, *To Cure Agent Misdeeds, Cut Their Fees*, SPORTS BUS. J., Aug. 8, 2005, at 20, *available at* http://www.sportsbusinessjournal.com/article/46479 (stating that NFLPA allows agents to earn 3% commission); Mike Florio, *Storm Brewing Between NFLPA, Agents*, PROFOOTBALLTALK.COM (Sept. 28, 2005, 1:39 PM EDT), http://archive.profootballtalk.com/9-16-05 through9-30-05.htm (explaining issues involved in discussions leading to 2005 agreement).

The lack of enforcement has made such an environment exceedingly difficult, often leaving an agent to choose between ethics and clients. Clean agents must take action, first by complying with all reporting requirements and secondly by taking steps to force the hands of the regulators. Litigation is the costliest and most preferably avoided measure, but an agent who wishes to continue to work in the athlete-representation industry may find litigation as a necessary means.

A lawsuit against the PAs seems to have the best chance for success, although former MLBPA Executive Director Donald Fehr's comments in defending such a suit are noteworthy. At the 2009 Sports Lawyers Association Conference, during the same Agent Regulation panel that Len Elmore questioned the role of athletes in agent scandals, Mr. Fehr unequivocally stated that if any agent were to sue a PA, the PA would immediately eliminate all agents and resort to its status as the exclusive representative of the players under §9(a) of the NLRA.[198] If a PA ever desired to handle all contract negotiations for a player, as is a PA's right under federal labor law, the PA would certainly require a massive increase in human resources, resources that perhaps would be better used to investigate and enforce the existing agent regulations.

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198. *See* Donald Fehr, Response to a Question, Ethics – Agent Regulation, Sports Lawyers Association Annual Conference, Chi., IL (May 15, 2009) (stating Fehr's belief that agent's have no basis to sue). Conference Brochure available at www.sportslaw.org > Conference Info > 2009 Annual Conference. Mr. Fehr was the Executive Director and General Counsel for the MLBPA. *See Donald M. Fehr, Executive Director*, MLBPLAYERS.COM, http://mlb.mlb.com/pa/bios/fehr.jsp (last visited Oct. 23, 2010) (explaining role of Fehr).