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# AN ANALYSIS OF ATHLETE AGENT CERTIFICATION AND REGULATION: NEW INCENTIVES WITH OLD PROBLEMS

*Bart Ivan Ring\**

It has become an all too familiar refrain in the arena of professional sports: the present day athlete is "uneducated," "untutored," "unaware," or "unwise."<sup>1</sup> So the story goes: highly talented, much heralded collegiate superstar signs with the proverbial unscrupulous player agent who exerts total control over the unsuspecting athlete's career and subsequently, through fraud and deceit, diverts all of the client's funds into risky investments and high-priced swampland. This scenario has been replayed and repeated over and over again amid a backdrop of escalating player salaries and increasing adulation showered continuously upon the athletic superstar in today's society.

Additionally, sports agents have been described as destructive, devious and inept.<sup>2</sup> Their greed for money and lust for the headlines combined with an apparent penchant for preying upon unsuspecting young adults like a pack of locusts, has cast an ominous and everlasting cloud upon the profession. It is a very lethal combination. Naive and unsophisticated athletes are exposed to the foreign terrain of high finance, a field heavily laden with immorality and instability. This mixture has unceremoniously placed the professional sports agent in an unenviable position of being a necessary evil disrespected by the great majority of individuals associated with professional sports.<sup>3</sup>

In the past decade there has been a dramatic escalation in the support for increased regulation and supervision of the heretofore unrestricted activities of the sports agent. All certification mechanisms are

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1. *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 726 (S.D. Cal. 1960); Comment, *Regulating the Professional Sports Agent: Is California in the Right Ballpark?* 15 PAC. L.J. 1231, 1234 (1984).

2. See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* (1979).

3. Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815, 816 n.7 (1981).

intended to alter the prevailing atmosphere of distrust and corruption into one which promotes confidence and respect in the player representative.

While the regulatory systems have the same avowed purpose<sup>4</sup> the potential for abuse is still very much a reality. This article will explore the advent of certification processes instituted by player associations and the California State Legislature. Whether it be in the field of individual contract negotiations, financial planning and/or endorsements, the scope of the agent's responsibilities has been expanded through these attempts to refine and improve the status of the professional player representative.

### I. RECURRING PROBLEMS

In the traditional athlete-agent relationship, the representative will promise to perform services such as "contract negotiation, investment advice and promotional services."<sup>5</sup> Despite the relatively recent development of the prominence of the sports agent in the professional battlefield, there is already a long litany of client dissatisfaction and judicial proceedings which underscore the vast problems inherent in the field.<sup>6</sup> Moreover, the level of displeasure has been aggravated by the fact that many involved in the profession do not share the view that regulation and certification procedures are needed to rectify the problem.<sup>7</sup>

The list of unethical practices and behavior reads like a "how to" booklet on the many ways to "siphon-off" a client's funds with very little money down or energy expended: fraud, misappropriation of funds, breach of fiduciary duties, conflicts of interest, fee gouging and embezzlement are the most common forms of under-handed activities and conduct. In short, the athlete is not the recipient of the services he was promised.

A great number of the aforementioned problems associated with athlete-agent relationships can be directly traced to the overall lack of stringent guidelines that effectively eliminate ill-equipped representatives from entering the sports agency profession.

The term "agency," is defined as a "consensual, fiduciary relation

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4. See NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (1983) at 1 [hereinafter "NFLPA REGULATIONS"].

5. J. WEISTART & C. LOWELL, *supra* note 2, § 318 at 326.

6. Comment, *supra* note 3, at 815.

7. *Hearings Before the House Select Committee on Professional Sports*, 94th Cong., 2d Sess. 290 (1976). Sports agent Jerry Kapstein stated: "We are an extremely small industry; a small amount of clients and even a smaller amount of representatives . . . . It does not take very long for the grapevine to weed out the bad apples among us." *Id.*

between two persons, created by law by which one, the principal has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal."<sup>8</sup> Agency law does not require the agent to have any technical expertise. An individual "who can act for himself is generally capable of acting as (an) agent for another . . ."<sup>9</sup> It is this relative ease of entry into the professional scene that has initiated reform and increased supervision of the player representative.<sup>10</sup>

Due to this relative non-existence of formal barriers preventing an individual to act as an agent, there has been a large influx of individuals from an even larger array of backgrounds who have attempted to cash in on the athlete sweepstakes.<sup>11</sup> As both money and prestige have grown synonymous within the agency field, the incidents of unqualified agents entering the marketplace has risen steadily.<sup>12</sup>

Whether it be a sports writer,<sup>13</sup> building contractor,<sup>14</sup> accountant,<sup>15</sup> attorney,<sup>16</sup> the evidence of abuse and overreaching is quite evident. Although the occurrence of unethical practices appear to happen in connection with non-attorney representatives more so than with practicing attorneys, it would be naive to pinpoint one sector of individuals as the main culprit in stifling the eradication of deceit in the profession.<sup>17</sup> With so much at stake, the chance for wrongdoing is all-encompassing during the recruitment and actual representation of the athlete.<sup>18</sup>

In *People v. Sorkin*,<sup>19</sup> a former sports writer entered into the sports agent profession and promised to advise and counsel his clients on finances and investments while reviewing their taxes.<sup>20</sup> Sorkin had no previous experience in negotiating professional contracts nor did he have

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8. 2A C.J.S. *Agency* § 29 (1972).

9. *Id.*

10. Comment, *supra* note 3, at 832.

11. Comment, *supra* note 1, at 1231 n.6.

12. See Kennedy & Williamson, *Money: The Monster Threatening Sports*, SPORTS ILLUSTRATED, July 17, 1978, at 46-51; Williams *Gladiator Traps: A Primer on the Representation of Black Athletes*, 9 BLACK L.J. 263, 271 n.86 (1986); Note, *Agents of Professional Athletes*, 15 NEW ENG. L. REV. 545 (1980).

13. See *People v. Sorkin*, No. 46429 slip op. (Nassau County, N.Y. Ct. Nov. 28, 1977) *aff'd*, 407 N.Y.S. 2d 772 (App. Div. 2d Dep't, July 24, 1978).

14. Williams, *supra* note 12, at 264.

15. *Id.*

16. *Id.*

17. See Comment, *supra* note 1, at 1231.

18. See Comment, *supra* note 3, at 815.

19. See *Sorkin*, No. 46429 slip op. (Nassau County, N.Y. Ct. Nov. 28, 1977) *aff'd*, 407 N.Y.S. 2d 772 (App. Div. 2d Dep't, July 24, 1978).

20. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros' Agent*, N.Y. Times, Oct. 9, 1977, § 5, at 1, col. 1.

any legal training.<sup>21</sup> Nevertheless, through his connections initiated by his brother-in-law,<sup>22</sup> Sorkin garnered a group of successful clients. As the athletes embarked on their athletic career, the agency agreements entered into between Sorkin and his clients included the requirement that all paychecks issued to the players would be sent directly to his office.<sup>23</sup> Although the funds were sent to Sorkin for investment purposes, Sorkin was using his client's monies to support a gambling habit.<sup>24</sup>

Sorkin's propensity to wager on sporting events led to an estimated \$626,000 loss to his clients.<sup>25</sup> Moreover, his inexperience in financial affairs and investments led to a monetary loss of \$271,000 for the athletes.<sup>26</sup> Unfortunately, the remedy for the players proved to be grossly inadequate and the profession of professional representation of sports figures suffered another black eye to its already tarnished image.<sup>27</sup>

A common practice during the earliest developmental stages of the profession included the agent collecting a large lump sum fee in advance from his client.<sup>28</sup> While this procedure enables the agent to receive a fee regardless of whether or not the athlete remains employed for the duration of the negotiated contract,<sup>29</sup> the inequitable results of this practice has traditionally been deemed unconscionable.

In *Brown v. Woolf*,<sup>30</sup> a professional hockey player employed agent-attorney Robert Woolf to negotiate a contract with the Pittsburgh Penguins franchise of the National Hockey League (NHL).<sup>31</sup> The scenario unfolded during an era which saw the growth of the rival World Hockey Association (WHA) and the increased opportunity for players to use

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21. *Id.* at 15, col. 1.

22. *Id.*

23. *Id.* at 15, col. 4.

24. *Id.* at 15, col. 1.

25. *Id.* at 15, col. 6.

26. *Id.*

27. Sorkin's misuse of his client's funds affected more than 50 professional hockey and basketball players. See Comment, *supra* note 1, at 1237.

28. For example, an athlete who signed a two-year non-guaranteed contract for a combined total of \$500,000 would compensate his agent by paying the agent's entire commission based upon their agreed fee for the agent's services. Thus, an agent charging a fee of five percent would receive \$25,000 irrespective of whether the athlete collects any portion of the negotiated agreement.

29. According to NFLPA records, very few contracts are now guaranteed. Unless a player is injured, he will probably not be entitled to any additional year(s) on his contract if, in fact, he does not perform for the particular franchise. Only the very elite (*e.g.*, Dan Marino, John Elway, Walter Payton) of the active members of the NFL receive fully guaranteed contracts from their respective clubs. (Information received from Mike Duberstein, Director of Research of the NFLPA).

30. 554 F. Supp. 1206 (S.D. Ind. 1983).

31. *Id.* at 1207.

each league as a crucial bargaining tool throughout the negotiation process. Woolf advised his client to reject an offer from the Penguins and recommended that Brown pursue a proposal from the WHA.<sup>32</sup> After Woolf negotiated a five-year contract with the WHA team, the instability of the fledgling league forced a renegotiation of the terms of the original agreement.<sup>33</sup>

The new terms actually reduced the compensation afforded to Woolf's client and included the subtraction of a retirement fund established in the initial bargaining process.<sup>34</sup> Despite the large reduction in compensation, Woolf attempted to collect his fee from his client irrespective of the now diluted value of the contract.<sup>35</sup> Woolf sought compensation for his services based upon the full value of the contract prior to any of these subsequent reductions in value.<sup>36</sup>

Brown received approximately twenty-four percent of the amount he was entitled to pursuant to the original agreement.<sup>37</sup> In turn, Woolf received a fee of twenty-one percent based upon what his client received.<sup>38</sup> Such facts are consistent with the modern trend that most athlete-agent fee schedules are now based upon the monies actually received by the player.<sup>39</sup>

The presence of overreaching and misrepresentation is not relegated to journeyman ballplayers and "run of the mill" athletes. In *Detroit Lions, Inc. v. Argovitz*,<sup>40</sup> Billy Sims, former Heisman Trophy winner and all-time leading rusher in Detroit Lion history, was caught in a cycle of misrepresentation and conflicts of interest which was played out during the emergence of the United States Football League (USFL).<sup>41</sup> Sims alleged that a contract negotiated by his agent Jerry Argovitz with the USFL Houston Gamblers was invalid due to the unethical behavior of his representative.<sup>42</sup> The allegations included fraud, misrepresentation and a breach of fiduciary duty.<sup>43</sup>

Although Argovitz was president of the Gamblers' franchise, he still attempted to act as Sims's agent in negotiations which pitted the Hous-

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See NFLPA REGULATIONS, *supra* note 4, at 9.

40. 580 F. Supp. 542 (E.D. Mich. 1984).

41. *Id.*

42. *Id.* at 543-44.

43. *Id.* at 543.

ton ballclub against the National Football League's (NFL) Detroit franchise.<sup>44</sup> Despite a clear presence of a conflict of interest, Argovitz acted as Sims's advisor.

Sims signed a contract with the Gamblers on July 1, 1983.<sup>45</sup> Soon thereafter Sims entered into a second contract with the Lions (December 16, 1983) for his future services. At the time of Sims's agreement with the Houston team, he was unaware of his representative's position and interest in the USFL franchise.<sup>46</sup> Throughout the negotiations, Argovitz made statements which influenced his client to jump to the rival football league.<sup>47</sup> During the critical stages of the negotiations, Argovitz informed sources connected with the Houston team of the amount of money offered by the Lions and the amount of compensation required to lure him away from the NFL ballclub.<sup>48</sup> Moreover, Argovitz misrepresented to his client that the Lions and their management were negotiating in bad faith and that the Gamblers could be much more receptive to his contractual demands.<sup>49</sup>

Sims, believing the representations of his agent, was convinced that the Lions were not interested in signing him to another contract.<sup>50</sup> In direct response to the advice of Argovitz, Sims instructed his agent to cease contact of any sort with the Lions and agreed soon thereafter to sign the July agreement with the Houston Gamblers.<sup>51</sup>

The court ruled that Argovitz breached his fiduciary duty owed to his client by not contacting the Lion management with the terms of the Gamblers' final offer. Without this contact with the Detroit management, Argovitz deprived his client as to making an intelligent and informed decision as to which club offered the most attractive

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44. *Id.* at 544. "Even the USFL Constitution itself forbids a holder of any interest in a member club from acting 'as the contracting agent or representative for any player.'" *Id.*

45. *Id.* at 545.

46. *Id.* at 544-45.

47. *Id.*

48. *Id.* at 545.

49. *Id.* at 545-49.

50. *Id.*

51. *Id.* Moreover, the presence of abuse in the compensation for the agent's services was apparent during the negotiations. The Gamblers offered Sims a \$3.5 million five-year contract, including skill and injury guarantees and a \$500,000 loan at one percent over prime. Argovitz was scheduled to receive \$100,000 from this loan for acting as Sims's agent. Pro rated over the lifetime of the contract, Argovitz's compensation is less than two and one half percent of the total package. However, by receiving this portion of the loan immediately, he actually was being compensated at an amount greater than twelve percent of the salary paid in the contract's initial year. If Argovitz generated business through a corporation, then, under an accrual accounting method, he would have tax liability in the first year. Therefore, the dollars are more advantageous on a present value basis if immediately received.

compensatory package.<sup>52</sup> It is clear that if Argovitz in fact had no pecuniary interest in the Houston Gamblers franchise he would have implemented a strategy by which both the Gamblers and Lions would have been encouraged to take part in a bidding war for his client's rights.<sup>53</sup>

Accordingly, the court rescinded the Sims-Gamblers agreement and upheld Sims's signed agreement with the Detroit Lions.<sup>54</sup> Nonetheless, the athlete lost a unique opportunity to receive a lucrative contract that would be commensurate with other highly sought after personnel who were signed by the Gamblers that particular year.<sup>55</sup>

This case also indicates that even the most visible and noteworthy athletes are susceptible to the unethical conduct of sports agents. What the aforementioned brief case study illustrates is the need for an effective regulatory system designed to police a field wrought with instability and unrestricted conduct.

## II. REGULATION AND CERTIFICATION

In direct response to the myriad of reports outlining the problems inherent in the field, various player associations and state legislators have attempted to inject some sanity into the athlete-agent marketplace. The National Football League Players Association (NFLPA) was the first organized body representing the direct interests of professional football players to establish a regulatory system patrolling prospective player representatives.<sup>56</sup>

The 1982 collective bargaining agreement (hereinafter "CBA") entered into between the NFLPA and the National Football League Management Council originally limited all player representation in individual contract negotiations to the "NFLPA or its agent."<sup>57</sup> In theory this provision appeared to deny undrafted and veteran free agent football players the option of retaining and choosing their own contract advisor.<sup>58</sup> Subsequently, the NFLPA rectified this potential problem by enacting the NFLPA Regulations Governing Contract Advisors.<sup>59</sup>

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52. *Id.*

53. See Williams, *supra* note 12, at 270.

54. *Detroit Lions*, 580 F. Supp. at 544.

55. *Id.* at 546.

56. NFLPA REGULATIONS, *supra* note 4, at i.

57. Collective Bargaining Agreement between National Football League Players Association and National Football Management Council (1982) at 32 [hereinafter "Collective Bargaining Agreement"].

58. Note, *The NFL Players Association's Agent Certification Plan: Is it Exempt from Antitrust Review?*, 26 ARIZ. L. REV. 699 (Summer 1984).

59. *Id.*



The main purpose of the regulations is to establish a network that gleans the qualifications of player agents and creates minimum standards of competence and more precise boundaries on fee compensation.<sup>60</sup> The regulations have also affected the scope of the services performed by the player's agent while alerting the athlete to potential contractual difficulties that might occur in his future dealings with his agent.

The regulations request preliminary information on the applicant's occupation, education, criminal convictions and any possible disciplinary actions taken against the prospective agent.<sup>61</sup> This data remains on file at the NFLPA offices and is available to any athlete and his family for verification of the background and credentials of a particular agent.

A critical area addressed by the NFLPA regulations is the amount of compensation charged by a player representative for his services. The regulations sought to reform this area of abuse by requiring all athletes and their agents to enter into a standard form representation agreement.<sup>62</sup> The form instructs all agents to comply with this prerequisite or jeopardize their standing as a certified contract advisor.<sup>63</sup>

The standard agreement contains a fee schedule which outlines the maximum amount an agent can charge his client purely for advice pertaining to individual contract negotiations. An agent may charge his client a higher rate than that prescribed by the NFLPA regulations only if he is engaging in other forms of consultation.<sup>64</sup>

The most pertinent aspects of the form include a requirement that the advisor's compensation be limited to no more than ten percent of the salary actually received by the athlete during the first year of any contract or series of contracts negotiated on behalf of the player by the agent.<sup>65</sup> Moreover, the agent will receive the lesser of two fees (not to exceed \$1,000) should he negotiate a contract which nets the athlete the minimum salary allowable in accordance with the athlete's years of service category under the CBA. A similar sliding scale of fee compensation governs the remaining years of any multi-year agreement.<sup>66</sup>

A contract advisor may receive compensation in excess of the aforementioned guidelines in cases of "exceptional achievement on behalf of the player in negotiation of the player's contract(s) or in cases where an

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60. See NFLPA REGULATIONS, *supra* note 4, at i.

61. *Id.* at Exhibit A at A1.

62. *Id.* at 7.

63. *Id.* at 3.

64. *Id.* at 2.

65. *Id.* at 9.

66. *Id.*

extraordinary amount of additional time was necessary to effectively complete the negotiation in question."<sup>67</sup> A player representative is also entitled to travel expenses and related costs in the negotiation of the contract.<sup>68</sup>

The main thrust of the regulations and its effect on agent fees arise in the realm of the actual definition of the term "compensation" and the expanse of the agent's rights to share in the various types of bonus money accrued by the athlete throughout the lifetime of the contract. The NFLPA regulations define "compensation" as "salary, signing bonus, or reporting bonus payments received by the player and attributable to the base year(s) of the contract(s)."<sup>69</sup> In particular, the regulations stipulate that the advisor shall not be entitled to receive a fee for "any incentive or performance bonuses . . . or benefits of any kind received for a player's services in the option year."<sup>70</sup> This clause effectively eliminates a wide range of potential fee compensation for the agent. This includes bonuses attained by the athlete for Pro Bowl selection, yards gained in a season, receptions, etc. Often, this can add up to substantial dividends for the agent who shares in the achievements of the athlete on the playing field.

The regulations also demand that the agent may only receive his compensation at the time the athlete receives the salary upon which the fee is based.<sup>71</sup> This provision guards against the previously common practice of receiving a large sum of money up-front.<sup>72</sup> The exclusion of incentive and performance bonuses from the fee schedule of contract advisors is an attempt at ensuring a more accurate relationship between the services performed by the contract advisor and the coinciding benefit received by the athlete.

Due to the development of the sports marketplace the professional representative and his function as contract advisor for his client has been dramatically modified. The value of an athlete entering the NFL draft is dictated to a large extent on the round and overall selection position he is chosen in the annual lottery of collegiate talent.<sup>73</sup> Consequently, the signing bonus, base salary and reporting bonus (usually not present in the

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67. *Id.* at 11.

68. *Id.* at Exhibit C at C2.

69. *Id.* at 9.

70. *Id.* at 11.

71. *Id.*

72. *See Brown*, 554 F. Supp. at 1206.

73. George Young, General Manager of the New York Football Giants, stated: "Because of the publication of salaries by the union, agents should know the numbers . . . why we have to go through this moonshot shit, I don't know. What the hell, they know what the market is." *The Austin Report*, Winter 1986, at 1.

first year of rookie contracts) are to a great extent in accordance with the round and overall selection position the athlete is chosen in the draft. Thus, a middle to late first-round selection will receive a signing bonus and base salary markedly larger than that of a third-round selection.

The development of a semi-structured pay scale has changed the role of a contract advisor and has shifted some of the emphasis in contract negotiation to areas which have traditionally been neglected or overlooked. With the decline and eventual disappearance of the USFL, the player representative has witnessed a vital bargaining chip vanish into the bankruptcy courts. Thus, a player agent must devote his personalized attention to the strengths and weaknesses of each of his clients and develop a string of performance bonuses that enable the athlete to receive fair compensation for his services. An agent must now possess the unique mixture of being a skilled negotiator and a keen evaluator of talent in order to incorporate the proper performance clauses into the contract.<sup>74</sup>

A contract advisor who devotes a substantial amount of time and effort in this area of the negotiating process is in essence justifying a great portion of the compensation he receives for the right to act as a players' representative. An agent who negotiates a contract which meets the average return in signing bonus and base salary and in turn ignores the importance of developing that fragment of the agreement pertaining to incentive clauses and performance bonuses is derelict in his professional responsibility to effectively negotiate a contract that is commensurate to the potential earning power of the athlete.

The regulations also accurately assess the worth of the agent's input into the negotiation of the option year of a contract by excluding that portion of the agreement from the contract advisors fee schedule.<sup>75</sup> Under the 1982 CBA, a veteran free agent may sign with his original ballclub at its "last best written offer given on or before February 1 of that year, or . . . a one-year contract with no option year with his old club at 110% of the salary provided in his contract for the preceding year

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74. For example, a contract advisor must be aware of performance bonuses that are geared primarily for players who "start" on their respective clubs. A typical incentive clause offered by NFL management is a bonus for participating in 50% of the offensive plays from scrimmage throughout the season. However, should a player become injured during the season, particularly in the early portion of the year, the athlete will never be able to fulfill the bonus requirements. Therefore, the well-prepared contract advisor might seek to incorporate a modification of this clause by demanding the inclusion of a bonus for a player who participates in 50% of the offensive plays from scrimmage while on the team's active roster.

75. See NFLPA REGULATIONS, *supra* note 4, at 11.

. . . .<sup>76</sup>

The agent who shares in the financial reward of a client's contract renewal at a mere ten percent as mandated in the CBA, would result in unjustly rewarding the contract advisor for services that deserve little remuneration. Of course the regulations do not forbid the agent from sharing in the benefits received for the negotiation of a renewal, modification or extension of the original contract at a salary above the minimum amount proscribed in the CBA.<sup>77</sup>

Through the strict guidelines set forth in the NFLPA regulations, the professional sports agent must expand his knowledge and develop his skill and expertise in an area that he otherwise would not have devoted a significant amount of time towards. Although some commentators may argue that the exclusion of incentive clauses from the fee schedule of contract advisors actually discourages consideration of these facets to the bargaining process, the professional representative must emphasize the importance of developing the proper mixture of performance clauses within the contract while not neglecting the more publicized negotiation of signing bonuses and base salaries.

While the NFLPA has made significant strides in establishing an effective certification process, there are still some major gaps in the regulations' scope and range. The current CBA and NFLPA certification process omits contract advisors of unsigned rookies from the scope of the regulatory process. A collegiate player entering the NFL draft is not considered a member of the unit of employees that constitutes the NFLPA and its representatives.<sup>78</sup> In particular, the ramifications of this loophole are only amplified when considering the chance of abuse is greatly heightened in connection with those athletes who are just drafted and venturing into the business world for the very first time.<sup>79</sup>

In direct contrast to this omission of the NFLPA certification system, the National Basketball Players Association (hereinafter "NBPA") has implemented a screening process strikingly similar to that of the NFLPA plan.<sup>80</sup> However, the NBPA certification regulation explicitly governs all contract negotiations involving rookies and veteran free

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76. See Collective Bargaining Agreement, *supra* note 57, at 25.

77. See NFLPA REGULATIONS, *supra* note 4, at 11.

78. Telephone interview with Cheryl Davis, Agent Certification Coordinator of the NFLPA (Dec. 8, 1986). See also Forbes, *Agents Still Get Free Shot at NFL's Rookie Crop*, USA Today, Feb. 18, 1987, sec. C, at 7, col. 1.

79. Davis interview, *supra* note 78.

80. See generally NBPA REGULATIONS GOVERNING PLAYER AGENTS (1986) at Foreword. (Hereinafter "NBPA REGULATIONS").

agents.<sup>81</sup>

As of March 7, 1986, the NBPA initiated a certification and regulatory system for contract advisors. The impetus for the creation of the regulation "was the increasing recognition among NBA players of the need . . . to ensure that agents representing players (including rookies) in individual contract negotiations with NBA teams provide services of a high quality at fee levels that are fair and equitable . . ." <sup>82</sup> The NBPA further states the need to establish a program that assists players and rookies in selecting individual agents.<sup>83</sup>

The NBPA regulations governing player agents differs in other areas of vital importance. In computing the maximum allowable fee accorded the contract advisor, the NBPA defines the term "compensation" as including "base salary, signing bonus and any performance bonus actually received by the player."<sup>84</sup> Thus, it would appear that the NBPA regulations are completely contradictory from that of the NFLPA certification process.

However, upon closer examination, the NBPA justifies the inclusion of performance bonuses within the expanse of the agent's fee schedule by drastically reducing the maximum compensation permitted in individual contract negotiations. Under the NBPA regulation, the agent receives a fee of four percent of the compensation negotiated for the player for each playing season.<sup>85</sup> The dramatic decrease in the maximum fee collected by an agent is neutralized by the inclusion of incentive and performance bonuses within the agent's fee schedule. The NBPA regulations arguably combine the more desirable aspects of the NFLPA system by establishing a preliminary screening process of prospective contract advisor's with a system that recognizes the need for restrictions on the amount of money charged by an agent for his services. The inclusion of performance bonuses within the contract advisor's financial reach might actually encourage the player representative to devote an increased amount of time and effort on that portion of the bargaining process.

### III. THE CALIFORNIA ATHLETE AGENCY ACT

The State of California created legislation intended to protect athletes from potential abuse prevalent in the profession. The Athlete

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81. See generally NBPA REGULATIONS, *supra* note 80.

82. *Id.* at Foreword.

83. *Id.*

84. *Id.* at 6.

85. *Id.*

Agents Act<sup>86</sup> is closely modeled after California's Talent Agencies Act, which is similarly designed to protect artists seeking employment in the entertainment industry.<sup>87</sup>

Nonetheless, the legislation is plagued by a wide range of problems involving its intended scope and application. Generally, the language of the Act is ineffective to combat the major problems inherent within the industry. A primary example of the deficiency of the legislation is reflected in the amount of the bond required to be posted by athlete agents.<sup>88</sup> Prior to the issuance or renewal of a registration, a surety bond in the penal sum of \$25,000 must be deposited with the Labor Commissioner.<sup>89</sup> The purpose of the bond is to encourage the agent to comply with the regulations and pay for damages due to "intentional or unintentional misstatement, misrepresentation, fraud, deceit or any unlawful or negligent acts or commissions or omissions of the registered athlete agency . . . ."<sup>90</sup> The amount of the bond is merely cosmetic in nature since it is miniscule when compared to the average compensation paid to professional sports figures.<sup>91</sup>

Moreover, the Act is lacking in the most common areas of educational and character requirements.<sup>92</sup> The application for registration is accompanied by affidavits or certificates of completion of any and all formal training or practical experience in any of the following specific areas: contract negotiation, complaint resolution, arbitration, or civil resolution of contract disputes.<sup>93</sup> When compared to the educational and character requirements needed to practice law in the State of California, the Act falls far short in ensuring the licensing of effective professional representation.<sup>94</sup>

The screening process instituted by the California Legislature has proven to be woefully inadequate in its attempt to stifle the onslaught of unprofessional contract advisors from entering the marketplace.

The most controversial portion of the Act is its treatment of attorneys. As defined in the Code, an "athlete agent" is:

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86. See generally CAL. LAB. CODE §§ 1500-1547 (West Supp. 1986).

87. See generally CAL. LAB. CODE §§ 1700 *et seq.* (West Supp. 1986).

88. CAL. LAB. CODE § 1519(a) (West Supp. 1986).

89. *Id.*

90. CAL. LAB. CODE § 1520(a) (West Supp. 1986).

91. The 1985 average base salary in the NFL was \$164,320. Information is based upon statistics released by the NFLPA offices.

92. See CAL. LAB. CODE § 1511(d) (West Supp. 1986).

93. *Id.*

94. Comment, *Attorneys and the California Athlete Agencies Act: The Toll of the Bill*, 7 COMM./ENT. L.J. 551, 588 (1984).

[A]ny person who, as an independent contractor, directly or indirectly, recruits or solicits any person to enter into any agent contract or professional sport services contract, or for a fee procures, offers, promises, or attempts to obtain employment for any person with a professional sport team or as a professional athlete.<sup>95</sup>

An athlete agent does not include "any member of the State Bar of California when acting as legal counsel for any person."<sup>96</sup>

The exemption of attorneys from regulation under the Act is based on the premise that legal practitioners are regulated by the State Bar of California and its accompanying Code of Ethics.<sup>97</sup> However, attorneys who go beyond the narrow scope of offering "legal counsel" might be subject to the agency legislation. Even an attorney who represents a limited amount of athletes and offers advice and counsel in areas including insurance, endorsements, and perhaps financial planning, would need to file an application with the state legislature.

The requirement that attorneys who provide guidance in areas aside from legal counsel is economically unrealistic considering the fact that in addition to a surety bond, a filing fee and annual registration fee is necessary under the Act.<sup>98</sup> A contract advisor's duties outside of the traditional realm of "legal counsel" includes the negotiation of endorsement contracts and personal appearances. These demands of the agent have become inextricably interwoven into the fabric of the well-prepared sports agent's strategies and methods and without a workable definition that would allow for more flexibility for professional legal counselors. Presently, many attorneys are not registered under the Act based upon the "legal counsel exemption."<sup>99</sup> Whether it is an attorney with just a few clients, or one with a long list of athletic superstars, the constraints and requirements placed upon attorneys operating as sports agents are both ineffective and misplaced. The California State Legislature must be sensitive to the changing role and demands of the sports agent/attorney and institute a code which will better effectuate the intended goals of the Act.

Perhaps the single most viable alternative would be the creation of a standardized examination offered to all agent applicants.<sup>100</sup> Considering

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95. CAL. LAB. CODE § 1500(b) (West Supp. 1986).

96. *Id.*

97. See Comment, *supra* note 94, at 565.

98. See CAL. LAB. CODE § 1517 (West Supp. 1986).

99. See Comment, *supra* note 94, at 562.

100. For example, an agent who represents several mid-round draft choices and charges an average fee of five percent for his services would have difficulty overcoming the cost of filing

the fact that in order to practice law an applicant must satisfy educational and character requirements and pass a rigorous bar examination, a system that would require a prospective sports agent to pass an exam designed to evaluate his/her competency would establish a much more sophisticated representative.<sup>101</sup>

Although some argue that the total number of agents is so small as not to justify such a rigorous system, the fact that competition for the 336 draftees for the annual NFL draft has escalated each year would indicate the need for reform.<sup>102</sup> Additionally, in light of the fact that the Labor Commissioner is demanding an average of \$2,000 for granting of a license, the monies generated for the input and administration of the legislation are available and present.

#### IV. CONCLUSION

There is no dispute that a professional and well-prepared contract advisor can play a vital role in the earnings of a professional athlete. The role of the sports agent has generally remained the same for the past decade: maximize the financial position of his client through contract negotiation, endorsements and other business opportunities. The method by which this must be accomplished has been dramatically affected by the intensified scrutiny of the activities of the sports agent.

The certification and regulation procedures initiated by various players associations and legislators have helped redefine and solidify the position of the sports agent within the business world of professional sports. Although these systems are designed to protect the naive athlete from financial suicide, there are many areas in which the licensing procedures need a stricter application to the important issues confronting the problem. An establishment of some uniformity in fee schedules combined with effective measures to combat the recurring problems inherent in the field are crucial components of any model regulatory system.

The sports agent must now possess the ability to evaluate the skills and strengths of his client and incorporate these qualities of the athlete into a sound financial package. The intensified certification and regulation of the contract advisor has in turn redirected the emphasis of the sports agent into areas that better ensures the effective and competent representation of professional athletes.

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fees and related expenses dictated by the Athlete Agency Act. This in essence encourages player representatives to ignore the legislation in order to survive as a profitable enterprise.

101. See Comment, *supra* note 1, at 1255.

102. The Austin Report, Winter 1987, at 3.



