Buffalo Law Review

Volume 30 | Number 4 Article 7

10-1-1981

The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation

Jeffrey P. Crandall

THE AGENT-ATHLETE RELATIONSHIP IN PROFESSIONAL AND AMATEUR SPORTS: THE INHERENT POTENTIAL FOR ABUSE AND THE NEED FOR REGULATION

INTRODUCTION

Interactions between sports agents[1] and athletes in the context of professional and amateur sports are recent phenomena. The business of athlete management itself was relatively obscure as little as twenty years ago.[2] The great boom in agent representation[3] that started in the late 1960's has resulted today in the relationship between athletes and their agents becoming almost as important as that between athletes and the teams that employ them.[4] Unfortunately for athletes, club owners, fans, and honest and efficient sports agents,[5] the number of problems resulting from agent-athlete interactions have swelled almost as fast as the ranks of the agents themselves. It has become apparent that a disturbingly high number of agents have not always performed in the best interests

---

1. An agent has been generally defined as "one who acts for or in the place of another by authority from him," or "a person who represents another in contractual negotiations," or "a business representative whose function it is to bring about, modify, effect . . . contractual obligations between the principal and third persons." RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

2. The legendary coach of the Green Bay Packers professional football team, Vince Lombardi, had a crude but effective method of frustrating the fledgling attempts of sports agents to break into the field of organized football in the early 1960's. When informed that an agent had come to negotiate player Jim Ringo's contract, Lombardi walked into his personal office and closed the door. Upon his return a few minutes later he told the would-be negotiator, "You are negotiating with the wrong team. Mr. Ringo has just been traded to Philadelphia." Kennedy & Wilson, *Money in Sports*, SPORTS ILLUSTRATED, July 24, 1978, at 47.

3. An agency relationship between an athlete (the "principal") and a sports manager (the "agent") is created by an agreement between the parties. 3 AM. JUR. 2d *Agency* § 17 (1962).

4. Today, owners of professional sports teams expect that almost all of their players will conduct negotiations with the aid of some kind of representative. *House of Representatives Select Committee Inquiry into Professional Sports*, H.R. Rep. No. 1786, 94th Cong., 2d Sess. (Jan. 1977) [hereinafter cited as *Committee Inquiry*], *reprinted in* PRACTISING LAW INSTITUTE, REPRESENTING THE PROFESSIONAL ATHLETE 203 (1978) [hereinafter cited as PRACTISING LAW INSTITUTE].

5. "Most agents are reputable, but a shocking percentage are not. . . ." Kennedy & Wilson, *supra* note 1, at 48. *See, e.g.*, Golenbach, *Now Calling Signals, The Lawyer-Agent*, JURIS DOCTOR, Oct. 1971, at 49.

of the athlete, or sports in general.[6]

This Comment will focus on the agency relationship between the athlete and his representative. The major areas of discussion will be the ramifications of the agent-athlete relationship, the problems that grow out of it, and potential solutions.

This Comment will also discuss the contrast between lawyer and non-lawyer agents, emphasizing the crucial impact this distinction has on the well-being of the athlete. Finally, a discussion has been included on the distinctions between the agent-athlete relationship in professional and amateur sports.

I. THE PRACTICAL NECESSITY OF AN ATHLETE RETAINING AN AGENT

Opinion as to whether or not all or most athletes need the assistance of sports agents is varied. For example, some of the athletes themselves are strongly against the idea of third-party representation, preferring to negotiate with team owners on their own.[7]

On the other hand, an agent's service can be of great benefit to an athlete.[8] An agent can insure that an athlete takes full advantage of his publicity value through endorsements, appearances, publishing and other money-making endeavors.[9] Whether or not an athlete properly exploits his promotional opportunities may actually have an effect on his performance on the field. For example, some commentators have noted that "[t]he athlete's mental condition, and his on-the-field performance, can be greatly influenced by his personal financial position."[10] An athlete performing under a long-term, low-paying contract may come to feel exploited if he eventually develops his talents. As a result both parties may be-

---

6. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 319 (1979) [hereinafter cited as WEISTART & LOWELL]. "[Such a] suggestion is by no means hypothetical." Agents are "the most destructive forces in sports today." *Committee Inquiry, supra* note 4, at 70.

7. For example, professional tennis player Chris Evert has emphatically stated that "[a]gents are anathema." *Quoted in* Kennedy & Wilson, *supra* note 2, at 49. Professional football great O.J. Simpson is "against business agents because they allow the athlete to rely on someone else. Once a player's career is over, these people aren't around." *Id.* at 47.

8. WEISTART & LOWELL, *supra* note 6, at 319. For comparative statistics of the value of contracts signed by first year players with and without the aid of an agent, *see* S. GALLNER, PRO SPORTS: THE CONTRACT GAME 40 (1974).

9. *See* WEISTART & LOWELL, *supra* note 6, at 319. This is an often overlooked point, as many athletes are not as aware as they should be of financial opportunities away from the playing field. *See* Golenbach, *supra* note 5, at 50.

10. WEISTART & LOWELL, *supra* note 6, at 319.

come dissatisfied; the player because he is not being paid an amount commensurate with his abilities and the club owner because he has to tolerate a disgruntled, nonproductive employee.

Case law exemplifies situations where an athlete would undeniably have been better off had he had the advice of a competent agent. For example, in *Los Angeles Rams Football Club v. Cannon,*[11] the District Court for the Southern District of California allowed a college football player, Billy Cannon, to breach a contract he had signed with a professional football team.[12] The court's decision in part hinged on the fact that the team had coerced Cannon, who had negotiated the agreement on his own, into signing a contract that was not in his best interests.[13] Had Cannon been aided by a properly trained sports agent, it would be reasonable to conclude that the whole problem could have been avoided.[14]

The advantages of the sports agent can also be reflected in the traditional make-up of the professional sports' power structure. As recently as the early 1960's, professional sports resembled a dictatorship, with the club owners wielding a great degree of control over their employees. Baseball, with its 1922 Supreme Court exemption from the antitrust laws, was the primary example of sports' monopolistic nature.[15] The standard reserve clauses found

---

11. 185 F. Supp. 717 (S.D. Cal. 1960).

12. The facts of the Cannon case are as follows: In November, 1959, Louisiana State University football star Billy Cannon signed a three-year contract with the Los Angeles Rams of the National Football League. One month later, Cannon revoked any offer he may have made to play for the Rams, claiming that he had never entered into a binding agreement with them. The Rams subsequently brought suit against Cannon for an order declaring the existence of a valid contract. Under the rules of the National Collegiate Athletic Association (NCAA), the signing of a contract with a professional team would render a player ineligible for the remainder of his collegiate career. NCAA CONSTITUTION, art. III, § 1(c) (1979). Taking note of this provision in ruling that there was no valid contract, District Judge Lindberg pointed out that he felt certain that Cannon would not intentionally disqualify himself from the upcoming Sugar Bowl, which is a prestigious post-season college football playoff game. 185 F. Supp. at 725.

13. The court was persuaded by the fact that Cannon was "untutored and unwise . . . in the ways of the business world." 185 F. Supp. at 726. "He was without counsel and advice . . . ." *Id.*

For a description of tactics that are commonly used by owners against athletes who are not represented by an agent, which are designed to induce them into signing contracts for less than they would otherwise receive, *see* GALLNER, *supra* note 8, at 40-45.

14. As the court pointed out, this was not Cannon's "chance in a lifetime to turn professional which he might lose forever if he did not grab it immediately." 185 F. Supp. at 726. Thus, proper counseling would have prevented Cannon from signing the contract.

15. Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S.

in all player contracts gave the athlete a simple option: accept what the club owner offered or retire.[16] The advent of the sports agent helped alleviate to some degree the gross inequality of bargaining power between owners and players.[17]

An additional advantage offered by sports agents stems from the limitations of the professional sports players associations.[18] In recent years, the efforts of the players associations for each sport have reaped considerable benefits for the athlete. One of the results of these accomplishments is that minimum wage scales and basic terms and conditions of employment have been established.[19] However, any suggestion that the players associations might aid in athletes' individual[20] negotiations is weakened by the fact that

---

200 (1922). *Accord* Toolson v. New York Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972).

16. Many commentators have pointed out the inherent inequities present in this situation. *See, e.g.*, Note, *The Balance of Power in Professional Sports*, 22 ME. L. REV. 459 (1970): "This bargaining imbalance is inconsistent with the premises of our free enterprise system and must be eliminated if the professional sports world is to avoid a total breakdown in labor-management relations." *Id.*

Today, however, almost every sport has been forced to ease up on the absolute restrictions of the reserve clause. For example, in 1974 major league baseball player Jim Hunter was declared a free agent by an arbitration panel, which found that the team that employed him had breached his contract by refusing to pay him all of the compensation that had been agreed upon. L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 197-201, 208 (1977). The decision became a precedent for other cases that soon followed. *See* In re Arbitration Between the Twelve Clubs Comprising the Nat'l League of Professional Baseball Clubs and the Twelve Clubs Comprising the Am. League of Professional Baseball Clubs and Major League Baseball Players Ass'n, Dec. No. 29, Grievance Nos. 75-27 & 75-28 (Dec. 23, 1975).

17. For example, lawyer-agent Martin Blackman maintains that the most important attribute a representative brings to the athlete is that of an equalizer. "If you can imagine a negotiation between an experienced and senior club official and a boy between the ages of 16 and 21, there is a certain built-in inequity in that negotiation." Testimony during *Committee Inquiry, reprinted in* PRACTISING LAW INSTITUTE, *supra* note 4, at 200.

18. The National Football League (NFL), National Hockey League (NHL), National Basketball Association (NBA), and Major League Baseball all have their own players associations.

19. *See, e.g.*, S. FISCHLER, SLASHING! 84-95 (1974) [hereinafter cited as FISCHLER], which depicts the rise of the NHL's Players Association (NHLPA) and the resultant benefits to the hockey players.

20. Determining the worth of an individual athlete is a complex and subjective process. Therefore, individual contracts with the respective clubs are negotiated by each player, and not by the group efforts of the players associations. "This is essentially a product of the inability to precisely quantify and categorize the range of value of a playing position or any similar generalization as is common in industrial enterprises." FINAL REPORT OF THE HOUSE OF REPRESENTATIVES SELECT COMMITTEE INQUIRY INTO PROFESSIONAL SPORTS, H.R. Rep. No. 1786, 94th Cong., 2d Sess. at 71 (Jan. 1977) [hereinafter cited as FINAL REPORT].

For an outline of "negotiation imperatives" that can aid an agent in assessing the true

their experience is concentrated in the area of collective bargaining. Agents have thereby been presented with the opportunity to fill the gap in the representation of athletes resulting from the inadequacies of the players associations.

Therefore, although some athletes prefer to deal with management on their own,[21] many others, especially those with a limited education or business background, may be significantly aided by the efforts of a competent agent.

II. Recurrent Problems and Abuses in the Agent-Athlete Relationship

The business of athlete management has been marred by sports agent-caused problems and abuses, both on the amateur and professional level. While some of these problems are the result of incompetent, although honest, efforts, a sizeable number are the result of fraudulent and deceitful practices. The following analysis will outline the most frequently recurring types of agent abuse.

A. *Agent-Caused Problems in the Context of Professional Sports*

Unlike amateurs,[22] professional athletes are not prohibited from acquiring the assistance of an agent. Thus, most agent-athlete interactions take place on the professional level. As a large percentage of all professional athletes retain agents to represent them, it is imperative that these agents are qualified.[23] Unfortunately,

---

contract value of an individual athlete, *see* GALLNER, *supra* note 8, at 35. These imperatives include: comparative salaries of other players; the team's financial situation; an understanding of the essential terms of the standard player contract; and preventative measures taken to guard against tactics engaged in by owners to coerce an athlete into signing a contract for less than he would otherwise receive.

21. Note that some commentators maintain that very few of the players who negotiate without representation obtain favorable contracts. *See* Adams, *Agents Due Thinner Cuts, More Slices of Basketball Pie After Merger*, The Louisville Courier-Journal & Times, Aug. 11, 1971, *reprinted in Hearings on S.2373, Before the Subcomm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 433 (1971) [hereinafter cited as *Senate Hearings*].

22. *See* text & accompanying notes 53-64 *infra*.

23. Most of the agency agreements entered into in professional sports require the athlete to be bound to the agent in an exclusive agency agreement. WEISTART & LOWELL, *supra* note 6, at 323. *See* GALLNER, *supra* note 8, at 174 for an example of the standard agency agreement used in the sports industry. For examples of exclusive agency agreements in the entertainment industry, *see generally* PRACTISING LAW INSTITUTE, COUNSELING PROFESSIONAL ATHLETES AND ENTERTAINERS (1972).

The exclusive agency notion is critical to the athlete who finds that he has selected an

this is not always the case.

At the amateur level, the consequences of agent abuses are generally confined to causing athletes to lose a year or two of college eligibility. Professional athletes have not been as fortunate. Agent problems at the professional level include fee gouging, breach of fiduciary relations, conflicts of interest and outright fraud.[24]

1. *Misappropriation of funds entrusted to the agent by the athlete.* Many sports agents have the athletes they represent sign an unlimited power of attorney, which gives the agent total control

---

incompetent or unscrupulous agent to represent him, as he will render himself liable to his original agent for his commission or breach of contract damages in the event he enters into an agreement with a new one. Note, however, that the athlete will not always be liable for the commission, as the agent will only be entitled to his fee if he can show that he would have been able to perform the promised acts if he had been allowed to continue. John B. Robeson Assoc. v. Gardens of Faith, Inc., 226 Md. 215, 172 A.2d 529 (1961). *Accord,* RESTATEMENT (SECOND) OF AGENCY § 449, comment d, (1958).

Case law from the real estate brokerage area suggests that the mere description of an agency as exclusive does not always mean that only the agent has the right to perform the acts set out in the agreement. *See* WEISTART & LOWELL, *supra* note 6, at 324, which points out the distinctions between an "exclusive agency" (where the broker is the exclusive agent, but the principal can sell on his own) and the granting of the "exclusive right to sell" (where only the agent can sell). Thus, the athlete entering into an exclusive agency agreement still retains the option of entering into negotiations on his own with the team, sporting goods manufacturers, and the like.

The fact that most athletes find themselves bound to exclusive agency agreements is important for an additional reason. The million-dollar contracts that are becoming increasingly common in the professional sports market leaves the lay person with the impression that the athlete entering into such an agreement has ensured himself of lifetime financial security. Unfortunately, the athlete often believes it also. In reality, after inflation, taxes, and wasteful spending by players who never had to deal with large amounts of money before, the monetary figures are not all that they appear to be, especially since many athletes are not prepared to enter another career once they have retired from professional sports. As the athlete will most likely be bound to an exclusive agency, "the realization of his economic potential may be wholly dependent upon the efforts made by the party designated as agent." WEISTART & LOWELL, *supra* note 6, at 326. Thus, representation by an incompetent or unscrupulous agent may destroy an athlete financially.

24. FINAL REPORT, *supra* note 20, at 73. One example of such agent abuse involves double billing of clients; for example, the agent and the athlete might negotiate an agency agreement that states that the team should, after deducting the amount from the player's salary, pay the agent's commission directly to the agent. After this, the agent will help himself to a second commission out of the trust account he has set up for the player's earnings. Athletes with little or no financial backgrounds often fall victim to such a ploy. *See Testimony before the New York Select Committee on Crime: Sports Agents' Practices,* New York, New York at 47-50 (Feb. 1-2, 1978) [hereinafter cited as *New York Select Committee*].

over the player's finances.[25] This can be a boon to the athlete who has hired a competent agent, as his financial problems are handled for him, but it creates easy prey for agents who are unscrupulous.[26]

One of the most flagrant examples in recent years of misappropriation of player funds involved agent Richard Sorkin, who represented fifty members of the National Hockey League and National Basketball Association. In November, 1977, Sorkin, a former newspaper reporter, was sentenced to three years in jail after pleading guilty to seven counts of grand larceny, involving a total amount of approximately 1.2 million dollars.[27]

Sorkin began acting as an agent in 1972. Under the agency agreements and the contracts he negotiated, his clients' paychecks were sent directly to him. He was to deduct his fees and invest the remainder. Unfortunately, Sorkin only had a "layman's knowledge of the stock market."[28] When his investments led to heavy losses of his clients' money, Sorkin turned to horse-racing and basketball bets in an unsuccessful attempt to recoup his losses.[29] As for his clients, none of the money they lost was ever returned to them.

2. *The agent's fee.* Another frequently occurring problem arises in the context of the agent's commission. For example, agents often attempt to negotiate contracts that insure them of getting their fee (which averages about ten percent of what an athlete earns from all sources) immediately. Such an arrangement may not be in the best interests of the athlete. For example, if a player signs a long-term, non-guaranteed contract and the agent takes his fee immediately, the agent will be over-compensated in the event that the athlete is not employed for the full term of the

---

25. *Id.* at 4.

26. The New York State Hearings brought out an additional problem with the giving of a power of attorney. It seems that it induces many naive athletes into thinking that their agents actually are attorneys.

27. People v. Sorkin, No. 46429 (Nassau County Ct., Nov. 28, 1977); *sentence aff'd,* 64 A.D.2d 680 (2d Dep't 1978). Hockey players Bobby Nystrom and Ron Greschner lost $145,000 and $86,000, respectively. Basketball player Dennis Duval lost $30,000 and was forced into bankruptcy.

28. Testimony by Sorkin before the *New York Select Committee, supra* note 24.

29. *Id.* Gambling by professional athletes is outlawed by all professional leagues. Having a gambler like Sorkin in close contact with players and their finances is certainly not in the best interests of professional sports. Sorkin also serves as an example of how great the temptation for the layman to become a sports agent really is, as he managed to earn $275,000 in his first year as an agent. *Id.*

contract.[30] In *Burrow v. Probus Management, Inc.*,[31] the district judge concluded that an agent's advising a football player to accept a bonus in a lump sum was not in the best interests of the plaintiff, but was "for the purpose of acquiring immediate funds for the benefit of the defendant which created additional tax liability in the amount of approximately twelve hundred dollars."[32]

Sports agents have also been charged with taking a commission that is an outrageously large portion of a player's salary. While most charge between six and ten percent of an athlete's total earnings, some charge as much as twenty-five percent of the value of all contracts the agent has secured for the athlete.[33]

It is crucial to note that there is more of an inherent potential for abuse, in regard to the agent's fee, on the part of the non-attorney agents. Although lawyer-agents also tend to charge on the more lucrative percentage basis in the sports context,[34] they are at least subject to the American Bar Association's sanctions against charging exorbitant fees. Pursuant to Disciplinary Rule 2-106(A), "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."[35] There are court-enforced sanctions for the violation of this canon, as it has been held that the charging of a "clearly excessive fee" is a ground for discipline.[36]

3. *Conflicts of interest.* Another potential problem area inherent in the agent-athlete relationship comes under the heading of

---

30. With a non-guaranteed contract, the player will not get paid if he is injured or "cut" from the team.

31. Civ. No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order). Probus Management has been investigated by the New York State Attorney General for breaching contracts with professional athletes.

32. *Id.* at 6. In addition, the court found that Probus falsified Burrow's tax returns, failed to pay bills as agreed in the contract and misappropriated an additional $30,000. Burrow was awarded $30,000 in compensatory damages, $60,000 in punitive damages and $5,000 in attorney's fees.

33. GALLNER, *supra* note 8, at 52. Note that "[t]he most respected athletic representatives find the payment of large percentages unethical." *Id.* Sam Gilbert, a Los Angeles businessman who has represented many professional basketball players, feels that "no one is worth 10 percent of a player's earnings." WEISTART & LOWELL, *supra* note 6, at 320 n.707.

34. As opposed to the majority of areas where attorneys usually collect fees on a per hour basis.

35. AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS, Cannon 2 [hereinafter cited as ABA CANONS OF PROFESSIONAL ETHICS].

36. State ex rel. Nebraska Bar Ass'n v. Richards, 165 Neb. 80, 90, 84 N.W.2d 136, 143 (1957). *But cf.* ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, FORMAL OPS. 27 (1930), 190 (1939), & 209 (1940).

conflicts of interest.[37] Critics of sports agents assert that agents are often insensitive to potential conflicts which may arise between their own interests and those of the athletes they represent.[38] In a typical situation, two athletes represented by the same agent may be seeking contracts from the same team. This might result in the agent tending to "compromise one client's demands in order to secure a more favorable contract for another."[39] Conflicts also arise in the context of fee arrangements. The athlete is better off deferring his income, while the agent may be more concerned with the athlete's ability to immediately pay his commission.[40]

From a legal standpoint, agency law dictates that an agent has

---

37. In the event that the agent is an attorney, he will be bound by the restrictions set forth in the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY. For example, an agent will be prevented from representing conflicting interests by the mandate of Disciplinary Rule 5-105(a): "A lawyer shall decline profferred employment if the exercise of his independent professional judgement in behalf of his client will be or is likely to be adversely affected by the acceptance of the profferred employment, or if it would be likely to involve him in representing differing interests. . . ."

The Code's Disciplinary Rules [hereinafter cited as DR's] are "mandatory in character." They establish duties in the sense that their violation may result in discipline. The Code's Ethical Considerations [hereinafter cited as EC's] are "aspirational" rules which lawyers should strive to obey but are not designed to serve as a basis for discipline. They are meant to be a source of principles and policies that are helpful in interpreting the DR's.

38. WEISTART & LOWELL, *supra* note 6, at 328. For examples of conflicts of interest that may arise when player association executives are also agents, *see* FINAL REPORT, *supra* note 20, at 76.

39. *Id. See* GALLNER, *supra* note 8, at 68. Unless the parties have consented to the adverse representation, and unless it is obvious that the agent can adequately represent the interests of each client, the agent has a duty to refrain from acting for a party whose interests are inapposite to those of the athlete. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(c); RESTATEMENT (SECOND) OF AGENCY §§ 391, 392, 394 (1958). However, an agent may be allowed to serve both parties to a transaction if there is no necessary conflict in their interests. Northrup v. Germania Ins. Co., 48 Wis. 420, 4 N.W. 350 (1880). But, even if there is a remote possibility of a conflict of interests, the agent will not be permitted to act to bind his principal. Herman v. Martineau, 1 Wis. 136, 142 (1853).

A classic example of conflicts of interest in the form of adverse representation involving professional sports is that of agent Richard Sorkin. *See* text & accompanying notes 27-29 *supra*. Sorkin was given money by NHL teams in an attempt to induce him to encourage players he represented to negotiate contracts with them. Testimony before the *New York Select Committee*, *supra* note 24, at 34.

40. *See* text & accompanying notes 31-32 *supra*. The professional basketball bidding wars, note 57 *infra*, created yet another conflict of interest situation:

> Recognizing that the representative exercises a great deal of control over his athlete-client, leagues in bidding wars have employed agents to induce athletes to sign with their league. Unless a disclosure is made to the athlete, the agent, who may also be representing the athlete, is involved in a conflict of interests.

GALLNER, *supra* note 8, at 53.

a duty to avoid representing conflicting interests;[41] that is, the agency cannot be used for the benefit of the agent himself or any person other than the athlete.[42] All persons dealing with the agency must take notice of this rule; in a situation where an agent is apparently pursuing an interest that conflicts with those of the athlete, all third parties are charged with notice of the agent's lack of authority to bind his principal by his actions.[43]

These agency law restrictions can be waived by the athlete's implied or express consent to the adverse representation.[44] The problem in the context of professional sports lies in determining whether or not a client has effectively consented to actions taken by the agent on his own behalf.[45] For example, even though an agent may have an interest in structuring the athlete's finances in a manner that will insure that his commission will be paid, the athlete will find it hard to prove that he had not agreed to the agent's doing so, even though it would be to the athlete's benefit from a tax standpoint to defer income to a later date.[46] Of course, in situations involving outright deception it is easier for the athlete to prove that the agent breached his duty of loyalty.[47]

4. *Other types of agent abuse.* Complaints against agents in the context of professional sports can take forms other than those major areas of abuse already outlined.[48] For example, agents have

---

41. *See, e.g.,* Mersky v. Multiple Listing Bureau, Inc., 73 Wash. 2d 225, 437 P.2d 897 (1968). *See generally* RESTATEMENT (SECOND) OF AGENCY § 394 (1958).

42. Brown v. Holston, 227 Ala. 225, 149 So. 690 (1933). The underlying public policy basis of this rule is the desire to keep the agent's attention focused on the welfare of the athlete by preventing external temptation. Mathewson v. Clarke, 47 U.S. (5 How.) 122 (1848).

43. Central West Casualty Co. v. Stewart, 248 Ky. 137, 58 S.W.2d 366 (1933). For example, a presumption of fraud will arise against an agent when it appears that he has personal interests conflicting with the athlete's. Harvey v. Tucker, 136 Kan. 61, 12 P.2d 847 (1932).

44. *See* WEISTART & LOWELL, *supra* note 6, at 329. *See, e.g.,* McConnell v. Cowan, 44 Cal. 2d 805, 807, 285 P.2d 261, 263 (1955).

45. WEISTART & LOWELL, *supra* note 6, at 330.

46. *Id.* at 331. *See* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 169 (13th ed. 1964).

47. *Id. See, e.g.,* text & accompanying notes 31-32 *supra.*

48. Note that the athlete's agent-caused problems will be aggravated by the fact that the athlete has responsibilities to third parties with whom his agent has dealt on his behalf (such as the team owner). This becomes critical in the event that the agent has not acted in the best interests of the athlete. For example, the athlete will be liable for any tortious acts committed by his agent, due to the doctrine of "respondeat superior." He will also be liable for acts done by his agent which are within the agent's actual or apparent authority, or which he ratifies. *See* 3 AM. JUR. 2d *Agency* § 183 (1962). Thus, the athlete will be bound

played a role in disrupting existing contractual relationships.[49] In some instances they have done so by inducing a player to jump to another league.[50] In other instances, agents have induced athletes to demand renegotiation of a binding contract.[51] Furthermore, agents have been blamed for causing athletes to lose incentive to perform due to the long-term contracts they negotiated for their clients. Finally, agents have been accused of paying money to team owners in exchange for the owners' coercing their players into signing agency contracts with those particular agents.[52]

B. *Agent-Caused Problems in the Context of Amateur Sports*

> Any insistence that the intercollegiate athletic program be operated for the purpose of promoting professional sports opportunities would seriously distort the fundamental principles of those programs as regards promotion of the educational value of sports and preclude delineation of "a clear line of demarcation between college athletics and professional sports."
>
> —National Collegiate Athletic Association Constitution art. 2-2(a).

---

by any properly executed contracts made by his agent, as long as the agent has acted within the scope of his authority or in the event that the contract is ratified by the athlete. *Id.* at § 268.

However, the athlete will not be liable for any unauthorized or unratified acts of the agent if the agent's authority has been revoked. *Id.* at § 262; Whiteside v. U.S., 93 U.S. 247 (1876). Third parties contracting with the agency relationship will obviously become obligated to the athlete himself. An authorized or ratified act of the agent has the same legal consequences as if the athlete had performed the act himself. 3 AM. JUR. 2d, *Agency* § 287 (1962). Thus, the athlete will be entitled to reap all benefits from any contracts entered into between his agent and third parties.

Any third party that intentionally aids an agent in violating a duty to an athlete will be subject to liability. RESTATEMENT (SECOND) OF AGENCY § 312 (1958). For example, persons who deal with the agent should be aware that knowingly accepting an athlete's money in payment of the agent's debts will entitle the athlete to recover from the third party. Gerard v. McCormick, 130 N.Y. 261, 29 N.E. 115 (1891). However, if the athlete is to recover it must be shown that the third party knew that the funds belonged to the athlete and that the debt in question was a private debt of the agent. *Id.*

49. WEISTART & LOWELL, *supra* note 6, at 321-22. Sports agents have also induced athletes to disrupt existing contractual relationships with other agents by specifically telling players to disregard other contracts they have signed. As a result, one professional basketball player ended up signing agency agreements with four different agents. Testimony before the *New York Select Committee, supra* note 24, at 40, 45.

Note also situations where the agent is the victim of the breached contract. For example, in Manton v. California Sports, Inc., 493 F. Supp. 496, 497 (N.D. Ga. 1980), agent Manton alleged that a professional basketball team induced a player to breach his agency contract in order to dupe the player into signing for less money.

50. *See* GALLNER, *supra* note 8, at 70.

51. WEISTART & LOWELL, *supra* note 6, at 322.

52. *See New York Select Committee, supra* note 24.

In the event that a college athlete were to sign a contract with a professional sports team or sports agent, he would forfeit his amateur status, scholarship benefits and college eligibility, thereby rendering himself ineligible to compete in further intercollegiate athletic events.[53] Although such a result might seem unreasonably harsh, the courts have held that the revocation of a student's amateur status for signing a contract "is rationally related to the goal of preserving amateurism in intercollegiate athletics."[54]

The most prevalent form of agent abuse on the amateur level is the signing of college athletes to agency contracts before they have officially graduated from college. [55] For example, despite their

---

53. *See, e.g.*, GALLNER, *supra* note 8, at 25, which describes the hardships endured by college basketball player David Brent, who signed a professional contract after his second year of college. The team with which he signed folded due to financial difficulties, and his once-bright collegiate career was ruined due to his forfeiture of collegiate eligibility.

Note that if a college athlete signs a professional contract he may still be able to participate on the intercollegiate level, although not in that particular sport. PRACTISING LAW INSTITUTE, *supra* note 4, at 228.

However, recent NCAA regulations provide that an athlete will forfeit his amateur status altogether if he hires an agent to negotiate his standard player contract with a professional team. It appears that the new rulings actually penalize a player who has the foresight to hire a competent agent to represent him. An example of the rule working against the best interests of the athlete is football player James McCallister, who signed a professional football contract while still in college. McCallister would have remained eligible to compete on the intercollegiate level, in a sport other than football, had he not hired an agent to represent him. *See* GALLNER, *supra* note 8, at 54.

54. Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976).

55. It is crucial to note in this context that such practices are usually the actions of non-attorney agents, due to the ABA's proscription against the solicitation of clients. *See* text & accompanying notes 76-87 *infra*.

The agent problem in the context of amateur athletics goes beyond the actions of the individual sports agents. Some of the blame falls on the shoulders of the professional leagues themselves. The formation of the American Basketball Association (ABA) in 1967 created a threat to the National Basketball Association's monopoly on professional basketball. Prior to the merger of the two leagues in 1977, a competitive bidding war between the respective sides took place in the search to recruit highly talented college players. In an attempt to force the ABA out of existence, the NBA hired a team of agents to lure college players to sign with NBA teams. Adams, *Pro Basketball War: Ugly Mess, Shrewd Agents*, Louisville Courier-Journal & Times, Aug. 8, 1971, *reprinted in Senate Hearings, supra* note 21, at 424-27. Although some of the agents were attorneys, others included a "dry cleaning manager, building contractor, stockbroker, college athletic trainer, and accountant." *Id.* at 426. Some of the agents had oral permission from the still-in-college athletes to represent them. The athletes paid as much as $300.00 a month until a formal contract could be negotiated after their graduation. *Id.* The ABA, which needed to become competitive in order to survive, also indulged in these kinds of practices. The extent of the unethical conduct of sports agents (as well as the teams themselves) during the basketball bidding wars "could rival the college basketball fix scandals of the 1940's if the housecleaning ever got rolling."

awareness of the restrictions of the National Collegiate Athletic Association (NCAA), it is estimated that agents sign at least ten percent of all college football players to agency contracts before their graduation date.[56]

Another problem created by agents on the amateur level is that poor advice given to an athlete often results in unnecessary litigation. Such litigation has frequently arisen in the context of a professional team secretly signing a college player before his college eligibility has expired. To render an already unethical situation even more distasteful, many of the athletes who signed these secret contracts eventually breached them in order to sign with another team.[57] In most of these cases, the courts allowed the athlete to honor his second contract because they viewed the first as unenforceable.[58] One exception, however, was the Tenth Circuit decision *Houston Oilers v. Neely*,[59] in which football player Ralph Neely was forced to honor his initial contract with the Houston Oilers. The court based its holding on the belief that Neely had no

---

Id. at 427.

56. *New York Select Committee, supra* note 24.

One example of such unethical conduct involved former college basketball star Jeff Ruland of Iona College. Ruland forfeited his amateur status by entering into an agreement with agent Paul Corvino prior to the 1979-80 college basketball season, which made Corvino his agent in future professional basketball negotiations. The incident was exposed in April of 1980. As a result, Ruland was forced to forfeit his senior year of college eligibility. As for agent Corvino, he was a building contractor who decided to earn some extra income by representing athletes.

Unfortunately, the Ruland incident is not an isolated one. It appears that the exploitation of naive college athletes by shrewd agents is becoming a widespread practice. N.Y. Times, Feb. 2, 1978, at D15, col. 2. *But see* Shannon, *Agents Should Be Part of a Changing College Scene*, N.Y. Times, Nov. 30, 1980, 5, at 2. That author argues that college athletes should be able to obtain the services of a qualified agent sometime during their senior year in college. In addition, he proposes that the NCAA set up a system of agent registration, with permanent banishment from the list of registered agents as the punishment for fraudulent practices. The rationale behind such a proposal is that a college player about to embark on a professional career is entitled to sound financial advice.

57. *See* Detroit Football Club v. Robinson, 186 F. Supp. 933 (E.D. La. 1960), *aff'd on other grounds*, 283 F.2d 657 (5th Cir. 1960); New York Giants v. Los Angeles Chargers, 291 F.2d 471 (5th Cir. 1960); Chicago Cardinals Football Club, Inc. v. Etcheverry, Civ. No. 3186 (D.C. N.M. June 26, 1956) (unreported decision).

58. The initial contracts were unenforceable due to the NFL standard player contract, which contained a clause making the approval of the league commissioner a condition precedent to the execution of the contract. As the teams would certainly not submit such "secret" contracts to the commissioner for his approval, the players were free to make a second contract in spite of the first. *See* GALLNER, *supra* note 8, at 57.

59. 361 F.2d 36 (10th Cir. 1966), *cert. denied*, 385 U.S. 840 (1967).

valid reason to breach the contract:

> While we do not for a moment condone the ruthless methods employed by professional football teams in their contest for the services of college football players, including the lavish expenditure of money, it must be conceded that there is no legal impediment to contracting for the services of athletes at any time, and the above mentioned conduct, while regrettable, does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of a more attractive offer.[60]

While it is apparent that agents are not always involved in these transactions,[61] their presence is often a motivating factor in causing an amateur to sign a pre-graduation contract.[62] It is the opinion of at least one commentator that "secret signing"-caused litigation would have been avoided if the athletes in question had been represented by attorneys rather than non-legally trained agents:

> When an athlete breached his first contract by deciding to play with another team, he was forced to employ legal counsel to argue his case in court on the ground that his initial contract was invalid. Perhaps if the athlete had retained an attorney to conduct his negotiations from the beginning, he could have saved the subsequent legal fees paid for defending the breach of contract action brought against him. The reason the fees could have been saved is that it is likely that a secret signing, before his college eligibility had expired, would have never taken place.[63]

III. How the Problems Arose

A. *Agents Are Not Required to be Licensed or Regulated*

Although many agents are highly reputable,[64] there are no restrictions or regulations that would serve to insure that all, or at least most, of them are capable of doing the job they hold them-

---

60. 361 F.2d at 41.

61. *See* text & accompanying notes 11-14 *supra,* for a discussion of the Los Angeles Rams' case.

62. Note that the extent to which college athletes enter into pre-graduation agreements is unclear, as such contracts usually are not made a matter of public record in order to protect the player's college eligibility.

63. Gallner, *supra* note 8, at 60. One reason for such an assertion is that it is more likely that an agent with a legal background would have secured a contract acceptable to the athlete in the first place. In addition, an attorney would have more respect for the sanctity of contracts, as well as an awareness of the consequences of a breach of contract action. Thus, even if the athlete received a more favorable second offer, there would be less chance of an agent encouraging him to take it if that agent were an attorney.

64. *See* text & accompanying note 5 *supra.*

selves out to do.[65] For example, agents need no law degree or agent license. In addition, "[t]here are no agents' associations or other such bodies that set ethical standards and police the profession."[66] Fortunately, those who are lawyers are governed by the bar associations and the Canons of Professional Ethics. Regulation of non-attorney agents has been left to the inconsistent efforts of the respective players associations. Although proposals have been made to set up unified licensing requirements for sports agents,[67] none have as of yet been implemented. It is not far-fetched to conclude that the lack of restrictions placed on those trying to enter the field and the lack of sanctions imposed on those who have not acted in their client's best interests are major causes of the widespread abuse that has taken place. The Commissioner of the National Basketball Association, Lawrence F. O'Brien, well aware of the lack of regulation, has observed that "[a]t some point, somewhere, someone is going to realize that there are people walking around with briefcases in sports who nobody knows and who are accountable to no one."[68]

The problem is aggravated by the fact that there are many persons active in the circles of professional sports who do not share the view that regulation is needed. This type of thinking was exemplified by the testimony of agent Jack Mills before the House of Representatives Select Committee Inquiry Into Professional Sports: "[The agent business] is sort of a self-regulating thing in the sense that people who are not doing a good job are going to be eliminated because the players are going to tell their friends. . . ."[69] However, the problem with this popular notion of "weeding out the bad apples" was inadvertently pointed out by agent Mills himself during the very same testimony:

> [T]he field is growing rapidly, I could not over emphasize that because there are so many people coming in and out of this profession that it is very difficult for us to know and it is very difficult for the players to know who is

---

65. Agency law does not require the agent to have any technical expertise as a "person who can act for himself is generally capable of acting as agent for another . . . ." 2A C.J.S. *Agency* § 29 (1972).

66. FINAL REPORT, *supra* note 20, at 72.

67. *See id.* at 78-79, which concedes that federal regulation of agents may be needed if the efforts to resolve the abuses by the professional sports teams themselves fail.

68. N.Y. Times, Oct. 9, 1977, § 5 at 15, col. 1.

69. PRACTISING LAW INSTITUTE, *supra* note 4, at 209.

really qualified to do a job and who has their best interests at heart.[70]

The Richard Sorkin situation[71] is proof that agent Mill's "weeding out the bad apples" system of agent regulation cannot work. Sorkin's business, which lasted four years, was legitimate for a while. It was not until he was swamped by losses from bad investments that he began misappropriating clients' money. Thus, as Sorkin's reputation did not become tarnished until long after many players had entered into agency agreements with him, there was no way to stop his business by "word of mouth" until it was too late.

One definite problem caused by the lack of regulation and licensing requirements is that individuals with criminal records are allowed to enter the sports agent market. For example, the President of Probus Management,[72] Norman Young, had served jail terms for several felony convictions, including grand larceny, before he began his career as an agent.[73] That such a person should not be handling athletes' finances became even more apparent when Young was found liable in the subsequent *Burrow* decision. Of course, had Young been an attorney, he would have lost his license to practice law after his initial felony conviction.[74]

B. *The American Bar Association's Prohibition Against Solicitation*

By entering into an agreement with an athlete, an agent impliedly represents that he possesses the standard knowledge and skill needed to adequately represent his client.[75] Thus, the agent must be able to negotiate contracts, handle investments, endorsements, tax-planning and the like.[76] However, as already demon-

---

70. *Id.* at 202.

71. *See* text & accompanying notes 27-29 *supra.*

72. The defendant in Burrow v. Probus Management, Inc., Civ. No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order).

73. *New York Select Committee Hearings, supra* note 24, at 244-46.

74. Pursuant to DR 1-102(A)(4), "A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." As a result, "[m]ost states make conviction for a felony grounds for automatic disbarment." Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice,* 43 CORNELL L.Q. 489, 490 (1958).

75. *See generally* 3 AM. JUR. 2d *Agency* §§ 202-05.

76. An athlete can protect himself to some degree by entering into a written agreement, with the agent he selects to represent him, which states what duties the agent is expected to perform. For one example of such an agreement, *see* GALLNER, *supra* note 8, at 173-76.

However, it is likely that an experienced attorney would be able to handle such matters more adequately than would be the non-lawyer agent. In fact, an athlete hiring an agent is

strated by this Comment, many agents are seriously deficient in these crucial areas. Although there may exist some legal recourse that an athlete can take against an incompetent agent,[77] it often comes too late; that is, failure to properly manage his finances early in his relatively short career often proves to be a financial catastrophe for the athlete.[78]

As remedies for the poorly managed athlete may not become available until it is too late to repair the damage done, the obvious solution would be to insure that the player is represented by a competent agent from the start. Unfortunately, the American Bar Association's restrictions against client solicitation make this difficult. Pursuant to DR 2-103(a) of the ABA Code of Professional Responsibility, "[a] lawyer shall not . . . recommend employment as a private practitioner . . . to a lay person who has not sought his advice. . . ." In the legal field, the prohibition against solicitation is fair in most contexts as it applies to all lawyers equally. However, since not all sports agents are attorneys, the rule gives an unfair advantage to non-lawyer representatives. The distinction between lawyer and non-lawyer agents becomes critical in light of the fact that the solicitation efforts of non-lawyer agents are perhaps the most flagrant examples of unscrupulous conduct. One example of this—already discussed in this Comment—is the illegal recruitment of college athletes.[79]

While the restrictions set forth by the National Collegiate Athletic Association potentially restrict the influx of non-lawyer agents into the amateur arena,[80] it is becoming obvious that many of these agents are in complete contempt of the rules. For example, in 1979 highly successful agent Mike Trope was quoted as saying:

> The rules are ridiculous and they're not being followed by anybody . . . . Why should I honor the NCAA rules when I'm not even bound by them? And I don't intend to honor them, not ever, unless Congress says all the rules of the NCAA are laws of the United States, and you can go to prison if you

---

in danger of encountering more than poor financial advice: the agent's conduct might reach the level of illegality. For example, the State of California brought an action against an agent for violation of the California Securities Code and grand theft, as a result of the agent's illegal solicitation of investment money ($72,000) from professional athletes. *See* GALLNER, *supra* note 8, at 64.

77. *See, e.g.*, text & accompanying notes 88-115, 143-170 *supra*.

78. *See* text & accompanying notes 8-10 *supra*.

79. *See* text & accompanying notes 53-64 *supra*.

80. *See* text & accompanying notes 53-54 *supra*.

break them.[81]

The lengths non-attorney agents will go to in recruiting clients are appalling. For example, some agents have offered players monetary bribes. "If I talk to a player, and he needs a thousand dollars, I've got the money to give him."[82] Other agents use the common tool of telling a recent college graduate that they can affect the athlete's position in the upcoming player draft. In reality, an agent has no power or authority to alter the draft selections in any way.[83]

Non-attorney agents are also notorious for slandering each other in attempts to increase their chances of recruiting a client,[84] or attempting to impress prospective clients by claiming to represent well-known professional athletes who they in fact do not represent.[85] Finally, a number of agents have engaged in bribing the college coaches of players in order to secure these athletes as clients.[86]

In essence, there exists an inherent "Catch-22" situation in the agent-athlete relationship; while an athlete would be better off being represented by an attorney-agent,[87] the ABA solicitation

---

81. McLeese, *A Whole New Ballgame for Lawyers,* STUDENT LAWYER, Oct. 1980, at 46.

82. Sports agent Mike Trope, *quoted in* Black, *A Hard Look at Agents,* SPORT, Dec. 1979, at 77. Some agents loan money to an athlete on the condition that the athlete select the agent to be his representative.

83. *Id.* at 77.

84. *Id.* Of course, attorney-agents are prohibited from engaging in such unethical conduct.

85. *Id.* at 81.

86. In 1978, during testimony before the New York State Senate Committee Hearing, agent Alphonse Dotson testified that "[t]here is an unofficial referral system. You have to understand that, per se, assistant coaches don't make as much money as head coaches and when they can get their hands on tax-free money they will refer kids." *New York Select Committee, supra* note 24, at 191.

87. Many commentators share the view that the attorney-agent is more likely to act in the best interests of the athlete. Others maintain that the actions of attorney-agents also leave something to be desired. *See, e.g.,* FISCHLER, *supra* note 19. In support of this notion, it does appear that attorneys would be benefited by better education in the context of sports law. For example, only a handful of the 160 or so ABA-accredited schools offer courses in sports law. When contrasted with the education of most non-attorney agents, this is merely a minor drawback. Chicago sports lawyer Jeffrey Jacobs, when asked whether or not it is advantageous for an athlete to be represented by an attorney, responded: ". . . I think lawyers are better educated than the general agent . . . . Before you can negotiate a football contract, you have to have an intimate knowledge of the National Football League collective bargaining agreement . . . [as well as] arbitration decisions . . . and general litigation. . . ." McLeese, *supra* note 81, at 46.

Some agents assert that non-lawyer agents can circumvent their legal inadequacies by hiring attorneys to assist them in complex areas. PRACTISING LAW INSTITUTE, *supra* note 4,

provisions make it easier for the non-lawyer to obtain clients.

IV. Potential Solutions to the Agent-Athlete Dilemma

It is obvious that the frequency of agent abuses in professional and amateur sports has increased dramatically in the past decade. Therefore, it would seem that litigation in this area would be extensive. On the contrary, however, the actual number of decisions is quite small indeed.[88]

One possible reason for the near absence of litigation is that the opportunity to sue an attorney for malpractice is removed in the event that the agent is not a lawyer. In addition, agents who have mismanaged athletes' funds (such as Richard Sorkin) often wind up in the throes of bankruptcy, leaving no pool of assets from which the athlete may collect. This was a bar to recovery in *Burrow v. Probus Management, Inc.*,[89] suits against the company itself would have been useless as it had gone out of business.[90]

Despite these drawbacks, it seems inevitable that the courts will eventually turn to causes of action and remedies arising from agency and contract principles[91] in order to hold sports agents lia-

---

at 200. The problem with this assertion is that the agent is going to have to share his commission with the attorney, which would encourage the agent to try to handle the matters on his own. In addition, any possible merit to such a proposal is removed by the regulations of the ABA itself. The ABA Canons mandate that:

> The professional services of a lawyer should not be controlled or exploited by any lay agency . . . which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all regulations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be directed to the client.

ABA Canon 35.

The ABA has determined that even a ten percent interest of the agent in the principal would not alter the fact that the lawyer's responsibility should be directed at his principal. American Bar Association Committee on Professional Ethics and Grievances, in Formal Op. 473 (1941).

88. Expanding the sports agent concept to include the representation of entertainment figures in general still turns up a small number of cases. Aside from the cases mentioned in this Comment, these decisions include: Campos v. Olson, 241 F.2d 661 (9th Cir. 1957); George Foreman Associates Ltd. v. Foreman, 389 F. Supp. 1308 (N.D. Cal. 1974), *aff'd*, 517 F.2d 354 (9th Cir. 1975); Russell-Stewart, Inc. v. Birkett, 24 Misc. 2d 528, 201 N.Y.S.2d 687 (Sup. Ct. 1960); Trammell v. Morgan, 158 N.E.2d 541 (Ohio App. 1957); and cases cited in Annot., 175 A.L.R. 617 (1948).

89. *See* text & accompanying notes 31-32 *supra*.

90. *New York Select Committee*, *supra* note 24 at 244.

91. *See* text & accompanying notes 149-70 *infra*.

ble for their misdeeds. In support of this view, one commentator has stated that "[c]ontroversies which arise will raise basically questions of agency and contract, and case laws from those general areas will provide precedent for resolving sports-related controversies."[92]

Leaving agency and contract remedies aside for the moment, there are a number of other promising solutions that might provide recourse for the wronged athlete.

A. *Regulation of Sports Agents by the Individual States: The California Approach*

In 1981, the State of California decided that the practically unrestricted activities of sports agents needed to be regulated in some manner. Therefore, the California legislature added a new section to California's Labor Code,[93] which promises to greatly reduce the potential for abuse inherent in the agent-athlete relationship. The pertinent provisions of the new statute are as follows.

Section 1500 defines the applicability of the new chapter. It states that the statute applies to "athlete agenc[ies]," and goes on to state that the term "athlete agency" does not include "any member of the State Bar of California when acting as legal counsel for any person."[94] This is of crucial importance, as it focuses regulation where it is needed most: on the practices of non-attorney agents and not those who have obtained a law degree and are representing clients on legal matters.

Section 1510 provides that "[n]o person shall engage or carry on the occupation of an athletic agency without first registering with the Labor Commissioner."

Section 1511 provides that prospective agents must submit an application for registration to the Labor Commissioner, accompanied by at least two affidavits from "reputable residents," who can attest to the "good moral character" of the applicant. This is important with respect to non-attorney agents as it subjects them to some type of character investigation, which is of course a prerequisite to an attorney's admission to the respective state bar associations.

---

92. WEISTART & LOWELL, *supra* note 6, at 323.
93. CAL. LAB. CODE §§ 1500 *et seq.* (West 1981).
94. *Id.* at § 1500(b).

Section 1513 provides that the Labor Commissioner "may refuse to grant a license," which, pursuant to Section 1514, will effectively prevent the rejected agent from resubmitting an application for a three year period.

Section 1515 provides that every license must be renewed at one year intervals, which will provide policing of agents like Richard Sorkin[95]—whose business was legitimate at the start—from further representation of athletes.

Sections 1519 and 1520 provide that each athlete agency must submit a $10,000 surety bond to the Labor Commissioner, which will insure that all applicants:

> will comply with this chapter and will pay all sums due any individual or group of individuals when [his agent] has received such sums, and will pay all damages occasioned to any person by reason of misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions of [the agent].

Section 1527 provides that the Labor Commissioner may revoke or suspend any registration if the agent has violated any provision of the chapter, has ceased to be of good moral character, or if the conditions under which the registration was issued have been altered.

Section 1530 provides that the Labor Commissioner must approve of all the contract forms used by each agent. This will serve to prevent "unfair, unjust, and oppressive" contracts, which are often used to the disadvantage of naive athletes. In addition, each contract must provide on its face that "[t]his athlete agency is registered with the Labor Commissioner of the State of California."

Section 1530.5 provides that each contract must also contain a provision in at least 10-point type stating "the athlete may jeopardize his or her standing as an amateur athlete by entering into the contract." This will at least serve as a warning to college athletes, although the practical effects have yet to be seen.

Section 1531 provides that all agents shall file a schedule of fees with the Labor Commissioner. This will help reduce some of the abuses surrounding agents' fees previously mentioned in this Comment.[96]

Section 1533 provides that the agent's books and records shall be open to the inspection of the Labor Commissioner.

---

95. *See* text & accompanying notes 27-29 *supra*.

96. *See* text & accompanying notes 30-36 *supra*.

Section 1536 provides that no agent shall issue a contract containing any term or condition in violation of law.

Section 1537 provides that no agent shall place any false, fraudulent, or misleading information in an advertisement, or make any false representations concerning his employment. This will serve to hinder the unscrupulous solicitation efforts of non-attorney agents.

Section 1541, relating to fees collected for obtaining employment for an athlete-client, states that all fees must be refunded in the event that the agent fails to procure the promised employment. In addition, it provides that the agent must pay to the athlete a penalty in the amount of the fee in the event that the fee in question is not refunded within 48 hours after demand therefor.

Section 1545 states that an agent must file a copy of his registration certificate with the secondary or post-secondary educational institution of any student athlete he seeks to represent. This must be done prior to the initial communication with the athlete. In addition, any subsequent agency agreements entered into must also be filed with the respective institutions.

Section 1546 provides that any agency contract that fails to comply with sections 1510 or 1545 will be void and unenforceable. The threat of losing his commission will certainly encourage an agent to comply with these provisions.

Finally, section 1547 provides that any violation of the statute is a "misdemeanor, punishable by a fine of not less than one thousand dollars ($1,000) or imprisonment for a period of not more than 60 days, or both."

California is not the only state that has considered or enacted an agent-regulating statute. For example, the New York Select Committee on Crime has supported the conclusion that there should be some type of agent regulation. In furthering that end, the Committee Hearing on Sports Agents[97] concluded that sports agents should be regulated by the individual states in the event that no Federal legislation is enacted. The Committee went one step further by submitting a bill to the New York State legislature that would require the regulation of any sports agent who represented at least one athlete employed by a New York State-based

97. *See New York Select Committee, supra* note 24.

team.[98] Unfortunately, the bill did not pass in 1979 or 1980 and there are no plans to reintroduce the bill. New York has therefore missed an excellent opportunity to enact legislation that would serve to diminish the abuses inherent in the agent-athlete relationship.

B. *Potential Regulation by the Courts: the Zinn v. Parrish Decision*

In the recent decision of Zinn v. Parrish,[99] sports agent Leo Zinn sought to recover the commission due him under an agency agreement with professional football player Lemar Parrish.

In 1971 agent Zinn, who had been in the athlete representation business for over twenty years, entered into a "Professional Management Contract" with football player Parrish. Under the terms of the agreement, Zinn agreed to use "reasonable efforts" to find employment for Parrish with a professional football team. In addition, he agreed to "act" in furtherance of Parrish's interests by: a) negotiating job contracts; b) furnishing advice on business investments; c) securing professional tax advice at no added cost;

---

98. S. 5972, submitted to the New York State Senate in 1979 and 1980 by Senator Ralph J. Marino. The Act would amend Chapter 912 of the Laws of 1920 relating to the regulation of boxing, sparring and wrestling, and would provide for the licensing of sports agents.

The pertinent provisions of the proposed bill are as follows:

Section 52 of the New York State bill would require the licensing of any agent who represented a minimum of three athletes (including at least one whose team is located within New York State) in a twelve-month period and who has held himself out publicly as an agent.

Section 53 would require all agents applying for a license to disclose certain information, including the method and nature of payment, power of attorney, prior criminal record, and the structure of the agent's business and financial management prior to the issuance of the license.

Section 55 provides revocation standards, which would ensure that meritorious complaints regarding financial activities, fraud, or misstatements would result in disciplinary measures. Sections 57 and 63 provide penalties for violation of the statute, ranging from letters of reprimand from the State Athletic Commission to fines or imprisonment for up to one year.

Section 59 would require every agent to execute and file with the Comptroller a $50,000 bond for each professional athlete represented. This would ensure that the agent abided by the provisions of the statute and rules and regulations of the State Athletic Commission.

Section 62 would establish a sorely needed advisory council on sports agents, which would assist the State Athletic Commission in reviewing agent-related issues.

99. 644 F.2d 360 (7th Cir. 1981).

and d) obtaining endorsement contracts.[100] Finally, the contract stated that Zinn would, at Parrish's request, seek to find him "gainful off-season employment."[101] The agreement itself was to be automatically renewed unless terminated by either of the parties by thirty days written notice to the other.[102]

The dispute between the parties began in 1974, when Zinn negotiated a four year series of contracts for Parrish with the Cincinnati Bengals of the National Football League, covering the 1974-77 seasons. Shortly after signing these agreements, Parrish, who had become disenchanted with the quality of the services he had received, informed Zinn that he "no longer needed his services,"[103] stating that he had no intention of paying Zinn the 10% commission due under the agency contract. In response, Zinn brought suit to recover the commission.

In the original dispostion of the case, the District Court for the Northern District of Illinois entered summary judgment for defendant Parrish.[104] The court felt that the statutory definition of "employment agency" could be expanded to include athlete agencies, which meant that agent Zinn was required to be licensed under the pertinent Illinois statute.[105] As Zinn was in fact not licensed, his contract was void and unenforceable.

On appeal the United States Court of Appeals for the Seventh Circuit reversed and remanded the lower court's ruling in an unpublished opinion.[106] On remand the district court shied away from the conclusion that sports agents are required to be licensed as private employment agencies. However, the court sympathized with Parrish's plight, as it felt that Zinn "did not have the capabilities and experience necessary to provide the services he obligated himself to provide."[107] This lack of expertise violated the "grea[t] fiduciary responsibilities"[108] owed by an agent to an athlete in an

100. *Id.* at 361.

101. *Id.*

102. *Id.*

103. *Id.* at 362.

104. 461 F. Supp. 11 (N.D. Ill. 1977).

105. ILL. REV. STAT. 1975, ch. 48, § 197(k) provides in part: "The term 'employment agency' means any person engaged for gain or profit in the business of securing or attempting to secure employment for persons seeking employment or employees for employers."

106. Zinn v. Parrish, No. 77-1609 (7th Cir. 1978).

107. Docket No. 75-c-4235 at 8 (N.D. Ill. March 21, 1980).

108. *Id.* at 6.

agency relationship.

In response to its belief that Zinn's services were inadequate, the district court ruled that Zinn's giving of advice on business investments required him to register as an investment advisor under the Investment Advisor's Act of 1940.[109] His failure to do so allowed the court to render the agency agreement unenforceable. Thus, the district court's holding opened the door for the use of the federal securities laws to regulate agents who give investment advice to their clients. However, the district court's decision was again overruled by the Seventh Circuit Court of Appeals,[110] which disagreed with the contention that Zinn was required to be registered as an investment advisor under the 1940 Act.

While acknowledging that the 1940 Act "must be read broadly in order to effectuate its purpose of 'protect[ing] the public and investors against malpractices by persons paid for advising others about securities,' "[111] the court of appeals felt that the district court was "in error in concluding that Congress by the 1940 Act 'intended to regulate' the relationship between an athlete and his manager."[112]

Despite its adverse holding, the court of appeals did not reject the application of the Investment Advisors Act to sports agents in all circumstances. Instead, it set out a list of factors that can be used in the future to determine whether an agent "holds himself out" as an investment advisor:[113] 1) " '[t]he maintenance of a listing as an investment advisor in a telephone or business directory;' 2) 'the expression of willingness to existing clients or others to accept new clients;' or 3) 'the use of a letterhead indicating any activity as an investment advisor.' "[114]

---

109. For the text of the Act, *see* 15 U.S.C. §§ 80b-1 *et seq.* (1976).

110. 644 F.2d 360 (7th Cir. 1981).

111. *Id.* at 363 (citing SEC v. Wall Street Transcript Corp., 422 F.2d 1371, 1376 (2d Cir. 1970), *cert. denied*, 398 U.S. 958 (1970), quoting (1960) U.S. CODE CONG. & AD. NEWS 3503).

112. 644 F.2d at 363, n.3.

113. *Id.*

114. For the following reasons, the court of appeals held that Zinn did not meet the definition of an investment advisor: 1) Zinn listed himself in his office building directory as a "Public Relations Consultant;" 2) his telephone directory advertisement was under the heading of "Public Relations;" 3) his letterhead did not contain the phrase "investment advisor;" 4) the district court failed to distinguish between "ordinary business advice" and "advice on securities;" and, 5) although Zinn did transmit securities recommendations from third parties to Parrish, such "isolated transactions . . . incident to the main purpose of his management contract to negotiate football contracts do not constitute engaging in the busi-

In essence, while the district court's decision in *Zinn* reflects a judicial effort to aid the athlete who has not received sound advice by expansive construction of already existing statutes, the better solution would be to enact new statutes, either on the federal or state[115] level, that would directly regulate the agent problem. The need for such direct regulation is certainly reflected in the court of appeals holding in *Zinn,* which refused to allow the district court's misapplication of the federal securities laws.

C. *Other Potential Solutions*

In response to the actions of unscrupulous sports agents such as Richard Sorkin, the New York State Senate formed a Select Committee to review the problem and determine whether sports agents should be licensed or otherwise subjected to some form of state regulation.[116] The Committee felt that "some state regulation is desirable to control sports agent abuses against players and teams."[117] Sorkin, a key witness, stated that he too felt that further agent abuses would be prevented by legislative regulation.[118]

The New York State Committee also analyzed whether or not the various players associations in each professional league were the proper vehicles for agent regulation. Although the associations have explored the possibility of regulation, the Committee felt that their "lack of enforcement power weakens their ability to safeguard their members."[119]

Another interesting point brought out by the testimony before the New York State Committee is that it would not be a good idea to have the various leagues regulate agents. For example, the Director of Security for the National Football League testified that the league should not be relied upon to investigate agent abuses, as it does not want to intrude on player-agent relationships.[120] The

---

ness of advising others on investment securities." *Id.* at 363-64.

115. *See, e.g.,* text & accompanying notes 93 & 98 *supra.*

116. *New York Select Committee, supra* note 24.

117. *Id.* at 5.

118. *Id.* at 92-95.

119. *Id.* at 5. Sorkin's testimony evidenced a reason why agents should be regulated by a neutral body and not by the players associations. Sorkin pointed out that the head of the National Hockey League's Players Association (NHLPA), Alan Eagleson, is himself an agent. *Id.* at 88. Thus, there exists the potential for conflicts of interest by having the players' associations regulate agents.

120. Testimony of John Danahy, *id.* at 257. The Vice President and General Counsel of

NFL fears that putting pressure on agents would in turn entice the agents to create friction between the players and their teams.[121] Thus, the professional leagues themselves are obviously not the answer, as their "we don't want to upset the balance of power" attitude precludes their acting to protect athletes from unscrupulous agents.

One school of thought argues that potential abuses by agents could be lessened by having athletic commissions regulate athlete-agent contractual relationships. Agents wishing to represent athletes would be licensed by and have their contracts filed with the respective athletic commissions.[122] Such regulation has been approved by the courts on the grounds that the prevention of abuse by players' managers is a legitimate objective of an athletic commission.[123] Unfortunately, this type of regulation has been implemented almost solely in the sport of boxing, and not the sports that are the most heavily plagued by agent abuses—baseball, basketball, hockey and football.

A House of Representatives Select Committee Inquiry into Professional Sports studied the problem of whether or not the licensing of agents should be a matter of federal concern.[124] Although the Committee concluded that further inquiry into the area was warranted, it made no move towards federal licensing, although it did state that this might be considered in the future.[125] The Committee felt that regulation should be left to the respective players associations and leagues. However, there are definite problems with this suggestion.[126] For example, the National Hockey League Players Association, which is admittedly concerned about agents, has chosen not to implement licensing requirements at the present: "We have found that even if we recommend certain agents as having satisfactory backgrounds, other agents whom we do not mention take umbrage at our suggestions."[127]

---

the NHL testified that the league generally does not investigate agent abuses. *Id.* at 277. For example, the NHL Board of Governors took no action in the aftermath of the Richard Sorkin fiasco. *Id.* at 293.

121. *Id.*

122. *See* WEISTART & LOWELL, *supra* note 6, at 152.

123. Ali v. State Athletic Commission, 308 F. Supp. 11 (S.D.N.Y. 1969).

124. FINAL REPORT, *supra* note 20.

125. *New York Select Committee, supra* note 24 at 79.

126. *See* text & accompanying notes 119-121 *supra.*

127. Personal letter of Oct. 29, 1980 from Alan Eagleson, the head of the NHLPA, to

The National Football League Players Association (NFLPA) has taken some positive steps. Starting in 1975, it has sponsored a series of legal seminars, which were geared towards educating both lawyer and non-lawyer agents in the proper representation of the professional athlete. Topics covered included contract negotiations, tax planning, grievance procedures and fringe benefits.[128] The NFLPA has also pioneered an informational service for agents, which provides quarterly reports on the status of sports litigation and legislation, in exchange for an annual fee.[129] Finally, as a policy measure, the NFLPA attempts to convince first-year players to dismiss any non-attorney agents they have hired.[130]

Ed Garvey, executive director of the NFLPA, has suggested that players' unions in each sport compile lists of "good" and "bad" agents, thereby providing athletes with some forewarning of who the unscrupulous operators are. However, for reasons stated previously in this Comment,[131] such an approach will not have much of an impact.

Yet another solution, and one that is already in use, is to have attorney-agents refrain from doing any actual legal work, which would enable them to solicit clients without violating the ABA Code of Professional Responsibility.[132] The attorney-agents would employ other attorneys when they needed legal work done. However, this approach does nothing to help those attorneys who want to be able to represent athletes on legal matters, nor does it do anything to stop the flood of abuses by non-lawyer agents.

D. *Relaxing the ABA Prohibitions Against Solicitation*

A promising solution to the problems created by dishonest and incompetent agents would be for the ABA to relax its prohibitions against solicitation, which would allow lawyer-agents to compete for clients with non-lawyer agents. Recent case law indicates that hope for such a solution exists. For example, in *Bates v. State Bar*

---

the author of this Comment.

128. FINAL REPORT, *supra* note 20, at 72.

129. *Id.*

130. GALLNER, *supra* note 8, at 63.

131. *See* text & accompanying notes 70 & 71 *supra.*

132. *See* Golenbach, *supra* note 5, at 50; PRACTISING LAW INSTITUTE, *supra* note 4, at 215. Such an arrangement does not require the attorney to give up his license to practice law.

of Arizona,[133] the Supreme Court opened the door to advertising by attorneys. The subsequent ABA amendments to Canon 2 or the ABA Code of Professional Responsibility reflect the Court's holding.[134]

In a 1980 decision, *In re Koffler,*[135] the New York State Court of Appeals held that New York lawyers could advertise their services to potential clients by mail, ruling that such actions constituted commercial speech protected by the First Amendment. In *Koffler,* the New York Appellate Division had previously concluded that client solicitation by mail violated section 47a of the Judiciary Law and DR 2-103(A) of the Code of Professional Responsibility.[136] In reversing that decision, the Court of Appeals stressed that the two provisions may constitutionally regulate, but not proscribe, direct solicitation by mail. The Court also pointed out that a factor in its decision was the need to assure "informed and reliable decision making."[137] Thus, the *Koffler* decision has made possible wider solicitation of clients by attorney-agents.[138] Attorneys will now be able to use the mails to solicit athletes who are about to enter the ranks of professional sports. Therefore, athletes will have a greater awareness of the availability of competent legal services necessary to meet their needs.

Despite the advances made by the *Koffler* case, the decision may cause problems of its own. Unlike the usual modes of attorney advertising, such as the newspaper, television, or radio, direct mail goes only to the addressee. As Judge Meyer in the *Koffler* case pointed out, the temptation for deception will be "therefore, greater, and the probability of exposure less, than for those more

---

133. 433 U.S. 350 (1977). Advertising by lawyers was originally outlawed in 1908 when the ABA adopted a formal ban on lawyer solicitation.

134. ABA CANON 2.

135. 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980).

136. Both provisions mandate that an attorney cannot recommend himself for employment.

137. 51 N.Y.2d at 148, 412 N.E.2d at 932, 432 N.Y.S.2d at 77 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977)).

138. Note that the *Koffler* decision only applies to *direct* mailings by attorneys; the court did not address the issue of whether attorneys could solicit clients by using third parties as a conduit to do the mailing for them. However, a recent New York Appellate Division decision, In re Alan I. Greene, 78 A.D.2d 131, 433 N.Y.S.2d 853 (2d Dep't 1980), has restricted third party solicitation. The court held that such mailings were not protected by the First Amendment and were prohibited by New York's attorney advertising regulations.

public media."[139] Despite such a possibility, it appears that there will still be ample public protection. For example, New York has a filing requirement for retainer statements, which is contained in the Appellate Division's rule 691.20.[140] Other courts have concluded that such a filing requirement for solicitation letters does indeed assure ample public protection.[141]

E. *Suing Non-Attorney Agents for Practicing Law Without a License*

Doubts as to the legality of non-lawyer representation of athletes are becoming more and more commonplace.[142] Support for this trend can be found in state statutes, which provide that no persons shall be permitted to "practice law" without first obtaining a license.[143] The "practice of law" has been defined as including "services rendered out of court [including] the giving of advice or rendering any service requiring the use of any legal skill or knowledge. . . ."[144] It has been held that the non-licensed practice of law is an illegal usurpation of the privilege of being an attorney and constitutes contempt of court.[145]

Some of the services agents perform for athletes fit into the realm of the illegal practice of law. For example, when dealing with the area of contractual negotiations, the Supreme Court of Washington noted that "the court should exercise its inherent power to confine . . . the preparation of contracts for others for those that are licensed to practice law in this state."[146]

---

139. 51 N.Y.2d at 149, 432 N.Y.S.2d at 878.

140. 22 N.Y. CT. RULES § 691.20.

141. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).

142. For example, Chicago sports lawyer Jeffrey Jacobs has stated that:

> I think the ABA, the Illinois Bar Association, the Chicago Bar Association—somebody—should file a suit against these agents for unauthorized practice of law. When an agent is sitting in there negotiating a contract, I think he's practicing law to a certain extent. It goes way beyond the question of dollars. There are laws in the state of Illinois that state if you're going to represent somebody and you're not a lawyer, you have to register to become an employment agency, which a lot of these people don't do.

Cited in McLeese, *supra* note 81, at 46.

143. *See, e.g.*, ILL. ANN. STAT. ch. 13, § 1 (Smith-Hund 1963).

144. People v. Peters, 10 Ill. 2d 577, 580, 141 N.E.2d 9, 11 (1957).

145. Biggs v. Plebanek, 343 Ill. App. 466, 99 N.E.2d 363 (1951), *cert. denied*, 343 U.S. 912 (1952). Such contempt of court might expose the actor to criminal prosecution. People ex rel. Chicago Bar Ass'n v. Barasch, 21 Ill. 2d 407, 173 N.E.2d 417 (1961).

146. Washington State Bar Ass'n v. Washington Ass'n of Realtors, 251 P.2d 619, 622

In many cases, courts rely on the need for public protection in determining whether or not a non-attorney's actions come under the heading of the "practice of law."[147] It is not far-fetched to conclude that the unscrupulous actions of non-attorney sports agents will sufficiently endanger public well being under such a definition as to constitute an illegal practice of law. Clearly, both the athlete and the fan are suffering from these actions; the athlete, obviously, from the types of problems already outlined in this Comment, and the fan from the diversion of his attention from the respective sports themselves.

F. *Solutions Inherent in Agency Law*

It is inevitable that the basic principles of agency law itself will make remedies available for the athlete.[148] For example, if an agent's failure to use reasonable care, diligence, and judgment has caused harm to the principal, he will be liable for any resulting damage.[149] In determining whether or not a reasonable degree of care has been exercised, the agent must measure up to the standard of skill possessed by other agents engaged in the same business; that is, he must be able to negotiate contracts, formulate investment plans, and the like as well as the average sports agent.[150]

(Wash. 1952) (Donworth, J., concurring).

147. "That is, the courts will ask whether the activity, if undertaken by laymen, will harm the public. If so, it is included within their definition of the 'practice of law'." Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power,* 28 U. CHI. L. REV. 162, 166 (1960); West Virginia State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420, 435 (1959).

148. As each party to an agency relationship have responsibilities to the other, there also exists remedies for an agent who has been wronged by an athlete. For example, an agent can bring an action for an unjustifiably breached contract. RESTATEMENT (SECOND) OF AGENCY § 463 (1958); 3 AM. JUR. 2d *Agency* § 38 (1962). However, the agent will not have a cause of action against a third party who fails to perform a contract that the agent has negotiated for the athlete (RESTATEMENT (SECOND) OF AGENCY § 363 (1958)), unless the agent has a personal interest in the contract itself. *Id.* at § 372.

149. RESTATEMENT (SECOND) OF AGENCY §§ 378, 379, 422-431. However, the agent is not liable for honest mistakes if he exercises reasonable skill. Hartzell v. Bank of Murray, 211 Ky. 263, 277 S.W. 270 (1925).

150. *See generally* McCurnin v. Kohlmeyer & Co., 347 F. Supp. 573 (E.D. La. 1972), *aff'd,* 477 F.2d 113 (5th Cir. 1973); United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2d 904 (Tex. Civ. App. 1948). As sports agents hold themselves out as having particular skills in a certain field, they must exceed the capabilities of ordinary citizens. Isham v. Post, 141 N.Y. 100, 35 N.E. 1084 (1894).

In the event that an agent has given his best efforts, but lacks the ability to manage the athlete properly, he is still liable for any damage caused by his ineptitude, as he should not have attempted to do that which he was incapable of performing.[151] This principle serves to give the athlete legal recourse against the many unqualified agents that dot the professional sports landscape.

Agency law also dictates that an agent will be liable to the athlete for all damage that is the natural result of his actions.[152] However, the amount of damage that actually occurs is the limit of the agent's liability; the athlete cannot recover if the agent can show that no damage resulted from his actions.[153]

Conversion of the athlete's funds, as in *People v. Sorkin*,[154] will also render the agent liable in tort.[155] This liability stems from the duty imposed upon the agent to keep the property and funds of the athlete separate from his own.[156]

The wronged athlete also has available the remedy of cancelling the agent's contract.[157] For example, except in situations involving express reservation in the agency agreement, the athlete can cancel the contract for cause, depending upon the circum-

---

151. An agent is under a duty not to attempt the impossible or the impracticable if that will subject the principal to the risk of expense. RESTATEMENT (SECOND) OF AGENCY § 384 (1958).

152. 3 AM. JUR. 2d *Agency* § 209 (1962).

153. Folsom v. Mussey, 10 Me. 297 (1833). The agent can also escape liability if the athlete has ratified the neglectful act. Bell v. Cunningham, 28 U.S. (3 Pet.) 69 (1830).

154. *See* text & accompanying notes 27-29 *supra*.

155. Reeside v. Reeside, 49 Pa. 322 (1865). The agent will also be liable for interest accrued from the date of conversion. Thompson v. Stewart, 3 Conn. 171 (1819).

156. RESTATEMENT (SECOND) OF AGENCY § 398 (1958). The law will not permit one person to secure the funds of another in his capacity as an agent, and then use the other's funds for his own benefit, without also implying a promise on his part to repay, which may be enforced in an action of assumpsit. Piedmont Grocery Co. v. Hawkins, 83 W.Va. 180, 98 S.E. 152 (1919).

157. The agency relationship can be terminated by the act or agreement of the athlete or his agent, or by operation of law. *See generally* Annot., 9 A.L.R. 223 (1920). If the agreement between the parties specifies no time for termination of the agency, the contract and authority may be revoked by the principal after the expiration of a "reasonable time." RESTATEMENT (SECOND) OF AGENCY § 105 (1958). What is "reasonable" depends upon the facts and circumstances of the particular case. *See generally* Annot., 89 A.L.R. 258 (1934); Annot., 85 A.L.R.2d 1344 (1962).

Inherent in agency law is the premise that the principal has the power to terminate his agent's authority at will. However, if such termination violates an existing contract, the principal will be liable to the agent for damages. Shelley v. Maccabees, 183 F. Supp. 681 (E.D.N.Y. 1960).

stances of the particular case.[158] A justifiable cancellation[159] will leave the agent without any redress whatsoever, except with respect to commissions due for services already rendered.[160] However, there is authority for the view that a principal who has been ignorant of his agent's unfaithful acts may recover any commissions already paid, as an unfaithful agent is not entitled to any compensation.[161]

In the context of conflicts of interest, agency law provides a remedy in the event that the agent has, for example, acted on behalf of both adverse parties to a transaction (such as the athlete and the team owner). If the agent has not received the consent of the parties in regard to the dual representation, he will be prevented from recovering commissions from either.[162] Representation of the second party automatically forfeits the right to compensation from the first. If the second party has no knowledge of the existence of the first, the commission will again be lost. However, if the second employer is indeed aware of the first engagement, "then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer."[163] As the contract violates public policy, it is rendered void.

From a tactical standpoint, the athlete has several avenues of action he can take against an agent who has wronged him. For example, he can pursue an action based on the contract itself for failure to perform.[164] Or the athlete can sue to recover any funds re-

---

158. *See generally* Annot., 32 A.L.R. 227 (1924), Annot., 52 A.L.R. 548 (1928), Annot., 89 A.L.R. 257 (1934).

159. Examples of what constitutes grounds for justifiable cancellation include serious neglect or breach of duty by the agent (Scriven v. Wintersteem, 69 S.D. 515, 12 N.W.2d 371 (1943)); dishonesty or untrustworthiness of the agent (DeFranco v. Shedden, 251 A.D. 720, 295 N.Y.S. 370 (1937)); disloyalty of the agent, such as pursuing interests adverse to those of the principal (Clark v. Delano, 205 Mass. 224, 91 N.E. 299 (1910)); or the use of the agency as a conduit to profits for the agent himself (Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 178 N.W. 684 (1920)).

160. The discharge of an agent for just cause terminates all rights to commissions not already earned and accrued. Bilz v. Powell, 50 Colo. 482, 117 P. 344 (1911).

161. Wechsler v. Bowman, 285 N.Y. 284, 34 N.E. 322, Annot., 134 A.L.R. 1346 (1941). However, the rule that an unfaithful agent may be denied a commission is not an absolute one; the decision to grant or deny a commission ultimately depends upon the court's discretion. Shulkin v. Shulkin, 301 Mass. 184, 16 N.E.2d 644 (1938).

162. Wadsworth v. Adams, 138 U.S. 380 (1890).

163. 3 AM. JUR. 2d *Agency* § 254 (1962).

164. RESTATEMENT (SECOND) OF AGENCY § 400 (1958). An agent who violates a duty

ceived by the agent,[165] or seek to recover damages for agent-caused torts.[166] The athlete can also pursue equitable remedies, such as an action for an accounting.[167]

Unfortunately for the athlete, agency principles dictate that he will be bound by contracts negotiated by his agent, even in situations where the agent has acted adversely to his interests, as long as the other party to the contract has no knowledge of the agent's dereliction of duty.[168] However, the athlete will not be bound by the contract if the other party knows or should have known that the agent has acted in an adverse manner.[169]

CONCLUSION

In conclusion, it appears that a combination of two of the above solutions would be the most effective method of curbing agent abuses: 1) A continued relaxation of the ABA solicitation restrictions; 2) Requiring licensing for all agents, or at least those not possessing a license to practice law.[170] Due to the conflicting personal interests of the respective leagues and players associations, licensing should be implemented through a neutral body, such as a "professional association" for agents, or, preferably, by the individual states themselves.

Finally, it appears that even now the number of athletes re-

---

owed his principal may be considered in breach of his contract so as to entitle the principal to the contract remedies of recision or damages. Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958).

165. Piedmont Grocery v. Hawkins, 83 W.Va. 180, 98 S.E. 152 (1919). This remedy may prove useful in future Sorkin-type situations. *See* text & accompanying notes 27-29 *supra*.

166. City Nat. Bank v. Clinton County Nat. Bank, 49 Ohio 351, 30 N.E. 958 (1892).

167. *See* 3 AM. JUR. 2d *Agency* § 330 (1962). As in any legal context, there are various limitations that may hamper an athlete's efforts to bring an action against his agent. For example, general statutes of limitation will apply. *Id.* at § 332. In addition, the agent may be able to defend against the action by showing, for example, that he was merely following the instructions of his principal. Brush v. Herlihy, 8 Ohio Dec. Reprint 104. Finally, the agent may be able to avoid, or reduce, in comparative negligence jurisdictions, liability by showing that the athlete was contributorily negligent or that there was a failure to mitigate damages. RESTATEMENT (SECOND) OF AGENCY § 415 (1958).

168. Guardian Foundation v. Turner, 191 Okla. 313, 129 P.2d 592 (1942). "The principal, having selected his representative and vested him with apparent authority, should be the loser in such a case, and not the innocent party who relied thereon." 3 AM. JUR. 2d *Agency* § 270 (1962); Exchange Bank v. Monteath, 26 N.Y. 505 (1863).

169. 3 AM. JUR. 2d *Agency* § 270 (1962).

170. *See, e.g.*, CAL. LAB. CODE § 1500-47 (West 1982), which provides for licensing of only non-attorney agents. *See* text & accompanying notes 93-97 *supra*.

taining reputable firms is increasing, with the unscrupulous operators playing a less significant role. This trend, coupled with an increase in regulation such as the newly-enacted California statute, may result in more honest and competent representation by agents in the future.

JEFFREY P. CRANDALL