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**Sports Agents & Student-Athletes: The Dilemma of**  
**Deterring Recruiting Improprieties**  
**A Focus on College Football**

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## **Sports Agents and Student-Athletes: An Introduction**

"There are moments you will always remember, like your first kiss or your first home run or the day you met your wife. For me, the first time I broke an NCAA rule to try to land a client is just as indelible."<sup>1</sup>

These words were spoken by former sports agent, Josh Luchs ("Luchs"), who, in a recent Sports Illustrated article, divulged many of the ins-and-outs of the sports agent world that were previously unknown.<sup>2</sup> This article was released shortly after the National Collegiate Athletic Association ("NCAA") issued its highly publicized ruling on the unscrupulous activities that occurred at the University of Southern California ("USC") over an almost four-year period.<sup>3</sup>

When asked why he came clean, Luchs responded:

"People should know how the agent business really works, how widespread the inducements to players are and how players have their hands out. It isn't just the big, bad agents making them take money. People think the NFLPA is monitoring agents, but it is mostly powerless. People should also be aware of all that an agent does for his clients. Catering to their needs can be an all-consuming job."<sup>4</sup>

At 20 years old, Luchs was the youngest agent ever certified by the National Football League's Players Association ("NFLPA"), and his first student-athlete encounter was with Kanavis McGhee in 1990.<sup>5</sup> Kanavis was a player that was expected to be a high draft pick in the 1991 National Football League's ("NFL") draft.<sup>6</sup> Luchs discovered where Kanavis lived and staked-out the apartment to talk to Kanavis, and immediately Kanavis asked for money, "I need some help. My mom lost her job, she's sick, and she hasn't been able to make her rent. If I don't

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<sup>1</sup> Josh Luchs and George Dohrmann, *Confessions of an Agent: I Will Never Forget the First Time I Paid A Player*, Sports Illustrated 62-70 (Oct. 18, 2010) [hereinafter *Confessions of an Agent*].

<sup>2</sup> Id.

<sup>3</sup> NCAA.com news services, *Division I Committee on Infractions Issues Decision on [USC]*, Released June 2010, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2010/Infractions/20100610+D1+COI+USC](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2010/Infractions/20100610+D1+COI+USC) (last visited Nov. 5, 2010) [hereinafter NCAA.com news services, *Division I ... USC*].

<sup>4</sup> Luchs, *Confessions of an Agent* at 70.

<sup>5</sup> Id. at 64

<sup>6</sup> Id.

come up with \$2,500, she is going to get evicted from her apartment."<sup>7</sup> Luchs told Kanavis that he would think about it, "Sure, it was breaking NCAA rules, but I would be helping Kanavis out. How would I feel if my mom was sick and I didn't have money to help her?"<sup>8</sup> Luchs decided to give Kanavis the money, and later that same day Luchs got a call from one of Kanavis's teammates who gave Luchs the same story and asked for the same amount of money.<sup>9</sup>

One of the misconceptions the public has about the sports agent business is that the kids are victims; preyed on by agent, but most of the times it is the players or someone from their family that approaches agents.<sup>10</sup> These sports agent interactions have severely negative effects upon both the student-athletes and the university or college ("school") for which they play.<sup>11</sup> These practices can result in loss of intercollegiate eligibility for the student-athlete, substantial team and school penalties, and sanctions on schools that include repayment of money, loss of scholarships, loss of television revenue, post-season play ineligibility, and game forfeitures.<sup>12</sup>

This paper will explain why current laws in place fail to deter these interactions between a sports agent and student-athlete. To understand the scope of this problem this paper will focus on the USC and Reggie Bush ("Bush") case, upon which the NCAA issued heavy sanctions.<sup>13</sup> It will explain the sports agent industry and the relationship between a sports agent and student-athlete. Also, it will analyze bodies of law in place at the federal and state level as well as the private bodies of law that govern sports agent and student-athlete interactions. Finally, this paper

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<sup>7</sup> Id.

<sup>8</sup> Id. at 65.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 St. John's L. Rev. 1225, 1229 (2004) [hereinafter *Regulating Sports Agents*].

<sup>12</sup> Id.

<sup>13</sup> NCAA.com news services, *Division I... [USC]*.

will discuss the problems with the current governing laws and suggest solutions to these problems.

### **Reggie Bush and USC**

It was revealed that Reggie Bush and his family accepted financial benefits worth more than \$100,000 from agents while Bush was playing at USC.<sup>14</sup> It started in September of 2004 when Bush's stepfather, Lamar Griffin ("Griffin"), approached family friend Lloyd Lake ("Lake") about partnering in a sports and entertainment agency where Bush would be the agency's anchor client.<sup>15</sup> Later, they approached Michael Michaels ("Michaels") who became the primary financial backer of their agency, New Era Sports & Entertainment ("New Era"); paying off \$28,000 in debt for Bush's parents so Griffin could "focus" on forming the agency in November of 2004.<sup>16</sup> In April 2005, the Bush family ran into financial troubles and Griffin, Bush's mother and brother moved into Michaels's \$757,500 Spring Valley home.<sup>17</sup> Bush's family failed to pay rent, promising to pay once Bush was drafted and signed with an NFL team.<sup>18</sup> Later that summer, Bush started an internship with Reebok consultant Michael Ornstein ("Ornstein").<sup>19</sup> In October 2005, Lake approached a sports agent to negotiate Bush's playing contract for his eventual jump to the NFL, and the sports agent agreed to join New Era if the firm landed Bush as a client.<sup>20</sup> In November 2005, Ornstein became an advisor for the Bush family as they sought to interview prospective sports agents. After Bush won the Heisman Trophy in

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<sup>14</sup> Charles Robinson and Jason Cole, *Reggie Bush Investigation: Cash and Carry*, Yahoo! News Network, Updated Sept. 15, 2006, <http://rivals.yahoo.com/ncaa/football/news?slug=ys-bushprobe> (last visited Nov. 15, 2010) [hereinafter: Robinson, *Reggie Bush Investigation: Cash and Carry*].

<sup>15</sup> Charles Robinson and Jason Cole, *Reggie Bush Investigation: Timeline*, Yahoo! News Network, Updated Sept. 15, 2006, [http://rivals.yahoo.com/ncaa/football/news?slug=ys-bush\\_timeline](http://rivals.yahoo.com/ncaa/football/news?slug=ys-bush_timeline) (visited Nov. 15, 2010) [hereinafter: Robinson, *Reggie Bush: Timeline*].

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

December 2005, the relationship between New Era representatives and Bush's family began to fracture.<sup>21</sup> Later that month, Ornstein emailed a third party to request a \$500,000 advance on memorabilia contract that the third party proposed for Bush.<sup>22</sup> In January 2006, Bush declared for the NFL draft hiring Ornstein<sup>23</sup> to be his marketing representative and sports agent Joel Segal to negotiate his playing contract<sup>24, 25</sup>.

In February 2006, Bush, his mother and his attorney met with Michaels and offered him \$100,000 to settle their dispute, but Michaels refused and told them he would file a lawsuit to recoup the money already given and the potential earnings lost when Bush failed to sign with New Era.<sup>26</sup> In April 2006, New Era's attorney sent Bush's family an eviction notice for Michaels's home.<sup>27</sup> The following day, Bush's family took about \$12,000 in home furnishings while vacating the house, and that same day, USC asked the Pacific 10 Conference to investigate the home and ties to a sports agency.<sup>28</sup> Three days later on April 24, the NCAA became a participant in the investigation.<sup>29</sup>

Almost four years later, the NCAA concluded their investigation finding, among other things, there was a lack of institutional control, impermissible inducements, and extra benefits received.<sup>30</sup> The NCAA imposed sanctions on USC that include,

“[F]our years probation; a two-year football postseason ban; ... vacation of regular and postseason wins for [the football program]; scholarship reductions. ... They also include a \$5,000 financial penalty; ... [L]imitations for the access granted to boosters and non-university personnel to team charters, sidelines, practices, locker

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<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> After Bush was drafted, Ornstein arranged marketing deals for Bush worth approximately \$50 million. (Robinson, *Reggie Bush Investigation: Cash and Carry*).

<sup>24</sup> Bush signed a 6-year, \$26.3 million playing contract. Id.

<sup>25</sup> Robinson, *Reggie Bush: Timeline*.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> NCAA.com news services, *Division I... [USC]*.

rooms and camps for men's ... football. The university must also disassociate itself from three boosters, including the former football ... student-athletes involved in this case. As a part of this disassociation, the university will not be able to accept financial contribution or other assistance for the athletics department from these individuals or provide them with any benefit and privileges. ... [Also,] the assistant football coach ... is prohibit[ed] ... from engaging in any recruiting activity with prospective student-athletes."<sup>31</sup>

The NCAA did not issue any direct sanctions against Bush because Bush had already left USC and was drafted by an NFL team, which already made him ineligible to play intercollegiate sports. These severe sanctions that will affect USC's recruiting ability will have a direct impact on the revenue USC's football team produces annually and hopefully deter future schools from allowing this kind of activity to occur.

Just recently, as to the completion of this paper, the NCAA issued a ruling on the University of Auburn ("Auburn") and one of their players, Cam Newton, that contrasts the Bush ruling. Newton's father and an owner of a scouting service worked together to actively market Newton as a part of a pay-for-play scenario in return for Newton's commitment to attend the school and play football.<sup>32</sup> Since then, Newton attended Auburn, and Auburn ruled Newton ineligible pending an NCAA investigation and ruling.<sup>33</sup> The NCAA reinstated Newton immediately finding that neither Newton nor Auburn had knowledge of his father's actions.<sup>34</sup> In the Bush case, the NCAA discovered hotel bills signed by Bush, which proved he had some knowledge of the improper benefits he was receiving.<sup>35</sup>

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<sup>31</sup> Id.

<sup>32</sup> NCAA.com news services, *NCAA Addresses Cam Newton's Eligibility*, Released Dec. 2010, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2010/Official+Statements/20101201+Cam+Newton+Rls](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2010/Official+Statements/20101201+Cam+Newton+Rls) (last visited Dec. 5, 2010) [hereinafter NCAA.com news services, *NCAA Addresses Cam Newton's Eligibility*].

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Robinson, *Reggie Bush Investigation: Cash and Carry*

## The Sports Agent Industry

“The reason we needed [sports] agents was to protect the players from owners ... the problem we have now is how to protect the player from the agent.”<sup>36</sup>

The sports representation field has grown significantly in the past several years due to huge increases in athletes' salaries, the advent of free agency, and the growing number of companies seeking athletes for endorsements.<sup>37</sup> Once thought of as individuals who negotiated player contracts for athletes, sports agents now perform a variety of functions including: I) determining the value of a player's services; II) negotiation of the player's contract with the club, including salary, incentives, bonuses, guarantees, no-trade clauses, and length of contract; III) soliciting and arranging product endorsements, speaking engagements, and other uses of the player's name and image for commercial purposes; IV) promoting the athlete's career through public relations, media coverage, and charitable activities; V) providing financial management services, such as tax advice, estate planning, career planning, and making arrangements for the sale of stocks, bonds, real estate, and other investments; VI) resolving conflicts that arise concerning areas such as enforcement of employment contracts, and behavioral problems such as substance abuse; VII) representing players in salary or grievance arbitration matters; VIII) arranging for movement of the player in the labor market, e.g., free agency, suggesting a trade to another club; and, IX) counseling a player about his post-career years.<sup>38</sup> While a variety of options exist, the most common arrangement for the agent-athlete relationship is a firm that

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<sup>36</sup> Jamie Schulman, *The NHL Joins in: An Update on Sports Agent Regulation in Professional Team Sports*, 4 Sports Law. J. 181, 186-87 (1997).

<sup>37</sup> Tamara L. Barner, *Show me the . . . ethics?: The implications of the Model Rules of ethics on attorneys in the sports industry*, The Georgetown Journal of Legal Ethics, (July 1, 2003); retrieved at, AllBusiness.com: A D&B Co., <http://www.allbusiness.com/legal/1009832-1.html> (last visited Nov. 21, 2010) [hereinafter Barner, *Show me the ... ethics?*].

<sup>38</sup> Paul D. Staudohar, *So You Want to be A Sports Agent*, Labor Law Journal (Winter 2006); retrieved at, AllBusiness.com: A D&B Co., <http://www.allbusiness.com/human-resources/employee-benefits-benefits/4063876-1.html> (last visited Nov. 21, 2010) [hereinafter Staudohar, *So You Want to be A Sports Agent*].

handles a mix of the functions previously mentioned.<sup>39</sup> At these agencies, it is common for one sports agent to handle negotiations, such as playing contracts or endorsement deals, while another agency or firm handles the athlete's financial management; a plethora of combinations exist for the athlete.<sup>40</sup>

The transforming development in the agent business in the 2000s was Hollywood's move into sports.<sup>41</sup> It started when CAA lured Tom Condon from IMG in 2005. The firm that represented Tom Cruise and Angelina Jolie joined forces with the guy who represented Peyton and Eli Manning.<sup>42</sup> As Fuchs put it, "at our new agency, we had something powerful to sell to players: celebrity. We told them, 'Come sign with us and be a star.' We were selling TV and movies to athletes, and it was like having the Golden Calf. I had Hollywood to sell. Let the other agents pay kids."<sup>43</sup> As the line between sports and entertainment representation blurred, companies like Offense-Defense ("O-D") Life, one stop shops for whatever needs an athlete might have, started to appear.<sup>44</sup>

O-D Life is a company operated by Matt Whittier<sup>45</sup> ("Whittier").<sup>46</sup> Whittier and O-D Life claim to offer: business management and development, wealth management, high-profile investments, public relations and marketing services, NFL rules advisement and family and substance abuse counseling.<sup>47</sup> There is one notable omission from O-D Life's long list of

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<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Luchs, *Confessions of an Agent* at 69.

<sup>42</sup> Id. at 69-70

<sup>43</sup> Id. at 70

<sup>44</sup> .George Dohrmann, *Under-the-radar Freelancers a Main Source of College Corruption*, Sports Illustrated, SI.com (Sept. 16,2010), [http://sportsillustrated.cnn.com/2010/writers/george\\_dohrmann/09/16/college.agents/index.html](http://sportsillustrated.cnn.com/2010/writers/george_dohrmann/09/16/college.agents/index.html) (last visited Nov. 23, 2010) [hereinafter Dohrmann, *Under-the-radar Freelancers*].

<sup>45</sup> Whittier is neither a lawyer, nor a registered financial advisor, nor a counselor. He does help operate O-D Sports, which runs youth football camps all over the country. That gives Whittier access to some of the nation's best talents at a young age, and he boasts that more than 350 O-D Sports alumni have played in the NFL. Id. at 1.

<sup>46</sup> Id.

<sup>47</sup> Id.



services: It doesn't represent athletes in contract negotiations.<sup>48</sup> It offers to help clients vet sports agents, to alert them to those known for "unscrupulous practices," but technically O-D Life is not a sports agency, and Whittier is not an agent.<sup>49</sup> This is an important distinction, because it means that O-D Life is not subject to the rules and regulations of the NFLPA, which certifies player agents; and, depending on one's interpretation of a particular state's sports agent laws, O-D Life and Whittier may not be governed by those, either.<sup>50</sup> The company operates in a vast gray area, free to contact and assist student-athletes without restraint, and to profit from these kids.<sup>51</sup>

It is also becoming more common for a player to hire an attorney on a per hour fee basis to handle salary negotiations, which is often far cheaper than the percentage cut.<sup>52</sup> Both sports attorneys and agents are subject to players' association regulations, state athlete agent statutes, and common law in the areas of fiduciary, agency, and contract principles.<sup>53</sup> If an agent wrongs an athlete, the client can look to statutory and common law for monetary and criminal penalties.<sup>54</sup> However, the ethical restraints and disciplinary measures contained in the Model Rules afford an athlete additional protection.<sup>55</sup> Because of their status as attorneys, these agents are subject to attorney disciplinary rules and standards of professional conduct governing attorneys, such as the Model Rules of Professional Conduct where a violation of these standards may result in a state bar disciplinary body taking action against attorneys.<sup>56</sup> Courts, however,

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<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>53</sup> Barner, *Show me the ... ethics?*.

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 Willamette L. Rev. 781, 805 (2006) [hereinafter Davis, *Regulating the Athlete-Agent Industry*].

have noted distinctions between a lawyer who is acting as an attorney, and one who is acting as a sports agent.<sup>57</sup>

As salaries of professional athletes rose to higher and higher levels, not only did the number of agents grow, but their business became more competitive.<sup>58</sup> Inducing an amateur athlete to sign with a particular agent through bribes became common.<sup>59</sup> Agents have provided cars, clothing, shoes, gift certificates, women, airline tickets, drugs, and, most commonly, cash to attract the attention of players and their families, some of whom are poor.<sup>60</sup> In 2000, sports agent and lawyer, Scott Boras (“Boras”), negotiated a 10-year deal for baseball player Alex Rodriguez for a record \$252 million.<sup>61</sup> Boras' 5% cut resulted in a fee of \$12 million.<sup>62</sup> While that example is from baseball, and the NFLPA sets a sports agent's cut at 3%<sup>63</sup>, it still shows the potentially high figures a successful sports agent can earn. The minimum NFL player salary for a new player was \$295,000 in 2008 and \$310,000 in 2009.<sup>64</sup> The average base salary of an NFL player in 2009 was around \$990,000, and the average NFL player signing bonus salary for all players in 2009 was approximately \$1.3 million.<sup>65</sup>

In order to compete with large firms, individual agents with fewer resources resort to unethical and even illegal behavior.<sup>66</sup> However, courts have recognized the fierce and sometimes ruthless competition that occurs when agents battle for a client, and in some instances, have held agents or agencies can use puffery to estimate the value of a player so long

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<sup>57</sup> Wright v. Bonds, 117 F.3d 1427 (9<sup>th</sup> Cir. 1997)(holding Wright was not acting as Bonds' legal counsel as he used the stationery of his sports management firm, as opposed to his law firm, in corresponding with Bonds)

<sup>58</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Barner, *Show me the ... ethics?*.

<sup>62</sup> *Id.*

<sup>63</sup> Dohrmann, *Under-the-radar Freelancers* at 2.

<sup>64</sup> Suketu Mehta, *NFL Player Salaries*, (posted Jan. 7, 2010), Buzzle.com, <http://www.buzzle.com/articles/nfl-player-salaries.html> (last visited Dec. 4, 2010).

<sup>65</sup> *Id.*

<sup>66</sup> Willenbacher, *Regulating Sports Agents* at 1228.

as it does not rise to the level of fraud or improper conduct, which is determined by a jury.<sup>67</sup>

Sports agents will often utilize runners<sup>68</sup> or freelancers<sup>69</sup> to their advantage, which often leads to unethical or illegal behavior.

When agents are unable or unwilling to meet with athletes directly, they employ runners to do their bidding.<sup>70</sup> An agent may already employ the runner and just implant him on the campus to pass money, cars, and other gifts to the athlete to induce him into signing an agency contract before he leaves college.<sup>71</sup> The most aggressive of the freelancers are financial advisers and marketing representatives, and for a simple reason; Big money is at stake.<sup>72</sup> An NFLPA-certified sports agent receives no more than 3 percent of a player's compensation, the lowest of any major sport.<sup>73</sup> However, there are no restrictions on the percentage taken from marketing deals with 20% being the average, and money managers work on commission or collect fees.<sup>74</sup> Also, sports agents stop collecting once a player's career ends, but financial advisers and marketing representatives keep getting paid, and if the player is big enough, the marketing opportunities continue long after the athlete is done playing.<sup>75</sup>

### **Agent-Athlete Relationship**

“[F]or every kid who didn’t take the money, there were dozens who called me and asked to get paid.”<sup>76</sup>

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<sup>67</sup> *Speakers of Sport, Inc. v. Proserv, Inc.*, 178 F.3d 862, 862-5 (7<sup>th</sup> Cir.1999) (West 2010).

<sup>68</sup> A runner will befriend the student-athlete and then advertise himself to agents as a conduit, offering his services as a close friend of the athlete and someone who can exert great influence over the decisions he makes. (Willenbacher, *Regulating Sports Agents* at 1228).

<sup>69</sup> Freelancers are not affiliated with an agent, but still try to get in with players so they can sell them to the highest bidder or profit in some other way. Examples of freelancers include childhood friends of the athlete, coaches, trainers, financial advisers, and marketing representatives. (Dohrmann, *Under-the-radar Freelancers* at 2).

<sup>70</sup> Willenbacher, *Regulating Sports Agents* at 1228

<sup>71</sup> Id.

<sup>72</sup> Dohrmann, *Under-the-radar Freelancers* at 2.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Luchs, *Confessions of an Agent* at 66.

The athlete-agent relationship is governed by federal common law on principles of agency law, contract law, and in some instances, criminal law.<sup>77</sup> A fiduciary relationship exists between a sports agent and an athlete upon the signing of an agency contract<sup>78</sup> or Uniform Players Contract<sup>79</sup> in a professional sports league, such as the NFL.<sup>80</sup> Once a student-athlete signs a representation agreement with a sports agent, the student-athlete loses the ability to participate in intercollegiate competition in the sport that the sports agent agrees to represent the athlete in marketing or playing contract negotiations.<sup>81</sup> The fiduciary relationship results from the manifestation of consent by the athlete to the agent that the agent will act on the athlete's behalf and subject to the athlete's control.<sup>82</sup> A sports agent may receive short term monetary gain if his client takes a banned substance and receives a large contract based on excellent performance; however, that sports agent must subordinate his own interests in favor of his client's, which includes longevity of success and avoiding trouble by adhering to banned substance policies.<sup>83</sup> A sports agent has a duty to discover and disclose to his clients material information that is reasonably obtainable, unless the information is so clearly obvious and apparent to the athlete that, as a matter of law, the sports agent would not be negligent in failing

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<sup>77</sup> Bryan Couch, *How Agent Competition and Corruption Affects Sports and the Athlete-Agent Relationship and What Can be Done to Control It*, 10 Seton Hall J. Sport L. 111, 129 (2000).

<sup>78</sup> Unfortunately, this does not govern the agent and student-athlete relationship for college football's problem because the student-athlete is not allowed to sign with an agent while playing intercollegiate sports per NCAA laws, even though the athlete is supposedly getting money with "no strings attached" from sports agents anyway. (Citing Luchs, *Confessions of an Agent* at 67).

<sup>79</sup> The provisions in these standard agent representation agreements easily allow athletes to terminate their contracts with agents at will with no need of for-cause. (Davis, *Regulating the Athlete-Agent Industry* at 785).

<sup>80</sup> Restatement (Third) of Agency, § 1.01 (2006)

<sup>81</sup> Davis, *Regulating the Athlete-Agent Industry* at 807.

<sup>82</sup> Restatement (Third) of Agency, § 1.01.

<sup>83</sup> Darren Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, Dartmouth Law Journal, Vol. 7, Issue 3, Fall 2009 (Lexis 2010), <http://www.lexisnexis.com/Community/LitigationResourceCenter/blogs/litigationblog/archive/2010/04/21/duties-of-sports-agents-to-athletes-and-statutory-regulation-thereof-1.aspx> (last visited Nov. 10, 2010) [hereinafter Heitner, *Duties of Sports Agents*].

to disclose it to the athlete.<sup>84</sup> Additionally, agency law also requires that sports agents use care in acting on behalf of their athlete clients and expend reasonable efforts to provide material information to them.<sup>85</sup> Additionally, a sports agent must not use his position or an athlete's property to benefit him or another entity, unless the athlete has given consent.<sup>86</sup>

Many state courts recognize that the relationship between a school and a student-athlete is contractual in nature.<sup>87</sup> A school that enters a contractual relationship with a student based on a scholarship or financial aid may sue a student in breach for compensatory, consequential, and possibly punitive damages.<sup>88</sup> It is asserted that if a contract exists between the two parties, the university has the ability to bring an action against the student for breach of contract, which includes a violation of NCAA eligibility requirements outlined in the agreement, and therefore a sports agent that interferes with this relationship can be sued for tortious interference with contract.<sup>89</sup>

Unfortunately, suits against sports agents or student-athletes may damage the reputation of the school and hurt recruiting in addition to shrinking the general applicant pool.<sup>90</sup> College sports are big business and schools make too much money from these programs to engage in publicized and damaging lawsuits.<sup>91</sup> Also, there exists just a one percent chance that a college athlete will make a professional team, even in a backup role, so the athlete and aspiring sports agent that cause a violation may not be able to pay a damage bill of six to seven figures to the

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<sup>84</sup> Douglas v. Steele, 816 P.2d 586, 590 (Okla. Civ. App. 1991).

<sup>85</sup> Restatement (Third) of Agency, § 8.08 (2006).

<sup>86</sup> Restatement (Second) of Agency, 400, 401 (1957).

<sup>87</sup> Taylor v. Wake Forest University, 16 N.C. App. 117 (N.C. Ct. App. 1972); Carr v. St. John's University, (231 N.Y.S.2d 410 (2d Dep't 1962).

<sup>88</sup> Willenbacher, *Regulating Sports Agents* at 1241

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1247.

<sup>91</sup> *Id.* at 1245-6.

school if convicted.<sup>92</sup> Legal action could make a statement that the school is more concerned with operating a business than educating their student-athletes.<sup>93</sup> In addition to choosing not to sue student-athletes and sports agents over NCAA violations, schools may simply be unable to successfully do so because of their constructive knowledge, or “willful blindness”<sup>94</sup> of the violation.<sup>95</sup> If a school employee fails to exercise the degree of care that is reasonable under the circumstances, the school itself may be held vicariously liable under the doctrine of respondent superior, which makes principals liable for the wrongful acts of their agents, when those acts are committed in the ordinary course and scope of the agent's authority.<sup>96</sup> The NCAA refers to this as a lack of “institutional control,” which includes failing to heed warning signs, not having proper procedures in place to monitor rules compliance, failing to regulate access to practice and facilities, and failing to take a proactive stance or show investigative concerns in some instances.<sup>97</sup> A school must either have known or should have known or had culpability in order to receive sanctions from the NCAA.<sup>98</sup>

The holding of the landmark case of United States v. Walters<sup>99</sup> made sports agents subject to various white collar crimes<sup>100</sup> and federal laws<sup>101</sup>.<sup>102</sup> Although Walters was reversed due to procedural error, the substantive law still holds.<sup>103</sup> Walters was decided in 1989, and since then many agents have been convicted of criminal charges showing the threat of jail time is

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<sup>92</sup> Id. at 1246.

<sup>93</sup> Id. at 1247.

<sup>94</sup> Such was the case for USC and Reggie Bush, but not Auburn and Cam Newton.

<sup>95</sup> Willenbacher, *Regulating Sports Agents* at 1248.

<sup>96</sup> Findlaw.com resources, *College Student-Athletes and Professional Sports: More Legal Issues*, (published 2010), ; [http://public.findlaw.com/education/college\\_sports\\_student\\_athletes.html](http://public.findlaw.com/education/college_sports_student_athletes.html) (last visited Nov. 20, 2010).

<sup>97</sup> NCAA.com news services, *Division I ... USC*.

<sup>98</sup> NCAA.com news services, *NCAA Addresses Cam Newton's Eligibility*.

<sup>99</sup> 997 F. 2d 1219 (7th Cir. 1993).

<sup>100</sup> Mail fraud and conspiracy to commit mail fraud. (Id. at 1221).

<sup>101</sup> Racketeer Influenced and Corrupt Organizations ("RICO") Act (Id. at 1221).

<sup>102</sup> Walters at 1221.

<sup>103</sup> Id. at 1221-2.

an insufficient deterrent. In 2000, William "Tank" Black, a prominent agent who represented several NFL and NBA players, was accused of engaging in fraudulent moneymaking schemes.<sup>104</sup> The Securities and Exchange Commission (SEC) charged that Black and several associates took advantage of clients' lack of investment experience by committing mail and wire fraud and money laundering to the tune of \$15 million in clients' money.<sup>105</sup> The suit against Black resulted in his receiving a five-year sentence for fraud in 2002.<sup>106</sup>

In order to represent athletes in professional team sports it is necessary to be certified as an agent, and certification is provided by the players associations, not by the leagues.<sup>107</sup> The NFLPA was the first association to certify sports agents in 1985.<sup>108</sup> Under the dual system of negotiations in sports, the union negotiates provisions applicable to all players in the league, such as minimum salaries, free agency, and salary arbitration.<sup>109</sup> The rules thus established underlie the second aspect of sports bargaining: negotiation of the individual contract between the player and his club.<sup>110</sup> Players in these individual situations are ordinarily represented by an agent, and this negotiation is usually the most important service that agents provide.<sup>111</sup> Negotiation is viewed as an art rather than a science; athletes rarely have the experience and acumen necessary to become a successful negotiator.<sup>112</sup> A lot of money is at stake and club representatives are quite proficient in handling salary negotiations.<sup>113</sup> Although agents get a percentage of the negotiated salary, they typically earn their share.<sup>114</sup>

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<sup>104</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

In order to get these athletes while they are still students, sports agents, rather than giving student-athletes large lump-sum payments, will give smaller amounts each month so players would stay in regular touch and befriend the sports agent.<sup>115</sup> Other types of benefits given are bail money, expensive dinners, concert tickets, access to professional trainers or coaches, and anything else a student-athlete might ask for.<sup>116</sup> These activities were more open in the 1960s, '70s, and '80s, before states passed sports agent laws making it illegal; now, agents still do it, but they are more secretive and use middlemen.<sup>117</sup> Social Networking such as Twitter and Facebook have contributed to these issues being aired more publicly since it gives the student-athletes a chance to incriminate themselves by posting pictures or comments for viewing by the entire world.<sup>118</sup> As to the scope of the problem, sports agent Luchs tells us,

“Anyone who thinks it doesn't go on needs to look at all the schools currently being investigated by the NCAA for contact between [student-athletes] and [sports] agents, places like Alabama, Florida, Georgia, and North Carolina. It goes on everywhere.”<sup>119</sup>

Why do these harming interactions occur? For the sports agent's perspective, Luchs informs us of the common stance among agents, “if they didn't take our money, they would take it from one of the dozens of other agents opening their wallets.”<sup>120</sup> Also, Luchs felt that since sports agents weren't members of the NCAA, they did not agree to follow [NCAA] rules, and the school and the NCAA were making money while the players, many of whom come from poor families, were not getting anything but an education, which many of them did not take

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<sup>115</sup> Luchs, *Confessions of an Agent* at 66

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> NCAA.com news services, *Q & A with NCAA Director of Agent, Gambling and Amateurism Activities Rachel Newman Baker*, released July 29, 2010, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/july+latest+news/interview+with+ncaa+director+of+agent%2C+gambling+and+amateurism+activities> (last visited Nov. 5, 2010) [hereinafter NCAA.com news services, *Q & A with NCAA Director*].

<sup>119</sup> Luchs, *Confessions of an Agent* at 66

<sup>120</sup> *Id.*



seriously.<sup>121</sup> From a student-athlete's perspective, one former player said that he took the payments because the scholarship did not provide enough money for rent and food, and he had four sons to worry about.<sup>122</sup> That same student-athlete admitted that he would do it all over again, and that if someone offered one of his son's money in college and it meant that son did not have to be hungry, he would tell the son to take the cash.<sup>123</sup>

While some instances of how these improprieties occur have previously been mentioned, there are varying methods and tactics that sports agents employ. A common way for an agent to gain a foothold in the sports agent field is by getting in with a single school.<sup>124</sup> Luchs explains, "How did Drew Rosenhaus become so big? He graduated from Miami and was embedded in the school when Ray Lewis, Warren Sapp & [Company] went there."<sup>125</sup> Sports agents have also used media contacts and draft analysts, who project that sports agent's pick higher than he deserves so the analyst can get a cut of the profit.<sup>126</sup> Agents also use coaches to gain a student-athlete's trust. This can occur in two ways; first, the sports agent may ask an NFL coach, current or former, to work out a student-athlete so that athlete becomes a better player.<sup>127</sup> Second, it occurs when a sports agent befriends a school's coach and is granted access to the student-athletes at practices or games,<sup>128</sup> or the coach steers the student-athlete in that sports agent's direction.<sup>129</sup>

Former players are common points of contact for agents at a school. An agent will go up to a player who just graduated, but did not make it to the NFL and ask them if they want "a little

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<sup>121</sup> Id.

<sup>122</sup> Id. at 64.

<sup>123</sup> Id.

<sup>124</sup> Id. at 66.

<sup>125</sup> Id.

<sup>126</sup> Id. at 69.

<sup>127</sup> Id.

<sup>128</sup> Robinson, *Reggie Bush: Timeline*.

<sup>129</sup> Luchs, *Confessions of an Agent* at 69.

something" for those four years spent at that school.<sup>130</sup> The former player will stay near campus and use his contacts with his old teammates to set up meetings with the agent.<sup>131</sup> The former player is usually paid for his troubles, typically a flat fee of a couple of thousand dollars or, in some cases, a percentage of the player's take.<sup>132</sup> Agents also cultivate relationships with personal trainers who are popular with players, using them to help recruit.<sup>133</sup> There are facilities that athletes want to work out at, those that are known for helping kids get drafted higher.<sup>134</sup> A player calls that facility about working out there and is told all the spots are filled, but certain sports agents have purchased time at the facility, and if the player were to sign with that sports agent, he could work out at the facility.<sup>135</sup>

### **State Legislation - The UAAA**

In 2000, the National Conference of Commissioners on Uniform State Law developed a proposed model law called the Uniform Athletes-Agents Act (UAAA), to protect the interests of student-athletes and schools by regulating agent activities.<sup>136</sup> The UAAA provides a template designed to encourage states to adopt its provisions into law.<sup>137</sup> As of July 2010, the UAAA has been passed in 40 states, the District of Columbia and the U.S. Virgin Islands.<sup>138</sup> This includes Illinois, which will take effect Jan. 1, 2011.<sup>139</sup> Three more states, such as California, have non-UAAA laws in place designed to regulate agents.<sup>140</sup> This creates a problem for agents operating

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<sup>130</sup> Dohrmann, *Under-the-radar Freelancers* at 1.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>137</sup> Id.

<sup>138</sup> NCAA.com news services, *FAQ on Uniform Athlete Agent Act*, released July, 2010, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act> (last visited Nov. 5, 2010).

<sup>139</sup> Id.

<sup>140</sup> Id.

in more than one state, because the provisions on compliance and penalties vary from state to state.<sup>141</sup>

To achieve its objectives, the UAAA provides for uniform registration, certification, and background checks of sports agents. Registration is required of agents who recruit or solicit a student-athlete to sign an agency agreement for contract negotiation or endorsements.<sup>142</sup> The UAAA imposes specified contract terms on agreements between agents and student-athletes with remaining eligibility in order to protect schools and their student-athletes<sup>143</sup> such as the inclusion of a warning on any agency contract that regards the loss of a student-athlete's loss of eligibility in that sport,<sup>144</sup> and the inclusion of the amount and method of calculating payments to be owed to the agent.<sup>145</sup> If the agency contract fails to comply with these requirements, it is voidable by the student-athlete.<sup>146</sup> The UAAA grants student-athletes the right to cancel an agency contract within 14 days of its execution.<sup>147</sup> Student-athletes and agents must notify schools within 72 hours of the signing of an agency contract or before the student-athlete's next athletics event, whichever comes first.<sup>148</sup>

The UAAA criminalizes certain intentional conduct by agents, including: providing materially false or misleading information;<sup>149</sup> providing anything of value to a student-athlete or another person prior to the athlete entering into an agency contract;<sup>150</sup> contacting a student-

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<sup>141</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>142</sup> Uniform Athletes Agents Act, § 4(a), § 2(1) & § 2(2), available at <http://www.law.upenn.edu/bll/archives/ulc/uaaa/aaa1130.htm> (last visited Dec. 5, 2010).

<sup>143</sup> Id. at § 10.

<sup>144</sup> Id. at § 10(c).

<sup>145</sup> Id. at § 10(b)(1).

<sup>146</sup> Id. at § 10(d).

<sup>147</sup> Id. at § 12.

<sup>148</sup> Id. at § 11(b).

<sup>149</sup> Id. at § 14(a)(1).

<sup>150</sup> Id. at § 14(a)(2)(3).

athlete for purposes of solicitation unless the agent is registered,<sup>151</sup> an agent's failure to register when required under the UAAA,<sup>152</sup> predating or postdating an agency agreement,<sup>153</sup> and failing to notify a student-athlete, before he or she executes an agency contract, of the potential loss of intercollegiate eligibility resulting from entering into such an agreement.<sup>154</sup> Schools have a statutory right of action against agents and student-athletes for any losses and expenses resulting from a penalty imposed on a school because of the conduct of an agent and student-athlete.<sup>155</sup> The UAAA gives authority to the Secretary of State to issue subpoenas that would enable the state to obtain relevant material that ensures compliance with the act, and it also provides for criminal, civil and administrative penalties with enforcement at the state level.<sup>156</sup>

### **Federal Legislation – SPARTA**

Prior to 2004, federal laws in place were not specifically designed to regulate the athlete-agent industry.<sup>157</sup> In 2004, the Sports Agent Responsibility and Trust Act (“SPARTA”) was enacted to protect schools and, to a lesser extent, student-athletes from improper recruitment practices of sports agents, and SPARTA’s key provisions are modeled after the provisions of the UAAA.<sup>158</sup> SPARTA serves an important role in creating duties for sports agents with respect to their relationships with athletes before agency law would kick in to protect athletes.<sup>159</sup>

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<sup>151</sup> Id. at § 14(b)(1).

<sup>152</sup> Id. at § 14(b)(3).

<sup>153</sup> Id. at § 14(b)(5).

<sup>154</sup> Id. at § 14(b)(6).

<sup>155</sup> Id. at § 16(a), 17.

<sup>156</sup> USLegal.com definitions, *Uniform Athlete Agent Act Law & Legal Definition*, retrieved Dec. 4, 2010, <http://definitions.uslegal.com/u/uniform-athlete-agent-act/>.

<sup>157</sup> Davis, *Regulating the Athlete-Agent Industry* at 811.

<sup>158</sup> Id. at 812.

<sup>159</sup> Heitner, *Duties of Sports Agents*.

The purpose of SPARTA is to regulate the unfair and deceptive acts and practices in connection with the contact between a sports agent and a student-athlete.<sup>160</sup> To promulgate this, SPARTA prohibits three different agent actions. First, SPARTA makes it “unlawful for a sports agent to (1) directly or indirectly recruit or solicit a student-athlete to enter into an agency contract, by (a) giving any false or misleading information or making a false promise or representation; or (b) providing anything of value to a student-athlete or anyone associated with the student-athlete before the student-athlete enters into any agency contract...”<sup>161</sup> SPARTA also makes it unlawful for a sports agent to enter into an agency contract with a student-athlete without providing the student-athlete with the SPARTA-required disclosure document.<sup>162</sup> Finally, SPARTA makes it unlawful for a sports agent to predate or postdate an agency contract.<sup>163</sup>

Like the UAAA, SPARTA requires that both agents and student-athletes, within 72 hours, notify the school of the student-athlete entering into the agency contract, and that these contracts include a written warning for the student-athlete about the loss of intercollegiate eligibility.<sup>164</sup> SPARTA grants power to the Federal Trade Commission (“FTC”) or a State’s attorney general to bring an action against a sports agent to enjoin that practice, enforce compliance with SPARTA, or to obtain restitution or other compensation.<sup>165</sup> SPARTA also gives a school a right of action against the sports agent for damages caused by a violation of SPARTA, but limits the rewards to actual losses and expenses incurred.<sup>166</sup> Congress only encourages States

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<sup>160</sup> Sports Agent Responsibility and Trust Act (“SPARTA”), 15 U.S.C.A. §§ 7801-7807, § 7802 (2004) (West 2010).

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> Id.

<sup>165</sup> Id. at §§ 7803, 4.

<sup>166</sup> Id. at § 7805.

to adopt SPARTA,<sup>167</sup> and SPARTA only compliments, rather than supplants, coinciding federal or state law.<sup>168</sup>

## Private Bodies of Legislation

### The NCAA

“The NCAA cared about [sports] agents like the average person cares about a single weed in the front yard: Sees it. Doesn't like it. Wishes it weren't there. But not about to get off the couch and do anything about it.”<sup>169</sup>

Until recently, this was the view that many people held regarding the NCAA and its focus on the sports agent and student-athlete problem plaguing collegiate sports, especially football. Under the late Myles Brand, who ran the NCAA from 2002 until his death in 2009, the NCAA had other priorities; the former president at Indiana cared about basketball and academics, sought to clean up both, and he did.<sup>170</sup> Brand was a successful NCAA president, but his office wasn't big enough to do it all; something had to slip through the cracks, and that something was the regulation of sports agents regarding student-athlete interactions and improprieties.<sup>171</sup> The NCAA began devoting employees solely to enforcing player-agent rules more than 10 years ago.<sup>172</sup> The staff of seven is part of a larger NCAA enforcement team consisting of forty-six employees.<sup>173</sup> In 2009, the NCAA's enforcement staff processed 29 cases of, what they consider, major infractions.<sup>174</sup> The NCAA does not have jurisdiction over sports agents, instead, the focus

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<sup>167</sup> Id. at § 7807.

<sup>168</sup> Id. at § 7806.

<sup>169</sup> Gregg Doyel, *NCAA Cures Its Apathy When it Comes to Slimy Agents*, CBSSports.com news services, posted July 21, 2010, <http://www.cbssports.com/columns/story/13659574/ncaa-cures-its-apathy-when-it-comes-to-slimy-agents> (last visited Nov. 21, 2010).

<sup>170</sup> Id.

<sup>171</sup> Id.

<sup>172</sup> Scott Olson, *Former Agent's Admission Shines Light on NCAA Enforcement*, Indianapolis Business Journal; IBJ.com news services, posted Oct. 14, 2010, ; <http://www.ibj.com/former-agents-admission-shines-light-on-ncaa-enforcement/PARAMS/article/22836> (last visited Nov. 20, 2010) [hereinafter Olson, *Former Agent's Admission*].

<sup>173</sup> Id.

<sup>174</sup> Karen Sloan, *Lawyering Up for the NCAA: Sanctions Are So Costly the Legal System is Getting Involved*, The National Law Journal.com, posted Sept. 6, 2010,

is to educate coaches, administrators and student-athletes about NCAA rules and policies in the agent arena and monitor their compliance.<sup>175</sup> Regarding the sports agent and student-athlete problem, there are several NCAA bylaws broken frequently.

The NCAA defines the term “agent” as including actual sports agents, runners, and financial advisors.<sup>176</sup> The NCAA makes no mention of marketing agents under their “agent” term. NCAA by-law 12.1.1, titled “Amateur Status,” states an individual loses amateur status and thus shall be ineligible for intercollegiate competition in a particular sport if the individual: a) uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received; d) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations; e) competes on any professional athletics team, even if no pay or remuneration for expenses was received; f) subsequent to initial full-time collegiate enrollment, enters into a professional draft; or g) enters into an agreement with an agent.<sup>177</sup>

Under NCAA Bylaw 12.3, a student-athlete may not agree verbally or in writing to be represented by a sports agent in the present or in the future for the purpose of marketing the

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[http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471657233&Lawyering\\_up\\_for\\_the\\_NCAA](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471657233&Lawyering_up_for_the_NCAA) (last visited Nov. 10, 2010).

<sup>175</sup> NCAA.com news services, *Q & A with NCAA Director*.

<sup>176</sup> NCAA.com news services, *Overview of NCAA Bylaws Governing Athlete Agents*, released July 2010, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Overview+of+NCAA+bylaws+governing+athlete+agents> (last visited Nov. 5, 2010) [hereinafter NCAA.com news services, *Overview of NCAA Bylaws*].

<sup>177</sup> Charles Robinson and Jason Cole, *Reggie Bush Investigation: The NCAA Rules*, Yahoo! News Network, Updated Sept. 15, 2006, [http://rivals.yahoo.com/ncaa/football/news?slug=ys-bush\\_ncaarules](http://rivals.yahoo.com/ncaa/football/news?slug=ys-bush_ncaarules) (last visited Nov. 15, 2010).

student-athlete's ability or reputation.<sup>178</sup> If the student-athlete enters into such an agreement, the student-athlete is ineligible for intercollegiate competition.<sup>179</sup> NCAA by-law 12.3.1.2 states that an athlete shall be deemed ineligible if he or she accepts benefits from agents or marketing representatives.<sup>180</sup> The rule further states that student-athletes, their family or friends cannot receive benefits or loans from agents.<sup>181</sup>

The NCAA has an enforcement process and reinstatement process that run independently of each other.<sup>182</sup> The enforcement process focuses on institutional involvement or culpability.<sup>183</sup> The reinstatement process is dealing with the individual student-athlete and his or her eligibility.<sup>184</sup> The student-athlete eligibility issues can become ripe within the context of an enforcement investigation, and when this occurs, the school and the enforcement staff agree upon facts that are then presented to the reinstatement staff specific to the student-athlete's eligibility.<sup>185</sup> Each NCAA division has its own Committee on Infractions.<sup>186</sup> The committees are independent groups that assess penalties against schools and individuals who break NCAA rules.<sup>187</sup> The committees are composed of lawyers, law school professors from member schools and representatives of the general public.<sup>188</sup> When a school discovers an NCAA rules violation has occurred, it must declare the student-athlete ineligible and may request the student-athlete's

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<sup>178</sup> NCAA.com news services, *Overview of NCAA Bylaws*.

<sup>179</sup> *Id.*

<sup>180</sup> Robinson, *Reggie Bush Investigation: Cash and Carry*.

<sup>181</sup> *Id.*

<sup>182</sup> NCAA.com news services, *Statement by NCAA President Mark Emmert on Cam Newton*, released December 2010,

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/NCA+A+addresses+eligibility+of+Cam+Newton> (last visited Dec. 5, 2010) [hereinafter NCAA.com news services, *Statement by NCAA President*].

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> NCAA.com news services, *Division I ... USC*.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*



eligibility be reinstated.<sup>189</sup> Reinstatement decisions are made by the NCAA national office staff and can include conditions such as withholding from competition and repayment of extra benefits.<sup>190</sup> In determining how a violation impacts a student-athlete's eligibility, the NCAA staff will assess whether the student-athlete knew that someone was receiving improper benefits on the student-athlete's behalf.<sup>191</sup> During the reinstatement process, NCAA staff review each case on its own merits based on the specific facts, and staff decisions are made based on a number of factors including guidelines established by the Division I NCAA Committee on Student-Athlete Reinstatement, as well as any mitigating factors presented by the school.<sup>192</sup> There are several mitigating factors that typically distinguish the reinstatement cases apart and they include the nature and scope of the violation, the assessed culpability of the student, the source of the benefits, and whether benefits were actually received by the student.<sup>193</sup>

The sanctions available when a student-athlete breaks the rules are the loss of eligibility and specific penalties, depending on the severity of the violations, ranging from repayment of the value of the benefits and sitting out games to permanent ineligibility.<sup>194</sup> The sanctions available when a school violates the rules can include probationary periods, recruiting restrictions, scholarship reductions, vacation of records and bans on postseason competition, among others.<sup>195</sup> The intent of these sanctions against schools is to ensure schools have sufficient deterrence from breaking the rules again, while also removing any competitive advantage a school may gain by

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<sup>189</sup> NCAA.com news services, *NCAA Addresses Cam Newton's Eligibility*.

<sup>190</sup> Id.

<sup>191</sup> Id.

<sup>192</sup> Id.

<sup>193</sup> NCAA.com news services, *Statement by NCAA President*.

<sup>194</sup> NCAA.com news services, *Q & A with NCAA Director*.

<sup>195</sup> Id.

cheating.<sup>196</sup> Courts are reluctant to grant relief to student-athletes and schools when seeking appeals from NCAA rulings and sanctions.<sup>197</sup>

### The NFLPA

“In 1999 the NFLPA had changed a rule to say that players who were found to have taken money from agents while in college would not have to pay the money back. Before, agents had the threat of litigation, so it was often easier for a player to just let the paying agent to do his rookie deal. However, the floodgates opened after the NFLPA changed that rule. Players, their parents, everyone put their hands out because there were no ramifications.”<sup>198</sup>

Under the National Labor Relations Act unions in sports are the "exclusive representative" of the players<sup>199</sup>. Because of this law, were unions so inclined they could take over the function of individual salary negotiations for players which is currently performed by agents.<sup>200</sup> The NFLPA requires completion of an application package, comprehensive evaluation, and background checks.<sup>201</sup> The NFLPA has the ability to suspend or decertify contract agents and financial advisors who break the rules, but the NFLPA has not yet targeted marketing agents, who apply their craft with little or no oversight or regulation.<sup>202</sup> Examples of prohibited conduct for the NFLPA include; a) Providing or offering a monetary inducement to encourage a player to sign with an agent, b) Providing or offering money or other thing of value to a player's family or other person to induce them to recommend an agent, and c) providing false or misleading information to a player. Unfortunately, none of this applies to the regulation of sports agents and

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<sup>196</sup> Id.

<sup>197</sup> See Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738, 744-747 (M.D. Tenn. 1990)(holding NCAA Bylaws were not subject to anti-trust challenges); see also Bowers v. National Collegiate Athletic Ass'n, 563 F.Supp.2d 508, 517 (D.N.J. 2008)(holding the NCAA's enforcement of eligibility requirements were not subject to the Americans with Disabilities Act of 1990, the Sherman Act, and various state statutes).

<sup>198</sup> Luchs, *Confessions of an Agent* at 68.

<sup>199</sup> Staudohar, *So You Want to be A Sports Agent*.

<sup>200</sup> Id.

<sup>201</sup> Id.

<sup>202</sup> Luchs, *Confessions of an Agent* at 68.

student-athletes because the NFLPA only protects NFL players who are members of their union, the NFLPA.

### The Model Rules of Professional Conduct

The Model Rules of Professional Conduct (“Model Rules”) provide certain benefits to an athlete that go beyond the federal and state statutes and regulations stipulated by the NFLPA: providing recourse for an athlete when their attorney has charged unreasonable fees, instilling education and training requirements beyond a four-year degree, and inducing proper assessment and disclosure of potential conflicts of interests.<sup>203</sup> An attorney stands to lose much more than a non-attorney agent if he fails to provide the client his best services. For an attorney that is also a sports agent, the potential threat of disbarment or a malpractice suit works as motivation to further ensure that they treat each and every client with fairness and within the auspices of all rules and statutory regulations.<sup>204</sup>

The most applicable Model Rule to the sports agent and student-athlete problem is the Model Rule regarding solicitation, which requires, in part, that an attorney shall not, by in-person or live telephone contact, solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.<sup>205</sup> Applying this to everything previously discussed, it becomes apparent that this rule, in effect, prevents attorney sports agents from speaking improperly to student-athletes because when this occurs, the attorney sports agent is acting on his own interests, and not the interest of the potential student-athlete client. This constructively places a bar from an attorney sports agent from competing with other ruthless

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<sup>203</sup> Barner, *Show me the ... ethics?*.

<sup>204</sup> Id.

<sup>205</sup> Id.

sports agents not held to the same standard, which may induce that attorney sports agent to remove himself from the student-athlete sector of the sports representation field all-together.

### **The Problem(s) with the Regulating Laws**

There are two basic problems at the center of the sports agent and student-athlete dilemma. From the student-athlete's perspective, there is a basic sense that they deserve something more than room, board, and tuition since the schools and the NCAA make such a large profit<sup>206</sup> from the risks they take on the field on a weekly basis. From the agent's perspective, the penalties in place are not sufficient to deter this unscrupulous activity from occurring; the potential to be made from a top athlete far outweighs the penalties, fines, and sanctions in place. This leaves the schools, for most parts, as bystanders waiting for punishment by the NCAA for unscrupulous conduct on the part of sports agents to their student-athletes, and by extension detriments the states that each school sits. State economies generate a great deal of money through high profile NCAA football programs and when these programs suffer from NCAA penalties, the economic impact can be felt throughout the state.<sup>207</sup> This is especially true of state-funded schools, which, if they do not generate athletics revenues, must supplement the school's funds with additional tax dollars.<sup>208</sup> The effects of this revenue shifting can be felt by out-of-state students, school employees, and other residents of the state.<sup>209</sup>

The NCAA has some serious problems it faces in regulating the sports agent and student-athlete problem. The first is that the NCAA has no jurisdiction over sports agents; they can only sanction student-athletes and school.<sup>210</sup> Second, the NCAA sometimes faces "serious challenges" when it comes to enforcement of its rules because it does not have subpoena power and cannot

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<sup>206</sup> Willenbacher, *Regulating Sports Agents* at 1245-6.

<sup>207</sup> *Id.* at 1237.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> NCAA.com news services, *Q & A with NCAA Director*.

compel anyone to testify.<sup>211</sup> Finally, there are so many actors<sup>212</sup> that contribute to and complicate this problem, it seems impossible that the NCAA can truly and fully understand all aspects of each case.

SPARTA and the UAAA are limited in focus; they only place duties on sports agents when they are either recruiting or signing student-athletes, and once the athletes no longer retain NCAA eligibility, SPARTA and the UAAA no longer apply.<sup>213</sup> Once the student-athlete label no longer applies, athletes must look outside of the statutory regulations to enforce the common law agency rules that bind sports agents to a fiduciary duty of care.<sup>214</sup> Even while the student-athlete label applies, the statutory regulations do not empower the student-athletes to take a private right of action themselves.<sup>215</sup> SPARTA is essential in creating a uniform national code of conduct and requirements for sports agents. However, the deterrents imposed by SPARTA, the creation of a civil cause of action for universities and state attorneys general, as well as FTC penalties, are not substantially different from the inefficient deterrents that already exist.<sup>216</sup> The UAAA model law was endorsed by the drafters of SPARTA, Congress whose intention was for the states to adopt the act, and still has not yet been adopted by all fifty United States. This causes problems in uniformly enforcing laws state-by-state

### **Solutions and Conclusion**

Currently, as to the completion of this paper, the NFL, NFLPA and sports agents are among the several groups that are working with the NCAA to find new ways to enforce rules

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<sup>211</sup> ESPN.com news services, *NCAA Prez Preaches Efficient Probes*, posted Nov. 9, 2010, <http://sports.espn.go.com/nfl/news/story?id=5825694> (last visited Nov. 20, 2010) [hereinafter ESPN.com news services, *NCAA Prez*].

<sup>212</sup> Runners, coaches, trainers, financial advisors, contract agents, marketing agents, former players, and freelancers, etc. . .

<sup>213</sup> Heitner, *Duties of Sports Agents*.

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> Willenbacher, *Regulating Sports Agents* at 1242-3.

prohibiting improper agent-related benefits for student-athletes, including possible post-NCAA financial penalties that reach into a player's potential NFL career.<sup>217</sup> The panel is identifying areas for greater collaboration, including enforcement efforts by state officials dealing with sports agent laws and examining the frequency and timing of agent contact with student-athletes.<sup>218</sup> The panel has met in October, and will meet in January 2011 and March 2011. Some estimate that by next spring, they will be in a position to inform the conferences and have them discuss this problem in their meetings that occur primarily in May and June 2011.<sup>219</sup>

Regarding the problem of the student-athlete's view that they are entitled to more than room, board and tuition, the time may have come to compensate players via stipends or other devices aimed at giving them something for their efforts and physical risks.<sup>220</sup> Also, the NCAA should create a department, or force each school to create a department, that facilitates interaction between student-athletes and sports agents where agents would have to set up meetings with student-athletes through that department, keeping a log of conversations that take place.<sup>221</sup> This would also help to regulate the problem of a sports agent's general lack of deterrence regarding improper interactions with student-athletes. The most logical and seemingly the most effective solution for this sports agent problem is creating any federal legislation, similar to SPARTA, that includes establishing a governing body that can create a national registry of sports agents, on par with the registration requirements that many states have

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<sup>217</sup> IBJ.com news services, *NCAA Tackles Agent Issue, Looks to New Sanctions*, posted Oct. 25, 2010, Indianapolis Business Journal, <http://www.ibj.com/ncaa-tackles-agents-issue-looks-to-new-sanctions/PARAMS/article/23036> (last visited Nov. 10, 2010).

<sup>218</sup> Id.

<sup>219</sup> NCAA.com news services, *What Happens Next*, posted July 2010, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/What+happens+next> (last visited Nov. 5, 2010).

<sup>220</sup> Olson, *Former Agent's Admission*.

<sup>221</sup> ESPN.com news services, *NCAA Prez*.

enacted.<sup>222</sup> From there, Congress should grant this governing body powers similar to what the NCAA has over student-athletes and their schools. Through this registry, the governing body can mandate that all agency contracts include a liquidated damages clause where it would cost an agent \$1 million or \$2 million if they had any part in making a student-athlete ineligible.<sup>223</sup> This would help re-establish deterrence in regards to sports agents and their practice of unscrupulous student-athlete recruiting improprieties. The dilemma of deterring sports agents from engaging in recruiting improprieties is extremely complicated in various ways, and any solution will take time, and efforts on all parties involved in these interactions. It seems, only through a uniform set of laws enforced by a governing body, which would have jurisdiction to govern a sports agent's unethical or illegal conduct, that this problem can begin its resolution.

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<sup>222</sup> Willenbacher, *Regulating Sports Agents* at 1249.

<sup>223</sup> Darren Heitner, *Athlete Agent Enforcement Thus Far, and Where to Go From Here*, SportsAgentBlog.com (posted Aug. 3, 2010), <http://www.sportsagentblog.com/2010/08/03/athlete-agent-enforcement-thus-far-and-where-to-go-from-here/> (last visited Nov. 20, 2010).