

10-1-1986

# Of Sports, Agents, and Regulations - The Need for a Different Approach

Miriam Benitez

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

---

## Recommended Citation

Miriam Benitez, *Of Sports, Agents, and Regulations - The Need for a Different Approach*, 3 U. Miami Ent. & Sports L. Rev. 199 (1986)  
Available at: <http://repository.law.miami.edu/umeslr/vol3/iss2/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# OF SPORTS, AGENTS, AND REGULATIONS — THE NEED FOR A DIFFERENT APPROACH

MIRIAM BENITEZ\*

I. INTRODUCTION .....	199
II. REGULATION OF ATHLETE AGENTS — THE PROGRAMS .....	201
A. <i>The State Legislative Program</i> .....	201
B. <i>The Concept of Self-Regulation</i> .....	204
III. THE REGULATION OF ATHLETE AGENTS — POSSIBLE ROADBLOCKS .....	206
A. <i>What is Regulated?</i> .....	206
B. <i>Enforcement</i> .....	208
1. IS THERE EFFECTIVE ENFORCEMENT .....	208
2. THE CHALLENGES TO ENFORCEMENT .....	211
C. <i>The Curious Status of the Attorney-Agent</i> .....	212
IV. REGISTRATION OF ATHLETE-AGENTS: TWO ALTERNATIVE SOLUTIONS .....	214
A. <i>New York</i> .....	215
B. <i>The Federal Alternative</i> .....	216
V. CONCLUSION .....	220

## I. INTRODUCTION

Professional sports are no longer just games played for fun and glory. The sports business is big, spawning a multi-million dollar industry. For example, in 1984 the average salary for a player in the National Football League was \$157,810, for players in the National Basketball Association it was \$325,000, and for major league baseball players it was \$329,408.<sup>1</sup> In 1985, Wayne Gretzky of the Edmonton Oilers earned \$825,000 for the season,<sup>2</sup> and Patrick Ewing of the New York Knicks signed a contract potentially worth \$30,000,000.<sup>3</sup> During the 1986 season, 59 baseball players received a salary of \$1,000,000 or more.<sup>4</sup>

The popularity and financial allure of the sports industry gave rise to the increase in television exposure, athletic competitions, and the public's interest in sport. The resulting financial incentives

---

\*J.D. Columbia Law School (1980). Member State Bar of New York. Deputy Counsel, City of New York Department of Cultural Affairs.

1. Shulruff, *The Football Lawyers*, A.B.A.J., Sept. 1985, at 45, 47.

2. 3 SPORTS INDUSTRY NEWS 121, Data Page (1985).

3. Welling, Tasini & Cook, *Basketball: Business is Booming*, BUS. WEEK., Oct. 28, 1985, at 73, 75.

4. N.Y. Times, Apr. 27, 1986, at § 6, col. 2.

produced a new and prominent player — the sports or athlete agent.<sup>5</sup> The athlete agent today not only negotiates playing contracts, but also other agreements on an athlete's behalf. Athlete agents, however, have not always acted in the best-interests of their clients. For example, in 1977 agent Richard Sorkin pleaded guilty to seven counts of larceny after he "gambled away or lost in the stock market almost \$900,000, including everything some of his clients had ever earned."<sup>6</sup> In 1984, the Royal Canadian Mounted Police indicted agent Peter Spencer for fraud, forgery, and theft in connection with two player-clients.<sup>7</sup> During 1986, seventy sports figures lost money invested in Technical Equities Corp. when the diversified, growth-oriented holding company headed by former sports agent Harry Stern filed for bankruptcy.<sup>8</sup> Agent Mike Trope summed up the perspective that led to these offenses: "'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 break them.'"<sup>9</sup> The potential for deceitful losses due to agent self-interest as evidenced by the above, requires that agents be regulated.

The need to adopt regulations is well recognized.<sup>10</sup> Several states have adopted or have introduced bills in their legislatures creating rules and regulations to govern athlete agents.<sup>11</sup> Several sports organizations and players' associations have also initiated or proposed some form of athletic agent registration.<sup>12</sup> Finally, federal

5. Hereinafter "agents" or "athlete agents."

6. Sobel, *The Regulation of Player Agents: State of California, NFL Players Association, and NCAA Adopt Rules to Regulate Athletes' Agents*, ENT. L. REP., March, 1984, at 3, reprinted in 203 PRACTICING L. INST., REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 13 (1985).

7. 2 SPORTS INDUSTRY NEWS 129, 132 (1984).

8. Nack, *Thrown For Heavy Losses*, SPORTS ILLUSTRATED, Mar. 24, 1986, at 40, 41.

9. McLeese, *A Whole New Ballgame for Lawyers*, STUDENT LAW., Oct. 1980, at 44, 46.

10. Massey, *The Crystal Cruise Cut Short: A Survey of the Increasing Regulatory Influences Over the Athlete-Agent in the National Football League*, 1 ENT. SP. L.J. 53 (1984); Sullivan, *Remedying Athlete-Agent Abuse: A Securities Law Approach*, 2 ENT. SP. L.J. 53 (1984); Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815 (1981) [hereinafter Comment, *The Agent-Athlete Relationship*]; Comment, *The Offer Sheet: An Attempt to Circumvent NCAA Prohibition of Representation Contracts*, 14 LOY. L.A.L. REV. 187 (1980) [hereinafter Comment, *The Offer Sheet*]; Comment, *Agents of Professional Athletes*, 15 NEW ENG. L. REV. 545 (1979).

11. CAL. LAB. CODE § 1500 (West 1981 & Supp. 1986); OKLA. STAT. ANN. tit. 70, § 821.61 (West Supp. 1985). In Texas, however, the legislature did not pass House Bill 1551, a proposal to regulate athlete agents.

12. See *infra* notes 14-44 and accompanying text.

legislation has been proposed in an effort to institute a national system for the registration and regulation of agents.<sup>13</sup>

This article will focus on some of the common aspects of the existing and proposed agent regulatory programs and will provide an analysis of each program's provisions relating to those common themes. Although the full impact of these regulatory programs will not be known for some time, their diverse provisions have created a situation which may serve to restrict rather than assist the purposes behind agent regulation. Finally, this article will conclude that a successful and effective regulatory program for agents cannot exist unless it is comprehensive, fairly and evenly administered, and adhered to by every practitioner in the field.

## II. REGULATION OF ATHLETE AGENTS — THE PROGRAMS

Two state legislatures and several sports organizations have responded to the growing complexities of the sports industry by implementing programs regulating the activities of sports agents. While these programs share common policies and procedures, they also share one distinguishing feature — each seeks to regulate the activities of a particular segment of the athlete agent industry. This section provides an overview of these regulatory responses.

### A. *The State Legislative Program*

In 1981, California emerged as a pioneer by enacting a legislative program governing athlete agents.<sup>14</sup> California passed the Lockyer Act in response to the pressing need to regulate the activities of athlete agents within the state.<sup>15</sup> The California Legislature

---

13. Professional Sports Agency Act of 1985 (hereinafter cited as Proposed Act). The Proposed Act, although never formally introduced into the 99th Congress, would have given the Secretary of Commerce the power to recognize self-regulatory organizations governing the activities of athlete agents. For further discussion, see *infra* note 104 and accompanying text.

14. CAL. LAB. CODE § 1500 (West Supp. 1986). Assemblyman William Lockyer (D-San Leandro) introduced this legislation, which was originally known as The California Athlete Agencies Act. Today the legislation is popularly referred to as the Lockyer Act. The Lockyer Act is not California's only inroad into the regulation of specific industry agents. The State also regulates agents in the entertainment industry pursuant to the Talent Agency Act, CAL. LAB. CODE § 1700 (West Supp. 1987). The language and procedures created under the Talent Agency Act are almost identical to those found in the Lockyer legislation. Between December, 1977 and September, 1983, representatives of artists filed thirty-one petitions with the labor commission under the Talent Agency Act. Only three of those actions proved successful. The Talent Agency Act, like the Lockyer Act, only regulates those persons who procure employment for their clients.

15. Horner, *The Sports Agents Problem: The Need for Immediate Regulation*, SPORTS LAW. NEWSLETTER, Spring 1985, at 8, 10.

originally passed the Lockyer Act as a registration measure. It merely required a prospective agent to file a registration statement with California's Labor Commission. Many agents ignored these registration provisions. Consequently, in 1985, California lawmakers amended the Lockyer Act into a licensing statute.<sup>16</sup> California's law requires that an applicant disclose in his application detailed information relating to his education or experience in the areas of contracts, contract negotiation, complaint resolution, and arbitration or civil resolution of contract disputes.<sup>17</sup> In addition to an initial \$100 filing fee and a \$250 annual registration fee, the Lockyer Act requires that the agent post a \$25,000 surety bond to protect the athletes he represents.<sup>18</sup>

The California Labor Commission is the agency empowered to administer the provisions of the Lockyer Act. In addition to investigating the applicant and issuing the license, the Commission reviews client contracts and their related schedule of fees, which the agent is required to file.<sup>19</sup> Furthermore, upon proper notice and hearing, the Commission may resolve agent-client disputes arising under the Lockyer Act, and has the power to suspend or revoke the license of an athlete agent.<sup>20</sup>

The Lockyer Act also requires California attorneys to be licensed unless they are "acting as legal counsel" for their athlete-clients.<sup>21</sup> This phrase's unclear meaning caused much controversy. Consequently, other regulatory proposals which have adopted similar language have also met with opposition.<sup>22</sup>

Changing the Lockyer Act to a licensing statute was only one of several amendments made to the Act in 1985. The Legislature also prohibited an agent's offer of any item of value to a university employee in return for a referral to a student athlete.<sup>23</sup> California, however, did lift its prohibition against referral of agents to students by unions or players associations.<sup>24</sup> A third amendment broadened the definition of an athlete's compensation which is subject to an agent's fee, together with a cap on the percentage the

---

16. E. GARVEY, *THE AGENT GAME—SELLING PLAYERS SHORT 2* (1984), reprinted in 203 PRACTICING L. INST., REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 20, 45 (1985).

17. CAL. LAB. CODE § 1511 (West Supp. 1986).

18. *Id.* at §§ 1517-1519.

19. *Id.* at §§ 1530-1531.

20. *Id.* at §§ 1527, 1543.

21. *Id.* at § 1500(b) (West Supp. 1986).

22. For a discussion of the implications of attorney licensing and the existing constraints on attorney agents, see *infra* notes 71-83 and accompanying text.

23. CAL. LAB. CODE § 1539(b) (West Supp. 1986).

24. *Id.* at § 1539(c).

agent may charge.<sup>25</sup>

In 1985, Oklahoma enacted a registration statute which also regulates the activities of athlete agents within the state.<sup>26</sup> The Oklahoma statute is similar to the Lockyer Act in that it requires detailed background disclosure by agents, the filing of contracts and related fee schedules, and the posting of a one hundred thousand dollar surety bond.<sup>27</sup> Unlike the Lockyer Act, however, the Oklahoma statute is administered by the Secretary of State and an annual \$1,000 registration fee is required.<sup>28</sup>

Oklahoma's statute is specifically concerned with the representation of National Collegiate Athletic Association's ("NCAA") athletes and other amateurs who have never signed a professional contract.<sup>29</sup> It also prohibits the offer of anything of value, including free or reduced price legal services, to induce an athlete to sign a representational contract.<sup>30</sup> The provisions of the Oklahoma statute also seek to combat the use of the infamous "offer sheet."<sup>31</sup> Using this device to circumvent NCAA rules is directly prohibited.<sup>32</sup> Finally, Oklahoma's law does not explicitly exempt attorneys from registration. It does, however, permit them to rely on their professional liability insurance in lieu of a separate surety bond.<sup>33</sup>

The California and Oklahoma statutes represent state legislative responses to the need for regulation of athlete agents. Although several other states have considered such legislation,<sup>34</sup> only California and Oklahoma have passed and implemented statutes.

---

25. CAL. LAB. CODE §§ 1531, 1539 (West Supp. 1986); CAL. BUS. & PROF. CODE § 6106.7 (West Supp. 1985).

26. OKLA. STAT. ANN. tit. 70, § 821.61 (West Supp. 1987).

27. *Id.* at §§ 821.62(C),(G), 821.63(A),(C) (West Supp. 1987).

28. *Id.* at § 821.62(E).

29. *Id.* at § 821.62(A)(1)-(2).

30. *Id.* at § 821.64(7).

31. The offer sheet was a device utilized by agent Mike Trope to evade NCAA rules against agent representation of a student athlete whose college eligibility was still effective. Comment, *The Offer Sheet*, *supra* note 10, at 187. The offer sheet is a revocable offer signed by a student-athlete and given to an agent. By its terms, the offer cannot be accepted by the agent until a date after the student athlete's eligibility has expired. From this date forward the agent can accept the offer and a representation contract is created. The NCAA views this device as an effort to evade its rules and regulations and as such its use gives rise to a violation. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 264 (NCAA 1985-86) (Case No. 28) [hereinafter cited as NCAA MANUAL].

32. OKLA. STAT. ANN. tit. 70, § 821.64(8) (West Supp. 1987).

33. *Id.* at § 821.62(G).

34. Among them Texas, New York, Pennsylvania, Indiana, and Nebraska.

### B. *The Concept of Self Regulation*

In an attempt to protect their members from the activities of unscrupulous and incompetent agents, players' associations and the NCAA have either implemented or are planning to implement rules and regulations governing agents who represent their members. The procedure adopted by the National Football League Players' Association ("NFLPA") is by far the most comprehensive to be instituted by an independent sports organization.<sup>35</sup> The 1982 amendments to the collective bargaining agreement between the NFLPA and the National Football League ("NFL") changed the nature of the representation of football players. Today this agreement serves as the benchmark for the regulation of athlete agents by other sports organizations. The 1982 amendments designate the NFLPA as the exclusive agent for all veteran NFL players.<sup>36</sup> Accordingly, the NFLPA established rules requiring its certification of all player agents for the purposes of negotiating a player's contract.<sup>37</sup> Thus, the NFLPA prohibits any uncertified player agent from representing a player in his contract negotiations.

The application utilized by the NFLPA is similar to that used in California.<sup>38</sup> The rules provide for a specified schedule of fees beyond which the agent may not charge his player client.<sup>39</sup> The NFLPA regulations also prohibit an agent from giving a player

35. In 1983, the Major League Baseball Players' Association ("MLBPA") considered compiling a computerized register of agents for the use of its members. The listing would contain specific information about the agent including services offered, fees charged, and background. 1 *SPORTS INDUSTRY NEWS* 163, 165 (1983). Faced with its members' growing problems in the investment arena, the MLBPA is considering several proposals for the certification of player agents. 3 *SPORTS INDUSTRY NEWS* 81, 87 (1985). The National Basketball Players Association instituted an agent certification plan on November 1, 1985. *Id.* at 301. The National Hockey League Players Association, while cognizant of agent-athlete problems, does not currently plan to institute registration or certification procedures. Letter from Alan Eagleson, executive director of the National Hockey League Players Association, to the author (May 28, 1986).

36. The NFLPA's rules govern veteran players as opposed to rookies. Rookies are those individuals who have never negotiated or signed a professional football contract.

37. These rules and regulations are contained in *NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS* (1983) [hereinafter cited as *REGULATIONS*].

38. The similarity is not coincidental. Ed Garvey was executive director of the NFLPA when it adopted the 1982 amendments to its collective bargaining agreement. He also played a major role in lobbying for the California legislation. See E. GARVEY, *supra* note 16, at 3, 24-25.

39. Under the rules, an agent's fee is restricted to a maximum of ten percent above the contract minimum in the first year, five percent above the minimum in year two, and two percent above the minimum in year three. Massey, *supra* note 10, at 60 n.30.

anything of value in return for retaining the agent's services.<sup>40</sup> Should the NFLPA deny certification, the regulations provide the applicant redress via an appeal to an outside arbitrator.<sup>41</sup> A violation of the regulations can subject an agent to fines, suspension, or ultimately, revocation of his certification.<sup>42</sup> There is no exemption for attorney agents in the NFLPA plan. To date, approximately 1,800 player agents have been certified through the NFLPA system and only four cases have been the subject of arbitration.<sup>43</sup>

The NCAA also instituted an athlete agent registration program in its effort to regulate the activities of persons seeking to represent student athletes. The NCAA's position is unique in that athlete agents are prohibited from entering into any agency relationship with a student-athlete until the student-athlete's college eligibility expires.<sup>44</sup> However, in view of the increasing opportunities available to student athletes, contact between the student and the agent have been difficult, if not impossible, to regulate. There have been many actual and rumored instances in which a student athlete has violated the NCAA's regulations in pursuit of the promise offered by a professional career.<sup>45</sup> In 1984, the NCAA initiated a voluntary annual registration program for athlete agents.<sup>46</sup> In this registration program the NCAA requests that the athlete-

40. Regulations, *supra* note 37, § 5(C), at 15.

41. *Id.* § 2(C), at 5.

42. *Id.* § 6(D), at 18.

43. It is interesting to note that the number of certified agents is significantly more than the number of players in the NFL. Tim English, Associate Counsel to the NFLPA, Remarks at the Seton Hall University Sports Law Symposium (Apr. 11, 1986). For a discussion of the results of the NFLPA's enforcement program, see *infra* notes 51-62 and accompanying text.

44. NCAA CONST. art. III, § 1(c). See also NCAA MANUAL, *supra* note 31, at 263, 264 (Case Nos. 24, 28). The term "college eligibility" refers to the period of time during which the student athlete may participate in intercollegiate athletics competition. NCAA CONST. art. IV § 1(a). To be eligible to participate as an amateur student-athlete, he or she must engage in the sport solely for the educational, physical, mental, and social benefits of the sport and not engage in any professional activity. NCAA CONST. art. III, § 1.

45. New York Football Giants, Inc. v. Los Angeles Chargers Football Club Inc., 291 F.2d 471 (5th Cir. 1961). In this case, Giants' owner Wellington Mara persuaded collegian Charles Flowers to sign with the Giants prior to the expiration of his college eligibility. The court denied specific performance of the Flowers contract based on the unclean hands doctrine. *Id.* at 473-74. Convicted former agent Richard Sorkin admitted signing many student-athletes to representation agreements prior to the expiration of their college eligibility. Kornheiser, Agent: 'Duped Clients'; N.Y. Times, Feb. 2, 1978, at D15, col. 3. The use of the offer sheet is also suspected of causing student athletes to sign agency contracts before their eligibility is over. See *supra* note 31; see also Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976); Comment, *The Agent-Athlete Relationship*, *supra* note 10, at 826; NCAA News, Nov. 18, 1985, at 16, col. 1.

46. Memorandum from NCAA to Player Agents (Aug. 24, 1984).



agent supply it with detailed information on his/her educational and professional background. The agent must also agree to notify the school director of athletics prior to any contact with a student or a student's coach. To further the goals of this program, NCAA member institutions are urging their student athletes to consider employing those agents who have registered under the program. The NCAA also plans to create counseling panels to aid the student athlete in determining the path of his athletic career after college.<sup>47</sup> The NCAA intends to make the list of voluntary registrants the primary reference tool for the counseling panel. Initially, about 200 agents registered for the program. The NCAA expects that 300 to 400 agents will eventually participate.<sup>48</sup>

These have been the responses of sports organizations to the regulatory challenge.<sup>49</sup> The following section outlines some of the existing and possible future problems arising from both the state legislative and self regulatory programs.

### III. THE REGULATION OF ATHLETE AGENTS—POSSIBLE ROADBLOCKS

Apart from sharing similarities in the rules and regulations governing their programs, the legislative and self regulatory plans outlined above also share limitations resulting from their respective concentration on separate aspects of the athlete agent industry. This section explores the types of activities regulated, the enforcement of existing regulations, and the status of the attorney-agent.

#### A. *What is Regulated?*

The comprehensive provisions found in the existing regulatory plans essentially only regulate the agent's role in an athlete's employment opportunities. This concentration ignores two major aspects of the agents' involvement in the sports industry — athletic endorsements and financial management. The lack of regulation in these two areas may lie in the nature of the relationship between

---

47. Memorandum from NCAA President John Toner to NCAA Member Institutions (Sept. 28, 1984).

48. 2 SPORTS INDUSTRY NEWS 169, 175 (1984).

49. Another sports organization concerned with athlete/agent relationships is the Association of Representatives of Professional Athletes (hereinafter cited as "ARPA"), a non-profit educational corporation. Although ARPA does not regulate its members, it has instituted a Code of Ethics. It also conducts continuing education programs to assist its members. ARPA has approximately 100 members who represent 1500 athletes in various sports. ASSOCIATION OF REPRESENTATIVES OF PROFESSIONAL ATHLETES DIRECTORY (ARPA 1984).

the athlete and the regulator. For example, California's law is administered by the state labor commission, whose concern is the agent in his role as employment agent. The authority of the NFLPA stems from its position as the representative of players in labor matters.<sup>50</sup> This emphasis results in important facets of the industry remaining neglected.

Only a few athletes will attain the level of success which gives rise to opportunities for lucrative endorsements on a national or international level. Many athletes, however, will experience such opportunities on a regional or local level, or possibly only for a short period of time. The relatively short length of the average athlete's playing career therefore increases the importance of post-athletic career options. To maximize these opportunities, the athlete naturally seeks guidance from his agent whom he has entrusted with his employment opportunities. For some athletes, the financial rewards are astounding.<sup>51</sup>

The high salaries paid in many sports have created the need for the athlete to manage and control his financial portfolio. Many agents perform financial services on behalf of their clients. For some, it is a function that they are more than competent to handle. For others, it is an area for which they are ill-prepared. The result could mean financial ruin for the athlete.<sup>52</sup> Unfortunately, none of

---

50. State laws governing the activities of employment agencies may be used to regulate athlete agents. See N.Y. GEN. BUS. LAW § 171(2)(a)-(b) (Consol. 1980).

51. For example, in 1985 Chicago Bulls basketball player Michael Jordan earned approximately \$500,000 in royalties from sales of the NIKE, Inc. "Air Jordan" line of sports-wear. Jordan received an additional \$200,000 that year from Wilson Sporting goods pursuant to an autographed basketball agreement. 3 SPORTS INDUSTRY NEWS 137, 144 (1985). Jordan is represented in both his contract matters and endorsement opportunities by ProServ, Inc., the management and marketing firm founded by Donald Dell in 1974. Pacelle, *ProServ's Center Court Conflict*, AM. LAW., Oct. 1985, at 131, 132. ProServ also represents New York Knick star Patrick Ewing, whose basketball contract is reportedly worth thirty million dollars. Ewing also endorses Adidas products. Cole, *Team Payer*, MANHATTAN, INC., Aug. 1986, at 131, 132. Product endorsements are important to athletes in all sports. At one point, several track and field stars were foregoing competition in American meets to participate in European events which were more important to sport shoe manufacturers. 3 SPORTS INDUSTRY NEWS 193, 198 (1985). William "the Refrigerator" Perry reportedly earned three million dollars in endorsements in 1985 and early 1986. Telander, *Go Downpitch and Buttonhook Smartly, Mate*, SPORTS ILLUSTRATED, Aug. 11, 1986, at 22, 22.

52. Many athletes have lost substantial sums of money on risky business ventures. In February, 1986, Technical Equities Corp. filed for reorganization under Chapter 11 of the Bankruptcy Act. Athletes including former L.A. Raider Pete Banaszak, current L.A. Raider offensive tackle Henry Lawrence, golfer Kathy Whitworth, California Angels pitcher Mike Witt, and others suffered losses totalling hundreds of thousands of dollars. Technical Equities founder Henry Stern was a former sports agent who once represented Dave Casper of the Raiders and basketball star Rick Barry. Particularly ironic are the financial troubles of Kareem Abdul-Jabbar and several other National Basketball Association players. Tom

the existing programs reach the activities of the most egregious violator — the agent who used the athlete to further his own financial ends.<sup>53</sup> The promotional and financial areas provide the greatest opportunity for abuse by the unscrupulous agent. In contractual matters the athlete has some degree of access to information. It is difficult, however, for the athlete to monitor the other activities in which he is represented by his agent. Moreover, there is no satisfactory legislative medium through which the athlete has redress. For example, securities laws regulate only one aspect of the agent's functions, and then only if the agent provided securities investment advice in the manner covered by the law.<sup>54</sup> Further, general fraud and similar laws come into play only after the agent commits flagrant violations. There are no laws that set standards or regulate athlete agents as a profession.

### B. Enforcement

The merits of an existing regulatory program are undermined when an effective enforcement plan is not in place. This section discusses the question of enforcement in two phases. First, the effectiveness of the enforcement provisions already in place is noted. Second, the possible challenges to some of the existing programs is discussed.

#### 1. IS THERE EFFECTIVE ENFORCEMENT?

Excluding the NCAA, the enforcement provisions of the current regulatory programs share the same essential elements. Upon notice, an agent must be afforded an opportunity to be heard if his registration is denied or before his current registration is sus-

---

Collins, an agent and financial manager for Abdul-Jabbar and other basketball stars, invested the players' funds in many of the same business ventures. The players ended their relationship with Collins after losing large sums of money. One player has sued Abdul-Jabbar claiming that Collins used the player's money to cover Abdul-Jabbar's expenses. Further suits are expected. Goodwin, *Enmeshed in a Tangled Web*, N.Y. Times, Mar. 15, 1987, at § 6, col. 1. In June 1985, Edmonton Oiler star Wayne Gretzky filed suit against his sports management firm and others charging that they provided him with negligent investment advice. Keteyian & Ramsay, *The Joyless End of a Joyride*, SPORTS ILLUSTRATED, May 12, 1986, at 32, 33. Dallas Cowboy Tony Dorsett's financial problems are legendary. See 3 SPORTS INDUSTRY NEWS 241, 248 (1985); Art Wilkinson, *Athlete's Attorney*, Remarks at Seton Hall University Sports Law Symposium, Newark, N.J. (Apr. 11, 1986); 3 SPORTS INDUSTRY NEWS 233, 234 (1985).

53. For example, convicted former agent Richard Sorkin misappropriated over \$900,000 of his clients funds during the period he was an agent. See *supra* note 6 and accompanying text.

54. 15 U.S.C. § 80b-2(11) (1981).

pended or revoked. Any athlete with a grievance may file a complaint with the regulatory group having jurisdiction over the matter. If the complaint is brought by the NFLPA, the only sanctions available are suspension or revocation of the agent's registration or certification. In states that regulate agents, possible consequences of misconduct include large fines and criminal charges. Under all the systems, any contract negotiated by a non-registered agent is voided and the athlete is refunded the fees paid.<sup>55</sup>

The first enforcement problem is the inability of regulatory programs to effectively get agents to register. Initially, only two athlete agents registered with California's Labor Commission pursuant to the Lockyer Act.<sup>56</sup> As of May 13, 1986, which was after the Lockyer Act was changed to a licensing statute, twenty-three athlete agents had obtained licenses.<sup>57</sup> This low response in a state with so many professional teams and universities is unfathomable.

The NFLPA has a relatively large number of registrants but enforcement is difficult because most athletes are reluctant to lodge complaints. Although several hundred agents have registered with the NCAA, the voluntary nature of its program raises serious doubts concerning effective enforcement.<sup>58</sup> The second enforcement problem is the inability to effectively root out and sanction violators of the various regulations. The NFLPA investigates allegations of wrongdoing by certified agents. Its understaffed office, however, is often faced with problems of obtaining evidence against accused agents.<sup>59</sup> In 1985 there were four litigated proceedings involving certified agents; ten proceedings were scheduled for mid-1986 and twelve are pending.<sup>60</sup> Of the four litigated cases, two turned on jurisdictional questions since the agreements in question preceded the NFLPA's rules. In two of the cases the agent prevailed, one by default. In the remaining two, the parties settled.<sup>61</sup>

55. See *supra* notes 14-33 and accompanying text.

56. See E. GARVEY, *supra* note 16, at 24.

57. Letter from Diana J. Burtis, California Department of Industrial Relations, Division of Labor Standards Enforcement, to author (dated May 13, 1986).

58. The enforcement arm of the NCAA is already beleaguered in its attempts to investigate and prosecute alleged violators. Rumors of improper payments to student athletes and recruiting violations abound. Keteyian, *Dilemma in the NCAA: Not Enough Cops*, SPORTS ILLUSTRATED, Apr. 14, 1986, at 19, 19.

59. Direct evidence and a written complaint are necessary to institute a case against a certified agent. REGULATIONS § 6(B) (1983). Players and other witnesses, however, are often reluctant to provide such information.

60. Tim English, Associate Counsel to the NFLPA, Remarks at Seton Hall University Sports Law Symposium, Newark, N.J. (Apr. 11, 1986).

61. *Coleman v. Jordan* (Aug. 29, 1984) (Moffett, Arb.); *Miller v. Courrege* (May 2, 1985) (Moffett, Arb.); *Robbins v. Courrege* (Mar. 12, 1985) (Moffett, Arb.). The default was

California's Labor Commission has one pending investigation.<sup>62</sup> At the present time it is too early to tell what Oklahoma's enforcement posture will be.

The third problem affecting enforcement is that of clearly defining who is subject to the respective regulations. The NFLPA's authority extends only to veteran players. Rookies are not within the definition of the collective bargaining group the NFLPA represents. This restriction prevents the NFLPA from requiring certification of rookies' agents, thus ignoring a potential source of agent abuse.<sup>63</sup> The major obstacle to including rookies within the NFLPA's jurisdiction is the question of whether rookies can be considered part of the unit of employees the NFLPA is certified to represent. The NFLPA cites two recent cases as support for its contention that it is also entitled to be the exclusive representative for rookies.<sup>64</sup> Although case law seems to favor the NFLPA, the collective bargaining agreement still limits coverage to veterans. The possibility of litigation on this issue looms.

Fourth, states which regulate their agents must coordinate efforts to control the activities of non-resident agents within the states' borders. Until local agents are properly supervised, it is difficult to conceive of effective governance of non-resident agents.

Fifth, proper enforcement of existing regulations requires an emphasis on the disclosure of pertinent information to potential clients. Currently, it appears that the athlete's decision to employ an agent is based upon the mere fact that an agent is registered or licensed rather than upon the agent's background and experience.<sup>65</sup> Full disclosure of pertinent background information on prospective agents would be of great benefit to athletes.

Finally, the spectre of liability could confront would-be regulators who fail to take action against an agent whom they licensed or

in *McCall v. Allen* (Dec. 12, 1985) (Moffett, Arb.).

62. Letter, *supra* note 57.

63. Student athletes are courted by sports agents who seek to represent them. Many times players choose agents on the basis of popularity contests without regard to the agent's credentials. Bart Oates, Remarks at Seton Hall University Sports Law Symposium, Newark, N.J. (Apr. 11, 1986); see also, Lieber, *Here's to a Guy from Kalamazoo*, SPORTS ILLUSTRATED, May 12, 1986, at 44, 46.

64. *Wood v. National Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984); *Zimmerman v. National Football League*, 632 F. Supp. 398 (D.D.C. 1986). These cases held, *inter alia*, that potential future players for a professional league, in addition to present players, are parties to the collective bargaining relationship between the players' associations and the league. Thus, rookies can be considered part of the bargaining unit a players' association represents.

65. Sullivan, *supra* note 10, at 57 (outline of a formula to provide full disclosure to an athlete).

certified. The very existence of a licensing or certification system is an indication to the athlete that the agent is competent and responsible. Naturally, the athlete would claim reliance on the licensing or certification, giving rise to possible litigation against the particular regulator. The current state laws governing agents require a disclaimer on information submitted to the athlete stating that the state does not pass upon the merits of the specific agent's qualifications, experience or ability.<sup>66</sup> This is the same type of disclaimer used when registered securities are offered. Other programs, however, do not contain this disclaimer. In fact, the NCAA's objective is to steer student athletes to those agents voluntarily registered with the organization.<sup>67</sup>

## 2. THE CHALLENGES TO ENFORCEMENT

The NFLPA and similar players' associations may be subject to antitrust claims.<sup>68</sup> This type of litigation could present the biggest potential challenge to the regulation of athlete agents. The Sherman Antitrust Act states, in pertinent part, that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."<sup>69</sup> During the years following this law's enactment, Congress carved out several exemptions to protect legitimate union activities.<sup>70</sup> The general rule arising from Supreme Court decisions interpreting these laws is that unilateral restraints by unions are protected under the law, provided the restraints are in the union's self-interest.<sup>71</sup> Traditionally, acceptable restraints involved pay, hours, and conditions of employment. It has been suggested that the NFLPA's restraints go beyond the type allowed under the exemptions.<sup>72</sup> The decision in *H.A. Artists and Associates, Inc. v. Actors' Equity Association*<sup>73</sup> may hold the key to that determination. In *Actors' Equity*, several theatrical agents chal-

---

66. CAL. LAB. CODE § 1530 (West Supp. 1986); OKLA. STAT. ANN. tit. 70, § 821.63(B) (West Supp. 1987).

67. See *supra* notes 44-48 and accompanying text.

68. Comment, *The NFL Players Association's Agent Certification Plan: Is It Exempt from Antitrust Review?*, 26 ARIZ. L. REV. 699 (1984).

69. 15 U.S.C.A. § 1 (West 1984).

70. Specifically, Congress accomplished this by the passage of the Clayton Antitrust Act, 15 U.S.C.A. § 17 (West 1984), and the Norris-LaGuardia Act, 29 U.S.C.A. § 101 (West 1984).

71. *United States v. Hutcheson*, 312 U.S. 219 (1941); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local Union 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965).

72. Comment, *supra* note 68, at 707.

73. 451 U.S. 704 (1981).

lenged a licensing system created to regulate theatrical agents. The Supreme Court upheld the licensing plan, citing various elements of the theatrical arena which made such licensing essential.<sup>74</sup> The Court could follow the same reasoning in any challenge to the NFLPA regulations regarding regulating the employment activities of an agent on behalf of his client. It is highly unlikely, however, that the exemption would be applicable if the NFLPA seeks to extend its rules to govern the promotional and financial activities of agents. Therefore, any incursion into this field by the NFLPA or any other players' association could give rise to a successful challenge.

It is doubtful that the NCAA, in any action, could legally justify full-fledged regulation of agents. The courts have granted the NCAA broad powers in supervising and policing intercollegiate athletics, provided its actions bear a rational relationship to the legitimate purposes of the NCAA.<sup>75</sup> Arguably, some regulation of athlete agents is rationally related to the NCAA's goals. The agent, after all, represents the concept of professionalism which is prohibited by the NCAA's rules during the student's eligibility period. The courts, however, would prohibit extensive regulatory controls because any comprehensive attempt to regulate persons and activities would be outside the reach of the NCAA constitution and by-laws.

### C. *The Curious Status of the Attorney-Agent*

Under existing regulatory programs, the attorney agent is the individual most strictly regulated. Lawyers are initially governed by their state bar associations and the Canons of Professional Ethics. These rules prohibit the solicitation of clients by attorneys. Specifically, Disciplinary Rule 2-103(A) of the American Bar Association's ("ABA") Code of Professional Responsibility provides that "[a] lawyer shall not . . . recommend employment as a private practitioner . . . to a lay person who has not sought his advice . . . ."<sup>76</sup> This places lawyers at a disadvantage in representing athletes. While the unregulated agent's solicitation maneuvers are un-

---

74. Among them were the great dependency actors have on their agents and the power held within the industry by agents. *Id.* at 720.

75. See *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976), *aff'd* 570 F.2d 520 (10th Cir. 1978); *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973); *Parrish v. NCAA*, 361 F. Supp. 1220 (W.D. La. 1973), *aff'd* 506 F.2d 1028 (5th Cir. 1975).

76. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1982), *reprinted in* Comment, *The Agent-Athlete Relationship*, *supra* note 10, at 831.

bridled, the attorney must refrain from approaching an athlete to offer his skills. As a result, some attorneys have ceased the practice of law to become full time agents.<sup>77</sup>

Solutions to the problem of the attorney's status in the area of sports representation are the subject of much discussion. It has been suggested that the ABA should relax its anti-solicitation rules. Cases such as *Bates v. State Bar of Arizona*,<sup>78</sup> *In re Koffler*,<sup>79</sup> *Ohralik v. Ohio State Bar Association*,<sup>80</sup> and *In Re Primus*,<sup>81</sup> have opened the door to increased advertising avenues for attorneys and relaxation of the anti-solicitation rules. Another suggested solution is to exempt attorneys from the registration requirements under the relevant athlete-agent law. This solution, and the statutory language creating such an exemption, invoked some controversy. California law and proposed federal legislation exempts attorneys from registration if they are "acting as legal counsel."<sup>82</sup> The meaning of this and similar phrases is unclear and undefined.<sup>83</sup> If an attorney is acting as legal counsel then he need not be registered under the athlete agent statutes. He would, however, be subject to his profession's local ethical and disciplinary rules. If an attorney is acting in the capacity of an agent, he must be licensed under state agents laws and may be subject to the disciplinary rules because he is still an attorney.<sup>84</sup> The attorney-agent is thus subject to two different regulations and the athlete is afforded extra protection. Some attorney agents have abandoned the practice of law and act solely as agents, but in association with a law firm.<sup>85</sup> This creates a "Chinese Wall" situation in the area of

77. Golenbock, *Now Calling Signals, The Lawyer Agent*, JURIS. DR., Oct. 1971, at 49, 49.

78. 433 U.S. 350 (1977).

79. 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980).

80. 436 U.S. 447 (1978).

81. 436 U.S. 412 (1978).

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

83. The Area Administrator, Bureau of Labor Standards Enforcement state of California, suggested that lawyers should be exempt from registration only if they are engaged in activities unrelated to contract negotiations, such as tax, trust and estates, and similar work. E. GARVEY, *supra* note 16, at 25. The Bureau interpreted this to mean that an attorney is exempt from registration if more than fifty percent (50%) of the attorney's services were rendered on legal matters outside of contract negotiations. Massey, *supra* note 10, at 63.

84. An example of this is present in the revisions to the California Sports Agents Act. See *supra* notes 21-25 and accompanying text.

85. This arrangement already exists among some of today's top sports representatives. Donald Dell, ProServ, Inc.'s founder, is also a partner in Dell, Benton & Falk, the separate legal partnership that handles the legal work on behalf of ProServ's clients. The ProServ company is an outgrowth of the law firm and is a marketing and management corporation. Pacelle, *supra* note 51, at 134. Ronald Shapiro, an attorney, also operates his management



agent regulation analogous to that existing in the banking and brokerage industries.<sup>86</sup>

Another aspect of the attorney-agent dilemma arises in those instances where agent certification by a players' association is in effect. It is suggested that this type of system shields attorney-agents from the solicitation prohibitions by invoking the first amendment rights of free speech, assembly, and association.<sup>87</sup> The reasoning underlying this theory arises from three Supreme Court cases.<sup>88</sup> These cases hold that union representative certification procedures are designed to advise union members of their legal needs and suggest appropriate counsel. Further, such plans are an exercise of a union's first amendment rights.<sup>89</sup>

Finally, the most comprehensive and effective solution to this dilemma is the licensing of all attorneys who perform work for athletes, provided that the regulatory programs in place cover more than just the negotiation and drafting of a player's contract. Licensing in this area would be no different than requiring an attorney to be licensed in other areas of practice such as securities, real estate, and insurance.

#### IV. REGISTRATION OF ATHLETE-AGENTS: TWO ALTERNATIVE SOLUTIONS

The preceding sections discussed the existing programs regulating athlete agents and illustrated some of the deficiencies in them. The following section discusses two alternatives, a comprehensive state program and a nationwide regulation under the auspices of the federal government. The state program is a variation of the legislation in New York which regulates boxing and wrestling. The federal program arises from proposed legislation urged

---

company, Personnel Management Associates, Inc., separately from his law practice. Flaherty, *Sports Law Takes the Field*, NAT'L L.J., June 13, 1983, at 35, 37. Leigh Steinberg, a noted attorney-agent, represents his clients in all matters. *Id.* at 37.

86. The doctrine of the Chinese Wall arose in the context of avoiding breaches of fiduciary duties by commercial lending and trust departments of financial institutions. Since confidential customer information is available to the trust department of a financial institution, it would constitute a breach of fiduciary duty to permit the commercial lending department access to such information for the purpose of generating business for the financial institution. The Chinese Wall is the term coined to describe the operational separation of both activities for purposes of preserving confidentiality. Goodman, Herman, & Blidner, *Conflicts of Interest, Trust Companies and the Chinese Wall*, 9 CAN. BUS. L.J. 435 (1984).

87. Sullivan, *supra* note 10, at 57-58.

88. *Id.* at 58-59 (citing *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967); and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971)).

89. *Id.* at 57-58.

by many within the sports industry.

### A. *New York*

In 1978 and 1979, State Senator Ralph Marino of New York introduced legislation aimed at regulating the activities of those who represent professional athletes.<sup>90</sup> Senator Marino's proposal would have been implemented by extending the authority granted to the New York State Athletic Commission ("SAC").<sup>91</sup> The SAC was created in 1920 by legislation aimed at curing abuses in the boxing and wrestling industries. Accordingly, the SAC is vested with jurisdiction over both amateur and professional boxing, and sparring wrestling matches and exhibitions. In accordance with the power vested in it by law, the SAC also passes rules and regulations to further its statutory aims.<sup>92</sup>

In general, the SAC regulates all aspects of boxing, sparring and wrestling contests held in New York. Every participant in such contests must be licensed by the SAC prior to their participation in any exhibition.<sup>93</sup>

The SAC must authorize the exhibitions and must give its approval to all contracts relating to any boxing or wrestling match.<sup>94</sup> The SAC may suspend or revoke an existing license when it finds that the licensee has committed an act detrimental to the sports under its jurisdiction. Under the rules adopted by the SAC, no license may be suspended or revoked without an opportunity for a hearing before the SAC.<sup>95</sup> The rules also govern the organization of, and conduct at, boxing and wrestling events.<sup>96</sup>

The 1978 and 1979 proposals represented a dramatic change to the existing New York law. They provided for the licensing of all sports agents who represent athletes in contract negotiations,

90. S. 9888-A, reintroduced as S. 5972 in 1979, would have amended Chap. 912 of the Laws of 1920 to require that all athlete agents be licensed by the State Athletic Commission. Companion bill S. 9890 would have increased the State Athletic Commission's jurisdiction.

91. Most states regulate some aspect of organized sport conducted within its boundaries. For example, New York and Massachusetts regulate boxing. N.Y. UNCONSOL. LAWS § 8901 (McKinney 1984); MASS. GEN. LAWS ANN. ch. 147, § 35 (West 1981); Florida regulates jai alai. FLA. STAT. § 551.01 (1985).

92. N.Y. UNCONSOL. LAWS, ch.7 § 1 (Consol. 1984).

93. *Id.* at § 6. The term participant encompasses everyone associated with the staging of a boxing or wrestling exhibition, from managers, trainers, and boxers to box office employees, doormen, and announcers. *Id.* at § 7.

94. N.Y. ADMIN. CODE tit. 25, §§ 206.3, 206.5 (1984).

95. N.Y. UNCONSOL. LAWS § 8917 (Consol. 1984).

96. *Id.* at § 8923.

investment counseling, or financial management. The Marino proposal required an agent to post a \$50,000 bond for each athlete represented. It also provided for specific rules and regulations governing the application for, and issuance of, the license, and sanctions for non-compliance with the law.<sup>97</sup>

The Marino bill was never enacted. Despite the increasing complexity of the sports industry and New York's prominence in that industry, the regulatory environment remains as it did when New York created the SAC in 1920. New York's SAC represents one alternative to the present attempts to regulate athlete agents. It can serve as a model for other states which contemplate the passage of comprehensive athlete agent legislation.

The expansive New York proposals tackle most of the questions left unanswered by the existing regulatory programs. First, the proposals cover every aspect of the athlete-agent relationship, including the emerging investment and promotional activities of agents. Second, the SAC is an independent agency of the State of New York specially empowered to govern athletics. It therefore has the expertise and enforcement powers to regulate sports. Significantly, the proposals made no mention of an exemption for attorney-agents. The position of attorney agents, therefore, remains unclear.

On the other hand, individual state programs present very practical problems. First, athlete agents would have to register in every state in which they conducted business, thus subjecting themselves to the payment of multiple registration fees and indemnification bonds. Second, the costs of administering a regulatory program may be prohibitive to some states whose sports involvement may be minimal. Third, such broad regulation may be deemed an attempt to regulate interstate commerce in violation of the commerce clause of the Constitution. Fourth, the athlete might suffer since a state-by-state registration requirement would reduce the number of potentially qualified agents from which the athlete could choose. Finally, the fact that regulation exists in some jurisdictions and not in others could result in agents shopping for non-regulated jurisdictions in which to transact business.

### B. *The Federal Alternative*

The growing complexity of the sports industry, the need to curb athlete agent abuse, and the variation in existing regulatory

---

97. S. 9890. See also *supra* note 90 and accompanying text.

programs have led to the introduction of federal legislation, the "Professional Sports Agency Act of 1985."<sup>98</sup> The Proposed Act is a result of members of the sports industry urging federal legislation aimed at regulating athlete agents. In the forefront of this effort has been the Sports Lawyers Association, which educates and lobbies legislators on this matter.<sup>99</sup>

The Proposed Act represents an effort to centralize the regulation of athlete agents and to create a uniform body of rules and regulations governing the activities of athlete agents. The legislative model used in formulating the Proposed Act was the Securities and Exchange Act of 1934 ("SEA").<sup>100</sup> Under the SEA, Congress provided the means for the creation of self-regulatory associations to govern the activities of its members.<sup>101</sup> Since the enactment of the SEA, only the National Association of Securities Dealers ("NASD") has been so organized.<sup>102</sup> The NASD is an example of an industry regulating itself. It has as its members over 6500 securities firms throughout the country, representing well over 100,000 individual registered representatives. The NASD also has the power to discipline its members for violations of its rules.<sup>103</sup> Throughout the years, the NASD has emerged as a dominant force in governing its members and protecting the investing public. While the Securities and Exchange Commission retains oversight authority, the NASD has proven its ability to ensure fair practices by its members and to discipline its members whenever the need arises.

The Proposed Act contemplates the organization of similar self-regulatory associations to govern the activities of athlete agents. Any independent association of sports agencies formed would be required to register as a national sports agency association under the jurisdiction of the Secretary of Commerce ("Secretary").<sup>104</sup> The Secretary, in accordance with adopted rules and regulations, would decide on the eligibility of an association of sports agencies ("association") for registration as a national sports agency association. Generally, the criteria to be used by the Secretary in

---

98. See *supra* note 13 and accompanying text for further discussion.

99. Shefsky, *Emphasis on Self-Regulation*, SPORTS LAW. NEWSLETTER, Spring 1984, at 1; Shefsky, *The Sports Agent Profession: Federal Legislation*, SPORTS LAW. NEWSLETTER, Spring 1985, at 1.

100. 15 U.S.C. § 78a (1981).

101. *Id.* at § 78g-1.

102. G. LEFFLER & L. FARWELL, *THE STOCK MARKET* (3d ed. 1963).

103. RULES OF FAIR PRACTICE Art. VII, § 3(c) (National Association of Securities Dealers 1978).

104. Proposed Act, sec. 5(a).

determining an association's eligibility would be as follows:

- (i) whether the association is so organized and has the capacity to carry out the purposes of the Act, enforce compliance by its members and those individuals associated with its members;
- (ii) whether the association's rules assure a fair representation of its members;
- (iii) whether the association can provide for the equitable allocation of fees, dues and other such charges;
- (iv) whether the association's rules are designed to prevent fraudulent and manipulative acts and practices, to mitigate abuses in sports contracts, and to protect athletes and the public interest; and
- (v) whether the association has in place a mechanism for disciplining violations of the Act.<sup>105</sup>

Once an association becomes a registered national association, it has the authority to govern the activities of its members and to take any disciplinary action consistent with the Act and the rules and regulations promulgated by the Secretary. The standards to be used by the Secretary in deciding whether to grant registration, and the range of disciplinary options available, are similar to those contained in the Lockyer Act and other regulatory programs.<sup>106</sup>

A major criticism levelled at the federal approach is that a new government bureaucracy, together with its attendant rules and regulations, will intrude upon another facet of American business. Of course, this legislation will generate some intervention by government in the business of sport. Apart from the pressing need for some regulation, however, the government's role will neither be novel nor overpowering. Government regulation of sport is already present in state athletic commissions.<sup>107</sup> Furthermore, the national sports association plan is primarily geared to provide agents with the privilege and opportunity to regulate themselves with only minimal federal intervention through statutory oversight. Also, the costs associated with the creation and maintenance of such an organization will be partially subsidized by the organization's members, much like the NASD.

Despite the comprehensive provisions of the Proposed Act, there are several points which have neither been fully explained

---

105. *Id.* at sec. 5(b)(1)-(10).

106. These sanctions can range from a public reprimand to a permanent revocation of the agent's license. *Id.* at sec. 7.

107. *Ohralik*, 436 U.S. at 350.

nor explored. First, the Proposed Act does not indicate whether it is applicable to athlete agents who perform services for amateurs or for college athletes whose eligibility has expired but who have not joined the professional corps. The title of the Proposed Act would seem to exclude agents involved with this latter group. In many instances, however, these situations present opportunities for abuse, since at this level athletes are not members of any professional organization which can impose restraints on persons seeking to represent them.<sup>108</sup> Nor do many of these athletes have the business or financial sophistication necessary to control the activities of an agent. Second, the Proposed Act's jurisdiction extends to the United States and its possessions and territories. There are, however, athletes who are recruited from foreign countries. Some agents may therefore attempt to circumvent regulation by signing such athletes to representation contracts in their foreign homes.<sup>109</sup> Third, there is no provision in the proposal allowing an agent who is not aligned with a sports agency association to register independently with the Secretary. Fourth, the Proposed Act still does not resolve the attorney-agent dilemma. Section 3(1)(D)(iii) of the Act includes "the managing or handling of funds belonging to an athlete" as an aspect of "active representation" except where all the services rendered constitute "legal services rendered by a licenced attorney . . . ." Again, the illusive term "legal services" is not defined in the Act and gives rise to the question of when the attorney is acting as an attorney and when is he acting as an agent. Finally, the proposal should contain a section specifically addressing the need for disclosure to the athlete of information about the agent. An excellent model for this concept is the one developed in a recent article.<sup>110</sup> A major element of this proposal is the requirement of disclosure to the athlete of facts about the agent which will permit the athlete to make an informed choice. The athlete must be provided with the disclosure document prior to entering into any agreement with the agent.

The Proposed Act is still in its drafting stage and is in need of

---

108. See *supra* notes 44-46.

109. A premier example of the signing of foreign athletes is the crop of baseball players originating from the Dominican Republic. A substantial number of players come from this Caribbean country, with most of them trained at San Pedro de Macoris. Not only have agents hit the island in droves, but several teams have permanent tryout camps located there. The influx of agents with promises to the unschooled and unsophisticated athlete has caused ever growing problems in the region and for the young athlete. Brubaker, *Many Miracles, More Mirages*, Wash. Post, Feb. 2, 1986, at D1, col. 1.

110. Sullivan, *supra* note 10.

further development. It does represent, however, an innovative and encompassing solution to the agent regulation problem. The federal approach offers several distinct advantages over the existing and proposed regulatory models. First, it permits a uniform set of rules and regulations to be implemented and applied consistently. Second, the federal legislation will cover all the aspects of an agent's representation of a client from contracts to promotions to investment. Third, the significant enforcement powers of a federal agency and national jurisdiction could be wielded to ensure the effective regulation of agents. The importance of this cannot be understated. As Dick Perry, the University of Southern California athletic director who headed the panel that drafted the NCAA's registration plan, noted: "We have virtually no leverage with the player agents. As far as they are concerned, the NCAA doesn't exist."<sup>111</sup> Indeed, when California first enacted its agent registration law, very few agents registered with the state.<sup>112</sup> Fourth, the associations of sports agents will be organizations with experience and expertise in the field and can set reasonable and comprehensive standards for its members, unlike state legislation which places the enforcement of its provisions with general regulatory agencies.

## V. CONCLUSION

This article focuses on the myriad of responses to the regulation of athlete agents and the inherent and potential problems threatening their effectiveness.

The first question is whether regulation of athlete agents should exist at all. Given the potential for the growth of the sports industry and the abuses accompanying such growth, some form of regulation is necessary.

The second question is what form should that regulation should take. The state legislative approach is promising but can be burdensome to both agent and the state alike. Sport, unlike the entertainment industry, affects all fifty states. Effective regulation would require each state to pass laws governing the athlete agent. This would result in the agent becoming subject to multiple licensing fees and bonding. Further, each state would have to create a regulatory body to oversee a possibly small group of individuals.

Regulation by players' associations and similar organizations is

---

111. 2 SPORTS INDUSTRY NEWS, 24, 24 (1984).

112. E. GARVEY, *supra* note 16, at 4.

too limiting because they can only control the employment function of the agent. Moreover, they would have no authority in the ever growing and lucrative endorsements, promotions and financial planning aspects of the agent's service to his client.

Finally, there is the federal alternative. This provides the comprehensive method of regulating every aspect of the activities of athlete agents and offers the athlete his best protection. With such a program the industry could regulate itself yet retain significant enforcement powers. All agents would be treated fairly and evenly under such a program and the athlete would have the opportunity to make an informed choice.