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THE CRYSTAL CRUISE CUT SHORT: A SURVEY OF THE INCREASING REGULATORY INFLUENCES OVER THE ATHLETE-AGENT IN THE NATIONAL FOOTBALL LEAGUE

CRAIG MASSEY*

I. INTRODUCTION

Continuing interest in professional football, the quickened pace of recruiting top-ranked college football players, and the complexities of contract negotiation and financial management have led to an athlete's need for the services of an agent.

The recruiting of a top football player begins when he is graduating high school and about to enter college. This is where the athlete learns: (1) how to beat the law; (2) how to make some money; and (3) about risk. Stories about athletes who have received up to \$10,000 for choosing to attend a certain college are not uncommon. New clothes, cars and spending money are commonly given to the nation's collegiate football heroes. If it is brought to the attention of the National Collegiate Athletic Association (NCAA) that, in fact, the athlete has indeed accepted money, cars, etc., the NCAA will declare him void of amateur status and revoke his right to play collegiate football.¹

It is unethical to entice college graduates with cars and cash in order to obtain management agreements, and it is a violation of the NCAA constitution to accept gifts and favors as an amateur athlete.² Unfortunately, both of the above transactions frequently occur.³ Of six National Football League (NFL) prospects interviewed by the author, four stated that they were offered car loans and cash up front if they would agree to have the offeror represent

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1. N.C.A.A. CONST. art. III, §5(g), cl.5 (1983). This "extra benefit legislation" states that an athlete cannot be provided with any benefits not available to the student body in general at his particular college or university. If he accepts any such benefit, he loses his college eligibility.

2. N.C.A.A. CONST. art. III, §1(f) (1978).

3. Sports agent Mike Trope, quoted in Black, *A Hard Look at Agents*, SPORT Dec. 1979, at 77 stated, "If I talk to a player, and he needs a thousand dollars, I've got the money to give it to him."

them in contract negotiations or full service management.⁴

Once the athlete has played out his college career, he is faced with a major decision concerning who will represent him in his career as a professional football player.⁵ A top professional football league prospect can expect to be approached by some 200 agents, attorneys or friends to discuss representation.

Among the questions raised in this comment are: What is an agent? By what laws must they abide? Who has jurisdiction over these representatives? What remedies are available to the athlete against an agent? In order to answer these questions, the definition of an "agent" must be understood and the deterrents to bad representation carefully scrutinized.

In many states, an agent is anyone who represents another person with that person's permission. Legally defined, an agent is "one who acts for or in the place of another by authority from him" or "a person who represents another in contractual negotiations," or "a business representative whose function it is to bring about [or] modify . . . contractual obligations between the principal and third person."⁶ As used in this comment, an agent is a person who represents a professional football team prospect or an NFL player in contract negotiations with an NFL team. The agency begins when the contract between the player and the agent is agreed upon, either orally or in writing.

Historically there have been many unethical agents in football.⁷ Today, efforts are being made to stop unethical agents from representing athletes. The hardships on players, teams, schools and reputable agents can be and are being minimized by various agencies and entities. The NCAA Bylaws restrict the college athlete from unethical dealings; the National Football League Players Association (NFLPA) has set parameters for agents in dealing with

4. Prospects interviewed were asked questions concerning their solicitation by agents who wanted to represent them. Although the players asked to omit their names in this comment, their school and draft years were Nebraska (1983), Grambling (1983), North Carolina (1983), Houston (1980), Pittsburgh (1983) and Vanderbilt (1983).

5. See Jones (ed.), *CURRENT ISSUES IN PROFESSIONAL SPORTS*, (1980). Note particularly Shepard, *Establishing the Contractual Relationship Between the Representative and the Athlete*, pp. 13-29.

6. *RESTATEMENT (SECOND) OF AGENCY* §1 (1958).

7. What constitutes a bad agent is hard to pinpoint. Poor contract negotiations with a National Football League franchise is an area pertinent to this comment. Today the NFL Players Association (NFLPA) has data which it supplies to agents to better prepare them to negotiate. Further, the NFLPA has the right to approve all contracts of certified agents before they are executed by the player.

the professional football player; and states have taken legislative action for the protection of the professional athlete.

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

The NCAA governs the amateur athlete during his college career. The NCAA, however, has never taken a strong stand in preventing abuse by agents. Penalties handed out by the NCAA Committee on Infractions are targeted at the player and the school involved in any impropriety and do not affect the agent involved. In *Shelton v. NCAA*,⁸ the court noted that if a college athlete were to sign a contract with a sports agent, he would forfeit his amateur status and college eligibility. The revocation of a student's eligibility for signing a contract, the court held, "is rationally related to the goal of preserving amateurism in intercollegiate athletics." The Ninth Circuit upheld the loss of eligibility for signing a professional contract even though the contract was alleged to be invalid. The athlete was penalized but not the agent who negotiated for him. The NCAA Constitution involves the relationship between athletes and their schools. The agent is regulated only indirectly by the NCAA through the agent's particular code of ethics,⁹ should he be subject to one.

The student-athlete needs to be aware that by receiving outside compensation, he is in violation of the NCAA constitution and consequently jeopardizes his future in football. He needs to understand that the risk of ineligibility is not worth the reward of immediate compensation.

III. THE NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT

Until the 1982 Collective Bargaining Agreement (CBA) between the NFLPA and the NFL Management Council, the Players Association had waived its exclusive right under the National Labor Relations Act to negotiate with management over individual players' salaries. In 1982, article XXII, section 2 of the CBA was amended to read:

Section 2. Other Compensation: A player will be entitled to receive a signing or reporting bonus, additional salary payments,

8. 539 F.2d 1197, 1198 (9th Cir. 1976).

9. If the agent is an attorney or professional (certified public accountant, etc.) he will be governed by a code of ethics. This topic is covered more fully in the section *The Licensed Attorney and the Non-Licensed Agent* of this comment, see *infra* p. 72.

incentive bonuses and such other provisions as may be negotiated between his club (with the assistance of the Management Council) and the NFLPA or *its agent*. The club and the NFLPA or *its agent* will negotiate in good faith over such other compensation; provided, however, that a club will not be required to deal with the NFLPA or *its agent* on a collective or tandem basis for two or more players on that club [emphasis added].¹⁰

The amended section 2 will drastically change the way sports agents negotiate with an NFL franchise. Ed Garvey, the 1982 Executive Director of the NFLPA, stated that he expects that many football agents will not be in the same business in the next few years due to this change. Additionally, the compensation an agent is to receive will be regulated.¹¹ The following regulations and procedures have been adopted by the players' union:

1. Each person seeking to represent a veteran player must prepare and submit an *NFLPA Agent Information Sheet* to the NFLPA office in Washington, D.C.
2. For each player-client, the representative must also submit a copy of any correspondence or written evidence of his representation agreement with the player. If there is no written agreement, the agent must submit a report describing his fee arrangement with the player.
3. The agent must be in full compliance with applicable state law.
4. The agent must keep the NFLPA apprised of the progress of salary negotiations and must obtain the NFLPA's approval of any contract between the player and an NFL club before it could be executed by the player.¹²

Each agent representing NFL players must attend one of the NFLPA briefings on the new 1982 CBA.¹³ The agent must also sign a statement stating that he will comply with all the requirements set forth by the NFLPA.¹⁴ This procedure was adopted by the NFLPA Board of Player Representatives during its off-season meeting in May 1982.

It is clearly stated in the 1982 CBA that "the club and the NFLPA or *its agent* will negotiate in good faith over such other

10. 1982 Collective Bargaining Agreement, art. XXII, §2 (1982).

11. Statement by Ed Garvey at the *NFLPA Agents Seminar* in San Francisco (Feb. 1983).

12. *NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS*, §5(B) (May 1983).

13. Letter from Ed Garvey, Executive Director, NFLPA, to prospective agents (Dec. 23, 1982).

14. *Id.*

compensation."¹⁵ This statement places the agent under the union's jurisdiction. For an agent to negotiate for a player who is a member of the NFLPA, he must be certified by the NFLPA. As a consequence of this particular language, the NFL franchise will always be negotiating with the NFLPA; either directly or indirectly through their "agent."

The *NFLPA Agent Information Sheet* requests information ranging from the agent's name and years in school to a copy of the contract between the agent and the athlete.¹⁶ The agent is required to make full disclosure to the union and consequently to the players. The purpose of disclosure is two-fold: (1) to protect the player from unscrupulous agents; and (2) to permit the NFLPA to take a positive and constructive role in individual as well as collective negotiations. The union claims these two roles will vastly improve contracts for individual players.¹⁷ It is the union's position that if it has total knowledge of contract negotiations, the player will benefit. This benefit will occur, however, only if the player and/or his agent uses the information received by the union.

The union has commented that it will use the acquired information to make an analysis available to players and certified agents including: (1) base salary information (alphabetically, by team, year entered the league, and draft round); (2) signing bonus information; (3) a breakdown of compensation components; (4) incentive and performance bonus ranges and details; (5) calculation of credited seasons for minimum salaries; (6) deferred compensation information; (7) league-wide averages in all areas; (8) ranking of salaries by position, by draft year, by draft round and by team; (9) salary averages by draft year, by draft round and by position; (10) analysis of percentage increase of salaries by position, draft round and draft year; (11) round-by-round draft information; (12) team salary averages; and (13) frequency distributions of salaries.¹⁸

Once all of this information is accumulated, two questions

15. 1982 Collective Bargaining Agreement, art. XXII, §2 (1982).

16. The NFLPA requests the following on its *Agent Information Sheet*: name; office phone; firm name; residence address and phone; professional credentials; college attended-degree, major, course of study and year graduated; graduate school and degree; law school, if any and year graduated; where one is licensed to practice law, year admitted, area of specialization, list of clientele, trust arrangements, etc.; and other professional training. An agent must also attach a copy of agreements made with athlete clients and provide a list of services.

17. Letter from Ed Garvey, Executive Director, NFLPA, to prospective agents (Dec. 23, 1982).

18. Statement by Mike Duberstein, Director of Research, NFLPA, at the *NFLPA Agents Seminar* in San Francisco (Feb. 1983).

arise. First, what is the fate of the agent under the new regulations? Second, why not just use a wage scale in light of all the statistics compiled?

The structure to rid the NFL of agents is already in place. The union simply has "to plead its case" to the players, using a statistical analysis, that agents do not benefit players or, in the alternative, that the union can provide the same benefits that an agent can. When the player is no longer benefited by the agent, the agent will eventually be eliminated. For agents to survive, they must ensure that they remain beneficial to players. Agents, as a group, also need to become more organized.¹⁹ For example, agents representing the top eleven players drafted by the NFL in 1983 never acted as a group and rarely exchanged ideas.²⁰

It is no secret that the union was pushing for a "percentage of the gross revenues the [NFL] teams were receiving during the 1982 Collective Bargaining Agreement negotiations with the NFL Management Council. The union want[ed] a scale based on what a player does, not what some anonymous scouting report thought he might or might not do."²¹ One of the union's goals in entering into the eventual strike by NFL players was to end the use of agents in the NFL. In the union's report, "Why a Percentage of the Gross,"²² the following comments were made in direct reference to agents:

That's their role: get players to sign contracts that are not guaranteed, for the lowest possible salary, for the longest possible time. Players aren't trained negotiators. 'I just want to play,' is heard year in and year out. Compare that to the general managers who met at Harvard in February 1981, to learn negotiating skills from Harvard Business School professionals. As for agents, they don't meet, they offer no competition. Most take their ten [percent] and disappear. Individual negotiations work for owner promoters and agents, but not for players. That's why we developed a system geared to aid all players.²³

When the union was asked at the NFLPA agents seminar why so

19. The only real organized group is the Agents Representing Professional Athletes (ARPA). However, of the top eleven players drafted in 1983, only two had agents who were members of ARPA.

20. The agents of the top eleven picks in 1983 were: Marvin Demoff, Jack Mills, Dick Lynn, George Kalafitas, Tony Agnere, Ed Keating, Ivory Black, Howard Slusher, and Deering Massey.

21. M.J. Duberstein, NFLPA, *Salary Survey Information*, at p.4, distributed at NFLPA Agents Seminar in San Francisco (Feb. 1983).

22. NFLPA, *Why a Percentage of the Gross* (Sept. 1981).

23. *Id.*

many agents vehemently opposed this percentage of gross idea, it answered, "Agents immediately get 5% to 10% of rookies' contracts; under a wage scale they won't. If you were earning \$500,000 a year off someone else, you wouldn't like it either."²⁴

The union wants a player to receive compensation based on performance. The union had proposed some \$38,300,000 in incentive bonuses based on three factors: starting team status, percentage of minutes played in a player's offensive or defensive unit and additional bonuses for specific positions.²⁵ It is clear that the only reason the agent still exists in the NFL is that the management council was not receptive to the union's "percentage of the gross" proposal.

There are, however, many important reasons to continue using agents. Many provide more services than merely negotiating a contract. Most agent management companies aid the player in personal matters outside his playing contract.²⁶ If the union takes away the financial and intellectual rewards gained by negotiating contracts, then the other enumerated services would eventually cease to be provided.

Player associations, like the NFLPA, are usually too concerned with collective bargaining to become involved in individual contract negotiations. As reported by the House of Representatives Select Committee Inquiring into Professional Sports:

Determining the worth of an individual athlete is a complex and subjective process. Therefore, individual contracts with the respective clubs are negotiated by each player, and not by the group effort of the players associations. This is essentially a product of the inability to precisely quantify and categorize the range of value of a playing position or any similar generalization as is common in industrial enterprises.²⁷

Under the present system of establishing a player's wage, an agent is necessary for an athlete to bargain competently with team management. The one-on-one relationship between player and agent is crucial to negotiation. The agent must understand the athlete's strengths and weaknesses in order to bargain effectively. The NFLPA is not staffed to bargain for some four hundred players

24. See Duberstein, *supra* note 21.

25. *Id.*

26. These services include: financial budgeting, providing legal services in such areas as drafting trust agreements, wills and divorces and arranging leases, rent and other household problems.

27. H.R. REP. No. 1786, 94th Cong., 2d Sess. (1977).

each season.²⁸ Without the adoption of the NFLPA's proposed "percentage of the gross" payment scheme or an alternative pay scale, agents will continue to represent players in negotiations.

The new agent regulations adopted by the NFLPA require the NFLPA to certify agents of veteran players before the agent can represent those players. Under the regulations adopted, agents are limited as to the fees they may charge the athlete.²⁹ The CBA limits agents in their compensation to percentages of only the amount gained above contract minimums.³⁰ The guidelines also state that the agent will receive his fee over the period of the player's contract. These two guidelines bring the union comfort. No longer can an agent take his fee "up front" based on the total contract. Nor can an agent receive compensation up to ten percent of the total contract. Under the new rules promulgated, an agent will be held to a maximum of ten percent above that year's contract minimum in the first year, five percent above the minimum in year two and two percent above the minimum in year three. If the contract is guaranteed by the franchise, the second year figure allows for seven percent compensation and the third year rises to three percent.³¹ Further, if an agent only negotiates a minimum salary, he would be entitled to a maximum of \$125.00 an hour (up to \$1,000.00) for his services. These new rules are subject to the Players Union Board of Representatives review on an annual basis. It is the NFLPA's position that an agent does not deserve a percentage

28. Each of the NFL's twenty-eight teams annually draft twelve players and five free agents. Including veterans whose contracts expire or who renegotiate their contracts, the total number of players who negotiate NFL contracts, the total number of players who negotiate NFL contracts is well over 400.

29. NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS, §4 (May 1983).

30. Contract minimums are the lowest amounts a NFL team may compensate any player who makes the club's active list. Contract minimums for the first five years beginning in 1983 are:

	1983	1984	1985	1986
Rookie	40,000	40,000	50,000	50,000
2nd Year	50,000	50,000	60,000	60,000
3rd Year	60,000	60,000	70,000	70,000
4th Year	70,000	70,000	80,000	80,000
5th Year	80,000	80,000	90,000	90,000

art. XXII, §1.

31. NFLPA statement by representative Allen, upon adoption of new agent regulations, May 1983. An example of this formula is: if a player receives a 1983 contract paying \$80,000 in year one, \$90,000 in year two, and \$100,000 in year three in a non-guaranteed contract, the agent's maximum compensation would be: In year one, \$80,000 - \$40,000 base = \$40,000 x 10% = \$4,000 compensation to agent. In year two, \$90,000 - \$50,000 = \$40,000 x 5% = \$2,000 compensation to agent. In year three, \$100,000 - \$70,000 = \$30,000 x 2% = \$600 compensation to agent.

of what a player can get on his own (i.e., the minimum wage).

Unfortunately, the Collective Bargaining Agreement will not have as great an impact on agents as desired, because most agents represent rookie athletes. Rookies are not required to have registered agents. Under the new guidelines, until the player's initial contract is negotiated and signed, he is not obligated to have a registered agent. As a result, it is possible that an unscrupulous agent could represent rookie players without the consent or approval of the union. The union is presently considering seeking a clarification of the rule to eventually include rookies.³²

Typically, an agent charges a flat fee for all of his services, i.e. contract negotiation and investment advice; however, under the new rules, compensation for negotiating the player's contract must be separate. As a result, the player will be faced with two decisions: who to retain to negotiate his playing contract and who is to manage his funds and supervise his personal services. The agent, as a result, can charge a higher fee for the personal services provided. The union cannot regulate the amount of fee charged for these other services. Because the agent needs certification, he will not, in all likelihood, over-charge for the other services out of fear of losing NFLPA certification. If a certified agent violates any of the NFLPA guidelines, he may be disciplined.³³

If the owners accept the wage scale proposal upon the expiration of the present CBA in 1986, the agent will no longer be of great benefit to the player. For the proposal to be accepted: (1) the owners must want a wage scale. In 1982, the owners did not approve or support a wage scale; (2) the union must want a wage scale. In 1982 when the NFLPA wanted a wage scale, the union had less control over the agents than they do now; and (3) there cannot be any substantial competition from outside the NFL to sign a player drafted by an NFL team. In 1982, there was not a substantial competitive league to drive up salaries beyond what other NFL teams were paying. Now, however, the United States Football League (USFL) competes directly with the NFL for players. If a wage scale were approved by the NFL, the USFL could bargain directly against the scale amounts.

32. *Id.*

33. NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS §6 (May 1983). The disciplinary procedure in the new regulation is as follows: a charge is made by a proper party; the charge will be investigated; an internal union board made up of players will hear the grievance and render a decision. There will be an appeal system to a neutral external arbitrator. The decisions will be on a case by case basis.

IV. STATE STATUTES

Prior to the recently adopted rules, there was very little regulation of sports agents. The NCAA had not made strong moves to regulate player representatives,³⁴ and the NFLPA had jurisdictional limitations restricting their ability to fully regulate the agent.³⁵ For many years, players who were abused by unscrupulous agents looked for an authority to regulate these agents. The question which arose was: where did the authority to regulate lie? Could the government regulate the agents since the athletic groups were not the appropriate bodies?

A Select Committee of the House of Representatives³⁶ studied the question of whether or not the licensing of agents was a matter of federal concern. The committee report stated that further inquiry into the area was warranted, but did not take any steps toward federal licensing.³⁷ This left the task of licensing to the states.

On September 28, 1982, the Governor of California approved a new section to California's Labor Code, which specifically regulated sports agents.³⁸ Assembly Bill 440, known as the "Lockyer Bill"³⁹ was aimed at ending abuses by agents such as "advancing money to players," "loans" for new cars and other living expenses and misappropriation of athlete's funds.⁴⁰ "The landmark legislation calls for a licensing system for agents which is similar to other California laws governing talent agencies in the entertainment industry."⁴¹

The article regulates "any person who, as an independent contractor directly or indirectly recruits or solicits any person to enter into any agency contract or professional sports services contract, or for a fee procures, offers, promises, or attempts to obtain employ-

34. "[T]he NCAA has been taking a 'hands off' stance even though several agents have been flaunting NCAA rules prohibiting the signing of contracts prior to the end of college eligibility." NFLPA, *The Audible*, Vol. III, No. 1 at 2 (Jan. 15, 1982). *But see* Miami Herald, April 19, 1984, at 5D, col. 1 where it was disclosed that the NCAA was taking an aggressive approach to regulating agents.

35. Not until 1982 did the NFLPA have certification requirements which focus mostly on agency fees paid by players. *See supra* notes 28 and 29.

36. HOUSE SELECT COMM. INQUIRING INTO PROFESSIONAL SPORTS, H.R. REP. No. 1786, 94th Cong., 2d Sess. (1977).

37. *Id.*

38. CAL. LAB. CODE §§1500-1547 (West 1981).

39. The bill was sponsored by state assemblyman William Lockyer (D-San Leandro).

40. NFLPA, *The Audible*, Vol. III, No. 1 at 2 (Jan. 15, 1982).

41. *See*, CAL. LAB. CODE, §1500 (West 1981). (Scope and Definitions of Talent Agencies).

ment for any person with any professional sports team."⁴² Curiously, the statute, when applied to athletic agents and agencies, does not include "any member of the State Bar of California when acting as legal counsel for any person."⁴³ The focus of the legislation is directed toward the area where most abuse is found: the non-attorney agent who is not governed by a code of ethics and is in little jeopardy when acting unethically. If an attorney-agent represents a client on a legal matter, he is not subject to the jurisdiction of the statute. It is important to note, however, that being an attorney does not automatically exclude the attorney from the state certification process. The California Division of Labor Standards Enforcement has stated that in order to be exempt from the certification process the attorney must meet a qualifying test requiring the attorney to be acting "primarily" as legal counsel for an athlete and only incidentally negotiating a sports services contract for such client-athlete. The Division of Labor Standards Enforcement interprets "acting primarily as legal counsel" to mean that more than 50% of the attorney's services are rendered as legal counsel on matters unrelated to the negotiation of sports services contracts for an athlete.⁴⁴

A jurisdictional issue is raised when the applicability of the statute is considered. Agents living in California are, of course, subject to the statute's jurisdiction, but what about those agents who do not live in California?

The question of whether out-of-state agents must register will most likely be resolved by determining whether or not a given agent has sufficient minimum contact with the state of California in his or her business, a question identical to those (sic) raised under the long-arm jurisdiction of the state. Although the bill does not so specify, it would appear that its coverage would include out-of-state agents who solicit college or professional athletes who play for teams in California or athletes who live in California. It would also appear to cover out-of-state agents representing non-resident athletes in dealings with California teams.⁴⁵

42. *Id.*

43. *Id.* §1500(b) (West 1981).

44. Letter from Carol Cole, Area Administrator, Division of Labor Standards Enforcement, State of California, to the author (Aug. 10, 1983). Ms. Cole further commented, in reference to attorney representation, that "after a year of experience they have found that such a definition is too vague to be adequately enforceable and are currently in the process of developing new language."

45. NFLPA, *The Audible*, Vol. III, No. 1 at 2 (Jan. 15, 1982).

If this jurisdictional claim is proper, many agents are in violation of the statute. Carol Cole stated that there are presently only seventeen agents certified and about four to five pending applications.⁴⁶ This is far short of the number of agents who represent athletes who work or live in California.⁴⁷

The Labor Commissioner plans to play an active role in the enforcement of this statute. Section 1547 provides that any violation of the statute is a "misdemeanor, punishable by a fine of not less than one thousand dollars (\$1,000.00) or imprisonment for a period of not more than 60 days, or both."⁴⁸ The Labor Commission has already filed one warrant for an "agent's" arrest in California. The warrant was issued as a result of a complaint a player filed with the Labor Commission alleging that an "agent" had taken money from him and some other players promising them a tryout with a professional sports franchise. The money was received by the "agent," but the "agent" did not appear at the tryout.⁴⁹

Upon the filing of a complaint, the commissioner will investigate the allegations. If the investigation shows impropriety by an agent, "the Labor Commissioner shall afford the holder of such registration an opportunity to be heard in person or by counsel" prior to the revocation of his license.⁵⁰

Sections 1510⁵¹ and 1545⁵² are two of the most significant sections of the Lockyer Act. Section 1510 states that "no person shall engage or carry on the occupation of an athletic agency without first registering with the Labor Commissioner."⁵³ Section 1545 provides:

(a) An athlete agency shall, prior to communicating with or contacting in any manner any student concerning an agency contract or a professional sports services contract, file with the secondary or post-secondary educational institution at which the student is enrolled a copy of the registration certificate of the

46. Letter from Carol Cole, Area Administrator, Division of Labor Standards Enforcement, State of California, to the author (Aug. 10, 1983) stating that as the Department of Industrial Relations learns the names of more agents and the players who they represent, the Department anticipates significant growth in the number of licensed agents.

47. The four NFL teams, the L.A. Raiders, San Diego Chargers, L.A. Rams, and San Francisco 49ers, have over 180 players working within the state's boundaries.

48. CAL. LAB. CODE §1547 (West 1981).

49. Reported by Carol Cole, *supra* note 44.

50. CAL. LAB. CODE §1528 (West 1981).

51. *Id.* §1510 (West 1981).

52. *Id.* §1545 (West 1981).

53. *Id.* §1510 (West 1981).

athlete agency; (b) An athlete agency shall file a copy of each agency contract made with any student, with the secondary or post-secondary educational institution at which the student is enrolled, within five days after such contract is signed by the student party thereto.⁵⁴

If the agency does not abide by these two sections, then the contract between player and agent is void.⁵⁵ Many agents will communicate with twenty to thirty athletes within California in hopes of representing two or three of them. For the agent first to establish if the athlete resides in California, or in any way falls within the state's "long-arm statute", will be a task many will not undertake. The Lockyer Act's success will be determined in the next two years. Determining factors will include: (1) how many agents will be registered; (2) how many contracts negotiated by non-registered agents are held unenforceable; and (3) how many agents are disciplined.

Other provisions of the Lockyer Act include: section 1515 which requires annual license renewal;⁵⁶ section 1519 which provides that "an athlete agency shall also deposit with the Labor Commissioner prior to the issuance of a renewal of a registration, a surety bond in the penal sum of ten thousand dollars,"⁵⁷ and section 1520 which provides that the surety bond shall be payable to "the people of the State of California and . . . [the proceeds from the bond] will pay all damages occasioned to any person by reason of misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions of the registered athlete agency, or its agents or employees, while acting within the scope of their employment."⁵⁸ Section 1527 states the circumstances under which the Labor Commissioner may revoke or suspend any agent's registration.⁵⁹ The three circumstances falling within section 1527 are: "(a) The registrant or his agent has violated or failed to comply with any of the provisions of this chapter; (b) The registrant has ceased to be of good moral character; (c) The conditions under which the registration was issued have changed or no longer exist."⁶⁰

Section 1530 of the act provides that athletic representation

54. *Id.* §1545(a)-(b) (West 1981).

55. *Id.* §1546 (West 1981). "Any agency contract which is negotiated by any agency who has failed to comply with Section 1510 or 1545 is void and unenforceable."

56. *Id.* §1515 (West 1981).

57. *Id.* §1519 (West 1981).

58. *Id.* §1520 (West 1981).

59. *Id.* §1527 (West 1981).

60. *Id.*

agencies need to submit a copy of their representation agreement to the commission. The contract is not to be "unfair, unjust, or oppressive to the person."⁶¹ Section 1530.5 states that "the contract shall contain in close proximity to the signature of the athlete a notice of at least 10-point type stating that the athlete may jeopardize his or her standing as an amateur athlete by entering into the contract."⁶² (The 1982-83 contracts of two California-based management companies did not comply with this section.⁶³)

Additional sections of the Lockyer Act include section 1533 which provides that the agency shall furnish to "the Labor Commissioner upon request of a true copy of such books, records, and papers or any portion thereof, and shall make such reports as the Labor Commissioner prescribes;"⁶⁴ and section 1535 which provides that no registrant:

shall sell, transfer, or give away any interest in or the right to participate in the profits of the agency without the written consent of the Labor Commissioner. A violation of this section shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars (\$100.00) or more than five hundred dollars (\$500.00), or imprisonment for not more than 60 days or both.⁶⁵

This section, in light of the other penalties, seems extremely harsh. As a result of this section, the agent will face a risk-benefit decision in deciding whether or not to stay out of the California jurisdiction simply to avoid the additional administration costs imposed by the act.

Section 1539 of the act states that "no athlete agency shall divide fees with an employer, an agent, or other employee of an employer."⁶⁶ Lastly, section 1540 provides that:

in the event that an athlete agency shall collect from a person a fee or expenses for obtaining employment, and the person shall fail to procure such employment, or the person shall fail to be paid for such employment, the agency shall, upon demand therefore, repay to the person the fee and expense so collected. Unless repayment thereof is made within 48 hours after demand

61. *Id.* §1530 (West 1981).

62. *Id.* §1530.5 (West 1981).

63. This is not necessarily a negative reflection on these management companies; rather it shows that the Commission needs to be more specific as to what is required in representation agreements. Curiously, both contracts were only one page in length.

64. CAL. LAB. CODE §1533 (West 1981).

65. *Id.* §1535 (West 1981).

66. *Id.* §1539 (West 1981).

therefore, the agency shall pay to the person an additional sum equal to the amount of the fee.⁶⁷

In order to comply with the Lockyer Act, a representation organization must: (1) pay a \$600 fee with the application (a \$100 filing fee plus a \$500 annual license fee); (2) open all records and books to the commission; (3) obtain written consent of any transfer of interest in the business entity that relates to profits obtained through a player; (4) not share profits with employer or other agents; (5) change business cards, stationery, etc. to read "athlete agency;" (6) put up a \$10,000 surety bond payable to the people of the State of California; (7) subject the individual and agency to criminal sanctions and monetary penalties for violations of the act; and (8) redraft agency contracts to reflect possible loss of amateur status. Many management companies are waiting to see what position the Labor Commission will take with regard to the Lockyer Act. If the commission strictly enforces the act, many agencies might be better off to stay clear of California's jurisdiction.

Presently, the act's provisions exist "in broad legislative language. The next step is the development of specific regulations dealing with notice requirement, enforcement procedures, and other details."⁶⁸ The development of enforcement proceedings should be aimed towards reducing agent abuses which result in financial losses to an athlete. The more technical areas (i.e. transfer of interest disclosure, amateur athlete disclosure when no loss occurs, etc.) should remain in the statute, as they now appear, as an effective deterrent; however, they should not be actively pursued by the commission. In reality, very few agencies are at this time in compliance with the act. Educating agents and athletes is a necessary first step toward positive results flowing from the legislation. If the results are effective, other state legislatures will be more likely to enact similar legislation.⁶⁹

Why does only California have an athlete-agent bill? Could other state legislatures be afraid of a constitutional violation? The Commerce Clause⁷⁰ of the United States Constitution authorizes Congress to regulate interstate and foreign commerce. The question arises whether the Lockyer Act could withstand scrutiny under the Commerce Clause. For the regulation to be constitu-

67. *Id.* §1540 (West 1981).

68. Letter from Carol Cole, *supra* note 44.

69. *Id.* The NFLPA legal department reports that New York, Massachusetts, Ohio, Washington and Canada have or are considering similar legislation.

70. U.S. CONST. art. I, §8, cl. 3.

tional, it will have to pass the test articulated in *Pike v. Bruce Church, Inc.*⁷¹ "Where the (state) statute regulates even-handedly to effectuate a legitimate local public interest, and its effect on interstate commerce are [sic] only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁷²

The question which exists is whether the "burden" imposed on commerce is clearly excessive. For example, an attorney-agent in Washington, D.C. represents a player who lives in Washington and is drafted by the Los Angeles Raiders. The Los Angeles Raiders' general manager travels to Washington to negotiate the player's contract. Because the paychecks are issued from Los Angeles, California, each month the Washington attorney will have established minimum contacts sufficient to fall within the jurisdiction of the Lockyer Act. Consequently, the Washington attorney would have to fill out the application, change his letterhead and business cards, put up a \$10,000 surety bond, pay a \$600.00 fee for a license, file with the college attended by the athlete and subject himself to criminal sanctions. In addition, the attorney's professional code of ethics imposes standards for protecting clients which are similar to those intended by the draftsmen of the Lockyer Act. This constitutional question will eventually be answered when and if the state of California begins to actively pursue the out-of-state attorney who has not complied with the Lockyer Act.⁷³

71. 397 U.S. 137 (1970). In *Pike*, the state of Arizona prohibited a company from shipping uncrated cantaloupes from its Arizona ranch to its nearby California packing plant, because of a state requirement that Arizona cantaloupes be packed in Arizona. The purpose of the requirement was to enhance the reputation of and demand for Arizona cantaloupes. Justice Stewart noted that state interest was found "legitimate" but "tenuous" and inadequate to justify the state-imposed burden. "The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal." *Id.* at 145.

72. *Id.* at 142.

73. Local agents do more business in the state thus warranting a more rigid application of the act as compared to an out-of-state agent. As the out-of-state agent has fewer clients in California, the cost of complying with the act is higher on a cost-per-athlete basis. The agent who only represents one player in-state is at a disadvantage under the Lockyer Act. The athlete can declare the agent-player contract "void and unenforceable," if the agent does not file "a copy of his registration certificate with the secondary or post-secondary educational institution." The statute further points out that the filing must be done "prior to the initial communication with the athlete" (§ 1545); if the agent does not comply with section 1545 the contract will be "void and unenforceable" (§ 1546). This presents a catch-22 situation for the agent. If, in the example presented in the text, the contract between the Washington attorney and the athlete drafted by the Raiders is declared void and

Many supporters of the Lockyer Act are quick to point out that since its enactment, other states have introduced similar legislation.⁷⁴ Until the questions as to the constitutionality of the act are answered, it would be unwise for any other state to adopt such legislation.

In 1978, the New York Select Committee on Crime and Sports Agents Practice met to review the agent-athlete problem and determine whether the sports agents should be licensed or regulated by the individual states. The committee found generally that "some state regulation is desirable to control sports agent abuses."⁷⁵ New York, however, has not as yet passed a bill similar to the Lockyer Act. Despite any overt legislation, section 170 of the New York General Business Law, which addresses agencies, has significance in the area of athlete-agent relationships.⁷⁶ Employment agency is defined as:

any person who, for a fee, procures or attempts to procure: (a) employment or engagements for persons seeking employment or engagements, or (b) employees for employers seeking the services of employees. Employment agency shall include any person who renders vocational guidance or counseling services and who charges a fee; all or any part of which is in consideration of such person procuring or attempting to procure employment or engagements for persons seeking employment or engagements.⁷⁷

Clearly, agents are subject to the statute in that they are "persons"

unenforceable under sections 1545 and 1546 because the attorney-agent did not file with the athlete's post-secondary school before his initial contact, the attorney-agent is out all of his expenses and his or her potential benefits under the contract. Is this outweighed by the benefits to the people of the state of California?

74. Telephone interview with Buck Briggs, counsel to the NFLPA (May 24, 1983) (at least six bills were in various state legislatures as of May 1983). In 1979 and 1980 there was specific legislation (S. 5972) submitted to the New York legislature that would require the regulation of any sports agent who represented an athlete employed by a New York-based team. Although the bill failed to pass in both 1979 and 1980, several provisions are worth noting: section 52 required the licensing of any agent who represented three athletes in any twelve month period (one of whom was on a New York-based team) and the agent held himself out publicly as an agent; section 53 called for disclosure of nature of payment, prior criminal record, power of attorney and financial management prior to licensing; section 55 called for disciplinary measures for proven complaints regarding financial activities, fraud or misstatements; sections 57 and 63 provided for discipline ranging from a letter of reprimand to fines and imprisonment up to one year; section 29 called for a \$50,000 bond for each athlete represented; and section 62 would have established an advisory council on sports agents.

75. Final Report, *New York Select Committee on Crime and Sports Agents Practices*, New York (Feb. 1-2, 1978).

76. N.Y. GEN. BUS. LAW §170 (McKinney 1968).

77. N.Y. GEN. BUS. LAW §171(2)(a)-(b) (McKinney 1983).

as that term is defined in section 171(b)(6).⁷⁸ Agents take a fee, and attempt to procure employment for persons seeking employment (the athlete). Under the Business Code, the agent is required to be licensed,⁷⁹ and the fees an agent may charge are regulated by section 185.⁸⁰ If the agent violates sections 172 or 185, he "shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed five hundred dollars, or imprisonment for not more than one year, or both, by any court of competent jurisdiction."⁸¹

Most of the case law which has construed this New York law to date deals with theatrical personalities rather than sports personalities. In reality, however, since many of the top athletes today deal in television commercials and endorsements, their agents fall undisputably within the statute.⁸²

The agent has found safety from the New York law under one of its statutory exceptions.⁸³ Section 171(8) specifically exempts from the definition of a theatrical employment agency "the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefore."⁸⁴ Whether the agent falls under the exception is a question for the courts to answer on a case-by-case basis. Although there have been a few similar cases,⁸⁵ the closest case on point is *William Friedkin v. Harry Walker, Inc.*⁸⁶ The question before the court in *Friedkin* was whether "[a]rticle 11 of the New York State General Business Law (GBL), requiring employment agencies to be licensed, appl[ies] to a booking agent who secured lectures and engagements for a client who is a motion picture and theatrical personality."⁸⁷ The court answered, "affirmative unless the agent is in the business of managing such a clientele and the seeking of em-

78. N.Y. Gen. Bus. Law §171(b)(6) (McKinney 1968). "Persons means any individual, company, society, association, corporation, manager, contractor, subcontractor, partnership, bureau, agency, service, office or the agent or employee of the foregoing."

79. N.Y. GEN. BUS. LAW §172 (McKinney 1975).

80. *Id.* §185 (McKinney 1975).

81. *Id.* §190 (McKinney 1975).

82. See Joe Theisman: *Pro Football's Entrepreneur of the Year*, Bus. Wk., Dec. 19, 1983, at 61.

83. N.Y. GEN. BUS. LAW §171(f) (McKinney 1975).

84. *Id.*

85. Meyer v. Walton, South Carolina, 135 N.Y.S. 574 (1912); Farnum v. O'Neill, 252 N.Y.S. 900 (1931); Austin v. National Employment Exchange, 266 N.Y.S. 306 (1933); The People of the State of New York v. Ted Pecham, 282 N.Y. 602 (1940).

86. 395 N.Y.S.2d 611 (1977).

87. *Id.*

ployment is only incidentally involved."⁸⁸

In applying this analysis to an athlete-agent, the question becomes: is the agent in the business of managing the athlete and is the seeking of employment only incidentally involved? If the answer is affirmative, the agent is exempt. "The question whether defendant's business only incidentally involves the seeking of employment as corollary to being a personal manager of plaintiff would ordinarily be a matter of factual determination."⁸⁹

The court in *Friedkin* held that the defendant was "clearly an unlicensed employment agency within GBL-171-(2) and the exclusionary provision of GBL-171-(8) is clearly inapplicable."⁹⁰ The court pointed out that the defendant had "failed to submit evidentiary facts with any probative value specifying or describing the performance of its alleged managerial activities."⁹¹

If the agent is also serving in a management capacity for the athlete, he will escape the New York licensing requirement. Those agencies which procure endorsements and advertisements for a particular player without providing management functions are still subject to the statute. If a separate corporation or business entity exists to promote the athlete within the agency there might be a licensing requirement. Other states have held that the employment agency law includes the athlete-agent relationship.⁹²

Regardless of the passage of pending legislation in other states dealing with sports agents, the fundamental problems presented by the Lockyer Act still exist. Are the rules constitutional? Will the act benefit the state enough to warrant the burden on interstate commerce? The best suggestion is to let California settle these

88. *Id.*

89. *Id.* See also *Mendel v. Liebman*, 303 N.Y. 88, 100 N.E.2d 149 (1951); *Greenfield v. Tripp*, 10 A.D.2d 638, 196 N.Y.S.2d 902 (1960).

90. *Friedkin*, 395 N.Y.2d at 613.

91. *Id.*

92. See *Zinn v. Parrish*, 461 F. Supp. 11 (N.D. Ill. 1977), *rev'd*, 644 F.2d 360 (7th Cir. 1981). Zinn negotiated a series of four one-year contracts for Lemar Parrish with the Cincinnati Bengals' NFL franchise. After the contracts were negotiated, Parrish refused to pay the agreed fee of 10%. Zinn brought suit to recover his fee. The district court held for Parrish, based on an Illinois statute very similar to that of the New York agency statute. The district court expanded the statutory definition of "employment agency" to include athletic agencies. Since Zinn was not licensed under the statute, his contract was void and unenforceable. The district court also held that Zinn should have been required to register as an investment advisor under the Investment Act of 1940. The Seventh Circuit Court of Appeals, however, overruled the district court's decision that Zinn was required to be registered as an investment advisor under the 1940 Act. The court of appeals felt that the district court was "in error in concluding that Congress by the 1940 Act intended to regulate the relationship between an athlete and his manager." *Id.*

questions before other states act. Because California has four NFL franchises and two USFL franchises, many athletes either reside in the state, were contracted in the state or do business in the state. This will result in many agents falling subject to the Lockyer Act. The act when coordinated with the NFLPA's certification system, should, in the long run, weed-out most of the "bad" agents. Before another state's senator puts taxpayers' money and legislative time into sponsoring similar legislation, he should consider whether it will be necessary in light of the growing respectability of agents as a result of the certification system and the Lockyer Act. This author contends it will not be necessary if California and the NFLPA can hold their ground.⁹³

V. THE LICENSED ATTORNEY AND THE NON-LICENSED AGENT

Today, if an agent is not subject to the Lockyer Act or the NFLPA certification system, he or she may represent a professional athlete and not be accountable to any substantial entity other than another profession's code of ethics. Presently, agents representing NFL rookies do not fall under the NFLPA's certification system, and, unfortunately, rookies account for the greatest percentage of new agents that are retained.⁹⁴

A major concern with respect to the non-licensed, non-attorney agent is whether negotiating contracts for an athlete with a business entity, such as an NFL franchise, constitutes the practice of law. It is illegal for a non-licensed agent to practice law. The practice of law clearly involves creating legal documents.⁹⁵ The question arises whether a multimillion dollar multi-page contract is a legal document.

Each state has its own broad power to regulate the practice of law.⁹⁶ A growing concern is that if each state does not view professional sports contract negotiating as a practice of law, the lack of uniformity will create inherent problems.⁹⁷ Although it is arguable

93. An example of how agents are becoming more respectable is that of the six 1982 representation contracts reviewed by the author, not one agent contracted to take their fee "up front." The "up front" fee was a major complaint by many players and its dissolution was part of the NFLPA's new certification requirement.

94. There are over 400 new players who sign contracts with NFL franchises each year. An agent will usually learn the trade of representation on players drafted in the lower rounds.

95. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 316 (1967).

96. *Id.* "It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules. . . . That the States have broad power to regulate the practice of law is, of course, beyond question."

97. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 198 (1939).

that sports contract negotiating is a practice of law, the argument will not support each state bar changing its code.

Until recently, there were "no agent associations or other such bodies that set ethical standards and police[d] the profession."⁹⁸ Attorney-agents, unlike some other agents, are regulated through their state's Canons of Professional Ethics. They risk disbarment which would result in loss of their profession and subject them to public embarrassment. If an attorney-agent were to misrepresent material facts to an athlete or commit fraud on an athlete, he may be disbarred.⁹⁹ Attorney-agents are subject to sanctions if they charge exorbitant fees. According to the American Bar Association's Disciplinary Rule 2-106(a) "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."¹⁰⁰ The non-attorney agent, representing a rookie player, can charge whatever fee the player is willing to pay.

Another area of potential abuse relates to possible conflicts of interest. Disciplinary Rule 5-105(a) states: "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests."¹⁰¹ Examples of potential conflicts are: (1) an NFL franchise paying the agent's fee without disclosure to the player-client; (2) representing more than one layer on a franchise; and (3) under-bidding one player to benefit another. The attorney-agent is accountable to the State Bar Association in which he is licensed, but the non-attorney outside jurisdiction of the California Lockyer Act¹⁰² is accountable to no one.

"What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 87, 366 P.2d 1, 8-9 (1961), *modified*, 91 Ariz. 293, 371 P.2d 1020 (1962).

98. Final Report, *New York Select Committee on Crime and Sports Agents Practices*, New York (Feb. 1-2, 1978). *But see supra* note 19.

99. Model Code of Professional Responsibility, DR 1-102(A)(4) (1981). "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . Most states make conviction for a felony grounds for automatic disbarment." *See also Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489 (1958).

100. Model Code of Professional Responsibility, DR 2-106(A) (1981).

101. *Id.* DR 5-105(A).

102. CAL. LAB. CODE §§1511, 1537 (West 1981). Section 1511 requires the prospective agent to submit an application for registration to the Labor Commissioner, accompanied by at least two affidavits from "reputable residents" who can attest to the "good moral character" of the applicant. This is important with respect to the non-attorney agents as it sub-

The area of solicitation and advertising has caused the biggest problem to attorneys and players. Because the non-attorney agent can advertise and solicit the players with little regulation, they are able to sell their services to a player more directly. Although the attorney is restricted in the mode of advertising he is permitted to use, the solicitation rules have been somewhat relaxed.

In 1977, the Supreme Court in *Bates v. State Bar of Arizona*,¹⁰³ held that lawyers have a constitutional right to advertise, in print, their price for routine legal services. Since *Bates*, all states have adopted new rules to allow at least some promotional activities by lawyers. These amendments, which vary widely from state to state, regulate the permissible content, form and media of lawyer advertising and solicitation. Many of these rules, however, still prohibit lawyers from communicating the type of information that *Bates* and various public surveys have found is most needed by the public. In addition, some states' rules prohibit lawyers from using the advertising techniques that may be most effective, thus diminishing the incentive for them to provide potential clients with information about the law, lawyers and legal services.¹⁰⁴ The United States Supreme Court emphasized that the state must regulate "with care and in a manner not more extensive than reasonably necessary to further substantial interests."¹⁰⁵ The states have relaxed their regulations on advertising but the non-attorney still has the edge. Direct mailings are a major part of recruiting the collegiate athlete. Many states do not permit attorneys to solicit clients by direct mailings. In Texas, for example, Disciplinary Rule 2-101 of the Texas Bar's Code of Ethics relating to publicity and advertising states:

(A) A lawyer shall not make on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. (2) Contains a statement of opinion as to the quality of legal ser-

jects them to some type of character investigation, which is of course, a prerequisite to an attorney's admission to their respective state bar associations. 30 *BUFF. L. REV.* 815, 836 (1981). Section 1537 provides that no agent shall place any false, fraudulent or misleading information in an advertisement, or make any false representations concerning his employment.

103. 433 U.S. 350 (1977).

104. 68 A.B.A. J. 809 (July 1982).

105. See *In re R.M.J.*, 102 S. Ct. 929 (1982), cited in 68 A.B.A. J. at 808.

vices. (3) Contains a representation or implication regarding the quality of legal services which is not susceptible to reasonable verification by the public. (4) Contains predictions of future success. (5) Contains statistical data which is not susceptible to reasonable verification by the public. (6) Contains other information based on past performance which is not susceptible to reasonable verification by the public. (7) Contains a testimonial about or endorsement of a lawyer. (8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.¹⁰⁶

The states are not in concurrence as to the direct mailing issue. The New York Court of Appeals and the Federal District Court in Iowa¹⁰⁷ have held that it is unconstitutional to prohibit mailings to potential clients. As for mailing to third parties, "Kentucky has held it permissible¹⁰⁸ while Louisiana¹⁰⁹ and New York¹¹⁰ have upheld prohibitions against it."¹¹¹

In-person solicitation by an attorney is allowed if the potential client "is a close friend, relative, former client, or one whom the lawyer reasonably believes to be a client."¹¹² As stated earlier, the non-attorney agent can approach the college athlete at will, while the attorney cannot.

It is obvious from these rules that if a lawyer wants to solicit athletes, he will be tightly regulated in comparison to the non-attorney. The regulation of the attorney-agent often causes the attorney to form a management group and not hold himself or herself out as an attorney. As a management company, the attorney can solicit, advertise and use testimony from past clients. It is very important, though, that the attorney make sure that he or she is not practicing law within the management company.

The reality of the attorney and non-attorney agent situation is quite different outside of the discussed legal barriers. Realistically, most top players will scrutinize an agent closely to find out if he or she is an attorney. Most of the agents representing the top players in the 1983 draft were attorneys.¹¹³ Although many of the agents

106. TEX. REV. CIV. STAT. ANN., art 12, §8 (1982).

107. *Kaffler v. Joint Bar Ass'n*, 412 N.E.2d 927 (N.Y. 1980); *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219 (S.D. Iowa 1981).

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

109. *Allison v. Louisiana State Bar Ass'n.*, 342 So.2d 489 (La. 1978).

110. *Greene v. Grievance Committee*, 54 N.Y.2d 118 (1981).

111. 68 A.B.A. J. at 811.

112. *Id.*

113. The first six picks and their respective agents in the 1983 draft were: (1) John Elway — Marv Demoff, attorney; (2) Eric Dickerson — Jack Mills, attorney; (3) Curt

do not represent themselves as attorneys, they will make their legal background known in order to obtain a player's confidence. Courts and the individual state bar associations need to relax the solicitation and advertising laws to permit the attorney to approach the athlete on common ground with the non-attorney agent.

VI. REMEDIES AND ENFORCEMENT

What remedies are available to the athlete, the agent or the university when violations of the NCAA Rules, the State Code of Ethics, the NFLPA rules or the Lockyer Act occur? Who are the bodies that will enforce the rules and laws promulgated to regulate agents, athletes and universities? As to the NCAA rules regulating agents, Mike Trope, a successful agent, stated: "The rules are ridiculous and they're not being followed by anybody. . . . Why should I honor the NCAA rules when I'm not even bound by them? And I don't intend to honor them, not ever, unless Congress says all the rules of NCAA are laws of the United States, and you can go to prison if you break them."¹¹⁴

The NCAA does not as yet regulate agents. NCAA enforcement has historically been directed towards regulating universities and collegiate athletes. The agent-athlete relationship seldom comes in direct contact with the NCAA.¹¹⁵

There has been a relatively small number of cases litigated against an athlete's agent. One reason is that the opportunity to sue an agent for malpractice is removed when the agent is not an attorney. The state bar associations have jurisdiction over attorneys and historically they are not the agents who are in violation of the standards. Another reason is that the agents who have seriously mismanaged players' funds have often ended up in bankruptcy with no funds from which the athlete might collect.¹¹⁶

Chicago sports lawyer Jeffrey Jacobs stated, "I think the ABA, the Illinois Bar Association, the Chicago Bar Association — somebody — should file a suit against these agents for unauthorized practice of law. When an agent is sitting in there negotiating a contract, I think he's practicing law to a certain extent. It goes way

Warner — Marv Demoff, attorney; (4) Chris Hinton — Dick Lynn, attorney; (5) Billy Ray Smith — George Kalafitas, attorney; (6) Jimbo Covert — Tony Agnone, attorney.

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

115. See *supra* note 34 and accompanying text.

116. *People v. Sorkin*, No. 46429 (Nassau County Ct., Nov. 28, 1977), *aff'd*, 64 A.D.2d 680 (2d Dept. 1978). Richard Sorkin was an agent whose business lasted several years and lost over \$261,000 of players' money. None of the players' money was ever returned to them.

beyond the question of dollars."¹¹⁷ In dealing with the area of contract negotiations, the Supreme Court noted in *Washington State Bar Ass'n v. Washington Ass'n of Realtors*,¹¹⁸ that "the court should exercise its inherent power to confine . . . the preparation of contracts for others [to] those that are licensed to practice law in this state."¹¹⁹ If a non-licensed agent is promoting his services as "full-service management" and proceeds to advise the player on legal matters (i.e. wills, trusts, divorces, drafting legal documents), the player may have a cause of action.

Within the law of agency, remedies exist for both the mishandled agent and athlete. Under the Restatement (Second) of Agency, "each party to an agency relationship has responsibilities to the other. . . . [A]n agent can bring an action for an unjustifiably breached contract."¹²⁰ The agent will be held to a higher standard than the ordinary citizen. "The agent must measure up to the standard of skill possessed by other agents engaged in the same business; that is, he must be able to negotiate contracts, formulate investment plans, and the like as well as the average sports agent."¹²¹ The athlete has a cause of action if the agent lacks the ability to manage the athlete properly.¹²²

Remedies for the athlete and agent exist at law. An agent can be sued for practicing law without a license, or suit can be brought against either the athlete or the agent within the law of agency. An agent can be sued in contract law or for criminal violations.¹²³ While there can be recovery in the courtroom under the laws of agency and contract,¹²⁴ this does not provide a proper deterrent.

117. McLeese, *supra* note 114.

118. 251 P.2d 619 (1952).

119. *Id.* at 622.

120. RESTATEMENT (SECOND) OF AGENCY, §463 (1958).

121. See generally *McCurnin v. Kohlmeier & Co.*, 347 F. Supp. 573 (E.D. La. 1972), *aff'd*, 477 F.2d 113 (5th Cir. 1973); *United States Liability Ins. Co. v. Hardinger-Hayes, Inc.*, 1 Cal. 3d 568, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*, 215 S.W.2d 904 (Tex. Civ. App. 1948): As sports agents hold themselves out as having particular skills in a certain field, they must exceed the capabilities of ordinary citizens. *Isham v. Post*, 141 N.Y. 100, 35 N.E. 1084 (1894), *cited in* BUFF. L. REV. 844 (1982).

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

123. See *supra* note 115.

124. RESTATEMENT (SECOND) OF AGENCY §400 (1958). An agent who does not perform under contract can be sued for failure to perform. "An agent who violates a duty owed his principal may be considered in breach of this contract so as to entitle the principal to the contract remedies of rescission or damages." *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958), *cited in* 30 BUFF. L. REV. 844 (1982).

Access to the courtroom is expensive. In court, the athlete is dealing "after the fact" and the damage to him has already been done.

The most practical methods of enforcement, remedies and regulation that are available to the agent and the athlete are through the state statutes such as the Lockyer Act, and the NFLPA certification system. If strictly enforced, these two entities could begin to clean up the entire sports agent business. Unfortunately, it is questionable whether they can be strictly enforced. The Lockyer Act's ability to withstand constitutional scrutiny will be important if questionable agency practices are to be eventually eliminated.

VII. CONCLUSION

There are presently no existing legal entities that can solve all the problems of the abuses which arise out of the athlete-agent relationship. Abuses by the agent, the university and the athlete can be substantially reduced by regulation from within the province of each party involved. In all likelihood, there will be no substantial federal action on the subject of regulating agents in the near future. The various athletic commissions which do "regulate" various sports also do not wish to become involved in the agent-player relationships.¹²⁵ In the future, however, agents should be regulated by state statutes such as the Lockyer Act. Agents will also be required to register with the Players Union (NFLPA). These two entities (the California legislature and the Players Union) can begin to solve the matter of agent abuse.

Whether the federal government, the NCAA, the NFLPA or the individual states exert their jurisdiction to regulate the agent, one thing is clear, the agent who once had a "crystal cruise" filled with up-front money and surrounded by ten percent fees has had the cruise cut short. For the average sport enthusiast who might be tempted to negotiate for the athlete, be careful. Today this exciting field may take you on a cruise entangled in regulations and complicated by certification.

125. Some critics argue that the athletic commissions should regulate agents and issue agent licenses. See generally Weistart & Lowell, *LAW OF SPORTS* (1978). Further, this type of regulation has been approved by courts on the grounds that "the prevention of abuse by players-managers is a legitimate objective of an athletic commission." *Ali v. State Athletic Commission*, 308 F. Supp. 11 (S.D.N.Y. 1969). Federal regulation is dormant. The House of Representatives Select Committee Inquiry into Professional Sports studied the issue of whether licensing of agents should be a federal concern and concluded that regulation should be left to players' associations and leagues. H.R. REP. NO. 1786, 94th Cong., 2d Sess. 71 (1977).