PROPOSALS FOR REFORM TO AGENT REGULATIONS

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I. INTRODUCTION

The summer of 2010 showed us there is a major problem in college football. One agent recently acknowledged a history of paying college football players. In June 2010, the National Collegiate Athletic Association (NCAA) punished the University of Southern California (USC) by giving the university a two-year bowl ban, placing it on probation for four years, reducing the number of scholarships it can award to student-athletes, and making the university forfeit an entire season of games. The NCAA took these actions after determining 2005 Heisman Trophy-winner Reggie Bush received improper benefits during his tenure as a member of the USC football team and the university did not exercise the appropriate institutional controls on its athletes. Shortly after the NCAA announced sanctions against USC, the University of Florida launched an internal investigation of a claim that former All-American center Maurkice Pouncey took $100,000 from an NFL agent’s associate before one of the school’s bowl games. The University of Alabama began investigations to determine whether defensive end Marcell Dareus attended an agent’s party at South Beach in Miami, and the University of South Carolina similarly began investigations regarding “whether tight end Weslye Saunders was also in attendance” at that same South Beach party. The University of North Carolina has also been mired in controversy that has led to the resignation of one of the university’s football coaches. These universities have an interest in determining whether their student-athletes have

3. See Beacham, supra note 2.
5. Id.
engaged in inappropriate behavior because if the student-athletes have engaged in wrongdoing, the universities may be punished by the NCAA if they do not take appropriate actions against the student-athletes.

There are many differences in opinion about who is to blame for this problem in college football. Some say the responsibility falls on the players. Some say the blame should be placed on the football coaches who employ a “win-at-all-costs attitude” that disregards players, places the coaches’ careers above the futures of their respective universities, and exposes the universities to sanctions. Some blame the agents. Some say the National Football League Players Association (NFLPA), the union that regulates agents, should both enact and enforce tougher regulations against agents. Some blame the NCAA. Others blame the states for not enacting tougher legislation, while also imposing burdensome fees on aspiring agents. Although many disagree about who is to blame, the parties agree there is a problem that needs to be solved.

This Article proposes amendments to the regulations governing interactions between college football players and sports agents. Part II discusses the parties involved in the matter. Part III surveys the current

10. See English, supra note 4.
12. See generally Sudia & Remis, supra note 11, at 80–91 (explaining deficiencies in state laws); see also Lloyd Zane Remick & Christopher Joseph Cabott, Keeping Out the Little Guy: An Older Contract Advisor’s Concern, a Younger Contract Advisor’s Lament, 12 VILL. SPORTS & ENT. L.J. 1, 2–3, 13–16 (2005) (detailing the burdens of multiple fees on agents at the start of their careers).
regulations that impact college football. Part IV provides proposals for change to the current regulations.

II. THE PARTIES

A. The Student-Athlete

The NCAA defines a student-athlete as: “a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student’s ultimate participation in the intercollegiate athletics program.”13 Other students, presumably uninvited walk-ons, become student-athletes “only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department.”14

In most cases, a student-athlete’s prowess on the football field is discovered during high school.15 To induce the student-athlete to play football, the university will offer a scholarship to the student-athlete. Most student-athletes deemed talented enough to play at the collegiate level will play at one of the schools offering him or her a scholarship. Many student-athletes accept scholarship offers to obtain an education while continuing to play football. There are others, however, who accept scholarship offers because of the practical reality that attending college to play football is necessary in order to have an opportunity to play professional football. When Deion Sanders was asked whether he wanted to be in college, he allegedly stated, “No, but I have to be.”16 If a student-athlete accepts a university’s scholarship offer—typically by signing a National Letter of Intent, a Financial Aid Agreement, and a Student-Athlete Statement—a contractual relationship will likely be formed between the student-athlete and university, whereby the student-athlete will represent the university as a member of its football team.17 The “athletic scholarship”—called a ‘grant-

14. Id.
17. See Timothy Davis, An Absence of Good Faith: Defining a University’s
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in-aid’ by the NCAA—can pay for tuition, room, board and required books.”18 “Not covered are incidentals, transportation, supplementary books and other expenses . . . .”19 The student-athlete is left to raise those funds on his or her own, and that can be a difficult task for many student-athletes who come from families with low incomes.

As part of his or her commitment to “the program”—as many coaches, student-athletes, and administrators refer to the college football team20—the student-athlete undertakes a demanding schedule.21 During the football season, the student-athlete’s typical day may involve waking up early enough to eat and attend classes from 8:00 a.m. to 12:30 p.m. He or she will then sneak in a quick meal before squeezing in an early afternoon class prior to attending team meetings and practices from 2:00 p.m. to 5:30 p.m. After practice, the student-athlete works out in the weight room, eats dinner, and studies. One student-athlete’s off-season day started as early as 5:00 a.m. and concluded in the early evening.22 Schedules like these provide very little free time for anything else.

If the student-athlete excels at football on the collegiate level, one of the teams in the National Football League (NFL) may offer the student-athlete an opportunity to play professional football. The student-athlete will typically hire an agent to negotiate the contract the player will sign with the NFL team.23

Educational Obligation to Student-Athletes, 28 Hous. L. Rev. 743, 770–71 (1991) (citations omitted) (stating the student-athlete promises to participate in athletics at the school and the university promises financial assistance through an athletic scholarship); Stangel, supra note 8, at 143 (citing Michael J. Cozzillio, The Athletic Scholarship and the National Letter of Intent: A Contract by Any Other Name, 35 Wayne L. Rev. 1275, 1290–91 (1989)).

19. Id.
20. See Ivan Maisel, The Maisel Report: College Football’s Most Overrated and Underrated Players, Coaches, Teams, and Traditions 1 (2008) (“‘Program’ is a buzzword, coachspeak that sunk its roots into the sports pages decades ago and will never leave as long as there’s a college football arms race.”).
B. The Agent

*Black’s Law Dictionary* defines an agent as: “One who is authorized to act for or in place of another . . . .”24 An agent is known by a number of different names in the context of sports, such as: “[S]ports agent, attorney-agent, athlete representative, athlete agent, player representative, student-athlete advisor, or player agent.”25 An agent’s function at one time was simply to negotiate player contracts for athletes, but now agents are performing a variety of functions, such as “financial management and accounting, public relations, investment, tax and estate planning and legal counseling.”26 Some agents are part of large companies that have offices in many nations and represent clients around the world.27 Other agents have a handful of employees and operate their businesses out of their homes.28 Both structures have their advantages, but there is no one structure that guarantees success.

The agent–athlete relationship is established at varying stages in the athlete’s career. In some cases, the agent recruits the athlete while the athlete is in high school or college,29 while in other cases, the agent recruits the athlete during the athlete’s tenure as a professional football player. Alternatively, the athlete may reach out to the agent after hearing about the agent’s skills from the athlete’s friends.

When the agent is recruiting the athlete, he or she will usually initiate contact through letters, cards, or brochures,30 and may include similar electronic communication through e-mails, Facebook invites, MySpace invites, or LinkedIn invites. The agent will reach out to not only the athlete, but, if necessary, to the athlete’s family, friends, coaches, resident-
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hall advisor, and classmates. The agent’s ultimate goal is to obtain a meeting with the athlete and convince him or her to sign a representation agreement.

Competition among agents for a meeting with the student-athlete is fierce. Part of the reason for the intense competition is many agents—over 750 in 2008—are pursuing a limited number of players. Another reason is the NFLPA now requires that all applicants for its certified contract-advisor examination, with some exceptions, possess a post-graduate degree. This regulation results in greater difficulty for agents to distinguish themselves through academic credentials. Moreover, even for those agents who manage to distinguish themselves in other ways, the available agent commission is lower than it was in the early 1990s.

An additional reason for the competitive environment is the student-athlete’s method of choosing his or her representative. Because there are so many agents from which the student-athlete can choose, one of the first questions a student-athlete will ask when evaluating an agent is, “Who else do you represent?” The student-athlete will typically eliminate from consideration those agents who have never represented a professional football player.

The competitive environment among the agents often leads to unethical behavior, such as providing prohibited benefits to student-athletes or possibly their friends and family members.

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31. Id.
34. Compare Mike Freeman, Players and Agents Fight over the N.F.L.’s Spoils, N.Y. TIMES, Apr. 16, 1998, http://query.nytimes.com/gst/fullpage.html?res=9C03E4D7173CF935A25757C0A96E958260&sec=&spon=&pagewanted=all (stating the maximum commission was five percent in the early 1990s), with NFL PLAYERS ASS’N, supra note 33, § 4(B)(1), at 12 (noting, as of 2007, three percent is the maximum fee a contract advisor can charge).
35. SHROPSHIRE, supra note 23, at 13.
36. Id.
37. See id.
38. See, e.g., id. at 14–15 (citation omitted) (noting part of the “common practice” of “lending” money and giving other benefits to college athletes).
C. The University

Universities field athletic teams for a range of reasons. At least one university administrator believes high-visibility athletic programs add value to a university education and may increase the university’s academic reputation. Some believe fielding successful athletic programs will bring about an increase in the university’s popularity and an increase in applications, allowing admissions officers to be more selective about who they admit. Some universities field football teams because they believe the teams are revenue generators, providing the income necessary to help pay for other athletic programs and institutional fiscal concerns. Because it is subject to a wide range of NCAA sanctions, a university fielding a football team as a means of generating revenue can quickly be placed in financial peril when its student-athletes knowingly or willfully violate NCAA rules and regulations. Sanctions may be particularly harsh when the NCAA believes the university turned a blind eye to the student-athletes’ conduct or did not exercise the proper controls to prevent the conduct from occurring. At the same time, when a university and its student-athletes are able to avoid rules violations and field a successful program, the payout can be impressive. Consider, for example, that over fifteen years ago a game between Michigan and Penn State could bring in more than $2 million in gate receipts. Consider also the payments made to several universities selected to appear in bowl games in 2009:

41. See, e.g., Anthony Schoettle, IU Football Gains Ground as Sports Program Nears Financial Crossroads, IBJ.com (Sept. 4, 2010), http://www.ibj.com/iu-football-gains-ground-as-sports-program-nears-financial-crossroads/PARAMS/article/22077 (“[Athletic Director Fred] Glass is promising significant attendance increases and a continued rebirth of the football program that he believes will lead to critical fiscal gains for the school and its athletic department.”).
BIG TEN
Bowl: School—Payout
Rose: Ohio State—$18.3M
Orange: Iowa—$4.5M
Capital One: Penn State—$4.5M
Outback: Northwestern—$3.3M
Alamo: Michigan State—$2.25M
Champs Sports: Wisconsin—$2.25M
Insight: Minnesota—$1.35M

BIG EAST
Sugar: Cincinnati—$18M
Gator: West Virginia—$2.75M
Meineke: Pittsburgh—$1M
PapaJohns.com: Connecticut—$300,000
St. Petersburg: Rutgers—$1M
International: South Florida—$750,00043

It is important to note the payouts for the bowl games are split among members of the universities’ conference.44

D. The NCAA

The NCAA is an association of 1,291 active, provisional, conference, and affiliated members in the United States and Canada.45 The

44. See id.
45. NCAA, 2008–09 NCAA MEMBERSHIP REPORT 3–6 (2009), available at
organization’s “core purpose is to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”46 In addition, the NCAA is concerned with maintaining its principle of amateurism and protecting student-athletes “from exploitation by professional and commercial enterprises.”47

The NCAA’s legislative structure consists of various cabinets and governing committees.48 Its Leadership and Legislative Councils, which include representatives from the member schools, oversee the cabinets and committees.49 Legislation proposed by the Legislative Council must ultimately be approved by the NCAA’s Board of Directors, which consists of school presidents and chancellors.50 The NCAA is not the only collegiate association in the United States.51 However, it is the most prominent.

E. The NFLPA

The National Football League Players Association is the union for players in the NFL.52 The NFLPA is authorized to engage in contract negotiations with NFL teams for NFLPA members.53 However, due to the NFLPA’s small staff and its members’ preference for using their own personal representatives, the NFLPA permits other persons to negotiate contracts for its members. To serve that purpose, the NFLPA certifies “contract advisors,” who are the only people permitted to negotiate with an NFL team on behalf of a player.54 The NFLPA also certifies “financial advisors,” who are the only individuals to whom a certified contract advisor may recommend players seeking financial advice.55 To be clear, a person

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47. Id. § 2.9, at 4.
48. Id. §§ 4.01–.9, at 19–27.
49. See id. fig. 4–1, at 28.
50. See id. §§ 4.2.1, 4.2.2, 4.6.2, at 23–24, 26.
52. See NFL PLAYERS ASS’N, NFL PLAYERS ASSOCIATION CONSTITUTION pmbl., §§ 1.01–.03 (2007), available at http://www.nflplayers.com/About-us/ (follow “Click here to access the NFLPA Constitution” hyperlink).
53. Id. § 1.03.
54. See NFL PLAYERS ASS’N, supra note 33, § 1(A), at 3.
55. Id. § 3(B)(24), at 10.
may be an agent, but an agent cannot negotiate a contract for a player with an NFL team unless that agent is also a certified contract advisor.\textsuperscript{56} A person can be a certified contract advisor, but that person cannot provide financial advice to a player unless that person is also a certified financial advisor.\textsuperscript{57}

**F. State and Federal Government**

The state has an interest in the success of its collegiate athletic programs. Both state and federal government legislators have an interest in protecting their citizens. Among the state’s citizens are its universities’ students, coaches, and faculty, all of whom would feel the negative impact of NCAA sanctions. The state may also be concerned its state-supported institutions will lose operating revenue because of NCAA sanctions, with taxpayers ultimately footing the bill through increased state taxes. Many state legislators believe agents engage in unscrupulous conduct that impacts state interests.\textsuperscript{58} Consequently, the state legislatures look for ways to ensure agents will not engage in behavior that will bring unwanted attention from the NCAA.

**G. Others**

The head football coach plays an important role in any football program. The head coach and staff recruit student-athletes, instruct those athletes, organize practices, work with the athletic director to schedule games, and raise funds for the program’s support.\textsuperscript{59} In many ways, the head coach sets the tone for the program.

The head football coach and his staff are in a difficult position.\textsuperscript{60} The coaches at the larger schools are well-paid and have an interest in

\textsuperscript{56} Id. § 1(A), at 3.
\textsuperscript{57} Id. § 3(B)(24), at 10.
\textsuperscript{58} See Sudia & Remis, supra note 11, at 70 (citing FLA. STAT. § 468.451 (2000)).
maintaining their employment at the university. 61 Moreover, the coaches work with the student-athletes every day and often communicate with them about matters unrelated to football, such as the student-athletes’ financial issues. 62 Finally, the coaches stand in a delicate balance between participant and administrator. In some ways they are on the side of the university—as a representative and an employee of the university—yet in other ways they are on the side of the players, trying to get the players more benefits, searching for loopholes by which to do this legally, or at least discreetly and quietly. 63

Boosters and booster clubs also play an important role. A booster club is an organization formed to contribute money to another organization. 64 A booster is generally a member of a booster club; however, the term could be applied to someone who is not part of a club but nonetheless contributes to the athletic program. 65 It has been said that “[i]n college football, the most indispensable players are not necessarily star quarterbacks.” 66 “Sometimes they’re the overeager alumni who write big checks and weigh in from the sidelines.” 67

Agents’ runners play an important role worth discussing. William “Tank” Black, a once-prominent sports agent, explained the runner’s role as follows:

Runners do the legwork for agents, going to college towns, picking up gossip, getting to know the hot players, and trying to influence who they sign with. Some runners are bona fide employees of agents, paying their dues until they can become licensed agents themselves.

Others . . . get a finder’s fee if a match is made. 68

61. Id.
62. See id.
63. Id.
65. See NCAA, supra note 13, § 6.4, at 46.
67. Id.
If an agent’s runner is successful at his or her job, it is much easier for the agent to recruit the student-athlete.

III. THE CURRENT REGULATIONS

This section provides information about the current rules promulgated by the governing bodies that regulate the relationships between agents and student-athletes. This section also provides analysis of those rules. The applicable governing bodies include the NCAA, the NFLPA, state legislatures, and the United States Congress.

A. NCAA Regulations

The NCAA has been creating and reforming regulations in collegiate athletics since the early 1930s. The NCAA provides that an individual loses his or her amateur status, and therefore is not eligible to compete in intercollegiate athletics, if that individual “[a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation.”

NCAA Bylaw 12.3.1 provides an individual may not agree, verbally or in writing, to be represented by an athlete-agent now or in the future for the purpose of marketing the student-athlete’s ability or reputation. If the student-athlete enters into such an agreement, the student-athlete is ineligible to participate in intercollegiate competition. Also, a student-athlete may not accept transportation or other benefits from an athlete-agent. This prohibition applies to the student-athlete and his or her relatives or friends.

A student-athlete is not subject to sanctions for merely talking to an agent or socializing with one, “as long as an agreement for agent


71. NCAA, supra note 13, § 12.3.1, at 73. “An individual, for purposes of this bylaw, is any person of any age without reference to enrollment in an educational institution or status as a student-athlete.” Id. § 12.02.1, at 65.

72. Id. § 12.3.1, at 73.

73. Id. § 12.3.1.2, at 73.

74. Id.
representation is not established.” 75 The NCAA gives an example: “[A] student-athlete could go to dinner with an agent and no NCAA violations would result if the student-athlete provided his own transportation and paid for his meal.” 76

The NCAA permits universities to create a professional sports counseling panel to perform any of the following tasks:

(a) Advise a student-athlete about a future professional career;

. . . .

(c) Review a proposed professional sports contract;

(d) Meet with the student-athlete and representatives of professional teams;

(e) Communicate directly . . . with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete;

(f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete and by having direct communication with those individuals who can comment about the abilities of an agent . . . ; and

(g) Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value . . . . 77

The panel membership “shall consist of at least three persons appointed by the institution’s president or chancellor (or his or her designated representative from outside the athletics department).” 78 No more than one panel member is permitted to be an athletics department staff member, and the majority of panel members “shall be full-time

76. Id.
77. NCAA, supra note 13, § 12.3.4, at 74.
78. Id. § 12.3.4.1, at 74.
employees outside of the institution’s athletics department.”

The NCAA regulations have a couple of positive aspects to them. First, NCAA rules do not prohibit communication between an agent and an athlete. Communication between the agent and the student-athlete is important because both parties need to determine whether they are an appropriate match for each other. The NCAA rules seem to permit this necessary communication. Second, although the restriction on agents providing benefits to athletes who meet with them is difficult for the NCAA to enforce, it is fair. The restriction helps level the playing field in the early stages of the relationship between the athlete and the prospective agents. But for this rule, the agent with the largest budget for “wining and dining” athletes would be at a tremendous advantage over other agents who might be a better fit but cannot afford to have an initial conversation with the athlete.

Unfortunately, the current NCAA regulations are insufficient in a few important ways. The NCAA cannot easily enforce a regulation restricting agents from providing benefits to student-athletes who meet with them because the wrongdoers have incentives not to talk about the prohibited acts—athletes want to avoid NCAA sanctions and agents want to avoid sanctions from the NFLPA and potential civil or criminal liability. The agent might also wish to avoid developing a reputation among the players as someone who pays student-athletes, as such a reputation can be financially costly. The bottom line is that both parties are likely to withhold information long enough for the student-athlete to exhaust his eligibility.

Some agents do not believe they are even bound by the NCAA rules. Mike Trope, a good example of a very successful agent in the 1970s, “made it clear that he did not consider the rules of the NCAA to

79. Id. § 12.3.4.2, at 74.
80. Id.
81. See id. § 12.3, at 73–74; see also Overview of NCAA Bylaws Governing Athlete Agents, supra note 75 (discussing permissible and impermissible interactions between agents and student-athletes).
82. NCAA, supra note 13, § 19.5, at 322–25.
83. See NFL PLAYERS ASS’N, supra note 33, § 6(D), at 17; Dohrmann, supra note 1 (discussing penalties he was subject to for violating NFLPA rules).
84. See Dohrmann, supra note 1.
85. See, e.g., id.
be the law of the land.” 86 When Mike Luchs, a prominent agent who made prohibited payments to student-athletes, asked Harold (Doc) Daniels, his mentor, about “[t]he lunches, the money each month, the bail, the concert tickets” they were giving to players in violations of the NCAA regulations, Daniels allegedly stated, “‘We ain’t members of the NCAA.’” 87 “We didn’t agree to follow these rules.” 88 Attitudes like these among agents increase the likelihood agents will continue to provide prohibited benefits.

Another problem with the NCAA regulations is articulated by Mike Slive, Commissioner for the Southeastern Conference: “‘NCAA rules make it difficult for student-athletes to seek and obtain the kind of advice in the context in which they need it to properly evaluate potential opportunities for a career in professional sports.’” 89 It is easy to see why he would make such a comment. Imagine the student-athlete who has completed his junior year of eligibility and is considering whether to declare himself eligible for the NFL College Draft. Who does he consult as he makes his decision? His coach has a vested interest in seeing him return for his final year of eligibility. The university’s professional sports panel has members of the university’s staff on it, one of whom may be a member of the athletic department’s staff. Such a panel has an incentive to recommend the athlete return to school for another year. Moreover, none of the people on the panel are likely to know the NFL market as well as two groups of people who are not going to be on the panel—agents and NFL team executives. A student-athlete making decisions under those circumstances is at a significant disadvantage. Part IV of this Article proposes solutions to the shortcomings present in the current NCAA bylaws.

B. Union Regulations

NFLPA regulations provide: “Contract Advisors are prohibited from . . . [p]roviding or offering money or any other thing of value to any player

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87. Dohrmann, supra note 1.
88. Id.
89. See Carey, supra note 7.
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or prospective player to induce or encourage that player to utilize his/her services.”90 Agents are also prohibited from “[p]roviding or offering money or any other thing of value to a member of the player’s or prospective player’s family or any other person for the purpose of inducing or encouraging that person to recommend the services of the Contract Advisor.”91 The players union also prohibits agents from providing players or prospective players “materially false or misleading information . . . in the context of recruiting the player as a client or in the course of representing that player as his Contract Advisor.”92 NFLPA regulations also prohibit agents from taking part in “unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other activity which reflects adversely on his/her fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players.”93

Under NFLPA regulations, an agent is barred from:

Communicating either directly or indirectly with . . . a prospective player who is ineligible for the NFL Draft pursuant to Article XVI of the CBA or communicating with . . . any person in a position to influence a prospective player who is ineligible to be drafted pursuant to article XVI of the CBA until the prospective player becomes eligible for the NFL Draft.94

Article XVI, Section 2(b) of the NFL–NFLPA Collective Bargaining Agreement declares a player ineligible “until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.”95 Note that agents are not prohibited “from sending any prospective player or prospective player’s parents, relatives or legal guardian(s) written materials which may be reasonably interpreted as advertising directed at players in general and not targeted at a specific player.”96

An agent who violates these rules, will be subject to discipline under

90. NFL PLAYERS ASS’N, supra note 33, § 3(B)(2), at 8.
91. Id. § 3(B)(3), at 8.
92. Id. § 3(B)(4), at 8.
93. Id. § 3(B)(14), at 9.
94. Id. § 3(B)(30)(a), at 11.
96. NFL PLAYERS ASS’N, supra note 33, § 3(B)(30)(c), at 11.
section 6 of the NFLPA Regulations.97 For example, the NFLPA fined
NFLPA contract advisor Marlon Sullivan $10,000 and suspended him for
six months “for improperly supervising a person he had hired to recruit for
him.”98 Sullivan’s recruiter gave money to a potential signee to encourage
him to sign with Sullivan.99

If an agent is a contract advisor who abides by the rules provided
above, but nevertheless fails for a three-year period to recruit a player who
makes it to an NFL team’s active roster, Section 2(G) of the NFLPA
Regulations provide the agent’s certification “shall automatically expire at
the end of such three-year period.”100

The current NFLPA contract-advisor regulations are flawed in a
number of respects. Section 2(G) increases the likelihood agents will act
unethically. For example, if an agent takes the Agent Certification
Examination in July or August 2011, he or she will not become eligible to
recruit student-athletes until written certification is received in September
2011.101 At that point, the clock starts ticking, and the agent has three years
to recruit a player who makes an NFL team’s active roster.102 Yet, the 2012
draft—the culmination of Year One—is unlikely to be fruitful for the agent
because the agent did not have the summer of 2011 to make his initial
contacts with student-athletes. Instead, at the moment the agent receives
word of passing the exam, the student-athlete has started school and is least
able to meet the agent. The agent is placed in a situation in which he or
she must think of ways to get the athlete’s attention. When some agents
are placed in such situations, their response is to violate the rules in an
effort to gain an audience with the players.

Moreover, section 2(G) leads to another common, arguably unethical,
practice that occurs among agents within sports-representation firms
containing more than one agent. In some instances, one agent will recruit a
player who makes an NFL team’s active roster. When the agent finishes
negotiating the contract with the team, the agent will list the agent’s name

97. Id. § 6, at 15–18.
98. NFL PLAYERS ASS’N, NFLPA Disciplines a Contract Advisor for
Violations, NFL PLAYERS ASSOC. (Oct. 12, 2010), http://www.nflplayers.com/Articles
/Public-News/NFLPA-Disciplines-a-Contract-Advisor-for-Violations/.
99. Id.
100. NFL PLAYERS ASS’N, supra note 33, § 2(G), at 5.
101. See id. § 2(F), at 5 (providing certification is not effective until a written
document is received after an applicant has passed a written examination and attended
the NFLPA seminar).
102. Id. § 2(G), at 5.
on a contract and the name of a second agent—a “co-agent.” The agent will list the co-agent’s name so that co-agent can maintain his or her certifications, which might otherwise expire because of the NFLPA’s three-year rule. This practice is misleading because it gives the false impression the co-agent is representing the student-athlete. The co-agent’s chances of success in the industry increase because, when the co-agent goes out on the recruiting trail, he or she can claim to represent the student-athlete. In essence, the co-agent is able to claim his or her colleague’s success as his or her own. Meanwhile, the agent who works for himself or herself is forced to compete against two agents—rather than one—that appear more successful than himself or herself. Such circumstances increase the likelihood the agent who works for himself or herself will seek a competitive advantage that is not ethical.

In addition, there is a feeling among agents that the NFLPA is not enforcing its current rules. That feeling among agents leads some agents to believe they must break the rules to remain competitive. For example, Octagon, a sports-representation firm, made headlines a few years ago when it began promising recruits they would “receive an expense-paid trip to the Super Bowl if they sign[ed] with [Octagon].” It can be argued this kind of promise constitutes an inducement, but the NFLPA was not ready to agree with that view. Indeed, when asked about the Super Bowl ticket giveaway, NFLPA general counsel Richard Berthelsen stated the union’s disciplinary council would need to review the matter. Berthelsen’s response could be interpreted as a signal the NFLPA was not going to prohibit Octagon’s marketing activities. Mike Sullivan, Octagon’s director of football operations, made matters more frustrating for his competitors when he stated, “We are just doing what other agents have done for years, and if it’s a problem for us, it’s a problem for everybody.” One legendary agent, Gene Burrough, agreed with Mr. Sullivan. Mr. Burrough, when asked about this issue during an interview for this Article, said it was good practice and done everyday.


105. Id.

106. Id.

Another problem with the current regulations is that the NFLPA’s rules apply to certified contract advisors but not to agents who serve functions unconnected to contract negotiations. Consequently, an agent can recruit a student-athlete for the purpose of providing marketing services to the student-athlete without the agent’s activities becoming subject to NFLPA regulations.

C. State Regulations

1. Common Law

Three common law theories may be applicable in the context of the relationship between sports agents and athletes. The first theory arises when an agent engages in conduct that constitutes negligence. The second theory arises when the agent engages in conduct that constitutes tortious interference with contract. The third theory arises when student-athletes engage in conduct that constitutes breach of contract.

A student-athlete may have a cause of action against an agent for negligence when the student-athlete violates NCAA rules on the advice of an agent. In some states, the elements of a negligence cause of action are as follows: (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, and (3) the breach was a proximate cause of the plaintiff’s personal injury or property damages. One could argue a sports agent, placed in a fiduciary position by the student-athlete who hired him or her, caused injury to the student-athlete by not acting with the degree of care he or she should have under the circumstances. A professional sports agent is presumed to know the NCAA regulations. The agent is also presumed to know what actions constitute a violation of NCAA regulations and can bring about the student-athlete’s immediate or retroactive ineligibility.

One defense to negligence claims is comparative or contributory negligence on the part of the student-athlete. In some states, the plaintiff is barred from recovery when the plaintiff’s fault is higher than that of the defendant. A defendant-agent sued by his or her client can argue NCAA

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108. NFL PLAYERS ASS’N, supra note 33, 1–2 (noting the regulations cover only “the conduct of agents who represent players in individual contract negotiations”).


110. See, e.g., IND. CODE ANN. § 34-51-2-6(a) (LexisNexis 2008 & Supp. 2010) (stating “the claimant is barred from recovery if the claimant’s contributory fault is
student-athletes are expected to know and abide by all relevant NCAA regulations. Most universities educate their student-athletes about agents and discourage them from signing contracts with agents while they have eligibility remaining. Thus, the agent can argue the student-athlete contributed to whatever fate befell him or her.

A university may have a cause of action against an agent for tortious interference with contract. In some states, the elements of a claim of tortious interference with a contract are as follows: (1) there exists a contract that is subject to interference, (2) there is a willful and intentional act of interference by the defendant, (3) the defendant’s intentional act of interference was a proximate cause of actual damages to the plaintiff, and (4) the plaintiff suffered actual damage or loss. The university can demonstrate there is a contractual relationship between the student-athlete and the educational institution. The agent knows about the existence of this contract. The agent likely also knows student-athletes must abide by all relevant NCAA regulations. If, because of the agent’s actions, the NCAA declares the student-athlete ineligible, forces the university to forfeit games, or does both, the university can argue it has been damaged by the agent.114

The university may have a cause of action against its student-athlete for breach of contract. The elements of breach of contract are: “(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.” The student-athlete and the university have a contractual relationship. The university can

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111. See, e.g., Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991) (citing Juliette Fowler Homes v. Welch Assoecs., 793 S.W.2d 660, 664 (Tex. 1990)).

112. WILLIAM A. KAPLIN & BARBARA A. LEE, A LEGAL GUIDE FOR STUDENT AFFAIRS PROFESSIONALS 432 (1997) (“An athletic scholarship will usually be treated in the courts as a contract between the institution and the student.”).

113. See NCAA, supra note 13, § 14.01.1, at 145 (requiring student-athletes meet eligibility requirements).

114. See id. § 19.5, at 322–25 (detailing penalties to institutions, such as forfeiting contests).


116. KAPLIN & LEE, supra note 112, at 432.
argue the student-athlete breaches the contract by engaging in conduct that causes the NCAA to declare him or her ineligible. If the university is forced to forfeit games or is placed on probation, it may file suit and attempt to prove it has been damaged and is entitled to compensation.

2. Uniform Athlete Agents Act

When the Uniform Athlete Agents Act (UAAA) was enacted in 2000, “at least twenty-eight States [had] enacted legislation regulating athlete or sports agents.” The statutes differed greatly with regard to registration procedures, registration requirements, and disclosures. There were also differences relating to registration terms, record maintenance, reporting, notice, renewal, warning, and security. This lack of uniformity led the NCAA and some universities to call upon the National Conference of Commissioners on Uniform State Law to draft a uniform law—the Uniform Athlete Agents Act. The Act regulates the relationships among student-athletes, athlete-agents, and educational institutions, and it regulates the activities of athlete-agents in order to protect the interests of student-athletes and academic institutions. According to the NCAA, forty states, the District of Columbia, and the United States Virgin Islands have adopted the UAAA—either in its entirety or with slightly altered provisions—as a means of regulating agents’ conduct. In addition, California, Michigan, and Ohio each have

118. See id.
119. Id.
120. Id.
121. See id.
non-UAAA laws that regulate athlete agents. What follows is a
discussion of pertinent provisions within the UAAA.

The UAAA provides important definitions. The UAAA uses the
term “athlete agent” and says the term applies to “an individual who enters
into an agency contract with a student-athlete or, directly or indirectly,
recruits or solicits a student-athlete to enter into an agency contract.”
“The term includes an individual who represents to the public that the
individual is an athlete agent.” The term is not applicable to “a spouse,
parent, sibling, or grandparent of the student-athlete or an
individual acting solely on behalf of a professional sports team or
professional sports organization.” The UAAA states a student-athlete is
“an individual who engages in, is eligible to engage in, or may be eligible in
the future to engage in, any intercollegiate sport.” “If an individual is
permanently ineligible to participate in a particular intercollegiate sport,
the individual is not a student-athlete for purposes of that sport.”

The UAAA requires agents to register. Under the UAAA:

(a) . . . [A]n individual may not act as an athlete agent in this
State without holding a certificate of registration . . .

01–9-15.1-16 (2006); Ohio Rev. Code Ann. §§ 4771.01–4771.99 (LexisNexis 2006);
2010).

123. Id.
125. Id.
126. Id. (alterations in original).
127. Id. § 2(12).
128. Id.
(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract, if:

1. a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and

2. within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) An agency contract resulting from conduct in violation of this section is void and the athlete agent shall return any consideration received under the contract.

The UAAA requires that agents provide student-athletes with an ineligibility warning near the signature line of each agency contract. The agent and the student-athlete must inform the university’s athletic director of the existence of a contract within seventy-two hours of signing or prior to “the next scheduled athletic event in which the student-athlete may participate.” The UAAA also permits the student-athlete to cancel the contract within fourteen days of executing it.

The UAAA adds punishment provisions not present in the common law. For example, the UAAA permits the secretary of state to “assess a civil penalty against an athlete agent” who violates the Act. The Act provides some protection to universities by allowing them to seek civil remedies from both agents and student-athletes if the universities are sanctioned because the agent or athlete engaged in prohibited behavior.

3. **Analysis**

The UAAA ensnares agents unregulated by the NFLPA—those who provide services unrelated to negotiating a contract with an NFL team.

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129. *Id.* § 4.
130. *Id.* § 10(c).
131. *Id.* § 11(a), (b).
132. *Id.* § 12(a).
133. *Id.* § 17.
134. *Id.* § 16.
135. *See id.* §§ 2(2), 4(a) (defining “athlete agent” to include anyone “who enters into an agency contract with a student-athlete” and requiring, with one limited exception, all athlete agents be registered with the state).
The statute also provides avenues for redress not available under the common law.136 Unfortunately, some of the UAAA’s critics argue states rarely enforce the statute’s provisions.137 According to one investigation conducted by the Associated Press, “more than half of the 42 states with sports agent laws have yet to revoke or suspend a single license, or invoke penalties of any sort.”138 Moreover, the UAAA does not provide student-athletes with a right to seek civil remedies from an agent if the agent’s failure to abide by the UAAA causes the student-athlete to be deemed ineligible.139 Finally, the UAAA does not apply to those students who have exhausted their eligibility.140

D. Federal Regulations—Sports Agent Responsibility and Trust Act

The Sports Agent Responsibility and Trust Act (SPARTA) was enacted, under President George W. Bush, on September 24, 2004.141 SPARTA makes it a violation of federal law for athlete-agents to recruit or solicit a student-athlete by “(A) giving any false or misleading information or making a false promise or representation; or (B) providing anything of value to a student athlete or anyone associated with the student athlete before the student athlete enters into an agency contract . . . .”142 The Act also prohibits the predating and postdating of contracts.143 The Act requires the athlete-agent disclose the following to student-athletes or their parents:

“Warning to Student Athlete: If you agree orally or in writing to be represented by an agent now or in the future you may lose your eligibility to compete as a student athlete in your sport. Within 72

136. See id. § 17.
139. UNIF. ATHLETE AGENTS ACT § 16 cmt. (“Section 16 does not specifically authorize an action by a student-athlete against an athlete agent because the student-athlete can bring an action against an athlete agent under existing law.”).
140. See id. § 2(12).
142. Id. § 7802(a)(1)(A)–(B).
143. Id. § 7802(a)(3).
hours after entering into this contract or before the next athletic event in which you are eligible to participate, whichever occurs first, both you and the agent by whom you are agreeing to be represented must notify the athletic director of the educational institution at which you are enrolled, or other individual responsible for athletic programs at such educational institution, that you have entered into an agency contract.”

According to the Act, the agent and the student-athlete must contact the institution’s athletic department within seventy-two hours of entering into a contract or before the student-athlete’s next scheduled athletic event, whichever occurs first.

SPARTA empowers any state attorney general to bring civil suits on behalf of the residents of the state. Damages and compensation from these suits can be obtained by the state on behalf of its residents.

Educational institutions may file suit for damages against agents who violate SPARTA.

Damages . . . are limited to actual losses and expenses incurred because, as a result of the conduct of the athlete agent, the educational institution was injured by a violation of this chapter or was penalized, disqualified, or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference, or by reasonable self-imposed disciplinary action taken to mitigate actions likely to be imposed by such an association or conference.

The Act also empowers the Federal Trade Commission (FTC) to enforce SPARTA. As a result, a sports agent may receive a fine of up to $16,000 for each violation the FTC designates as an unfair or deceptive act or practice.

144. Id. § 7802(b)(3).
145. See id. § 7805(a).
146. Id. § 7804(a)(1).
147. Id. § 7804(a)(1)(C).
148. Id. § 7805(b)(1).
149. Id. § 7805(b)(2).
150. Id. §§ 7801(4), 7803(b).
151. 16 C.F.R. § 1.98(c) (2010). 15 U.S.C. § 7803(a) states a violation of SPARTA “shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under [15 U.S.C. § 57a(a)(1)(B)].” 15 U.S.C. § 7803(a). This section grants the FTC the authority to define which practices are unfair or deceptive.
SPARTA uniformly exposes sports agents throughout the United States to lawsuits. The UAAA is a statute that may be adopted by some states but not by others, and may not necessarily be adopted in its entirety; however, SPARTA is a federal law applicable in all United States states and territories. Moreover, the Act adds a federal agency—the FTC—to whom sports agents may be held accountable for their actions. These provisions are useful and may help regulate agents’ behavior.

However, SPARTA only applies to situations in which the agent is recruiting a student-athlete. Also, SPARTA’s definitions of agents and student-athletes are substantially similar to UAAA’s definitions. Thus, similar to the UAAA, when the student-athlete is no longer a student-athlete, the statute does not provide much protection for him or her. Moreover, the statutes specify those who may file suit against the agent.

In addition, some say the statute is not enforced. The Associated Press reports an FTC spokesman said the FTC “has had ‘very, very few’ complaints and taken no enforcement actions.” Moreover, the FTC “generally focuses on acts and practices that affect a significant number of consumers or signify an emerging trend.” There is a danger the FTC will say the alleged agent actions do not rise to a level that would warrant FTC involvement.

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under § 45(a)(1). Id. § 57a(a)(1)(B). 15 U.S.C. § 45(b) allows the FTC to institute proceedings against those who engage in unfair or deceptive practices, and § 45(l) sets a penalty of $10,000 per violation, which was increased to $16,000 on February 9, 2009. 16 C.F.R. § 1.98(c) (2010).


154. See 15 U.S.C. § 7802(a)(1) (“It is unlawful for an athlete agent to directly or indirectly recruit or solicit a student athlete . . . .” (emphasis added)); see also UNIF. ATHLETE AGENTS ACT § 14(a) (“An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, may not . . . .” (emphasis added)).

155. 15 U.S.C. §§ 7804(a)(1), (d), 7805(b)(1); see also UNIF. ATHLETE AGENTS ACT § 16(a).

156. See Zagier, supra note 138.

E. University Policies

The universities are in a unique position because university administrators are responsible for making sure the university is following NCAA rules. The best way for administrators to do such a thing is to limit their student-athletes’ contact with those who might provide prohibited benefits to the student-athletes. At the same time, the administrators want their student-athletes to have access to those individuals who can best help the student-athletes pursue their opportunities to play in the NFL. Smart administrators recognize that when the athlete launches a successful professional career, the university benefits because potential recruits will likely associate the student-athlete’s success with the university. In the paragraphs that follow, this Article discusses ways a few universities attempt to balance their interests and those of their student-athletes.

Universities use their compliance offices to regulate contact between student-athletes and agents. Administrators at some universities require all contact and meetings between agents and the university’s student-athletes be initiated in accordance with the athletic department’s program. Some universities require agents to provide the university’s compliance office with all the materials they send to the student-athlete.

Universities assert varying degrees of control over an agent’s ability to meet and interview student-athletes. At Notre Dame University and the University of Florida, the university websites list many general regulations but do not direct specific time frames in which agents and

158. NCAA, supra note 13, § 1.3.2, at 1.
student-athletes are allowed to meet. At Indiana University, “meetings must be scheduled through the student-athlete’s Head Coach in conjunction with the Compliance Office[,] and a member of the student-athlete’s coaching staff must be present at all times during any meeting.” At the University of Alabama, the compliance office hosts an Agent Day at which agents have an opportunity to meet student-athletes. At the University of Texas at El Paso (UTEP), the administrators permit agents to meet with student-athletes during a designated window in the spring semester. The University of Texas at Austin provides a similar window for interviews, but it only lasts five days. Texas Christian University (TCU) administrators give the athletic department discretion to host one or more agent days.

At TCU, administrators only permit agents who are registered with the NFLPA and the State of Texas to meet with its athletes, and the agents are only permitted to meet with players who are about to enter their last year of eligibility. Once the university notifies the agent about this meeting period, the agent must inform TCU’s Office of Athletics Compliance of the student-athletes with whom he or she would like to meet. The Office of Athletics Compliance then informs the student-athletes of the agent’s interest. After the student-athlete has selected the agents with whom he or she wishes to interview, TCU’s Office of Athletics Compliance then schedules interviews and supplies the agent and student-athletes with the interview’s date, time, and location.

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165. See UNIV. OF TEX. AT EL PASO COMPLIANCE OFFICE, supra note 159.

166. See UNIV. OF TEX. AT AUSTIN, supra note 161, at 2.


168. Id.

169. Id.

170. See id.

171. Id.
Compliance.\textsuperscript{172}

At TCU, “[a]gents may meet with all seniors at one time or individually.”\textsuperscript{173} The interviews last up to forty-five minutes with individuals and up to an hour with groups.\textsuperscript{174} During the interview, TCU student-athletes may complete questionnaires, but they are instructed not to provide their phone numbers or addresses.\textsuperscript{175} TCU’s website notes an athlete agent cannot make any phone calls to a student-athlete until completion of the student-athlete’s final game, which includes any bowl game of his or her senior year.\textsuperscript{176} An agent would be subject to penalties under the Texas Athlete Agents Act and excluded from future interviews for making telephone calls to a student-athlete at TCU outside the designated interview periods.\textsuperscript{177}

The agent policy at the University of Miami also incorporates a restriction on agent contact prior to the university’s bowl game.\textsuperscript{178} However, Miami goes further by telling student-athletes “to record on a log all agents who attempt to communicate with them.”\textsuperscript{179} “Agents in the State of Florida are prohibited from contacting any student-athlete, unless a student-athlete initiates the contact with the agent and the agent gives prior notice to the University in which the student-athlete is enrolled prior to meeting the student-athlete.”\textsuperscript{180}

In analyzing these policies, it is apparent universities are attempting to find the balance between protecting their interests and providing opportunities for their student-athletes. Their self-imposed policies generally accomplish this goal. However, some university policies place student-athletes at a disadvantage because the policies force the student-athletes to decide on their professional representation in a short period of time—the period from the last game to the NFL College Draft. Some believe this is too short a window for a student-athlete to make a decision, especially when the student-athlete is suddenly approached by numerous,

\begin{flushleft}
\textsuperscript{172} Id. \\
\textsuperscript{173} Id. \\
\textsuperscript{174} Id. \\
\textsuperscript{175} Id. \\
\textsuperscript{176} Id. \\
\textsuperscript{177} See id. \\
\textsuperscript{178} Letter from David Reed, Assistant Athletic Dir. for Compliance, Univ. of Miami, to Sports Agents (2007), \textit{available at} http://grfx.cstv.com/photos/schools/miff/gerel/auto_pdf/07agentpolicyinfo.pdf. \\
\textsuperscript{179} Id. \\
\textsuperscript{180} Id.
\end{flushleft}
sophisticated agents.

IV. PROPOSALS

A. The NCAA

The NCAA should permit a student-athlete playing football to work up to five hours per week during the regular season and ten hours per week during the spring semester. The NCAA can bring about this change in one of two ways: it can either restrict the number of hours the athlete is required to practice, or it can require the university to provide a job for the student-athlete that does not interfere with the football team’s schedule and the student’s studies.

If the university provides the job, it should pay the student-athletes no more than twice the federal minimum wage, or twice the state minimum wage if the latter is higher. If this proposal were enacted, universities would likely choose to provide jobs for the student-athletes rather than limit the number of hours the players practice. Smart coaches would adapt to the new rule. Within one year of the rule’s enactment, football players would be receiving from $14.50 to $17.34 per hour for jobs that involve reviewing game tapes and submitting reports about opposing teams.181

A scenario such as the one described above is a win–win for all involved because it puts money in players’ pockets without requiring them to take time from their academic studies or do more football-related work than they are already doing. Moreover, it allows coaches to become more confident about the players’ preparation for upcoming games. The limit on wages also prevents coaches from exploiting the system. Otherwise, a coach might decide to pay the starting quarterback $50.00 per hour to do the same job he pays the backup long snapper $7.25 per hour to do.

The wage limit also diminishes the effectiveness of the critics’ argument that this proposal offends the spirit of amateurism. Indeed, it is unlikely rational individuals would conclude that a player who makes between $72.50 and $86.70 per week for watching game film—or doing some other menial football-related task—is not truly an amateur.

The NCAA should permit member schools to establish a “Contingency Fund” from which a coach or athletic director may withdraw funds and award grants to players based on financial need and academic merit. Under this proposal, schools would be permitted to distribute a dollar amount equal to the maximum value of any undergraduate academic scholarship advertised by an NCAA school during the previous year. A student-athlete would be permitted to apply for a grant of up to the difference between the maximum scholarship and that athlete’s award. The coach or athletic director would have the discretion to award the grant or reject the student-athlete’s application. Under this method, the university’s decision to grant or reject the student-athlete’s proposal would be an open record. The student-athlete would have to state the purpose for which he or she is requesting the money. Further, the university would have to provide documentation of the financial awards given to the student-athletes and the reasons the awards were given.

An example helps illustrate the proposal described above. Imagine that Indiana University (IU) elects to establish a Contingency Fund. Suppose that on December 31, 2010, the most generous scholarship available to students is that provided by Vanderbilt University and is valued at $56,634. That amount would be the maximum IU could provide to members of its 2011 incoming freshman class during the 2011 to 2012 school year. If John Doe, IU’s freshman punter, submits an application requesting a grant so he can attend a funeral in another state and he has not yet received $56,634 in aid, IU’s coach has the discretion to provide the funds necessary for John Doe’s travel expenses. If Dan Doe, IU’s freshman quarterback, submits an application requesting a grant to replenish his wardrobe, IU’s coach has the discretion to provide funds to Dan, as well. In both cases, however, the application and the decision are available for public review. Such transparency helps to ensure the athlete does not take from the fund—and thus his teammates—for reasons that would not withstand scrutiny. This kind of transparency would also help to ensure the coach is not secretly awarding grants to his or her star players and denying grants to less important players.

The Contingency Fund is a sound proposal because it helps limit the ability of agents to take advantage of a student-athlete’s financial circumstances when the agent is recruiting him or her. The fund also helps

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the football coach “make good” on a promise he or she almost certainly made to the student-athlete—to “look out” for him or her. The fund should also help open communications between the university and the student-athlete because the student-athlete would have to communicate his or her problems to the university administrator—via the application—in order to obtain the money. This communication would be useful to the university, even if its administrators reject the student-athlete’s application, because it would give administrators notice the student-athlete may soon become a target for agents. Finally, if the university administrators choose to raise money for the Contingency Fund through the university’s boosters, alumni, and other friends of the program, the administrators can use the fund to help those parties feel as though they are an even more valued and important part of the university.

Although the Contingency Fund is a sound proposal, some will argue it is not necessary. The NCAA has established a special assistance fund that is available, but not guaranteed, to students who qualify. Qualification is limited to “(1) Pell-eligible students; (2) Students receiving athletic scholarships who have unmet financial need; [and] (3) Foreign students who have unmet financial need.” This fund provides financial assistance to qualifying students for the following purposes:

1. Medical and dental costs not covered by another insurance program (e.g. hearing aids, contact lenses, glasses, off-campus psychological counseling);

2. Costs associated with student or family emergencies;

3. Costs of expendable academic course supplies (e.g. notebook, pens) and rental of non-expendable supplies (e.g. computer equipment and cameras) that are required for all students enrolled in a course; [and]

4. Cost of clothing and other essential expenses.\footnote{NCAA Special Assistance Fund, supra note 183.}
The special assistance fund is helpful; however, the fund cannot be accessed by a broad-enough range of student-athletes.\(^{185}\) Moreover, the NCAA places limits on the dollar amount and purposes for which the fund can be accessed.\(^{186}\) All things considered, the existence of the NCAA’s special assistance fund is not enough to render the Contingency Fund unnecessary.

Some might also argue Title IX makes the implementation of a Contingency Fund unrealistic. Title IX provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”\(^{187}\) Those universities that violate Title IX will not receive federal funding.\(^{188}\) A university can prove compliance with the law by satisfying any “prong” of the “three-prong test”: (1) providing athletic opportunities substantially proportionate to the student enrollment, (2) demonstrating a continual expansion of athletic opportunities for the underrepresented sex, or (3) fully and effectively accommodating the interest and ability of the underrepresented sex.\(^{189}\) One possible effect of this rule is new spending on football players could require a proportional increase in spending on women’s athletics. Alternatively, the university could eliminate other men’s sports to help bring back balance and avoid increased spending in its athletics program.

The Title IX argument is not sufficient to deter implementation of the Contingency Fund proposed in this Article. Title IX provides a strong counterargument to the position that it is time to pay the players. The proposed Contingency Fund is not meant to constitute a salary and


\(^{186}\) See NCAA, STUDENT ASSISTANCE FUND GUIDELINES, available at http://www.ncaa.org/wps/wcm/connect/1f3de9004e0d54509ea1fe1ad6fc8b25/%28Guidelines%29-Student+Assistance+Fund+GUIDELINES.pdf?MOD=AJPERES &CACHEID=1f3de9004e0d54509ea1fe1ad6fc8b25 (last visited Mar. 24, 2011).


\(^{188}\) Id. § 1682.

\(^{189}\) Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. 3 (Apr. 20, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf (citing Title IX of the EOMC Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979)) (providing the most recent interpretation of Title IX university compliance, which has basically reverted back to the interpretation in 1972).
therefore is not in opposition with Title IX. Moreover, under the Contingency Fund proposal, the worst case scenario—in terms of dollars spent—is the university would have to expand its spending on women’s athletic programs by an additional $56,634 per athlete.\textsuperscript{190} The top football programs will have no difficulty increasing their budgets accordingly.\textsuperscript{191} In light of the above, it seems clear the NCAA should permit the implementation of a Contingency Fund.

The NCAA should also institute a student-athlete oversight program. Under this proposal, each student-athlete who is a member of a football team at a BCS qualifying school would be required to submit an inventory of assets and liabilities prior to enrolling at the university. The student-athlete would also be required to open a university-approved bank account. All money paid and received by the student-athlete would be recorded through this bank account. No one would be permitted to give money to the student-athlete unless that gift was made through the student-athlete’s bank account. The person who wants to give money to the student-athlete must be willing to submit to an NCAA audit, if requested, so the NCAA can determine whether the person who gave the gift had the financial means necessary to do so.

Furthermore, an NCAA committee would periodically review the inventory and accounts of student-athletes to determine whether they are in compliance with NCAA regulations. If the NCAA lacks the funds necessary to review all student-athletes, the review could be conducted on a random sample. Alternatively, the reviews could be conducted on student-athletes who are considered professional prospects by respected publications or by virtue of the NFL inviting the student-athlete to participate in the NFL Combine. These reviews could be coordinated with or without the universities’ compliance directors’ assistance.

An oversight program would help limit corruption. The audit requirement would help prevent agents from giving money to the student-athlete’s family, with the understanding the money would be given to the student-athlete. Requiring the NCAA to conduct the audits would be

\textsuperscript{190} Or whatever the most generous scholarship available to students that year happens to be. \textit{See Estimated Costs for 2010–2011, supra note 182 and accompanying text.}

useful because it removes the university’s compliance office from the equation. The compliance officer is likely to be under some degree of pressure to avoid disclosing infractions that are not clear violations of NCAA rules. The proposed oversight program may be difficult to implement because of the high cost of hiring investigators. However, the NCAA could defray the cost by requiring its members to pay a fee. The organization could also make the fee compulsory, or it could require any member school intending to participate in a bowl game to pay a fee toward expanding the oversight committee.

B. The Union

The NFLPA should change its policies concerning the number of years an agent must wait before they take the certification examination. If the NFLPA permitted agents to practice for five years without negotiating a contract before he or she is required to retake the certification examination, it would lessen the burden on agents to be successful right away. Lightening this burden may decrease the possibility agents will engage in unethical behavior in order to keep their licenses valid. Moreover, lightening this burden will give agents more time to find their place in the sports-representation industry. The current regulations create an environment in which agents feel obligated to get in wherever possible. This attitude inevitably leads to a lower quality of services.

The NFLPA could determine only licensed attorneys who demonstrate a working knowledge of the complexity of the sport are eligible to become certified contract advisors. The union could also require attorneys to only charge an hourly rate and limit the amount charged for the firm’s legal services to three percent of the player’s salary. These changes alone would increase protections to student-athletes because attorneys are regulated by a state supreme court or state bar association that has adopted rules of professional conduct. The Model Rules of Professional Conduct contain minimum standards of conduct for lawyers and give student-athletes “a means for redress should their lawyer-agent act unethically or unfairly.” Moreover, a change to an hourly rate fee structure would make it easier for some attorneys to move into sports representation without first convincing law-firm partners to change their established billing models. Finally, the change is not overly restrictive

because it would still allow nonlawyer agents to carry out other functions, such as marketing and financial management.

Although the proposed change would work, there are good reasons for not incorporating such a change. First, there are several very capable agents who are not attorneys but nonetheless function as contract advisors. Second, there are nonlawyer agents who focus all their energy on providing outstanding services for student-athletes and professional football players. Those nonlawyer agents may be better than the lawyer agents who bill at an hourly rate and frequently provide services in other areas of the law in order to pay their bills. Finally, some athletes prefer their agents not only handle contract negotiations, but also befriend, counsel, and mentor them in other areas of life. The lawyer agent may not have the time, cultural familiarity, or desire to play multiple roles in the athlete’s life. Indeed, there is a reason why some agents use “runners” to build the student-athlete’s trust: the agent does not think he or she can single-handedly earn the student-athlete’s trust.

C. The State

The states should work together to eliminate registration fees. Many states have adopted the UAAA but have also incorporated a broad range of registration fees. Consequently, an agent may be expected to pay $20 for registering in one state and an additional $2,500 to register in another state. This lack of uniformity causes confusion and encourages some agents to avoid registering in either state. If the states eliminate registration fees, more agents will register, which will make it easier for state regulators to monitor agents’ activities in their states.

Ultimately, individual states should add a statutory cause of action and remedy for student-athletes injured by agents who violate the UAAA. The states should also void all sports-representation contracts between agents and student-athletes entered into within two weeks following the student-athlete’s last collegiate game, excluding college all-star games. By creating this no-contract period, the state gives its citizens an opportunity to make decisions without agents in the locker room following the player’s last collegiate game applying pressure to sign a contract. Moreover, the change provides universities with the opportunity to assist student-athletes in the agent-selection process. Finally, the window provides enough time for high-rated student-athletes to obtain one of the benefits of selecting an agent soon after electing to become a professional football player—NFL
Combine training paid for or advanced by the agent.\textsuperscript{193}

\textbf{D. Federal}

Congress should amend SPARTA to add a statutory cause of action and remedy for student-athletes injured by agents who violate the Act. The student-athlete should be permitted to recover damages sufficient in amount to deter prohibited behavior. One agent suggested student-athletes be allowed to recover damages up to one million dollars.\textsuperscript{194} Whether one million dollars is the appropriate number is uncertain, but agents would likely take such an amount seriously.

Congress could also determine a floor—or minimum amount—the student-athlete would recover if injured by an agent who violates SPARTA. If an agent knows a minimum fine of $100,000 will result from a SPARTA violation that injures a student-athlete, the agent will be more likely to circumscribe harmful behavior.

\textbf{E. Universities}

University administrators should pay attorneys to review contracts offered by agents to the universities’ student-athletes after exhaustion of their eligibility. The university administrators could pay the fees as they arise or the administrators could require law firms to provide the service as part of retainer agreements already in place. The university could also pay the legal fee through the Contingency Fund described above.

University administrators should either begin or continue to educate their student-athletes about state laws related to sports agents. Compliance directors could also be used to focus more intensely on actions of those players who are likely draft picks.

\textbf{F. Other Measures}

The NFL, NFLPA, and NCAA could work together to punish student-athletes for accepting money from agents and their minions. These

\textsuperscript{193} The author of this Article considered voiding all contracts signed prior to seven days after the final day of the NFL Combine but determined the student-athletes’ demand for pre-NFL Combine training would make such a proposal too unpopular to implement.

organizations can enforce accountability at two stages: (1) when the student-athlete engages in behavior prior to the NFL College Draft that constitutes a violation, and (2) when the student-athlete participates in prohibited conduct that is not deemed a violation until after the NFL College Draft. What follows is a discussion of ways these organizations can work together to promote accountability at those varying points in the student-athlete’s career.

One option is for the NFL to deem a student-athlete ineligible to play in its league for one or two years if, prior to the Draft, any governing body—the NCAA, university, state or federal court—has determined the student-athlete accepted improper benefits from an agent during the student-athlete’s career. This suspension, however, would not prohibit the student-athlete from playing in the Canadian Football League or other United States football leagues—the Arena Football League, for example. Furthermore, after the requisite suspension period, the student-athlete would be eligible for the NFL College Draft or he could petition the NFL to enter its Supplemental Draft. The threat of a suspension such as this has the potential to deter student-athletes from engaging in prohibited behavior. However, the suspension is arguably too heavy-handed. “This is a young man’s game,” said Gene Burrough during one interview.195 “[A two year ban] would kill the player’s career because after two years no NFL team would want him.”196 Moreover, the NFLPA would likely not support such a proposal. The union recently released the following statement: “The NFLPA is opposed to any penalty being imposed upon a player in the NFL for conduct relating to the receipt of benefits in violation of NCAA rules while the player was in college.”197

Another penalty could be implemented when the student-athlete engages in prohibited behavior prior to the NFL College Draft. The NFL could declare a student-athlete ineligible for the Draft for one year if, prior to the Draft, any governing body—the NCAA, university, state or federal court—determines the student-athlete accepted improper benefits from an agent during the student-athlete’s career. The player would then have to either sit out one year and enter the Draft or join a team as an undrafted free agent. However, allowing a player to join a team as an undrafted free agent would inevitably create a scenario in which a player who would have

195. Telephone Interview with Gene Burrough, Sports Agent (Nov. 2, 2010).
196. Id.
been a top draft pick for one of the previous season’s worst teams is instead a free agent pickup for a playoff team. Thus, to maintain the parity objective of the Draft’s current format, the NFL could hold a Supplemental Draft or develop some other system that would provide teams with the worst records the opportunity to select the best athletes.

This proposed penalty has the potential to deter prohibited behavior by student-athletes because he knows going undrafted can result in losing a significant amount of money. At the same time, the rule would permit the student-athlete to pursue professional ambitions without interruption. Opponents of this proposal might argue the likely loss of income is too extreme to justify its adoption. Moreover, the NFLPA may be reluctant to support this sanction because it relates to conduct taking place while the student-athlete was in college.

Once the student-athlete exhausts his college eligibility and is eligible for the Draft, the NFL can implement a different procedure. Prior to the Draft, the NFL could require that a Draft-eligible student-athlete sign a statement verifying whether he has received improper benefits from an agent—or someone affiliated with an agency—during his tenure as a football player for his university. If the student-athlete indicates he has not received improper benefits from an agent and it is later determined he did receive such benefits, the student-athlete would be subject to suspension from playing in the NFL for a period of time, possibly without pay. The salary the player forgoes during his suspension would not count against his team’s salary cap. However, if the student-athlete indicates he has received improper benefits, he would be eligible for amnesty. The athlete would not be subject to sanctions, but the agent would be called to appear before the necessary governing body.

Implementation of the above sanctions would discourage student-athletes from accepting improper benefits because the sanctions would impact the student-athlete’s professional career and income. The current NCAA rules allow a student-athlete to accept improper benefits during college and then escape punishment once his or her actions are discovered. Meanwhile, the student-athlete’s teammates, university, and future football team bear the brunt of the offending transgressions. The unfairness of the current rules is exemplified by the Reggie Bush–USC case. While current members of the USC football team are banned from playing in another bowl game and have been stripped of the opportunity to

198. *But see* UNIF. ATHLETE AGENTS ACT § 16(a) (2000) (allowing a right of action by a university against a “former student-athlete”).
win the BCS national championship, Bush will continue his career without punishment. Had the above proposal been in place, Bush would not be eligible to play in the NFL for a period of time. Or perhaps Bush would have disclosed his actions years ago. In that case, he would likely still have his Heisman trophy and USC would not be the victim of NCAA sanctions.

The above proposal does have some potential flaws. First, amnesty may encourage student-athletes to engage in improper behavior with the thought they can simply confess their violations after their eligibility has expired. Second, implementation of this proposal may create a situation in which two actors—the agent and the student-athlete—do wrong, but only one actor—the agent—is punished. Nonetheless, the prospect of amnesty may discourage an agent from giving improper benefits to a student-athlete because the agent knows the student-athlete can turn the agent in without facing penalties. The agent—in giving improper benefits to the student-athlete—would likely not tell. If the student-athlete voluntarily exposed this, punishment for the agent would ensue under the current UAAA.199

It is also possible NFL players and team management would balk at the idea of supporting a rule possibly resulting in losing a key teammate during a Super Bowl run because of something he did while in college. However, the rule would possibly cause veteran players and team owners to encourage an athlete to come clean so his actions as a student-athlete do not later hurt the team.

V. CONCLUSION

These days it is fashionable to blame the agent for much of the corruption taking place in college football. But most agents are simply trying to earn a living by providing counsel to young men who desire to play professional football. An agent has yet to be accused of providing money to a student-athlete in exchange for the athlete throwing a football game. An agent has yet to convince a professional football team to pay more money to the athlete than the team can afford to pay. An agent does not set ticket prices. Nor does an agent tell a student-athlete when to wake up, when to wash, when to take classes, when to eat, where to eat, what position to play, how much to play during a game, and where he or she can go to school if he or she decides to transfer. An agent does none of those things but is somehow labeled a “pimp” by other professionals.200 Indeed,

199. See id. § 14(a)(1)-(3).
whereas the student-athlete serves at the pleasure of his or her coaches and university, the agent serves at the pleasure of the student-athlete.

Although they are the least powerful character in the university–coach–athlete–agent relationship, the agent is capable of bringing down all the parties through the agent’s selfish actions. This is because the NCAA has created a system based on the spirit of amateurism. This Article leaves to others the question of whether that system should remain in place. Rather, this Article assumes the system is appropriate and advances proposals to help regulatory bodies improve it. By incorporating the proposals outlined above, the interested parties will create an environment that enhances accountability and creates more opportunities for the athletes, agents, and university officials to achieve their objectives.