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The Regulation of Athlete-Agents

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The emergence of the athlete-agent industry is a relatively new phenomenon. As recently as 20 years ago most athletes negotiated their own professional contracts. They had little reason to do otherwise. These athletes were without bargaining leverage, being inseparably bound to a team through a reserve system, with no competing professional leagues to look to for employment (Dow, 1990). Contract negotiation in these circumstances was more a matter of taking what was offered or refusing to play.

During the 1970s and 1980s, however, other options became available to players, giving them the bargaining leverage they had previously lacked. The emergence of competing professional leagues provided players with an opportunity to leave their current employment at the promise of receiving more money elsewhere. Additionally, through litigation and collective bargaining, players gained a measure of economic freedom to market their talents as free agents. These developments predictably caused the demand for a limited supply of quality athletes to escalate (Rypma, 1990). Concurrently with these developments, expanded media coverage during this same period made professional sports more popular and profitable than in years past. The increased revenues enjoyed by franchise owners allowed them to meet, albeit grudgingly, the increasing player salary demands (Dow, 1990). As professional sport evolved into a multi-billion dollar industry (Schubert, 1986) the need to hire professional assistance became apparent to many athletes, who sought to reap the benefits of their increased bargaining leverage (Dow, 1990).

The arrival of the athlete-agent, however, has not been without problems. First, the intense competition for a limited supply of quality athletes encourages corruption (Shropshire, 1989). Until recently, corrupt or unscrupulous agents had everything to gain and nothing to lose by bending or breaking the rules. Through offers of money, gifts or other inducements, such agents persuade college players to sign representation contracts before the expiration of their collegiate eligibility, and thereby violate collegiate eligibility rules (Shropshire, 1989). Second, while agents perform professional services to their athlete clients, there are no professional requirements or standards to which they must rise (Dow, 1990). The industry

has evolved past contract negotiation, with many agents now providing additional services, including soliciting, negotiating and securing additional income opportunities, providing financial advice and income management services, and furnishing general guidance on legal and tax matters (Narayanan, 1990). Few agents have expertise in all these areas, yet many attempt to compete with those who profess such knowledge, since, if an agent is honest and manifests a lack of knowledge in a certain area, he or she will not be as attractive to a prospective client as the less-than-honest agent who purports to be a master of all trades (Dow, 1990).

Whether through corruption or incompetence, the abuses of the agent-player relationship, committed by the relative minority of agents, have taken their toll on the profession's reputation and have prompted measures from a variety of sources to regulate athlete-agents (Dunn, 1988).

■ NON-LEGISLATIVE REGULATION

The National Collegiate Athletic Association (NCAA)

By the mid-1970s, repeated instances of agent abuse prompted the NCAA, an unincorporated association of almost 1000 members and the primary regulator of intercollegiate athletics, to promulgate regulations in an attempt to limit the "likelihood of an unscrupulous agent preying on a talented young and financially naive athlete" (Schubert, 1986). NCAA rules provide that an individual will lose eligibility for intercollegiate competition if the student-athlete contracts orally or in writing to be represented by an athlete-agent, or if the student-athlete receives any type of payment or promise of payment (*NCAA Manual*, 1992-93, art. 12.3.1).

In a further attempt to prevent agents from "preying" on student-athletes, the NCAA established a voluntary player-agent registration program in 1984 (Rypma, 1990). The program required disclosure of an agent's education and background, and imposed notification requirements upon the agent prior to contact with a student-athlete (Rypma, 1990). The program's primary flaw, however, was its voluntariness. The NCAA could assume no jurisdiction over an athlete-agent. Agents prone to abuse would simply not register, and the NCAA was powerless to monitor, regulate or sanction their activities. Further, as with most regulatory efforts aimed at athlete-agents, the program also failed to require agents to meet any particular competency qualifications prior to registration (Rypma, 1990). Citing these limitations, the NCAA discontinued its program in 1989 (Rypma, 1990).

The NCAA has not, however, ceased all efforts to control the unscrupulous activities of agents. The Association has drafted prototype legislation for use by states considering the adoption of athlete-agent legislation (Cosgrove, 1990). In addition, in 1988 the NCAA began requiring student-athletes, participating in the Division I men's basketball tournament and in sanctioned college football bowl games, to sign an affidavit certifying that the athlete has not signed with an agent. This practise continues to date (Cosgrove, 1990).

Professional Team Sport Players' Associations

The agent certification plans implemented by players' associations are tailored to fit the regulatory needs of the particular sport involved. In general, these plans benefit the athletes, since they are provided with better trained agents, who must

adhere to a set of rules or suffer sanction (Rypma, 1990). Yet, despite these apparent benefits, the regulations possess inherent limitations in content, scope, and jurisdiction that hinder their effectiveness (Dunn, 1988).

In 1983, the National Football League Players' Association (NFLPA) became the first professional team sport players' union to initiate an player-agent certification program (Rypma, 1990). The 1982 collective bargaining agreement between the NFL and NFLPA had reserved the exclusive right for the NFLPA or "its agent" to negotiate individual NFL player contracts. The 1983 program was established to certify agents as "NFLPA Contract Advisors," who, under the program, are required to use a standard representation agreement, to comply with certain limits on compensation for contractual negotiations, and attend period training seminars (Ring, 1987). Fines, suspensions, and/or revocations of licenses are among the penalties imposed for noncompliance.

Despite the program's intent to protect athletes from agent incompetence and corruption, several problems persisted. First, the program, in its original form did not address the corruption occurring in intercollegiate athletics. Until recently, the NFLPA certification program did not apply to regulate agents negotiating a player's first contract with the league (Dunn, 1988). Only agents representing current NFL players were covered. Alerted to the potential for agent abuse of athletes who had yet to sign their first NFL contract, the program was amended in 1989 to include agents negotiating on behalf of these prospective players (Shropshire, 1989). Second, the plan is limited in scope. The plan regulates only "contract advisors" of NFL players, and its rules prohibit the charging of excessive fees for only contract negotiation and money-handling services. Agents providing other services can charge excessive fees and effectively evade the plan's restrictions (Dunn, 1988). Third, the plan is devoid of any specific criteria for granting or denying agent certification. The NFLPA's program, not unlike the plans implemented by other players' unions, expects applicants to disclose their educational, professional, and employment background, yet does not require any minimum levels of training, education, skill, or knowledge as a condition for representing professional athletes (Rypma, 1990). The only criteria, in fact, to deny certification concern misconduct such as fraud, embezzlement, and theft (Shropshire, 1989).

The recent abandonment of collective bargaining rights by the NFLPA, in conjunction with its antitrust battle against the NFL, has created some additional problems with the enforcement of agent certification provisions. Under its current status, the NFLPA can no longer impose bans on representation by unregistered agents. The system has effectively become voluntary, although the incentive to participate is provided by the salary information that the union can supply (Gross, 1990).

In 1986, the National Basketball Players' Association (NBPA) adopted regulations governing player agents. These regulations loosely parallel the NFLPA program. Certified agents are required to use a standard representation agreement and to comply with certain limits on compensation for contractual negotiations (Rypma, 1990). Like the NFLPA plan, fines, suspensions, and/or revocations of licenses are among the disciplinary measures imposed for noncompliance. One key distinction between the NBPA and NFLPA schemes, until recently, was the

inclusion within the NBPA program of agents negotiating a contract for a player who has yet to sign with an NBA team (Dunn, 1988).

The Major League Baseball Players' Association (MLBPA) adopted its agent certification plan in its 1985 labor agreement, but delayed implementation of the plan until 1988 (Rypma, 1990). Not surprisingly, the plan is similar to its football and basketball counterparts. One major distinction, however, is that the MLBPA plan does not restrict the fees chargeable by an agent for service rendered. The agent, however, is required to provide an itemized statement of fees to the MLBPA (Dunn, 1988).

At present, the National Hockey League Players' Association has no agent certification program and no plans to implement such a scheme in the near future (Rypma, 1990).

The Association of Representatives of Professional Athletes (ARPA)

The ARPA was founded in 1978, to provide competent and honest representation to professional athletes. It remains the only self-regulating organization within the sport-agent profession. The ARPA's Code of Ethics attempts to ensure integrity, competence, dignity, management responsibility, and confidentiality from agents in the representation of their clients (Dunn, 1988).

Notwithstanding its laudable intentions, the ARPA has done little to address the problems of agent incompetence and corruption. Since the ARPA cannot compel agents to join the organization, agents prone to abuse or corruption will simply not join. In addition, even for members of the ARPA, there is no enforcement mechanism for violators of its Code of Ethics (Dunn, 1988).

The American Bar Association (ABA)

The ABA's Code of Professional Responsibility has some relevance here. The ABA Code proposes standards of integrity and conduct for all attorneys, and has been adopted in some form or another by many state bar associations. The obvious deficiency here is that while many sport agents are attorneys, the Code has no effect on agents who are not attorneys (Shropshire, 1989).

The foregoing non-legislative regulatory efforts are, by nature, limited in scope and effectiveness. They have, for example, had little direct impact on the corruption occurring in intercollegiate athletics where we find most of the abuse. Another proposed answer has been government involvement, to provide a stronger regulatory base to reach all agents in all sports.

■ AGENT-SPECIFIC LEGISLATION

The old adage, that simply having a client is the lone prerequisite for calling oneself a athlete-agent, is no longer entirely accurate. Now, in addition, such a title often requires registration and payment of fees under some state legislative scheme (Rodgers, 1988-89). The list of states with some form of athlete-agent legislation has grown from California, which was the first to pass such legislation in 1981, to include 24 states across the country (Wilde, 1992). In addition, as many as six other states are currently considering some form of agent legislation (Stiglitz, 1991).

The boom period for state legislation occurred during the mid to late-1980s in response to the outrage spawned by the well-publicized misdealings of such notorious athlete-agents as Norby Walters, Lloyd Bloom, Jim Abernethy and others. During 1988 alone, for example, 12 states passed agent legislation (Rodgers, 1990).

Unlike the voluntary organizations previously outlined, state legislative schemes, through the incorporation of civil and criminal penalty provisions, attempt to ensure that all agents in all sports abide by the rules (Dunn, 1988). An obvious disadvantage with state-by-state agent legislation is the confusion resulting from conflicting laws between various states, there being no federal agent legislation at present. In addition, current state legislation does not create any objective standards for competency. An attempt is made to control the corruption, but not the incompetence.

State athlete-agent legislation varies immensely in form and content. A division, however, can in general terms be made between early legislation (early to mid-1980s), which concentrated on regulating the agent, and the current legislative trend (mid-1980s to present), which focuses on the economic havoc an unscrupulous agent can cause a college or university (Rodgers, 1988-89).

Early Legislation

Although the specific statutes vary substantially in form and content, state athlete-agent legislation enacted during the early to mid 1980s, in general terms, typically includes provisions for agent registration, payment of fees, posting of surety bonds, contract approval, and criminal penalties for agent misconduct. The California legislation, passed in 1981 and amended in 1985, for example, focuses on protecting the athlete through an extensive licensing, registration and regulation program (Cosgrove, 1990). The legislation does not prohibit contact with a student athlete prior to the expiration of collegiate eligibility, but it does impose a limit on fees chargeable by the agent and requires the posting of a $25,000 surety bond (California Athlete Agencies Act of 1981).

In 1987, Texas became the fourth state to enact athlete-agent legislation. Although tailored after its California predecessor, the Texas statute has a number of important distinctions. Most notably, the statute prohibits any contact with a student-athlete prior to the expiration of the athlete's eligibility, except in state-sponsored athlete-agent interviews to be conducted at each institution during the athlete's final year of eligibility. In addition, the Texas legislation requires that copies of the signed representation contract be filed with the university athletic director and the Secretary of State's office within five days of signing. The student athlete is given 16 days thereafter to cancel the contract (Texas Athlete Agent Act of 1987).

The Current Trend

From the late 1980s to the present, the focus of state athlete-agent statutes has shifted away from protecting the athlete, to addressing the economic damage an unscrupulous agent could cause for a college or university. This current legislative trend is characterized by provisions requiring notice to the school and state before

and/or after the signing of a representation contract, waiting periods for valid contracts, the creation of causes of action in favor of colleges and universities for agent misconduct resulting in damages, and an abandonment or modification of the onerous registration requirements common in earlier legislative schemes (Rodgers, 1989-90).

The statement of legislative intent in the first section of the Florida statute illustrates the focus of this current legislative trend:

> The Legislature finds that dishonest or unscrupulous practices by agents who solicit representation of student athletes can cause significant harm to student athletes and the academic institutions for which they play. It is the intent of the Legislature to protect the interests of student athletes and academic institutions by regulating the activities of athlete agents which involve student athletes at colleges or universities in the state. (Florida Athlete Agents Act of 1988).

The Florida statute is arguably the most stringent in the country, as the state targets both the agent and the athlete for civil and criminal penalties for statutory violations (Rodgers, 1988-89). Indicative of the current legislative trend, the Florida statute does not, for example, prohibit contact between an athlete and an agent prior to the expiration of the athlete's collegiate eligibility. It does, however, sanction offering inducements to sign, and requires both the athlete and the agent to give notification of the signing of a representation contract prior to participating in any athletic event or within 72 hours of the signing, whichever first occurs. The athlete is given 10 days after this notification to rescind the contract. Failure to notify renders the contract void and also constitutes a criminal offense for both the athlete and the agent (Florida Athlete Agents Act of 1988). Only Florida, Iowa and South Carolina have such a provision imposing criminal sanctions on athletes for failing to give notice of signing (Rodgers, 1988-89). Florida's statute also holds the student or agent liable in damages that result to the college from an athlete's subsequent ineligibility if the student or agent fails to notify the athletic director that the student has entered into a contract (Florida Athlete Agents Act of 1988).

Other legislative schemes incorporate a variety of novel provisions which deserve some mention. The Indiana statute provides another example of notice provisions; however, in Indiana, the notice by the agent to the athletic director of the university or college involved is required 10 days prior to the execution of the representation contract (Indiana Failure to Disclose Recruitment Act of 1988). Only Georgia, Ohio and Minnesota have a similar provision requiring this prior notice (Rodgers, 1988-89).

Minnesota is one of only a few states that specifically include non-collegiate athletes within the scope of its legislation. The Minnesota statutory definition of "student athlete" includes not only current college athlete but "any individual who may be eligible to engage in collegiate sports in the future" (Minnesota Athlete Agents Act of 1988). High school athletes, for example, such as baseball or hockey players who are commonly drafted out of high school, are protected under the Minnesota statute but would not receive the same protection under most other state regulatory schemes. Only Louisiana, Maryland, Mississippi, Oklahoma, and Kentucky have similar provisions (Rodgers, 1988-89).

Kentucky employs a seemingly much simpler solution to address agent misconduct by prohibiting any contact whatsoever with an athlete until the expiration of his collegiate eligibility. The Kentucky legislation imposes a criminal prohibition on recruiting or soliciting, directly or indirectly, a student athlete to enter into an agent contract, professional sports services contract, or other sports related contract before the student athlete's eligibility for collegiate athletics has expired (Kentucky Athlete Agents Act of 1988). The statute does not prohibit activity by agents once an athlete's eligibility has expired, and, like many of the more recent statutes, has no agent registration requirement (Cosgrove, 1990).

Nevada has also followed this current trend of choosing not to impose licensing and registration requirements on sport agents. Rather, its regulatory scheme, emphasizes the potential damage which can flow from an agent whose activities have caused a student athlete or institution to violate rules of the NCAA to which the institution is a member. Nevada became one of the first states to statutorily list the specific revenue items that may be considered in calculating a damage claim against an unscrupulous agent, including loss of television revenue, a decline in ticket sales, loss of post-season revenue, and other opportunities through which the institution would have realized revenue if the NCAA rules had not been violated (Nevada Athlete Agents Act of 1989). Tennessee has enacted similar provisions (Tennessee Athlete Agents Act of 1988).

Agent-specific legislation has not been the panacea many anticipated. States have appeared less than enthusiastic to devote their limited resources to policing legislative requirements. Not surprisingly, agents prone to abuse have ignored these statutory provisions and continued to conduct business as usual. In addition, differing state requirements have created an administrative nightmare for many honest agents doing business in several states. This, coupled with a perceived lack of enforcement, often encourages the breach of these provisions. State legislation is also criticized as being primarily designed to keep student athletes eligible and playing for state universities, rather than protecting the athletes and their future professional careers, since many classes of athletes are left unprotected by most legislative schemes. State regulatory efforts also, for the most part, create no objective standards for competency to which an agent must rise for entry into the profession. As evidenced throughout this discussion, the failure to require special training of athlete-agents is one of the major difficulties with the industry as a whole. Finally, a potentially fatal flaw of state-by-state regulation is that such laws may not pass constitutional muster. Under the commerce clause of the United States Constitution, Congress is authorized to regulate interstate and foreign commerce. The regulation of sports agents would appear to be within the federal commerce power since many agents do operate simultaneously in many different states (Dunn, 1988).

■ OTHER REGULATORY EFFORTS

Agent-specific legislation is not the only legal means used to regulate the conduct of athlete agents. Other common law or statutory remedies, while not specifically directed at agents, have been used to attempt to control their abusive conduct. For example, the common law civil remedies of breach of contract,

misrepresentation, fraud, deceit, and negligence have been applied in cases of agent misconduct (Shropshire, 1989). In addition, various federal and state criminal statutes have been used, albeit unsuccessfully, to attempt to criminally sanction agent misconduct. Sport agent Jim Abernethy, for example, who had signed and provided illegal payments to an athlete before his eligibility had expired, was indicted and convicted at trial on a charge of tampering with a sports contest in the state of Alabama. Abernethy's conviction was overturned on appeal when the Alabama Court of Criminal Appeals construed the Alabama tampering statute in a manner favorable to Abernethy and sport agents in general (Narayanan, 1990). Sport agents Norby Walters and Lloyd Bloom were federally indicted for conspiracy to commit extortion and other multiple charges involving violations of the Federal Mail Fraud Statute (Goodman, 1990) and the Federal Racketeer Influenced and Corrupt Organizations Act (Narayanan, 1990). Walters and Bloom, who were generally accused of dealing with a reputed organized-crime figure, cheating one athlete out of his signing bonus and threatening at least four clients with violence if they attempted to break their representation contracts, were found guilty at trial on five of the seven indictment counts. Their convictions, however were later reversed and remanded for new trials by the U.S. Court of Appeals (Narayanan, 1990).

■ FUTURE ALTERNATIVES?

Despite the previously described regulatory efforts, the problems of agent misconduct and incompetence persist. Are further regulatory attempts futile? Can anything be done to remedy these problems? The following suggestions are aimed at controlling sport agent abuses and ensuring athletes of competent and trustworthy representation.

Increased Enforcement

Even though 24 states have, to date, enacted athlete-agent legislation, little has been done to actively enforce these statutory requirements. After almost a decade under its statute, California, for example, only had 19 agents registered (Cosgrove, 1990). Even taking into account the statutory exception from registration for practicing attorneys in California, this number seems to be overwhelmingly low. The perception given to agents in many states seems to be that while a state may have legislation, it is not enthusiastically enforcing its requirements. The lack of enforcement of these legislative schemes, coupled with the rigors of registration, almost encourages the breach of statutory requirements (Shropshire, 1989). Why have agent-specific legislation if only lip service is going to be paid to ensuring compliance?

Federal Legislation

Federal athlete-agent legislation is frequently cited as the answer to the agent problem. Athlete-agent activity clearly involves interstate activities within federal power under the Commerce Clause of the Constitution (Dow, 1990). The industry is truly national in scope. The federal alternative would address jurisdictional ambiguities and substantive inconsistencies of existing state regulation, erase

multiple application and fee requirements, and eliminate forum shopping by agents who attempt to avoid states that have legislation (Goodman, 1990).

Athlete-agent legislation has been proposed at the federal level. Although never formally introduced to Congress, the National Sports Lawyers Association drafted the Professional Sports Agency Act in 1985. The proposed statute addressed many recurring concerns relevant to the athlete-agent industry, including standards for training, experience and competence, but failed to gain legislative support (Dow, 1990).

The imminent passage of a federal athlete-agent statute seems unlikely. One could reasonably surmise that if such a measure were not introduced in the wake athlete-agent scandals in the late-1980s, then current congressional support would be difficult to find when other, perhaps more pressing issues, are attracting the attention of federal legislators.

Model Sports Agency Act

This proposal is, perhaps, a more realistic compromise between the current state-by-state legislative scheme and an improbable federal alternative. Much like the Uniform Securities Act, for example, such a model statute would promote uniformity among the states, while allowing each state the latitude to adopt certain provisions deemed necessary. Reciprocal agreements could exist between states to overcome the burden of agents having to register in more than one jurisdiction (Dow, 1990). Under this alternative, legislators could also begin to focus on screening prospective agents by regulating the standards for entrance into the profession. The regulation of professional occupations, such as doctors and lawyers, has traditionally been a matter of state concern (Rypma, 1990). The model statute could establish objective criteria for entrance into the profession, including, for example, the successful completion of a comprehensive examination to evaluate the candidate's knowledge of concepts fundamental to competent athlete-agent representation, such as: collective bargaining agreements, basic player contract issues, free agency restrictions, arbitration procedures, and relevant tax law (Rypma, 1990).

Career Counseling Panels

Despite the recent demise of its player-agent registration program, the NCAA may have another solution to protecting athletes from unscrupulous agents and ensuring competent athlete representation in its career counseling legislation (Garvey and Remington, 1991). NCAA legislation currently provides for the establishment of career counseling panels for student-athletes at its member institutions. As presently structured, these panels are designed to be comprised of full-time university faculty members, who would advise student-athletes about future professional careers, review proposed professional sports contracts, and meet with the student-athletes and representatives of professional teams (*NCAA Manual*, 1992-93, art. 12.3.4). In limiting the panel's composition to full-time faculty of an institution, its efficacy becomes necessarily dependent upon the faculty expertise available. Many institutions may not have qualified faculty who are willing to provide such service. As a result, such panels have largely failed to fulfill their intended purpose.

The panel idea, however, has merit and can be salvaged for the benefit of student-athletes. One answer would be to amend the NCAA legislation to allow institutions to seek qualified panel membership outside its full-time faculty. A much simpler solution, however, would be to legislatively alter the panel's purpose. Rather than serving as a professional representation panel, where its ability to fulfill an agent-like function is dependent upon the training and expertise of available full-time faculty members, these committees could be effectively utilized to simply search for, screen, and interview potential agent applicants, thereby protecting student-athletes from unscrupulous agents and ensuring competent representation. Such a "grass-roots" approach to scrutinizing the qualifications and scruples of prospective agents is, perhaps, the only meaningful solution to this difficult problem.

■ CONCLUSION

It has become ironic that athletes who were once thought to have been protected by their agents are now perceived as needing protection from them (Neff, 1987). During the past decade we have witnessed a dramatic escalation in support for increased regulation and supervision of athlete-agents, yet the regulatory measures which have been instituted have fallen short of curbing unscrupulous conduct by some agents and addressing the incompetence of others. Perhaps through the suggested measures outlined in this article, we can shift the public focus away from the unscrupulousness and incompetence and back to the myriad of beneficial services that sports agents can provide to professional athletes (Narayanan, 1990).

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