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COMMENT

REMEDYING ATHLETE-AGENT ABUSE: A SECURITIES LAW APPROACH

MICHAEL J. SULLIVAN*

I. INTRODUCTION

Most athletes entering the world of professional sports require an agent to assist them in securing the best possible contractual agreement. Because the only qualification for becoming an agent is having a client, the great majority of agents lack either the training or the integrity necessary to fulfill the needs of the athlete. To compound the problem, the athlete being represented is often either too busy or too inexperienced in the workings of law and business to evaluate the agent's capabilities.¹

Ironically, part of the blame for the problem of agent abuse can be placed on the American Bar Association (ABA). To date, the ABA Code of Professional Responsibility prohibits qualified attorneys from soliciting athletes as clients.² Consequently, under-qualified non-attorney-agents often lure athletes into signing agency agreements before they can research the market for a qualified representative. State regulation aimed at the problem has been, unsurprisingly, impotent. The California approach for example, which seeks to establish licensing standards for non-attorney-agents, is currently being ignored.³

This article focuses on the inherent potential for abuse in the agency relationship between the athlete and his agent. The discussion of possible solutions includes the relaxation of ABA anti-solicitation rules, a possible exemption based on the first amendment, state regulation and finally, a securities law approach. A securities

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1. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 321 (1979) (hereinafter cited as WEISTART & LOWELL).

2. Model Rules of Professional Conduct Rule 7.3 (1983).

3. Sobel, *The Regulation of Player Agents*, 5 ENT. L. REP. No. 10, at 3 (March, 1984) (hereinafter cited as Sobel).

law approach on the federal level, with registration and extensive prior performance disclosure before an agency contract is entered into, is the best solution to the problem because it fosters informed and intelligent decision-making concerning the choice of an agent.

II. THE CAUSE OF THE PROBLEM

There are two principle causes of the problem of agent abuse. The first is the lack of requirements for entering the business.⁴ The second is the lack of information available to college athletes with which to evaluate the qualifications, integrity and experience of prospective agents. Because the typical athlete has little, if any, understanding of the business world,⁵ he is often incapable of making such an evaluation.

Part of the blame for the problem can be placed on the ABA's policy of maintaining restrictions against client solicitation which preclude potential attorney-agents from making their services known. At its August, 1983 national meeting, the ABA ratified Rule 7.3:

DIRECT CONTACT WITH PROSPECTIVE CLIENTS

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone, or telegraph, by letter or other writing, or by other communication directed to a specific recipient . . .⁶

The predecessor sections to Rule 7.3, which were more lenient with respect to client solicitation,⁷ drew heavy criticism as being in con-

4. R. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 22 (1983).

"Anyone can be an agent. Every frustrated jock, every accountant who is bored, every lawyer who is doing pig iron contracts feels that athletic representation could be a lot more exciting, and it offers some vicarious thrills. The Hillside Strangler could be an agent." See also Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815-49 (1981).

5. WEISTART & LOWELL, *supra* note 1, at 321.

6. *Supra* note 2.

7. Model Code of Professional Responsibility DR 2-103 and DR 2-104A (1980). The predecessor rules were more lenient since they did not expressly prohibit direct mail solicitation as does Rule 7.3. For case law holding that direct mail solicitation by a lawyer of clients with whom he has no existing relationship is constitutionally protected commercial speech, see *Koffler v. Joint Bar Association*, 432 N.Y.S.2d 872 (1980). *But cf.* FLA. STAT. § 877.02 (1983), (making solicitation, in any form, a misdemeanor punishable by one year of imprisonment or a one thousand dollar fine).

flict with a basic tenet of a lawyer's professional responsibility, namely ensuring that "every person in our society should have ready access to independent professional services of a lawyer of integrity and competence."⁸ The enactment of Rule 7.3 perpetuates the two principal causes of agent abuse by preventing qualified attorneys from competing with non-attorney-agents in making their services known to the athlete.

Accordingly, as one commentator described, "there exists a 'Catch-22' situation in the agent-athlete relationship; while an athlete would be better off being represented by an attorney-agent, the ABA solicitation provisions make it easier for the non-lawyer to obtain clients."⁹ When one considers that most flagrant examples of unscrupulous conduct involve non-attorney-agents, the ABA's policy becomes absolutely indefensible.

The best illustration of the "Catch-22" situation comes from the respective reactions of attorney and non-attorney-agents to the National Collegiate Athletic Association (NCAA) rules prohibiting college athletes from signing contracts with professional sports teams. While attorney-agents have, because of several disciplinary rules, complied with the NCAA rule, non-attorney-agents totally disregard it. For example, in 1979 agent Mike Trope stated that:

The rules are ridiculous and they're not being followed by anybody . . . why should I honor the NCAA rules when I'm not even bound by them? And I don't intend to honor them, not ever, unless Congress says all the rules of the NCAA are the laws of the United States, and you can go to prison for ten years if you break them.¹⁰

Trope likely has a similar opinion of the NCAA's agent registration plan which became effective April 18, 1984.¹¹

III. POSSIBLE SOLUTIONS TO AGENT ABUSE

A. *Relaxing ABA Anti-Solicitation Rules*

A promising solution to the problem of dishonest and incompetent agents would be the relaxation of ABA anti-solicitation rules. Despite repeated outcries for such a change from distin-

8. Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 184.

9. Comment, *supra* note 4, at 832-33 (footnote omitted). Cf. S. GALLNER, PRO SPORTS: THE CONTRACT GAME 25 (1974) (describing the hardships endured by basketball player David Brent whose college career was forfeited because of NCAA regulations).

10. Mcleese, *A Whole New Ballgame for Lawyers*, Student Lawyer, Oct. 1980, at 46.

11. N.Y. Times, April 19, 1984, §B at 19.

guished scholars,¹² the ABA remains unpersuaded. At its August 1983 meeting, the ABA ratified Rule 7.3 and thus rejected the proposal of the Kutak Commission and the American Trial Lawyers Association.¹³ Both proposals would have opened the door to solicitation by attorney-agents in situations devoid of fraud and overreaching.

The impetus for ABA code revision may have to come from case law. An examination of both recent and established court decisions indicates that there is still hope for such a revision. In the companion cases of *Ohralik v. State Bar of Ohio*¹⁴ and *In re Primus*¹⁵, the Supreme Court applied the ABA solicitation rules to two factual situations which are analogous to the athlete agency situation. In *Ohralik*, the Court upheld as constitutional the application of Disciplinary Rules DR 2-103(A) and DR 2-104(A) to direct in-person solicitation by an attorney of two injured 18 year old female accident victims. The Court reasoned that the state has a "compelling" interest in preventing these aspects of solicitation that involve fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct.¹⁶

In *Primus*, the Court found the application of DR 2-103(A) and DR 2-104(A) to the solicitation by an American Civil Liberties Union (ACLU) lawyer for indigent sterilization victims violative of the first and fourteenth Amendments.¹⁷ The Court reasoned that solicitation of prospective litigants by non-profit organizations that engage in litigation "as a form of political expression" and "political association" constitutes expressive and associational conduct protected by the first amendment.¹⁸

Most appropriate to the athlete-agent dilemma is Justice Marshall's concurring opinion in *Ohralik*.¹⁹ In attempting to provide guidance for activity "falling between the poles"²⁰ represented by the *Ohralik* and *Primus* cases, Marshall concluded that the first

12. See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L. J. 1181 (1972); Note, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L.L. REV. 77 (1973).

13. PROPOSED CODE FOR PROFESSIONAL RESPONSIBILITY RULE 7.3 (1983), Insert American Bar Journal November, 1983 at 29 see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103A and DR 2-104A.

14. 436 U.S. 447 (1978).

15. 436 U.S. 412 (1978).

16. 436 U.S. at 468.

17. *Id.* at 439.

18. *Id.*

19. *Id.* at 468-77.

20. 436 U.S. at 468.

amendment would protect "benign in-person commercial solicitation."²¹ In a footnote, Marshall explained: "I mean solicitation by advice and information that is truthful and that is presented in a non-coercive, non-deceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision."²² Justice Marshall reasoned that "rules against solicitation substantially impede the flow of important information to consumers from those most likely to provide it—the practicing members of the Bar."²³

Even under a constrained interpretation, Marshall's concurring opinion seems to protect on-campus solicitation by attorney-agents under circumstances devoid of the potential for over-reaching. Such circumstances could exist for example, if college athletic directors administered and supervised on-campus meetings between attorney-agents and prospective professional athletes. By providing a forum for the supervised solicitation of athletes, the athletic director would ensure that the athletes receive all the relevant information necessary for an informed choice concerning an agent.²⁴ Moreover, by arming the athlete with information in a controlled environment, the athletic director would deter the "secret signing"²⁵ of athletes in violation of NCAA rules.²⁶ Because it would be augmented by the disciplinary powers of the state and local bar associations, supervised on-campus solicitation by attorney-agents would actually further NCAA policy.²⁷

B. *First Amendment Exemptions from Anti-Solicitation Rules*

Another line of case law suggests the possibility of an exemption from the anti-solicitation rules for attorney-agents who solicit athletes after gaining a recommendation from the respective professional league players associations. This may be a feasible solution since most players unions have expressed the view that attorney-agents do a far better job in representing the interests of

21. *Id.* at 472.

22. *Id.* n.3.

23. *Id.* at 473.

24. *Id.*

25. "Secret Signing" is a term used to describe a college athlete's pre-graduation signing of a professional sports player contract. See Comment, *supra* note 4, at 828.

26. See S. GALLNER, *supra* note 9, at 101, where the author states that "the best deterrent to overreaching by attorneys will be clients armed with information about comparable services available from other attorneys."

27. *Id.* at 826.

players than do non-attorney-agents.²⁸ These unions have expressed, as a matter of union policy, their desire that members be represented by attorney-agents.

Until 1982, the National Football League Players Association (NFLPA) declined to fully exercise their authority under Section 9 of the National Labor Relations Act²⁹ to act as the "exclusive representative" of all employees in the certified unit for the purpose of collective bargaining concerning wages, hours, and other conditions of employment. In an effort to combat the problem of agent abuse the NFLPA, in its 1982 Collective Bargaining Agreement, retained the right to be the exclusive bargaining representative for all players employed by NFL teams.³⁰ Thus, the Association has created a certification system under which a player's own agent is required to become a registered agent of the NFLPA. With the exercise of jurisdiction by the NFLPA over agents through its certification system, in-person-solicitation by certified attorney-agents may be shielded from the anti-solicitation rules by the first amendment rights of free speech, assembly, and association. Indeed, the following Supreme Court decisions lend support for this theory.

In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,³¹ the Court considered the question of solicitation in a case where a union's legal services plan resulted in channelling all or substantially all of the railroad workers' personal injury claims, on a private fee basis, to lawyers selected by the union and recommended in its literature and at meetings. In upholding the solicitation under the legal services plan, the Court reasoned that the union's first amendment rights of free speech, petition and assembly necessarily include the right of workers personally or through a special department of their Brotherhood to: 1) advise members concerning their needs for legal assistance; 2) make suggestions as to appropriate counsel.³²

In *United Mine Workers v. Illinois State Bar Ass'n.*,³³ the Illinois Bar Association brought suit against the union for unauthorized practice of law based on the union's employment of a li-

28. See Comment, *supra* note 4, at 842.

29. National Labor Relations Act § 9, 29 U.S.C. § 159 (1982).

30. See Comment, *supra* note 4, at 842.

31. 377 U.S. 1 (1964).

32. The Court intimated that the participating lawyers were not soliciting at all. "The railroad workers, by recommending competent lawyers to each other obviously are not themselves engaging in the practice of law, nor are they *nor the lawyers whom they select parties to any solicitation*" *Id.* at 6-7.

33. 389 U.S. 217 (1967).

censed attorney to represent members in connection with worker's compensation claims.³⁴ The Court upheld the union's plan on first amendment grounds. In so holding, the Court rejected the notion that the activity of the union and its counsel could not be shielded by the first amendment because it did not involve litigation for political purposes.³⁵

Finally, in *United Transportation Union v. State Bar of Michigan*,³⁶ the Court reversed a state court injunction prohibiting a comprehensive union plan to institute personal injury claims. Under the plan the union paid investigators to keep track of accidents, to visit injured members (taking contingent fee contracts with them) and to urge members to engage named private attorneys who were selected by the union and who had agreed to charge a fee set by prior agreement with the union. In approving the plan in the face of the Michigan Bar's solicitation rules, the Court held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."³⁷

As applied to the NFLPA agent certification procedure, *Trainmen*, *Mine Workers*, and *Transportation Union* suggest that solicitation by certified attorney-agents is immune from the anti-solicitation rules. The certification procedure, like the legal services plans in *Trainmen* and its progeny, was designed to advise union members concerning their needs for legal assistance and suggest appropriate counsel. Similarly, like the plans in *Trainmen* and its progeny, the NFLPA certification system has the effect of channelling clients to particular attorneys approved by the association as competent to handle the members' interests. That the NFLPA may also certify competent non-attorney-agents does not destroy the analogizing construction since the purpose of the certification plan was to effectuate the association's policy of recommending at-

34. The court was persuaded by facts indicating that interests of union members were being jeopardized by unscrupulous attorneys who often demanded 40-50% of the amount recovered under the Worker's Compensation Act for attorney's fees. That agents are prone to abuse athletes and have a 25 year history of such abuse may lead a court to analogize the legal services plan in *Mine Workers* with a player association agent certification plan. See *supra* notes 29-32 and accompanying text.

35. The Court opined that "the litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with small ones, are guarded." 389 U.S. at 223.

36. 401 U.S. 576 (1971).

37. *Id.* at 585.

torney over non-attorney-agents.³⁸

Moreover, the analogy remains intact even though the rights sought to be protected by the certification plan do not involve redress for personal injury. The extent of first amendment protection is the same for associational activity undertaken to secure rights of union members in a court of law and associational activity undertaken to secure rights of union members at the bargaining unit with management.³⁹

Even though solicitation by certified agents may receive first amendment protection coextensive with that afforded under *Trainmen* and its progeny, its utility in combating agent abuse remains questionable. The reason for the pessimism is the limited jurisdiction of the players unions with respect to their bargaining units.

In the *Trainmen* line of cases, the abuse sought to be reme-

38. As further support for this analogy, it should be noted that the NFLPA sponsors legal seminars geared towards educating both lawyer and non-lawyer-agents in the proper representation of professional athletes. Similarly, player associations provide salary information for and work with agents in areas ranging from developing arbitration strategy to processing grievances. Ruxin, *supra* note 4, at 842. The difficulty arises however, when player association officials also privately represent athletes in private negotiations with their respective teams. For example, the executive directors of the hockey and basketball player associations also represent individual athletes. In this context a court may refuse to grant first amendment protection to the players association based on the theory that a conflict of interest precludes the association from being the true champion of the collectivity of players.

39. In these three cases, the Court tended to merge the rights of assembly and petition into the speech clause, treating all three rights as elements of an inclusive right of freedom of expression. Therefore, although certain conduct may call forth a denomination of petitioner assembly, there seems little question that no substantive issue turns upon whether one is engaged in speech, assembly or petition. U.S. Constitution Revised and Annotated, at 1034 (1972); *cf.* *Coates v. Cincinnati*, 402 U.S. 611 (1971); see text and accompanying note 64 *supra*. The only other difference between the agent situation and that of the unions in *Trainmen* and its progeny, is the absence in the former of important state or federal legislation. For example, in *Trainmen*, the activity of the union in establishing the legal services plan was legitimated by the policies underlying the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) and the Safety Appliance Act, 45 U.S.C. §§ 1-43 (1982). At page 5 of its opinion the Court held that:

It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purposes of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.

Although California has enacted an Agent Registration Act, CAL. LAB. CODE §§ 1500-1547 (West 1981), it cannot be compared with the Federal Employers' Liability Act or Safety Appliance Act in terms of popularity or clout. Therefore, absent enactment of a comprehensive federal registration act for agents like the one proposed herein, the protection afforded the union in *Trainmen* may not be available to the Players Associations.

died was not imposed on workers until *after* they entered the protective environment of the bargaining unit. In the athlete-agent context, that abuse takes place *before* the athlete joins the bargaining unit. Consequently, by the time the player joins the union he has already signed an agency contract and has had that agent negotiate his first employment contract with a professional team. Unless the NFLPA can, in the face of significant labor and anti-trust law problems, persuade the National Labor Relations Board (NLRB) to expand their bargaining unit to include college athletes, the efforts of the NFLPA and other player unions to combat agent abuse will come too late.⁴⁰

C. State Regulation of Agent Abuse: The California Approach

Recognizing that many of its college athletes were being victimized by unscrupulous agents, the California Legislature approved California Labor Code Section 1500, the Lockyer Act.⁴¹ The statute requires all agents, except lawyers "acting as legal counsel," to register annually with the Labor Commission, pay a licensing fee, and deposit a \$10,000 security bond.⁴² The statute empowers the State Labor Commission to investigate the moral character of any applicant and, upon proper notice and hearing, refuse to grant a license or suspend or revoke a license.⁴³

While the California statute has been praised because of its focus on the practices of non-attorney-agents,⁴⁴ it is not likely to serve the purpose for which it was designed. Aside from the fact that it is currently being ignored by California agents,⁴⁵ the Lockyer Act regulates too narrow an area of conduct. Perhaps the most significant problem with the California Act is its lack of prior

40. Sobel, *supra* note 3, at 8. See Comment, *supra* note 4. See also Boris v. U.S.F.L., slip op. (S.D. Cal. Feb. 5, 1984) holding that the U.S.F.L.'s eligibility rule constitutes a *per se* violation of the Sherman Act. With the *Boris* decision, player associations will have to expand their bargaining unit to include college sophomores. This assumes that the freshman year will be used as a try-out year for professional teams.

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

42. CAL. LAB. CODE § 1519 (West 1984).

43. CAL. LAB. CODE §§ 1512-13 (West 1984).

44. Comment, *supra* note 4, at 834.

45. Under CAL. LAB. CODE § 1545 (West 1981) an agent must file a copy of his registration certificate with the athlete's school "prior to communicating with or contacting in any manner any student concerning an agency contract." Thus, a situation could arise where the agent files his certificate with the school on September 1, and knocks on the athlete's door on September 2nd. It is highly unlikely that the athlete is informed of the agent's qualifications by the time he invites the agent into his room. Moreover, it is unlikely that anyone in the Athletic Department or Administration has read the certificate. Thus, the Act's filing requirement affords the athlete little, if any, protection.

performance disclosure. Section 1511(c) of the Lockyer Act only requires that the agent list his business or occupation for the two years immediately preceding the date of application. The information provided by Section 1511(c) is rendered ineffective since it may not reach the athlete in time to enable an informed decision regarding the choice of an agent. Thus, disclosure under the Lockyer Act is both too little and too late.

D. *The Securities Law Approach*

In exposing the weaknesses of the NFLPA agent certification plan, the NCAA agent registration program and the Lockyer Act, two themes become evident. The first indicates that a plan to regulate athlete-agents must be administered by a federal agency with significant enforcement powers. The second demonstrates that the legislation governing athlete-agents must emphasize full disclosure as a method of combating athlete-agent abuse.

Disclosure is a central aspect of national policy in the field of securities regulation. The emphasis on disclosure in our securities laws is based on two considerations.⁴⁶ The first consideration assures that investors and speculators have access to enough information to enable them to arrive at their own rational decisions. The second rests on the belief that appropriate publicity tends to deter questionable practices and to elevate standards of business conduct. The objective of the Securities Act of 1933⁴⁷ is to produce a document which tells a prospective purchaser the things he really ought to know before buying a security; one he can examine in his home or in his office. The proposed National Athlete-Agent Disclosure Act (the Act), is the embodiment of these considerations in the area of athlete-agent regulation.

Like the Securities Act of 1933, the theory behind the Act is that informed, intelligent decisions respecting the choice of an agent come only after careful and extensive examination of that agent's prior performance and educational qualifications. Toward this end, sections 102 and 105 of the Act combine to establish a twenty day period during which time the athlete will have in his possession a substantial disclosure document detailing the agent's experience in the field of athlete representation, educational qualifications and similar information with respect to individuals with whom the agent is and has been affiliated. Only upon the expira-

46. D. RATNER, *SECURITIES REGULATION: MATERIALS FOR A BASIC COURSE* 74 (1980).

47. *Id.* at 82; 15 U.S.C. § 77 (1982).

tion of the twenty day waiting period will the agent's registration become effective (pursuant to section 101(c)) allowing him to solicit the athlete in-person in an effort to obtain his signature on an agency contract. Although the Act requires the agent to file only one registration statement (section 104) and only one disclosure statement (section 102), it contemplates an effective date for in-person solicitation for each and every athlete the agent wishes to pursue. In this manner, the Act views in-person solicitation of each individual athlete by an agent like a distinct and separate offering of a new security by an issuer. Section 102, subsections (b)(7) and (b)(8) require that the agent describe all fees which the athlete is required to pay throughout his relationship with the agent.

Section 103 provides that the agent must obtain a surety bond or establish a trust account in each state in which he does business in an amount equal to twenty-five percent of the value of all professional sports employment contracts negotiated in that state or fifty thousand dollars, whichever is greater. This is designed to act both as security against agent embezzlement and as malpractice insurance. According to section 103, the bond or trust account would cover damages caused by fraudulent practices and negligence.

Section 104 provides that a prospective agent must submit an application for registration to the Commission disclosing his name and address, experience relating to the representation of athletes, copies of any contracts, services to be offered and any other information that the Commission may request. Pursuant to subsection (b) of section 104 the Commission will issue a certificate of registration at which time the agent may send a disclosure statement to a prospective athlete pursuant to section 102. Subsection (d) of section 104 requires that the agent amend his registration to include material changes in information.

Section 105 prohibits the agent from entering into an agency contract with an athlete in derogation of the time established for such solicitation by the Act. Pursuant to section 105, the agent cannot sign an athlete to an agency contract unless: 1) the agent is registered; 2) the athlete has had twenty days in which to examine the disclosure document; and 3) the agent's registration has been declared effective with respect to the particular athlete sought to be signed by the agent.

Provision is made in section 106 for the revocation or suspension of an agent's registration. Section 106 also provides for a stop order denying the effectiveness of an agent's registration as it relates to the solicitation of a particular athlete. Grounds for the is-

suance of a stop order, revocation or suspension are largely discretionary and focus on the necessity of protecting any athlete or prospective athlete. Section 107 also addresses registration.

Sections 108 and 109 delineate the investigative and enforcement powers of the Commission in administering the Act. These include cease and desist orders, standing in the federal courts to obtain injunctive relief, court orders imposing fines of one thousand dollars upon agents who fail to observe a cease and desist order and orders of restitution. The Act's section 110 imposes a twenty-five thousand dollar fine, a five year term of imprisonment or both for each willful violation of the Act.

Section 111 allows the athlete to void any agency contract and receive all sums already paid to the agent if the agent uses any untrue or misleading statement in the solicitation of the athlete, or fails to comply with the disclosure requirements of section 102. Subsection (b) of section 111 provides for a private cause of action for an athlete based on an agent's breach of contract. Subsection (b) also provides for reasonable attorney's fees in connection with such an action. Subsection (d) of section 111 allows any athlete damaged by an agent's violation of the Act, or breach of contract, to bring an action to recover damages against the bond or trust account provided for in section 103. Subsection (i) of section 111 renders void any stipulation or provision in any agency contract binding an athlete to waive compliance with any provision of the Act, its regulations, or orders issued under the Act pursuant to section 112.

Provision is made in section 114 for the annual renewal of an agent's registration upon payment to the Commission of a one hundred dollar fee. Section 114 also provides for the amendment of all disclosure documents filed under the Act. Failure to do so will result in the termination of the agent's registration.

Because the Act seeks to regulate only the solicitation of athletes by individuals who currently answer to no one, it provides liberal exemptions. First, the Act would exempt broker-dealers,⁴⁸ who are regulated by section 15 of the Securities Exchange Act of 1934 and the National Association of Securities Dealers (NASD), when they limit their services to conduct covered by the Securities Exchange Act. Second, the Act would exempt investment advisers

48. The 1934 Act defines a "broker" as a "person engaged in the business of buying and selling securities for the account of others," 15 U.S.C. § 78(a)(4) (1982). While it defines "dealer" as "any person engaged in the business of buying and selling securities for his own account." 15 U.S.C. § 78(a)(5)(1982).

who limit their services to conduct regulated by the Investment Adviser's Act of 1940,⁴⁹ or state banking laws. Finally, the Act would exempt licensed attorneys who: 1) limit their services to the negotiation of a professional sports service contract;⁵⁰ and 2) do not solicit athletes as clients.

There are four principal reasons why the proposed Act is superior to existing regulatory measures. First, because it contains significant enforcement provisions and calls for administration by a federal agency. The Act provides the deterrent effect lacking in the NCAA and California registration systems.⁵¹

Second, it calls for administration on the federal level; the Act creates a uniform body of law in the area of athlete-agent regulation. Nothing would be more expensive or chaotic than a continuation of the trend of agent regulation by individual states.⁵²

Third, since the Act regulates agent solicitation of college athletes, it fills the gaps currently left open by players association agent certification plans. This is especially compelling in view of the insurmountable labor and anti-trust law problems associated with expanding players associations' bargaining units to include college athletes.⁵³

49. See 15 U.S.C. §§ 80b-1 to 80c-3; cf. *Finn v. Parish*, 644 F.2d 360 (7th Cir. 1981).

50. The proposed Act would promote resistance from the organized bar to the extent that it regulates and seeks to sanction solicitation by attorneys. The California Act met with similar resistance. See Sobel, *supra* note 3, at 6. However, if the Act was enacted by Congress the organized bar would have little leverage for deterring members from soliciting athletes within the guidelines of the Act. With respect to the lawyer exemption, its requirements are conjunctive. That is, the attorney must limit his services to the negotiation of player contracts *and* must have obtained the athlete through means other than solicitation.

51. See *supra* note 39 and accompanying text. See also 1984 SPORTS INDUS. NEWS 24 (John Leavens, NCAA assistant director for legislative services, stated that the NCAA "can do little to encourage agent compliance").

52. To date, three states other than California have considered adopting player agent laws. They are New York, Texas and Indiana. Sobel, *supra* note 3, at 7. It seems that, notwithstanding *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), professional sports constitutes interstate commerce. Cf. *Radovich v. National Football League*, 352 U.S. 445 (1957). Accordingly, in order to avoid a plethora of litigation on difficult questions of constitutional law and conflicts of law, federal legislation should be enacted in this area.

53. The labor law problem is that the definition of the "bargaining unit" in 29 U.S.C. § 159(b) (1982) speaks in terms of a unit comprised of "employees" and 29 U.S.C. § 152(3) (1982) defines "employees" as "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice." It does not contemplate athletes not yet working for a particular employer. The anti-trust problem is that the NFLPA could lose its labor exemption under the anti-trust laws. See generally 15 U.S.C. § 17 (1982); 29 U.S.C. §§ 52, 104, 105, 113 (1982). In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), the court established a three-part test to qualify for a labor exemption. First, the restraint of trade (in this case the agent certification plan) must affect *only* the parties to the collective bargaining relationship. Second, the agreement sought to be exempted must involve a mandatory subject of collective bargaining.

Finally, by sanctioning in-person solicitation by attorney-agents, the Act would ameliorate the "Catch-22" situation perpetuated by the ABA Code of Professional Responsibility.⁵⁴ Under the Act, once their respective registrations are declared effective with respect to a particular athlete, the attorney and non-attorney-agent stand on equal ground and would be left to their own devices to obtain the athlete as a client.

IV. CONCLUSION

In conclusion, the proposed Athlete-Agent Disclosure Act would be the most effective method of remedying the problem of athlete-agent abuse. Because it arms the athlete with information about comparable services available from numerous agents, the Act fosters informed and intelligent decision-making concerning the choice of an agent. Moreover, it regulates solicitation of college athletes; the Act protects those most likely to be victimized by unscrupulous agents. Finally, because it contains significant enforcement provisions and calls for administration by a federal agency, the Act provides the deterrent effect which existing forms of agent regulation simply cannot provide.**

Third, the agreement sought to be exempted must be the product of bona fide arms-length bargaining. The NFLPA certification plan would fail the first requirement of the *Mackey* test. The plan would affect college athletes who are not currently, and cannot be, parties to the NFLPA collective bargaining agreement with NFL management council. See A. Farnsworth, *Herschel Walker v. National Football League: A Hypothetical Lawsuit Challenging the Propriety of the NFL's Four-or-Five Year Rule Under the Sherman Act*, 9 PEPPERDINE L. REV. 603, 620-24 (1982).

54. See *supra* note 12 and accompanying text.

** The author does not indicate provisions in the proposed statute for the procedure to appeal the Commission's decisions, nor which court would have jurisdiction to hear such appeals.

THE ATHLETE-AGENT DISCLOSURE ACT

Section 100. Definitions. When used in this Act, unless the context otherwise requires:

- A. "Commission" means the Federal Trade Commission or any person acting under the authority of the Federal Trade Commission with respect to the enforcement of this Act.
- B. "Athlete" means any individual who is the subject of solicitation by an athlete-agent in connection with the services listed in paragraph C of this section.
- C. "Athlete-Agent" means any person who, as an independent contractor, directly or indirectly recruits or solicits any athlete to enter into any agency contract or professional sports service contract, or for a fee procures, offers, promises, or otherwise attempts to obtain employment for any athlete with a professional sport team. "Athlete-Agent" also means any person who seeks endorsements for any athlete, manages money for any athlete or gives investment advice to any athlete, provided however, that persons already registered under Federal or State Securities or Banking laws need not register under this Act with respect to services rendered to an athlete which are regulated by said Securities or Banking laws; provided further, that the definition of "Athlete-Agent" shall not include licensed attorneys who do not solicit athletes as clients and who limit their services to the negotiation of sports service contracts.
- D. "Agency Contract" means any contract or agreement pursuant to which a person authorizes or empowers an athlete-agent to negotiate or solicit on behalf of such person with one or more professional sport teams for the employment of such person by one or more professional sport teams.
- E. "Professional Sport Services Contract" means any contract or agreement pursuant to which a person is employed or agrees to render services as a player on a professional sport team.

Section 101. Registration of Athlete-Agents.

Consent to Service of Process.

- A. Prior to the solicitation, whether by telephone, mail, in-

person or through a third person, of an athlete, the athlete-agent shall register by:

- (1) filing a copy of the disclosure statement required by section 102;
 - (2) furnishing a bond in accordance with the provisions of section 103;
 - (3) providing a sworn to and certified statement containing the information required by section 104;
 - (4) providing, in accordance with subsection B of this section, the Attorney General of each state in which the athlete-agent does business with an irrevocable consent, appointing the respective Attorney General to be his attorney to receive service of any legal process in any noncriminal suit, action or proceeding which arises under this Act, or any regulation or order adopted or issued under the provisions of this Act; and
 - (5) submitting a nonrefundable registration fee of \$1,000 in accordance with subsection B of section 104.
- B. Every athlete-agent proposing to solicit athletes either personally or through a third person for the purpose of acting as the athlete's representative with respect to any of the activities described in subsection C of section 100 shall file with the Attorney General of each state in which the athlete-agent does business, an irrevocable consent appointing said Attorney General or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his agent which arises under this Act, or any regulation or order adopted or issued under this Act after the consent has been filed. Service may be made by leaving a copy of the process in the office of the Attorney General.
- C. (1) Except as hereinafter provided, the registration of an athlete-agent under this Act shall become effective on the twentieth day after the filing thereof or such later date as the Commission may determine, having due regard to the adequacy of information respecting the athlete-agent theretofore available to the athlete.
- (2) If it appears that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal

service or the sending of a confirmed telegraph notice not later than ten days after the filing of the registration statement, and after an opportunity for a hearing within ten days after such notice by personal service or the sending of such telegraph notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (1) or upon the date of such declaration, whichever date is the later.

Section 102. Disclosure to the Subject Athlete Required.

- A. At least twenty days prior to the time the athlete signs an agency contract but not before the certification of the athlete-agent's registration statement under paragraph B of section 104, the athlete-agent shall provide the athlete with a written document, the cover sheet of which shall be entitled in at least ten-point bold fact print "Disclosure Required By Federal Law." Under this title shall appear the statement in at least ten-point type that "The Federal Trade Commission does not approve, recommend, endorse or sponsor any athlete-agent." The twenty day period shall begin to run when the Commission is satisfied, from proof provided by the athlete-agent, that a disclosure statement satisfying the requirements of this section was sent or given to the athlete.
- B. The disclosure document shall contain the following information which shall be presented in a single document in the order set forth in this subsection and shall include a comment which positively or negatively responds to each disclosure item required to be in the disclosure document by use of a statement which fully incorporates the information required within such document:
 - (1) (a) The athlete-agent's name, address and principal place of business and that of any athlete agency firm with whom the athlete-agent is affiliated; and
 - (b) the name under which the athlete-agent intends to do business.
 - (2) The business experience of the athlete-agent, includ-

- ing:
- (a) the length of time he or she has conducted business as an athlete-agent;
 - (b) the number of agency contracts entered into between the athlete-agent and an athlete;
 - (c) the number of professional sports service contracts negotiated by the athlete-agent;
 - (d) the extent of the athlete-agent's investment or financial management experience; and
 - (e) similar information regarding the employees of any athlete-agency firm listed in subsection B(1)(a) of this section.
- (3) The educational background of the athlete-agent including but not limited to:
- (a) legal degrees;
 - (b) accounting degrees or certification;
 - (c) undergraduate degrees in business administration; and
 - (d) similar information regarding the employment of any athlete-agency firm listed in subsection B(1)(a) of this section.
- (4) A statement disclosing who, if any, of the persons listed in subsection B(1)(a), including the athlete-agent:
- (a) has, at any time during the previous seven years, been convicted of a felony or pleaded nolo contendere to a felony charge if such felony charge involved fraud, including but not limited to, a violation of any securities law or unfair or deceptive practices of law, embezzlement, fraudulent conversion, or misappropriation of property;
 - (b) has, at any time during the previous seven years, been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action:
 - (i) involving allegation of fraud, including but not limited to violations of any securities law or unfair or deceptive practices law, embezzlement, fraudulent conversion, or misappropriation of property; or

- (ii) which was brought by a present or former athlete and which involves or involved the agent-athlete relationship.
- (5) A statement disclosing who, if any, of the persons listed in subsection B(1)(a) at any time during the previous seven years has:
 - (a) filed a petition for liquidation or reorganization under Federal Bankruptcy law;
 - (b) been adjudged bankrupt;
 - (c) been reorganized due to insolvency; or
 - (d) been a principal, director, executive officer or partner of any other person that has so filed or was adjudged or reorganized, during or within one year after the period that such person held such position with such other person. If so, the athlete-agent shall set forth the name and location of the person having so filed or having been so adjudged or reorganized, the date and any other material facts.
- (6) A factual description of the services offered by the athlete-agent.
- (7) A statement setting forth the fee which the athlete is required to pay the athlete-agent or his firm.
- (8) A statement describing any recurring fees in connection with the services described in paragraph 6 of this subsection.
- (9) A statement disclosing:
 - (a) the total number of athlete-agency contracts the athlete-agent is obligated under;
 - (b) any financial interest the athlete-agent has in any professional sports team;
 - (c) the number of athlete-agency contracts during the preceding three years that were voluntarily terminated or not renewed by athletes within or at the conclusion of the term of the athlete-agency contract; and
 - (d) with respect to the disclosure required by subparagraph (c) of this subsection, the disclosure statement shall include a general categorization of the reasons for such refusals to renew or terminations, including but not limited to the following categories:
 - (i) failure to prudently advise with respect

- to investments or money management;
- (ii) failure to obtain full market value for the athlete's services;
- (iii) conflicts of interest with the athlete; and
- (iv) excessive fees.

Section 103. Surety Bond or Trust Account Required.

- A. Unless exempted by subsection B of this section, the athlete-agent must obtain a surety bond issued by a surety company in every state in which he does business or must establish a trust account with a licensed and insured bank or savings institution located in every state in which he does business. The amount of the bond or trust account shall be fifty thousand dollars or an amount equal to twenty-five percent of the value of all professional sports service contracts which the athlete-agent has negotiated in the state, whichever is greater. The bond or trust account shall cover damages caused any athlete due to the athlete-agent's misstatement, misrepresentation, fraud, deceit, or negligence.
- B. Any athlete-agent who maintains professional malpractice insurance in an amount in excess of that required by subsection A above need not obtain a surety bond or establish a trust account.

Section 104. Application for Registration.

- A. Unless exempted by the proviso to subsection C of section 100, any athlete-agent intending to solicit, as a client, any athlete must register with the Commission and file an application which shall contain the following documents and information:
 - (1) the official name and address and principal place of business of the athlete-agent and that of any firm with whom the athlete-agent is affiliated, if any;
 - (2) the business experience of the athlete-agent and that of the persons employed by the firm with whom the athlete-agent is affiliated, including the length of time such athlete-agent has conducted business as an athlete-agent;
 - (3) a copy of any contracts or other documents relating to the services offered by the athlete-agent;
 - (4) a factual description of the services offered by the athlete-agent or members of any firm with whom he

- or she is affiliated;
- (5) any other information the Commission in its discretion reasonably requires.
- B. Upon satisfactory submission of the information and documents required by subsection A of this section, and all information and documents required by sections 102 and 103, and the payment of a registration fee of one thousand dollars, the Commission shall issue a certificate stating that the athlete-agent has been registered.
- C. The Commission may from time to time by regulation or order exempt any athlete-agent for the reasons stated in the proviso to subsection C of section 100.
- D. The athlete-agent shall immediately notify the Commission of any material change in information contained in the application for registration and shall make appropriate amendments of the disclosure statement.

Section 105. Prohibited Solicitation Activity.

No athlete-agent shall solicit an athlete to enter into an agency agreement unless:

- A. the athlete-agent has been registered in accordance with section 104;
- B. the athlete has had in his possession for at least twenty days, the disclosure statement required by section 102; and
- C. the athlete-agent's registration has been declared effective by the Commission in accordance with paragraph C of section 101.

Section 106. Registration Suspended or Revoked.

- A. The Commission may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any athlete-agent registration if it finds:
- (1) that such order is necessary for the protection of any athlete or prospective athlete;
- (2) that the registration of the athlete-agent as of its effective date or as of any earlier date in the case of an order denying effectiveness, is incomplete in any material respect or contains any statement which is, in light of the circumstances under which it was made, false or misleading with respect to any material fact; or
- (3) that any provision of this Act or any regulation, or-

der or condition lawfully adopted, issued or imposed under this chapter has been willfully violated by an athlete-agent.

- B. The Commission may, by order, summarily postpone or suspend the effectiveness of the registration of an athlete-agent pending final determination of any proceeding under this Act. Upon entry of such order the Commission shall promptly notify the registrant that the order has been entered, and of the reasons for such entry, and that within fifteen days after receipt by the Commission of the written request the matter will be set down for a hearing. If no hearing is requested and none is ordered by the Commission, such order will remain in effect until modified or vacated by the Commission.
- C. No stop order may be entered under this section except as provided in subsection B of this subsection without:
 - (1) appropriate prior notice to the registrant;
 - (2) opportunity for a hearing; and
 - (3) the issuance of written findings of fact and conclusions of law by the Commission.

Section 107. Registration Does Not Imply Approval.

- A. That an application for registration under this Act has been filed or that an athlete-agent is effectively registered shall not constitute a finding by the Commission that any document filed under this Act is true, complete and not misleading. No such fact shall mean that the Commission has passed in any way upon the qualification of, or recommended or given approval to, any athlete-agent.
- B. No athlete-agent shall make or cause to be made any representation inconsistent with subsection A of this section to any prospective athlete.

Section 108. Investigations. Powers of the Commission.

The Commission may make such public or private investigations as it deems necessary to determine whether any athlete-agent has violated, or is about to violate, any provision of this Act, or any regulation or order adopted or issued thereunder, or to aid in the enforcement of this Act.

Section 109. Violations. Remedies and Enforcement Powers of the Commission.

Whenever it appears to the Commission that any athlete-agent is violating, or is about to violate, any of the provisions of this chap-

ter or any regulation order adopted or issued under this Act, the Commission may:

- A. order the athlete-agent or agents to cease and desist from the violations of the provisions of this Act or of the regulations, rules or orders adopted or issued under this Act. After such order is issued, the athlete-agent named in such order may, within fourteen days after receipt of the order, file a written request for a hearing;
- B. bring an action in Federal Court to enjoin the acts or practices constituting a violation and to enforce compliance with this Act or any regulation or order adopted or issued under this Act;
- C. seek a court order imposing a fine not to exceed one thousand dollars per violation against any athlete-agent to have violated a cease or desist order issued by it;
- D. in addition to any other remedies provided by this Act, apply to the court hearing the matter under this Act, for an order of restitution whereby the defendants in such action shall be ordered to make restitution of those sums of money shown by the Commission to have been obtained by them in violation of any of the provisions of this Act, plus interest at the rate of eight percent per annum. Such restitution shall be payable to the persons whose assets were obtained in violation of any provision of this Act; and
- E. any time after the issuance of a cease and desist order provided for in subsection A of this section, accept an agreement by any athlete-agent charged with violating any provision of this Act to enter into a written consent order in lieu of an adjudicative hearing.

Section 110. Penalties.

Any athlete-agent who willfully violates the provisions of section 105 shall be fined for each violation a maximum of twenty-five thousand dollars, or imprisonment for not more than five years or both.

Section 111. Contracts Voidable. Athlete's remedies.

- A. If an athlete-agent uses any untrue or misleading statement in the solicitation of an athlete, or fails to give the proper disclosure in the manner required by section 102, then, upon written notice to such athlete-agent, the ath-

lete may void the agency contract and shall be entitled to receive from such athlete-agent all sums paid to such athlete-agent.

- B. Any athlete injured by a violation of this Act by an athlete-agent's breach of contract subject to this Act, or any obligation arising therefrom, may bring an action for recovery of damages, including reasonable attorney's fees.
- C. Upon complaint of any person, including but not limited to an athlete, that an athlete-agent has violated the provisions of this Act, the federal district court for the district in which either the athlete or the athlete-agent is located shall have jurisdiction to enjoin the defendant or defendants from further violations.
- D. Any athlete who is damaged by any violation of this Act, or by the athlete-agent's breach of contract or of any obligation arising therefrom, may bring an action against the bond or trust account provided for in section 103 to recover damages suffered.
- E. The rights and remedies provided by this Act shall be in addition to any other rights or remedies provided by law or equity.
- F. Every cause of action under this Act shall survive the death of any person who might have been a plaintiff or defendant.
- G. No person may sue under this section more than six years after the breach of a contract covered by this Act.
- H. No athlete-agent who has made or engaged in the performance of any contract in violation of any provision of this Act, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any cause of action on the contract.
- I. Any condition, stipulation or provision binding any athlete to waive compliance with any provision of this Act, or any regulation, or order adopted or issued under this Act is void.

Section 112. Commission to Adopt Regulations.

The Commission may from time to time adopt, amend and rescind such regulations as are necessary to carry out the provisions of this Act.

Section 113. Commission to Keep Register of Applications.

- A. A document is filed when it is received by the Commission.
- B. The Commission shall keep a register of all applications for registration which are or have ever been effective under this Act and all denial, suspension or revocation orders which have ever been entered under this Act. Such register shall be open for public inspection.

Section 114. Renewal of Registration. Amended disclosure document.

Within one hundred and twenty days following the end of the athlete-agent's most recent fiscal year and each year thereafter, each athlete-agent who has been registered under this Act shall submit to the Commission:

- A an annual renewal registration fee of one hundred dollars;
- B an amendment to the information contained in the athlete-agent's application filed in accordance with the requirements of subparagraph A of section 104; and
- C an amended disclosure document filed in accordance with the requirements of sections 101 and 102. In the event that the seller fails to submit the fee and information within the time period and in accordance with requirements of this Act, the registration of the athlete-agent shall be deemed terminated.