



1-1-1984

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Recommended Citation

Dana A. Fox, *Regulating the Professional Sports Agent: Is California in the Right Ballpark?*, 15 PAC. L. J. 1231 (1984).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol15/iss4/13>

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Regulating the Professional Sports Agent: Is California in the Right Ballpark?

An agent has been defined as "one who acts for or in the place of another by authority from him" or "a business representative whose function is to bring about, modify, effect . . . contractual obligations between the principal and third persons."¹ Under these definitions, the principal can be a professional athlete and the third person can be a professional sports team. The distinguishing characteristic of a sports agent is that he represents the athlete in seeking employment, and when properly authorized, negotiates contracts for the athlete that the athlete is bound to perform.² Commonly, the athlete agent will agree to provide services in three areas: contract negotiation, investment advice, and promotional services.³

Today, two types of agents may be found in professional sports: agents who are attorneys, and agents who lack significant legal training.⁴ Several professional athletes have been very successful in either negotiating their own contracts⁵ or in obtaining advice from an agent who is not an attorney.⁶ Commentators have suggested, however, that not only are nonattorney agents likely to be less scrupulous in their methods of operation than attorney agents,⁷ but that the athlete is likely to receive better representation from attorney agents.⁸

1. S. GALLNER, *PRO SPORTS: THE CONTRACT GAME* 51 (1974).

2. *Id.*

3. The representation agreement may require the representative to: (1) negotiate the athlete's employment contract or contracts as a professional athlete; (2) give financial and investment counseling, i.e., invest in stocks, bonds, real estate, restaurants, etc., and devise a prudent investment plan; (3) give advice on tax savings; (4) plan for future security; (5) publicize and promote the athlete's name and abilities to benefit his reputation and possible draft position; (6) conduct endorsements and advertising. *Id.* at 66.

4. *Id.* at 50.

5. *Id.* at 51.

6. One author writes:

As an example that no special skill is required to act as an agent, look at [baseball player] Randy Hundley . . . who used his father, a builder, as his representative; or [football player] Duane Thomas . . . who used former football player Abner Hayes. Others who have become agents include a drycleaning manager, a building contractor, a college athletic trainer, a stockbroker, and an accountant.

Id.

7. *See id.* at 64; *see also* *Burrows v. Probus Management*, 31 Civ. No. 16840 (N.D. Ga., Aug 9, 1973) (unpublished order).

8. *See* GALLNER, *supra* note 1, at 64.

Almost any person capable of acting as an agent for himself may act as an agent for another⁹ because of the nature of the principal-agent relationship.¹⁰ Agents exhibit vastly different levels of expertise and knowledge about the contract negotiating system in professional sports.¹¹ Some critics have stated that the athlete is in a position to be taken advantage of if he does not approach contract negotiations with an intelligent and scrupulous agent.¹² The greatest complaint from athletes is that the services promised to the athlete by the agent either are not delivered or are drastically inadequate.¹³ Conversely, several situations have arisen in which the agent has complained of being dismissed improperly, thus entitling him to the compensation due him as dictated by the agreement between the agent and the athlete.¹⁴

Recently, several methods for regulating athlete agents have been developed. These methods have been designed to eliminate the potential problems that exist in the field of athlete representation.¹⁵ In 1981, the California Legislature added a new chapter to the California Labor Code¹⁶ to reduce the potential for abuse in the field of representing professional athletes by both attorney and nonattorney agents.¹⁷ Self-regulation by agents also has been attempted with limited success.¹⁸ Sports associations, moreover, have established regulations with which agents must comply to represent athletes participating in a particular sport or league.¹⁹ Finally, courts reluctantly have attempted to lend some order to the field of athlete representation through application of standard contract and agency principles.²⁰

The methods of regulation currently in existence are ineffective. They have not provided an enforceable method of resolving the prob-

9. *Id.* at 51.

10. R. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 21 (1983).

11. *Id.* at 22-23.

12. See GALLNER, *supra* note 1, at 51.

13. See Note, *Agents of Professional Athletes*, 15 NEW ENG. L. REV., 545, 547-48 (1980).

14. *Zinn v. Parish*, 461 F. Supp. 11 (N.D. Ill. 1977).

15. See *infra* notes 92, 123, 150 and accompanying text.

16. CAL. LAB. CODE §§1500-1547.

17. Press Release from California State Assemblyman Bill Lockyer, February 9, 1981 (copy on file at the *Pacific Law Journal*).

There are . . . a great number of kids who are more or less blind when they enter this business, who may not know what constitutes a good contract or a maximum benefit. This bill (AB 440) is especially for them. It is for the rookies and for all those hundreds of players who may not . . . have the upper hand in contract negotiations, but who constitute the real work force in professional sports.

Id.

18. See *infra* note 150 and accompanying text.

19. See *infra* note 123 and accompanying text.

20. See *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 724 (S.D. Cal. 1960); Comment, *The Agent-Athlete Relationship in Professional Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815, 817 n.12 (1981).

blems created by athlete agents. Many of the problems that existed prior to the introduction of these methods remain unsolved.

The purpose of this comment is to explain the problems that exist in the athlete-agent relationship. This comment will demonstrate the difficulties encountered in the area of athlete representation by nonattorney agents. The problems created by nonattorney representation will be contrasted with the benefits that exist when the athlete is represented by an attorney agent. In addition, this comment will examine the methods currently used to regulate athlete agents, focusing upon the reasons these methods are ineffective. Finally, the author will present proposals for improving athlete agent regulation by remedying any existing methods that can become, with certain changes, enforceable systems of regulation in the field of athlete representation. An examination of recent cases will demonstrate the types of problems that currently exist in the field of athlete representation.

ILLUSTRATING THE BASIS FOR DISPUTE

With the rise of professional sports as a viable part of the entertainment industry, and with the creation of new rival leagues competing for talented athletes,²¹ the relationship between athletes and their agents has become almost as important as the relationship between athletes and the teams that employ them.²² An agent's service to an athlete can ensure not only that the athlete receives the best contract available, but that the athlete's maximum promotional value is used to the economic benefit of the athlete.²³ The agent also serves a useful purpose in bridging the gap between collective bargaining agreements obtained by player associations that establish rights for all players in a certain sport and the individual needs of a particular athlete not covered in the collective bargaining agreements.²⁴ Collective bargaining agreements exist between the players unions and the owners of the teams in each respective sport.²⁵ They provide certain benefits for every athlete entering into a professional contract and establish standard terms and obligations that must be included in all

21. See GALLNER, *supra* note 1, at 53-54. In 1983 for example, the United States Football League began competition. Already the USFL has been able to lure away several players from the National Football League. SPORTING NEWS, Feb. 28, 1983, at 48.

22. See GALLNER, *supra* note 1, at 50. "The importance of choosing a skilled, reliable and ethical representative cannot be overemphasised." *Id.* For an explanation of the benefits an athlete can derive from being represented by an agent, see RUXIN, *supra* note 10, at 17-21.

23. See GALLNER, *supra* note 1, at 50.

24. See RUXIN, *supra* note 10, at 101. Collective bargaining agreements are also called basic agreements. *Id.*

25. *Id.*

sports contracts.²⁶ The agent can aid the athlete in obtaining rights and compensation which exceed the minimum requirements called for in the collective bargaining agreements. The skilled agent also understands peripheral areas involving tax benefits, corporate gains advantages, mutual funds, and long term investments.²⁷ Writers have commented that the athlete should be able to pursue his goal of achieving career success, leaving his financial security to one who understands the complex business transactions involved in modern professional sports.²⁸

As a result of the increased interest in professional sports and necessary use of sports agents, a dramatic increase in the number of cases in which one party has taken advantage of the other has been reported.²⁹ Although some complaints are brought by the professional sports team,³⁰ many are initiated by the athlete.³¹ Numerous complaints arise when one agent attempts to convince an athlete that he can provide better representation for the athlete than the athlete's current agent.³² Often, dealings of agents are detrimental not only to athletes, but to other agents as well. This problem is exemplified in *Roundball Enterprises Inc. v. Ray Richardson and G. Patrick Healy*.³³

A. Roundball v. Richardson and Healy

Young, often uneducated athletes are highly impressionable and sometimes are considered to be "untutored and unwise."³⁴ An athlete can encounter serious legal problems with little difficulty by failing to understand the ramifications of his decisions. The defendant in the *Roundball* case, Michael Ray Richardson, is a professional basketball player who had agreed with Roundball Enterprises to be represented in contractual negotiations exclusively by Roundball.³⁵ Roundball also was to provide Richardson with financial and business advise-

26. One author explains: "In addition to knowing what other comparable players are being paid, a good agent offers attributes which most players lack: detailed *knowledge* of the rights of his client under his contract and his basic agreement . . ." *Id.* at 19.

27. GALLNER, *supra* note 1, at 64.

28. *Id.* at 64.

29. Comment, *supra* note 20, at 816.

30. *See, e.g.*, *Cincinnati Bengals Inc. v. Bergey*, 453 F. Supp. 129, 131 (S.D. Ohio 1974).

31. *See, e.g.*, *Burrows v. Probus Management*, 31 Civ. No. 16840 (N.D. Ga., Aug 9, 1973) (unpublished order) (football player suing agent); *Brown v. Woolf*, 554 F. Supp. 1206, 1207 (S.D. Ind. 1983) (hockey player suing agent).

32. *See infra* note 33 and accompanying text.

33. No. 82 Civ. No. 7000 (S.D. N.Y. March 31, 1983).

34. *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 726 (S.D. Cal. 1960).

35. *Roundball*, No. 82 Civ. No. 7000 (S.D. Cal. 1960).

ment services.³⁶ In addition, Roundball acquired a power of attorney³⁷ from Richardson regarding a cash management account maintained in Richardson's name by a large investment house.³⁸

Richardson subsequently met Healy who was president of Professional Sports Management, a corporation offering the same services as Roundball Enterprises.³⁹ Richardson was persuaded to sign an agreement retaining Professional Sports Management as Richardson's exclusive business representative and notified Roundball that the prior contract was terminated.⁴⁰ A few months later, Richardson allegedly contracted again with Roundball, employing it as his exclusive business and financial manager.⁴¹ Then, apparently at Healy's suggestion, Richardson revoked the power of attorney given to Roundball.⁴² Roundball brought suit against Healy and Richardson for wrongful interference with its contractual relationship and for breach of contract.⁴³

Proper counseling from a qualified attorney would help prevent athletes such as Michael Ray Richardson from ending up in court.⁴⁴ The attorney's familiarity with the law, combined with certain ethical considerations, constrains an attorney's conduct so the possibility of an attorney counseling an athlete to disregard a prior contract is substantially reduced.⁴⁵ The activities of nonattorney agents rarely are regulated.⁴⁶ As a result, many persons who should not be athlete agents

36. *Id.*

37. One author explains:

A power of attorney is a written document by which one person (the athlete) appoints another person (who may not necessarily be an attorney) as his legal representative or agent and gives that agent authority to perform certain acts or kinds of acts on the athlete's behalf, such as signing contracts and incurring debts.

RUXIN, *supra* note 10, at 47. Professional basketball players World Free and Johnny Neuman found out the hard way that an athlete should not give his agent a power of attorney to handle all investments. *Id.*

38. *Roundball*, No. 82 Civ. No. 7000 (S.D. N.Y. March 31, 1983).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See GALLNER, *supra* note 1, at 64.

45. *Id.* at 69-71; see *infra* note 163 and accompanying text. One writer has made an insightful comment about using an attorney as an agent:

Because an attorney seeks to establish a long-term business relationship with the athlete, the contract negotiations serve primarily as a stepping stone to generate other business for the attorney. It is therefore more likely that an attorney will seek to maximize every aspect of the contract terms for his client without taking financial advantage of him. He knows the association will continue to provide legal fees as long as he continues to represent him.

GALLNER, *supra* note 1, at 67-68.

46. The only state that currently regulates agents is California. RUXIN, *supra* note 10, at 91.

are allowed to represent athletes and manage their finances without having proven expertise. Furthermore, since no regulation exists for nonattorney agents, athletes lack the ability to be informed of the qualifications of possible agents. This lack of information can have grave consequences for the athlete.

B. Information of Richard Sorkin⁴⁷

A less complicated case, but one with far reaching consequences, involved a nonattorney operating out of New York. Richard Sorkin became involved in athlete representation when his brother-in-law purchased the New York franchise in the then newly established World Hockey Association (WHA).⁴⁸ Prior to his involvement with his brother-in-law's franchise, Sorkin had been a sports writer.⁴⁹ He had no legal training and had never negotiated a contract for an athlete.⁵⁰ As a talent scout for the franchise, Sorkin discovered several hockey players playing in the minor leagues who eventually became members of the older, established National Hockey League (NHL).⁵¹

Sorkin started his sports agent career by negotiating contracts with teams in both the WHA and NHL, promising to advise and counsel clients on finances and investments, and to review their taxes.⁵² Players for whom Sorkin had negotiated contracts began to rely on Sorkin for all their financial and business needs.⁵³ As a player would turn over his paycheck to Sorkin for investment and savings purposes, Sorkin would advise each client of the balance of his account.⁵⁴ Actually, Sorkin was pooling these funds from his clients and using most of the money to satisfy his gambling habit which he had prior to becoming an athlete agent.⁵⁵ When checks began to bounce, the clients became suspicious and discovered that the stated balances in their

47. *People v. Sorkin*, No. 46429 (Nassau County, N.Y. Ct. Nov. 28, 1977), *aff'd*, 407 N.Y.S. 2d 772 (App. Div. 2d Dept., July 24, 1978).

48. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros Agent*, N.Y. Times, Oct. 9, 1977, §5, at 1, col. 1.

49. *Id.* at 15, col. 1.

50. *Id.*

51. Among these were such players as Bob Nystrom, Lorne Henning, Lanny McDonald, and Tom Lysiak. *Id.* at 15, col. 3.

52. *Id.*

53. "Sorkin claimed to provide complete financial services for his players. All paychecks were sent directly to him, and, after deducting his fees, usually at the beginning of a contract, Sorkin was to pay all the bills and keep the money in a trust at interest of six percent." *Id.* at 15, col. 4.

54. *Id.*

55. "He was considered [to be] a gambler, but not an extravagant one. Authorities put the range of his bets [in 1969] at \$50 or \$100 a week—perhaps a third of his salary. *Id.* at 15, col. 1.

accounts were fictitious and that most of the money had been spent by Sorkin.⁵⁶

More than fifty professional hockey and basketball players were the victims. Investigating authorities placed the losses of Sorkin's clients at approximately \$1.2 million; \$626,000 was traced to gambling losses while \$271,000 was due to stock market losses.⁵⁷ Sorkin eventually pled guilty to seven counts of grand larceny.⁵⁸ The athletes, however, recovered very little of their lost money.

The *Sorkin* case is notable because Sorkin had been dismissed from a previous job for gambling and for attempting to bribe a race horse jockey.⁵⁹ If a proper background investigation had been conducted or required before Sorkin was allowed to represent athletes, he may have been denied permission to undertake athlete agent activities, and many of the problems would not have occurred.⁶⁰ The *Sorkin* case evidences the need for athlete agent regulations that require a proper background investigation to be completed before the agent receives a license to engage in athlete representation.⁶¹ Comprehensive regulation would prevent a person such as Richard Sorkin, who has a propensity for misusing funds, from becoming an agent. Other abuses occur in the form of fraud perpetrated against the athlete due to a lack of established regulations that control the agent in his dealings with the athlete. It is essential for the protection of the athlete that some type of fee schedule be included in the regulatory scheme imposed.

C. *Brown v. Woolf*⁶²

Athletes who have been disappointed by the services rendered to them by their agents have sued their agents on theories of misrepresentation, undue influence, and fraud. An example of a case in which

56. *Id.* at 15, col. 4.

57. *Id.* at 15, col. 6.

58. *See Sorkin*, No. 46429 (Nassau County, N.Y. Ct. Nov. 28, 1977), *aff'd*, 407 N.Y.S. 2d 772 (App. Div. 2d Dept., July 24, 1978).

59. *Montgomery*, *supra* note 48, at 15, col. 1.

60. One person involved in the case is quoted as saying: "[M]anagement and players' associations have a stake in getting together and appointing people whose sole job is to watch agents. . . . You can't count on prosecutors to keep organized crime out of sports or players from losing their money. Prosecutors, by their nature, come in after the fact."

Id. at 15, col. 6.

61. Prosecuting Attorney Dennis Dillon of the Nassau County District Attorney's Office was quoted as saying: "Obviously, the case calls out for some method of scrutinizing the background of people who want to become agents. . . . If somebody is a compulsive gambler, he would be sorely tempted to give information or influence games." *Id.* at 15, col. 1.

62. 554 F. Supp. 1206 (1983).

a court has found fraud to have been perpetrated is *Brown v. Woolf*.⁶³ Andrew Brown, a professional hockey player, had engaged the services of Robert Woolf, a well-known sports agent and attorney, to negotiate a contract for Brown with the Pittsburgh franchise of the NHL.⁶⁴ The team offered to pay Brown \$80,000 per year under a two year contract.⁶⁵ Woolf rejected the offer, telling Brown that the athlete could receive a guaranteed contract for a longer period of time with better benefits from a team in the WHA.⁶⁶ After Brown signed a five year contract with a WHA team, the team began having financial difficulties.⁶⁷ Woolf then negotiated two reductions in compensation in Brown's contract that included the loss of a retirement fund.⁶⁸ At the same time, Woolf attempted to collect his fee from Brown, based on a percentage of the full value of the contract prior to any reductions.⁶⁹ Eventually, the team declared bankruptcy. Brown received a total of \$185,000 on an \$800,000 contract, while Woolf received his full five percent fee of \$40,000.⁷⁰

Brown brought suit against Woolf based on constructive fraud.⁷¹ Brown claimed that Woolf had made several material misrepresentations upon which he had relied during the modification negotiations.⁷² Brown also claimed that Woolf violated his fiduciary duty by failing to investigate the financial situation of the franchise, and by failing to examine possible consequences of a deferred compensation agreement. Brown alleged a further breach of Woolf's fiduciary duty in that Woolf had negotiated reductions in his client's compensation while insisting on receiving his full fee.⁷³ Absent regulations that would prevent an agent from receiving his fee even when his client does not receive the compensation negotiated under the contract with the sports team, the problems presented in the *Brown* situation will continue

63. *Id.*

64. *Id.* at 1207.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* Brown therefore, only received approximately 24% of the amount he was entitled to pursuant to his contract with his employer. Woolf, on the other hand received a fee of over 21% based on what Brown received, a dramatic increase over the 5% called for in the representation agreement. *Id.*

71. *Id.* at 1208. The case defined constructive fraud as "acts or a course of conduct from which an unconceivable advantage is or may be derived, a breach of confidence coupled with an unjust enrichment which shocks the conscience or a breach of duty . . . which [the] law declares fraudulent because of a tendency to deceive. . . ." *Id.*

72. *Id.* at 1207.

73. *Id.*

to occur.⁷⁴ The amount of fees charged by an agent continues to be an area in the field of athlete representation where athletes are most vulnerable.

D. The Agent's Fee

One of the problem areas that is least regulated, and which usually arises after a contract is negotiated, is the amount of fees charged by the agent.⁷⁵ Most fees are calculated in one of three ways: on a contingency or percentage basis, on an hourly basis, or on a flat fee basis.⁷⁶ The most criticized, yet most popular method, is the percentage basis.⁷⁷ While most agents regularly charge between six and ten percent of the athletes' total earnings,⁷⁸ some agents have been successful in charging up to twenty-five percent of the value of the contract negotiated by the agent.⁷⁹

Fees are usually established by payment structures that also present a problem. For example, agents often will negotiate a contract so that a large lump sum is paid up front to the athlete, enabling the agent to receive his fee regardless of whether the athlete remains employed or the team remains financially solvent.⁸⁰ Some commentators contend that if the agent is hired to seek employment for the athlete and employment is obtained, the agent is entitled to his fee regardless of what happens between the athlete and his employer in

74. For a discussion of the ability of agents to take their fee up front without regard to what happens in the future between the athlete and the athlete's employer, see GALLNER, *supra* note 1, at 52, 67.

75. Robert Ruxin gives a warning to the athlete:

The athlete should discuss in detail an agent's method of fee calculation before agreeing to retain the agent. More than one player has discovered later that what he assumed to be free was not. After [football player] Greg Pruitt signed his first pro football contract, his agent reportedly gave him a list of every expense he had incurred while Pruitt was an undergraduate. The agent had insisted that if Pruitt needed anything, he should let him know, and Pruitt did.

RUXIN, *supra* note 10, at 57.

76. *Id.* at 55.

77. For a discussion of the benefits and criticisms of the percentage basis method, see *id.* at 55-56.

78. Comment, *supra* note 20, at 822.

79. GALLNER, *supra* note 1, at 52.

The most respected athletic representatives find the payment of large percentages unethical. The representative who negotiated contracts for pro basketball stars Kareem [-Abdul] Jabbar and Sidney Wicks of the NBA has said "I dislike super-agents. They prey on unsuspecting black athletes with ghetto backgrounds. Agents like that ought to be paid an hourly fee, not a percentage . . . No one is worth 10 percent of a player's earnings."

Id.

80. Comment, *supra* note 20, at 821.

the future.⁸¹ In most situations, however, the agent is not hired solely to obtain employment, but also to provide a complete financial management package to be furnished for the life of the agreement between the athlete and his agent.⁸² When the agent receives his fee after finding employment for the athlete, but prior to delivering the required services, the agent is in a position to abuse his fiduciary and contractual obligations to the athlete.⁸³ Regulations that would impose a fee and payment schedule on agents would minimize, if not solve, these problems and would prevent the unsuspecting athlete from being bound to pay an agent for services that are never rendered.⁸⁴

In summary, choosing a reliable, knowledgeable and ethical agent is of utmost significance to an athlete negotiating a contract with a professional sports team.⁸⁵ A knowledgeable agent not only understands the complex bargaining process,⁸⁶ but also can estimate the employment and promotional values of the athlete.⁸⁷ Moreover, a proficient agent can evaluate the athlete's best economic alternatives during the contract negotiation process.⁸⁸ The problems noted above demonstrate that many of the difficulties that arise in the sports agency field are attributable to a lack of effective regulation. Several attempts have been made to regulate the field of athlete agents to prevent those problems from recurring.⁸⁹ Although a few of the regulations have had limited success, most have been unsuccessful.

PRESENT METHODS OF REGULATION

The athlete-agent relationship is regulated in varying degrees depending on the state and the sport in which the athlete participates. Califor-

81. For an argument that theatrical agents, who are similar in many respects to athlete agents, should receive their fee upon employment of the actor, see Johnson and Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 406-07 (1974).

82. RUXIN, *supra* note 10, at 17-21.

83. According to one writer:

Up-front collection cheats a player in two ways. First, as the NFL rookie [may] discover, he may be cut and not receive part or all of [his] salary. Second, due to inflation, a dollar today buys more than today's dollar will by next year and much more than today's dollar will buy in twenty years when the player may be collecting deferred compensation. But an agent who collects up front receives his entire fee in present dollars rather than in the inflated dollars the player will earn.

Id. at 58.

84. See *infra* note 114 and accompanying text.

85. See *supra* note 22 and accompanying text.

86. Ruxin, *supra* note 10, at 18-21.

87. See *supra* note 23 and accompanying text.

88. See *supra* note 27 and accompanying text.

89. See *infra* notes 92, 123, 150 and accompanying text.

nia is the only state that has attempted regulation through legislation.⁹⁰ Internal regulation by both players' associations and agent organizations are existing alternatives to legislative mandate. An examination of these and other methods will show why none presents an enforceable scheme of effective regulation.

A. *The California Labor Code*

Players, agents, and management, at various times, have expressed their desires to have athlete agents regulated or licensed.⁹¹ The California Legislature passed Assembly Bill 440 in 1981⁹² adding a new chapter to the California Labor Code purporting to regulate the athlete representation field.⁹³ The new chapter is unique in its approach toward regulating athlete agents.⁹⁴ Several areas, nevertheless, continue to cause problems in light of the new law. Three of the more controversial subjects are the charging of fees, the effectiveness of bonding requirements, and the difficulty of deciding who is covered by the laws.

1. *Problems in defining who is covered*

Section 1500 of the Labor Code defines an athlete agent as one who "recruits or solicits any person to enter into any agency contract or professional sports service contract or for a fee procures . . . or attempts to obtain employment for any person with a professional sports team."⁹⁵ Problems enforcing the California regulations have arisen because of a provision⁹⁶ excepting attorneys from the regulation when acting as legal counsel. An attorney acting in the role of a *sports agent* is covered by the provisions of the law, but an attorney is not covered when representing the athlete as *legal counsel*.⁹⁷ Critics have claimed that the phrase "as legal counsel" is too broad and can cover almost any activity in which an attorney engages, including acting as a representative of a professional athlete.⁹⁸ Many contend that when the agent is negotiating for the athlete, he

90. CAL. LAB. CODE §§1500-1547.

91. *See generally* Licensing of Sports Agents: Interim Hearings on AB 440 Before the California State Senate Select Committee on Licenses and Designated Sports July 22, 1983. [hereinafter cited as Hearings].

92. CAL. LAB. CODE §§1500-1547.

93. *See supra* note 17 and accompanying text.

94. In 1981 the State of New York considered similar legislation, but failed to implement any method of agent regulation. *See Comment, supra* note 20, at 836-37.

95. CAL. LAB. CODE §1500(b).

96. *Id.*

97. *Id.*

98. *See Hearings, supra* note 91, at 19 (statement of Attorney Margaret A. Leonard).

actually is engaging in the practice of law.⁹⁹ Ascertaining when an attorney agent is subject to regulation pursuant to the California Labor Code, therefore, is virtually impossible.

Section 1510 of the Labor Code requires agents who are covered by the law to register with the Labor Commissioner prior to conducting any business activities.¹⁰⁰ Section 1511 requires an agent to submit a registration application with the Labor Commissioner.¹⁰¹ The purpose of this application is to provide the Labor Commissioner with information from which a background investigation can be conducted.

The basis for exempting attorneys from the registration requirements is the existence of the American Bar Association Code of Professional Responsibility. The code arguably provides sufficient preexisting guidelines for the attorneys' conduct.¹⁰² The exemption for attorneys, however, does little to aid enforcement of the provision. When the laws went into effect, 150 athlete agents were notified; only eighteen applications were filed requesting licenses with fourteen applications resulting in licenses being issued.¹⁰³ Violations of the law have resulted in only one criminal complaint.¹⁰⁴ The primary reason so few agents have registered is because of the ambiguous wording of the exemption provided for attorneys under section 1500.¹⁰⁵ Enforcement of the new chapter of the Labor Code would be improved if the Labor Code

99. Sports Attorney Jeffrey Jacobs has said: "When an agent is sitting in there negotiating a contract, I think he's practicing law to a certain extent." McLeese, *A Whole New Ball Game For Lawyers*, 9 STUDENT LAWYER 41, 46 (1980-81).

100. CAL. LAB. CODE §1510.

101. *Id.* §1511.

102. See Hearings, *supra* note 91, at 16 (Statement of Attorney Margaret A. Leonard).

I feel that the State Bar Association does a fantastic job. And the incentive for me to be a good attorney, and to be ethical and to take care of my clients is the threat of disbarment. I think that disbarment is a fantastic encouragement for me to operate professionally.

Id.

The A.B.A. has undertaken to state rules of professional ethics that it hopes will be adopted by the states through their own bar associations or courts. By this process of adoption, and perhaps simply through recognition of the rules within the profession at large, the bar seeks to establish prevailing norms governing the responsibilities of the attorney in the attorney-client relationship. . . . The rules promulgated by the bar association therefore have considerable significance. . . .

Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1065 (1978).

103. See Hearings, *supra* note 91, at 28-29 (statement of Carol Cole, Division of Labor Standards Enforcement).

104. *Id.* at 29.

105. *Id.* at 40 (statement of Carol Cole, Division of Labor Standards Enforcement).

[T]he most prevalent issue . . . is the issue of licensing of attorneys. The law . . . is not clear when acting as legal counsel [sic]. . . . We attempted to [regulate attorneys] by indicating that if more than 50% of the attorney's time was in matters related to other than sports service contracts that he would be exempt. . . . But the problem . . . in enforcement is that we don't have any way of following through

were to cover all types of agents, including attorneys and nonattorneys alike. Outside of the definition of attorney agent and the exception for attorneys, the Labor Code bonding requirement has attracted the most attention.

2. Bonding Requirements

Section 1519 requires an agent to deposit a \$10,000 surety bond with the Labor Commissioner prior to being issued a license to represent athletes.¹⁰⁶ A surety bond is designed to protect the insured from liability for damages or to protect the persons damaged by injuries occasioned by the assured as specified in the bond.¹⁰⁷ The bond provides a source of relief for the athlete if he suffers any damages due to an agent's misrepresentation, fraud, or deceit.¹⁰⁸

To comprehend the inadequacy of this provision an understanding of the way in which a bond is secured and the current salary market of professional athletes is required. In most situations, a bond is secured through a bonding company, with the person seeking the bond paying approximately ten percent of the face value of the bond.¹⁰⁹ The bonding company then issues the bond, and provides, for a fee, the remaining ninety percent of the value of the bond.¹¹⁰ An agent who wishes to comply with section 1519, therefore, must pay only ten percent of \$10,000 or \$1000 to receive a license to practice as a professional sports agent.

In light of the relatively small amount of money an agent must procure to be bonded, an examination of average salary levels in some of the major professional sports is important. The average annual salary in professional basketball is \$215,000,¹¹¹ while the average in professional football, which has one of the lowest average salary levels in professional sports, is \$90,102.¹¹² If an athlete were to sign a contract at the average salary level in professional basketball, he could

with that as to [the extent of non-sports service work]. And according to [my information], about 85% of the agents are attorneys.

Id.

106. CAL. LAB. CODE §1519.

107. BLACKS LAW DICTIONARY 225 (4th ed. 1968) (definition of surety bond).

108. CAL. LAB. CODE §1520 states in part: "Such surety bonds . . . shall be conditioned that the [applicant] . . . will pay all sums due any individual or group of individuals when such person or his . . . agent has received such sums, and will pay all damages occasioned by reason of misstatement, misrepresentation, fraud, deceit . . ."

109. Telephone interview with Garry D. Stewart, Attorney, (Nov. 23, 1983) (notes on file at the *Pacific Law Journal*).

110. *Id.*

111. RUXIN, *supra* note 10, at 112.

112. *Id.*

receive only a fraction of his salary in the form of damages provided for by the bond.

The bonding requirement is inadequate because it fails to take into consideration the value of the average professional sports contract. The bond does not provide an adequate remedy to the athlete who is economically injured by the misfeasance of an agent.¹¹³ The new chapter of the Labor Code also was designed to remedy the problems arising from the charging of fees by agents.¹¹⁴

3. Fees

Section 1531 requires an agent to submit a fee schedule to the Labor Commissioner.¹¹⁵ A fee schedule establishes the percentage of the client's contract an agent will charge his client and states how the agent is to be paid.¹¹⁶ Although this provision would allow the athlete to determine the percentage of the contract that the agent will take prior to entering into any representation agreement, the provision fails to establish a maximum percentage figure that the agent may charge.¹¹⁷ As evidenced by the *Woolf* case,¹¹⁸ situations may exist where the agent ends up receiving a fee that is substantially higher than that which the athlete and the agent agreed the agent would receive. A percentage limitation should be imposed to prevent an agent from taking advantage of an unsuspecting athlete by receiving more than that to which he is entitled. For example, although the stated contract fee for Robert Woolf in *Brown v. Woolf*¹¹⁹ was five percent, Woolf ultimately received over twenty-one percent of the compensation received by the athlete, because the athlete only received approximately one-fourth of his contract salary from his employer.¹²⁰

While California has attempted to regulate sports agents, no other state has followed its lead.¹²¹ Consequently, many sports industries have established regulations to control agents operating in particular sports. This type of internal regulation may provide California with an alternative to its present laws.

113. See *supra* notes 111-12 and accompanying text.

114. See CAL. LAB. CODE §1531.

115. *Id.*

116. See *infra* note 128 and accompanying text.

117. See CAL. LAB. CODE §1531.

118. 554 F. Supp. 1206.

119. *Id.*

120. See *supra* note 70 and accompanying text.

121. See *supra* note 94 and accompanying text.

B. Internal Regulation

Faced with a lack of effective state regulation, players' associations in different professional sports have attempted to regulate sports agents internally.¹²² A recent attempt is the National Football League Players' Associations Regulations Governing Contracts Advisors (hereinafter NFLPA Regulations) which became effective in September 1983.¹²³ The NFLPA Regulations were developed in response to the growing concern among National Football League (NFL) players about the quality of representation offered in the past by lawyers, agents, and others in individual contract negotiations with NFL clubs.¹²⁴ The regulations govern *any* agent, attorney or nonattorney, when negotiating contracts and when giving advice to individual players in the context of negotiating with NFL teams.¹²⁵ An agent is investigated and a license is denied if the agent has been involved in prior conduct constituting fraud, misrepresentation, embezzlement, misappropriation of funds, or theft.¹²⁶ Before the agent can represent the athlete, the athlete must request the agent to act as his representative and must verify this request to the NFL Players Association.¹²⁷

The Contract Advisor Regulations are unique because they establish not only a fee schedule,¹²⁸ but also a maximum fee percentage that can be charged by the agent.¹²⁹ The regulations also allow this percentage limitation to increase slightly if the athlete receives a contract guaranteeing employment, commonly referred to as a "no-cut" contract.¹³⁰ The same section defines the athlete's compensation, from which the agent's salary is computed, to include salary and signing or reporting bonus payments. Incentive bonuses are excluded, however,

122. For a discussion of the role of the players' associations in basketball, hockey, and baseball, see RUXIN, *supra* note 10, at 93-98.

123. National Football League Players' Association Regulations Governing Contract Advisors §8 [hereinafter cited as NFLPA Regulations].

124. Letter from Kendra D. Chatman, Agent Certification Coordinator NFLPA (November 16, 1983).

125. NFLPA Regulations, *supra* note 123, §1.

126. *Id.* §2(C).

127. *Id.* §3. This same section provides: "The contract advisor shall be solely responsible and liable for, and shall hold the NFLPA harmless from, any damages or claims arising from his or her activities as contract advisors." *Id.*

128. *Id.* §4(C) (1)-(5).

129. *Id.* §4(C)(4).

130. *Id.* The term "no-cut" is often used interchangeably with the term "guaranteed". A true "no-cut" contract guarantees the player a spot on the team's roster, while a "guaranteed" contract ensures that the player will be paid even if he does not make the roster. RUXIN, *supra* note 10, at 102-03.

because they are considered nonguaranteed payments.¹³¹ An incentive bonus has been described as an amount of money that is paid to the athlete for meeting certain criteria, such as playing in a certain number of games or making an all-star team.¹³² By not including incentive payments as compensation, the regulations present a potential conflict of interest problem.

Although an incentive payment may be in the athlete's best interest, an agent is unlikely to have the athlete paid in this manner because the agent will receive a smaller fee.¹³³ Under the NFL Regulations, an agent may base his fee only upon guaranteed payments. If payment is based upon a contract calling for contingent payments, the agent is running the risk that his fee will be lower than if the contract called for guaranteed payments. Supporters of the NFL Regulations urge that the burden is upon the *athlete* to accomplish the event that calls for contingent payments to be made, thus the agent should receive no percentage of the payments.¹³⁴ The agent, however, is the person who negotiated the contract for the athlete. The agent used his skills and expertise to structure the contract in a way that would benefit the athlete. Any conflict of interest, therefore, should be resolved in the agent's favor.¹³⁵ The agent should receive some compensation based on incentive income paid to the athlete, even if that income is lower than the percentage of guaranteed compensation received.

Section 4(c)(5) of the NFL Regulations provides that an agent may not receive his fee unless and until the player receives the compensation upon which the fee is based.¹³⁶ This same section also prevents collection of a fee based on deferred compensation unless the compensation is received by the player.¹³⁷ This provision is directed toward remedying the situation in which an athlete receives a multiple year contract and the agent takes his fee based on a percentage of the

131. NFLPA Regulations, *supra* note 123, §4(C)(5). "[T]he term compensation shall be deemed to include only salary, signing bonus, or reporting bonus payments . . . [but] shall not include any incentive or performance bonuses." *Id.*

132. RUXIN, *supra* note 10, at 101.

133. This is true because of the exclusion of incentive bonuses from the athlete's compensation which the agent bases his fee upon. If, according to §4(C)(5), half the athlete's compensation received is in the form of incentive payments, the agent can base his fee only upon the other half of the payments. NFLPA Regulations, *supra* note 123, §4(C).

134. See Johnson and Lang, *supra* note 81, at 406 n.174.

135. *Id.* at 403 n.164.

136. NFLPA Regulations, *supra* note 123, §4(C)(5). "Such fee shall not be payable, however, until and unless the player has been on the clubs active list under such contract for at least one regular season game." *Id.*

137. *Id.* "[A] contract advisor [is prohibited] from receiving any fee for his services until and unless the player receives the compensation upon which the fee is based." *Id.*

entire contract, regardless of whether the athlete remains with the team or whether the team pays the athlete.¹³⁸ Under the regulations, the agent can only take his percentage based on the amount the athlete actually receives, not the amount he is expected to receive.¹³⁹ The regulations also address a problem not covered by current California law, namely, solicitation of clients.

SOLICITATION

The National Football League Regulations prohibit the NFL contract advisor from engaging in the solicitation of clients.¹⁴⁰ Since attorneys are already barred by the Code of Professional Responsibility from participating in this type of activity,¹⁴¹ the regulations attempt to place attorneys on equal footing with nonattorneys. The same provision is devised to prohibit nonattorney agents from engaging in unscrupulous activities to obtain new clients.¹⁴² The regulations also are designed to protect the athlete agent from other agents who value obtaining a new client more than a preexisting contract between an athlete and an agent.¹⁴³

As previously mentioned in the discussion of the *Roundball* case,¹⁴⁴ an athlete frequently will hire more than one agent, attempting to obtain the best contract available. To accord some order to these situations, the Contract Advisor Regulations provide that upon agreement, the agent becomes the "exclusive representative" for negotiating the player's contract.¹⁴⁵ This reduces the likelihood that an athlete will hire more than one agent to conduct his contract negotiations. Often, agents will attempt to represent athletes even though the athlete is under a previous agreement with a different agent. This measure recognizes the need to protect the agent, who is in a preexisting representation agreement with the athlete, from other aggressive agents. This same provision dictates that no amendment can be made to the agreement without the approval of the NFL Players Association.

138. See *supra* note 83 and accompanying text.

139. See *supra* note 137 and accompanying text.

140. NFLPA Regulations, *supra* note 123, §5(C)(1)-(5).

141. MODEL CODE OF PROFESSIONAL RESPONSIBILITY. DR 2-103(A)(1983).

142. See Johnson and Reid, *Some Offers They Couldn't Refuse*, SPORTS ILLUSTRATED, May 21, 1979, at 28 (for an interesting discussion of ethically questionable activities being conducted in the recruitment of college athletes by agents); see also Axthelm, *Marvin Barnes and the Work Ethic*, NEWSWEEK, Dec. 2, 1974, at 61. An examination of the problems occurring in the recruitment of amateur athletes is beyond the scope of this comment.

143. See *infra* note 145 and accompanying text.

144. See *supra* note 33 and accompanying text.

145. NFLPA Regulations, *supra* note 123, §4(A).

Moreover, an agreement must be in writing, otherwise it is void.¹⁴⁶

With the exception of the problems discussed, the NFL Players' Association Regulations are a marked improvement over any other method of regulation. Although the NFL Regulations do not include a bonding requirement, the addition of this type of provision, if tailored to the modern wage scale of professional athletes, would increase the effectiveness of the NFL Regulations. The NFL Regulations also provide a source of information to which the athlete can look to make a sound decision when selecting an agent. Under the NFL Regulations, an athlete is able to contact the Players Association to determine whether a certain agent is worthy of being hired.¹⁴⁷ Alternatively, an agent may contact the Players Association to determine whether an athlete has an existing valid representation agreement with another agent.¹⁴⁸ Although arguably the Regulations, designed by the Players' Association, work to the decisive advantage of the athlete, they are an equitable method of regulating the representation business. Because of the experience of the Players' Association in dealing with the types of problems experienced by athletes and agents, the Players' Association was in a position to draft regulations designed directly to remedy the problem areas for both. Another method of internal regulation is that created by the agents themselves.

C. *The Association of Representatives of Professional Athletes*

The National Football League Regulations are internal regulations that were developed by a particular sports association over agents representing athletes in that sport.¹⁴⁹ The Association of Representatives of Professional Athletes (ARPA) is a method of self-regulation by agents.¹⁵⁰ ARPA is a national association of sports agents, with a voluntary membership consisting of agents who are both entrepreneurs in the representation field and experienced attorneys.¹⁵¹ The association is comprised of approximately 200 agents throughout the United States, representing more than 1500 professional athletes in many different sports.¹⁵² With the assistance of the NFL Players'

146. *Id.*

147. One author comments: "To aid him in the selection of a good [agent], the player might call the players' associations of the respective leagues who keep files for this purpose, as well as other athletes, his college coach, or people he respects." GALLNER, *supra* note 1, at 65.

148. *See supra* note 145 and accompanying text.

149. *See supra* note 123 and accompanying text.

150. RUXIN, *supra* note 10, at 89-90.

151. Association of Representatives of Professional Athletes, Code of Ethics (1983) [hereinafter cited as *ARPA Ethics*].

152. *Id.*

Association, ARPA was created in 1978 for the dual purpose of "providing a strong voice for its members as well as a safeguard for the athlete."¹⁵³ ARPA attempts to achieve its goals by offering educational seminars and by improving the ethical standards of the profession.¹⁵⁴

The ARPA Code of Ethics resembles that of the American Bar Association. The ARPA regulations contain five canons covering (1) the degree of integrity and competence required in athlete representation, (2) dignified conduct, (3) management responsibility, (4) client confidence, and (5) competent handling of client matters.¹⁵⁵ As a whole, the ARPA Code of Ethics is a proficient attempt at self-regulation by agents.¹⁵⁶ The code of ethics takes an affirmative stance on solicitation by declaring that ethical conduct precludes an athlete representative from soliciting a client, or from receiving compensation directly from a professional athletic team for having an athlete sign with that team.¹⁵⁷ Many of the provisions, however, are too broad and do not establish definitive rules from which an agent can determine his course of conduct. For example, no fee schedule is established with which the agent must conform; only certain factors are provided for determining whether a fee is reasonable.¹⁵⁸

The main problem with the internal regulations of ARPA is that compliance is voluntary. No sanctions can be taken against one who is not a member, and no agent can be compelled to become a member. ARPA lacks the power of the NFLPA to compel persons wishing to represent athletes to comply with its regulations.¹⁵⁹ In addition, ARPA lacks the authority of a legislative mandate similar to California Labor Code section 1500. ARPA was created with the aid of the NFLPA.¹⁶⁰ With the introduction of the NFLPA Regulations, however, much of the support that ARPA once enjoyed no longer may exist. Due to the lack of success the ARPA Code of Ethics has achieved, the NFLPA now has placed its authority behind its own system of regulation. It is questionable, therefore, whether ARPA can look to

153. *Id.*

154. RUXN, *supra* note 10, at 101.

155. *ARPA Ethics*, *supra* note 151, at 1-6.

156. RUXN, *supra* note 10, at 90. One writer noted that "ARPA is trying to promote standards of competence, professionalism, and integrity . . ." *Id.*

157. *ARPA Ethics*, *supra* note 151, Rule 2-104(G).

158. *Id.* Rule 2-104(D)(1)-(5).

159. A writer for the *Washington Post* commented that "since membership is entirely voluntary, ARPA lacks clout, and no one in the business is forced to subscribe to its code of ethics unless he or she chooses." RUXN, *supra* note 10, at 90.

160. *Id.* at 89.

the NFLPA for active support because the NFLPA must now use its resources to implement the NFLPA Regulations. The NFL Regulations do not take any formal stance on the ARPA rules. The material provisions of both methods of regulation cover different areas of sports agency and are not in conflict with each other. Nevertheless, the current ARPA regulations are not comprehensive. ARPA also lacks the authority to provide an effective system of agent regulations due to the fact that membership in ARPA is voluntary.¹⁶¹ The American Bar Association Model Code of Professional Responsibility, however, provides guidelines for the conduct of attorney agents. The Model Code of Professional Responsibility may assist in the regulation of some athlete agents.

D. ABA Model Code of Professional Responsibility

The American Bar Association Model Code of Professional Responsibility (hereinafter ABA Code) plays a role in the way attorney agents must conduct their activities. Two provisions are particularly important: DR 2-103(A) provides that a lawyer shall not recommend himself or his organization to a client,¹⁶² and DR 2-103(B) prevents a lawyer from giving anything of value to any person to secure his employment.¹⁶³ These two rules have the effect of prohibiting the solicitation of athletes as legal clients.¹⁶⁴ Attorneys operating as agents, however, have found ways to circumvent these provisions.¹⁶⁵ This occurs most commonly when the attorney works for a sports management firm. Certain members of the firm who are not attorneys solicit the clientele and the attorney agent then does the actual negotiation work.¹⁶⁶

The American Bar Association does not have the power to control the sports agency field because not all agents are attorneys, and the ABA Code does not apply to nonattorneys. To simplify enforcement and promote equity, effective regulations must apply to attorney and

161. See *supra* note 160 and accompanying text.

162. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1983). "A lawyer shall not . . . recommend employment as a practitioner, or himself, his partner or associate to a lay person who has not sought his advice regarding employment of a lawyer." *Id.*

163. *Id.* DR 2-103(B) (1983). "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client . . ." *Id.*

164. See, GALLNER, *supra* note 1, at 69.

165. See *id.* at 65.

166. *Id.*

nonattorney agents on an equal basis. Compliance cannot be a decision left up to the agent, but must be mandatory.¹⁶⁷

A need for parity is evidenced by both the NFLPA Regulations and ARPA Code of Ethics.¹⁶⁸ Clearly, those involved in the sports representation field would desire to increase the standards placed on nonattorneys rather than risk a reduction in the level of professional responsibility among attorneys. With these ideas in mind, an examination of possible solutions to the problems involved in the regulation of sports agents demonstrates that these goals are attainable.

POSSIBLE SOLUTIONS

An examination of the current methods of regulation in the athlete agent field has revealed that no one method is effective entirely. A study of the ways to remedy the problem, therefore, is necessary. The examination that follows is designed to explain the possible solutions and to analyze whether a selective synthesis of current methods is in order.

In the new chapter of the Labor Code that governs professional sports agents, California has the potential for a legitimate and effective method of agent regulation.¹⁶⁹ Internal regulation, however, such as the NFLPA Regulations, may be the most effective means of regulation because each set of regulations can be contoured to the sport in which the athlete participates.¹⁷⁰ Finally, methods of regulation in industries similar to the sports industry may be adopted and tailored to fit the needs of the athlete agent business.¹⁷¹

A. California Labor Code

The California Legislature has taken a step in the proper direction by enacting legislation directed toward regulating the athlete agent field. The fact that the Legislature enacted the new chapter of the Labor Code dealing with athlete agents evidences the existence of problems in the representation field. The chapter regulating agents as it presently reads, however, is unenforceable and fails to regulate the

167. For a comment on the problems of regulations imposing voluntary compliance, see *supra* note 159.

168. See, e.g., NFLPA Regulations, *supra* note 123, §5(C); ARPA Ethics, *supra* note 151, Rule 2-103.

169. See *supra* notes 90-117 and accompanying text.

170. See *supra* notes 123-35 and accompanying text.

171. See *infra* note 197 and accompanying text.

representation field adequately. The chapter of the California Labor Code presently governing professional sports agents can be improved by making certain substantive changes aimed at providing protection for both the athlete and the sports agent.

1. *Improving Existing Law*

The current Labor Code provisions regulating athlete agents are insufficient.¹⁷² They are ambiguous in defining the persons covered by the laws,¹⁷³ contain an unproductive bonding requirement,¹⁷⁴ and lack enforcement capabilities.¹⁷⁵ Because the lack of enforcement can be rectified when the class of persons who fall within the law is defined more precisely, the need for a clearer definition of athlete agent is apparent.¹⁷⁶ Specifically, the provision excluding an attorney "when acting as legal counsel" from the provisions should be omitted, and instead, the law should identify when an attorney will be exempt from the registration requirements. The exemption could be based on either a percentage of the attorneys work that involves sports agency, or that percentage of his gross income that is derived from representing professional athletes. In addition to this change, the code section pertaining to bonding requirements must be amended.

2. *Proposal for Bonding Requirement*

Section 1519 of the Labor Code currently requires an agent to post a bond in the amount of \$10,000 prior to being issued a license by the Labor Commissioner.¹⁷⁷ Some critics have called for a dramatic increase in the amount of this bond because of the high average salaries paid to professional athletes.¹⁷⁸ A substantial increase in the amount of the bond requirement, however, without regard to the value of the contract being negotiated, may price a lot of agents out of the business. When an athlete and an agent enter into a representation agreement to negotiate contracts or to obtain employment for the athlete, an escrow fund could be created in the name of the agent.

172. See *supra* notes 90-117 and accompanying text.

173. See *supra* note 96 and accompanying text.

174. See *supra* note 113 and accompanying text.

175. See *supra* notes 101-02 and accompanying text.

176. See *supra* note 96 and accompanying text.

177. CAL. LAB. CODE §1519.

178. California Senate Select Committee on Licensed and Designated Sports proposed amendments to AB 440, at 5 (1983) [hereinafter cited as Amendments] (copy on file at the *Pacific Law Journal*). The committee has suggested an increase in the amount of the bond from \$10,000 to \$50,000. *Id.*

The agent's percentage of the full value of the contract would be placed into this escrow and released only as the athlete receives his compensation from the team as dictated by the contract.¹⁷⁹ This would ensure that the agent would receive a percentage based on the amount the athlete actually received, not the amount he was supposed to receive.¹⁸⁰ In addition, this method would guarantee the agent only that compensation to which he is entitled. Furthermore, the possibility of fraudulent conduct would be reduced since the agent could not take his percentage and depart without completing his obligations under the representation agreement.¹⁸¹

The escrow fund method could be designed to give an exclusion to the attorney agent. An attorney in the State of California is not required to carry malpractice insurance.¹⁸² The exemption, however, could accept proof of a sufficient amount of malpractice insurance if the applicant for an athlete agent license is a member in good standing of the State Bar of California.¹⁸³ By purchasing malpractice insurance, the attorney agent in effect has become bonded. Because the attorney's malpractice insurance could provide any injured athlete with a guaranteed source of relief, no further bonding requirement would be necessary. A final way of improving Labor Code section 1519 would be to implement a "floating" bond requirement.

3. Floating Bond Requirement

As explained earlier, the California bonding requirement is disproportionate to the current salary levels in professional sports, and thus provides an inadequate remedy for the athlete.¹⁸⁴ When an agent negotiates a new contract to replace a previous contract, the Labor Commissioner could require that the agent post a bond at a percentage rate of the value of the athlete's present professional contract. The amount of the bond, therefore, would have a direct correlation

179. The escrow method would be one way to implement NFLPA Regulation §4(C)(5) which prevents an agent from receiving his fee until the player receives the compensation upon which the fee is based. NFLPA Regulations, *supra* note 123, §4(C)(5).

180. See *supra* note 70 and accompanying text.

181. This would prevent the type of situation discussed by Gallner:

If the agent is employed at 10 percent of the negotiated contract value, and he negotiates a \$50,000 with a \$5,000 bonus (payable immediately) for his athlete-client, the agent would have earned \$5,500 regardless of whether or not the athlete makes the squad. That money will come out of the bonus, and the athlete will end up with nothing [if he does not make the team].

GALLNER, *supra* note 1, at 67.

182. CAL. BUS. & PROF. CODE §6060.

183. Amendments, *supra* note 178, at 5.

184. See *supra* note 113 and accompanying text.

to the value of the athlete's services and would be a more fair representation of the amount of the agent's misfeasance than the present flat amount of \$10,000. This method would give greater protection to the athlete who is negotiating a large salary contract. Furthermore, this scheme would not be restrictive to those agents negotiating smaller contracts for which the bond suggested by some critics could be larger than the contracts themselves.¹⁸⁵ An alternative to legislatively mandated regulation is internal regulation of the athlete agent.

B. Internal Regulation

If the California Legislature chooses not to devise an effective method of regulating the athlete agent, professional players' associations may adopt methods to regulate agents in their particular sport. The benefit of internal regulation is that it can be well tailored to the problems unique to the particular sport.¹⁸⁶ Enforcement would be improved since the burden of implementing these regulations would be upon the players association rather than upon some branch of state government that would be responsible for many different sports.

The best of these methods of internal regulation is the National Football League Players Association Regulations.¹⁸⁷ As previously discussed, the NFLPA Regulations have eliminated the attorney/nonattorney classification¹⁸⁸ and have made the solicitation of clients by agents unethical.¹⁸⁹ The provisions prohibiting solicitation appear to be a step in the right direction to curb the abuses that occur when agents attempt to obtain new clients.¹⁹⁰ Prohibiting solicitation would prevent athletes from being inundated with offers of representation that create the risk that misrepresentations will be made by the agent.¹⁹¹

The difficulty in applying the NFLPA Regulations in California is that they conflict with certain provisions of the California Labor Code. For example, the NFLPA Regulations prevent nonattorney agents from engaging in solicitation,¹⁹² while the pertinent provisions of the California Labor Code do not. A nonattorney agent in California can be in strict compliance with the new chapter of the Labor

185. Under the proposed amendments of the California Senate Select Committee, an agent possibly could have to deposit a \$50,000 bond in order to negotiate a \$25,000 contract. See Amendments, *supra* note 178, at 5.

186. See *supra* notes 124-37 and accompanying text.

187. *Id.*

188. Regulations, *supra* note 123, §1.

189. *Id.* §5(C)(1-5).

190. GALLNER, *supra* note 1, at 53.

191. For an example of such a situation, see *supra* note 33 and accompanying text.

192. Regulations, *supra* note 123, §5(C)(1)-(5).

Code while in violation of one of the NFLPA Regulations. The result is that an agent in California who wishes to represent a professional football player in negotiations with an NFL team must follow the more exacting standards of the NFLPA Regulations.

California should either adopt regulations similar to those of the NFL Players' Association, or combine the effective provisions of the present Labor Code with the NFLPA Regulations. This type of selective incorporation would accomplish, for example, the prohibition of agent solicitation of clients¹⁹³ while eliminating any ambiguity in defining who is covered by the regulations.¹⁹⁴ The NFLPA Regulations, if incorporated into the Labor Code, then would apply to agents in all professional sports in California. Industries other than the professional sports industry are regulated to some degree by external agencies. Successful regulatory methods in those industries may provide the California Legislature with alternative approaches in formulating an enforceable scheme for regulating the professional sports agent.

C. Adopting Regulations from Similar Industries

The field of athlete representation is not the only area in which a need exists for regulation of the agent. One commentator advocates a system of regulation similar to that used to regulate stock brokers.¹⁹⁵ Stock investors and athletes are in analogous situations when they agree to have another person represent them. Both situations involve a principal-agent relationship in which the agent must act in the best interest of his principal within the authority given to him by the agreement between principal and agent.¹⁹⁶ In both situations, the principal is bound by the actions of his agent, provided the agent acted within the scope of his authority.¹⁹⁷ More importantly, in both situations, absent proper regulations and provisions for excluding those persons incapable of acting in a fiduciary capacity, the client is at a serious disadvantage and the possibility for fraud and misconduct is great.

The Federal Securities Act¹⁹⁸ establishes not only a bonding requirement for brokers,¹⁹⁹ but requires brokers to file with the Securities and Exchange Commission a past business history report and a yearly

193. *Id.*

194. *Id.* §1; see also *supra* note 188 and accompanying text.

195. Note, *supra* note 13, at 569-70.

196. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY, §3 (1964).

197. *Id.*

198. 15 U.S.C. §78 (1976).

199. *Id.*

balance sheet and income statement.²⁰⁰ Stock brokers also are required to pass an entrance examination prior to being issued a brokers license.²⁰¹ Provisions similar to the Securities Act are potentially applicable to a scheme of comprehensive regulation of athlete agents. The expense of implementing the Act, however, makes it a less preferable method of regulation. For instance, the cost of conducting entrance examinations of potential agents may not be justified by the extent of agent malpractice. The filing of a yearly balance sheet, however, would provide the regulatory agency an excellent opportunity to scrutinize the operations of the agent without incurring excessive costs.²⁰² The most effective provisions of the Federal Securities Act could be adopted into a comprehensive regulatory scheme for athlete agents. In the following section, the author will propose a final solution to the regulation issue. This solution involves a synthesis of the most effective provisions from all the existing and proposed methods of regulation.

THE PROPER BLEND FOR THE SOLUTION

The best solution to the regulation problem comes not from one set of laws or proposals, but from a proper blend of the most effective provisions of several types of regulations. First, attorneys should not be excluded from any regulation system, similar to the exclusion found in California Labor Code section 1500.²⁰³ By expressly including attorneys within the purview of its regulations, the NFLPA has eliminated any difficulty in determining whom those regulations cover.

Regulations that govern both attorneys and nonattorneys on an equal basis would provide uniformity regarding the solicitation of clients by athlete agents.²⁰⁴ Currently, attorney agents are prohibited from soliciting clients by the ABA Code.²⁰⁵ Any new method of regulation, rather than allowing attorney agents the right to solicit, which would be in direct conflict with the ABA Code, should prevent both types of agents from soliciting clients. As provided in the NFLPA Regulations, the athlete should be advised to request the services of the agent. In addition, the athlete should have to certify to the Labor

200. *Id.*

201. *Id.*

202. Examination of the cost effectiveness of implementation of the Federal Securities Act to regulate athlete agents is beyond the scope of this comment.

203. CAL. LAB. CODE §1500(b).

204. *See supra* note 168 and accompanying text.

205. *See supra* note 164 and accompanying text.

Commissioner that he has requested the agent to represent him.²⁰⁶ This type of provision will protect athletes from the overpowering influence used by agents to attract clients.

Third, the regulations should not impose a flat-fee bond requirement for the reasons that the bond requirement either fails to take into consideration the value of the contracts being negotiated, or is so large as to be prohibitive.²⁰⁷ A floating bond provision²⁰⁸ or an escrow payment system²⁰⁹ for compensating agents should be adopted. Under either method, proof of a sufficient amount of malpractice insurance could allow the attorney to receive an exemption from the bonding requirements.²¹⁰ The attorney's malpractice insurance would provide the athlete with a source of damages if he were injured as a result of the attorney's misfeasance.

Fourth, the author proposes that any new form of regulation must contain a fee schedule which takes into consideration the market value of the professional athletes' talent and the type of contract negotiated by the agent.²¹¹ This type of fee schedule will not only reward compensation based on the work performed by the agent at each stage of the contract, but also will ensure that the agent receives no more than what he actually deserves pursuant to the representation agreement.²¹² Any fee schedule must specify a maximum percentage of the value of the contract that the agent may take as his compensation.²¹³ A sliding fee schedule properly allocates more compensation to the agent following the consumation of the contract when the agent is doing most of his work, than in the later years when the athlete is doing the work and has established himself with the employer.²¹⁴

Finally, to prevent the athlete from encountering legal problems by hiring more than one agent, and to preclude agents from attempting to represent an athlete once the athlete has an agreement with another representative, an exclusive representation provision should be included.²¹⁵ This would provide the first agent who validly con-

206. Regulations, *supra* note 123, §3.

207. See *supra* note 178 and accompanying text.

208. See *supra* note 184 and accompanying text.

209. See *supra* note 179 and accompanying text.

210. See Amendments, *supra* note 178, at 5.

211. See *supra* notes 111-13 and accompanying text.

212. This will remedy the type of problem that occurred in *Brown v. Woolf*, 554 F. Supp. 1206 (1983). See *supra* note 70 and accompanying text.

213. See, e.g., Regulations, *supra* note 123, §4(C)(1-5).

214. *Id.*

215. *Id.* §4(A).

tracts with the athlete the assurance that only he will be seeking employment opportunities for his client. Under the exclusive representation provision agents should be prevented from attempting to persuade athletes to leave other agents by using false inducements as in the *Roundball* case.

This author has proposed that the solution to regulating professional sports agents is a synthesis of the most effective provisions of several types of regulation. Almost three years have passed since the new chapter was added to the Labor Code governing sports agents.²¹⁶ At that time, the California Legislature attempted to create a system of regulating the athlete representation field. The problems that existed prior to the enactment of these laws, however, still exist; therefore, the burden once again is upon the Legislature to continue its efforts to implement an effective system of regulation.

CONCLUSION

Substantial agreement exists that agents serve a useful purpose.²¹⁷ A good agent among other things, can shape the package of compensation an athlete receives to meet the player's needs, enable the athlete to earn extra income from endorsements, speeches, and commercials, and advise an athlete about the effect his personal conduct may have on his career. A dramatic increase in the amounts of money paid for the services of professional athletes has caused an increase in unethical conduct by athlete agents. This increase also has prompted frequent legal disputes. Many professional athletes find their on-the-field accomplishments being overshadowed by their off-the-field legal difficulties. At no time has the need to regulate athlete agents been greater than at the present. Any form of regulation must control and deter unethical conduct by agents. In addition, the regulations must allow the athlete to make the best business decision available when entering into a contract with a professional team.

The present method of regulation adopted by California suffers not only from ambiguities in defining who is covered by the laws, but also from a bonding requirement that completely fails to consider the current salary market of the professional athlete. For example, the minimum salary that a professional basketball player can receive is \$40,000.²¹⁸ Based on Labor Code Section 1519,²¹⁹ a \$10,000 surety

216. CAL. LAB. CODE §§1500-1547 (effective January 1, 1982).

217. GALENER, *supra* note 1, at 50.

218. RUXIN, *supra* note 10, at 112.

219. CAL. LAB. CODE §1519.

bond obviously cannot provide the athlete with a remedy if he is injured due to the agent's unscrupulous conduct. Other methods of regulation, however, present California with alternate approaches that could protect the athlete from the types of problems previously discussed.

The author has examined several alternatives to the present method of regulation based on the types of problems found to exist in some of the recent cases in the field of athlete agency. The solution to the current problems lies with a combination of the most effective provisions of several different forms of regulation. Attorneys and nonattorneys should be covered by any system of regulation. The system should include both a floating bond requirement and a fee schedule that recognizes the value of the agent to the athlete. Finally, attorney and nonattorney athlete agents should be prohibited from soliciting clients. As proposed in this comment the proper synthesis will provide the athlete with the means to receive the best representation possible with the least amount of agent-induced problems. The burden is now upon the California Legislature to remedy the current difficulties. The Legislature must examine why the current laws have been unsuccessful, and, based upon alternatives found elsewhere, it must restructure the provisions of the Labor Code regulating professional sports agents to provide an equitable scheme of regulation for both the athlete and the agent.

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