
2-1-2021

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THE CHANGING LANDSCAPE OF INTERCOLLEGIATE ATHLETICS—THE NEED TO REVISIT THE NCAA’S “NO AGENT RULE”

John P. Sahl*

The National Collegiate Athletic Association (NCAA), the primary governing body for intercollegiate athletics, promulgated its “No Agent Rule” in 1974 prohibiting advisors of student-athletes from communicating and negotiating with professional sports teams. As part of a core principle of amateurism, the NCAA adopted this rule, in part, to delineate between professional athletes and student athletes. However, through economic and societal evolution, this policy is antiquated and detrimental to the personal and professional development of college athletes.

This Article argues in favor of expanding the recent Rice Commission’s recommendation, adopted by the NCAA, to grant an exception from the No Agent Rule for Men’s Division I elite basketball players to all college sports and levels of competition. The NCAA’s landscape for governing college athletics has undergone many recent changes, some of which strengthen the notion that all student-athletes would benefit from earlier access to agent advice and assistance. The Changing Landscape of Intercollegiate Athletics—The Need to Revisit the NCAA’s “No Agent Rule” discusses this need by first detailing the evolution of NCAA governance, followed by an analysis of the Gatto decision and its impact on the Rice Commission’s report promoting an exception to the No Agent Rule for Division I Men’s elite basketball players.

Finally, this article recommends that because of the changed and ever-evolving landscape of college sports, the NCAA should abandon its No Agent Rule in favor of a Modified Agent Rule (MAR). The MAR

* The author wishes to thank Professors Joann M. Sahl and Matthew Juravich, and the University of Akron Athletic Director, Lawrence R. Williams, for their helpful insights and comments and Associate Law Librarian Susan M. Altmeyer, and my research assistants, Lindsay Casile, Bridget Brenner, and David Belfiglio for their valuable research, editorial assistance, and generous support.

would enable all student-athletes to contract with sports agents subject to some NCAA oversight to protect student-athletes from agent abuse and to support the NCAA's commitment to amateurism. The MAR promises to alleviate some of the stress and challenges that hinder all student-athletes, especially gifted athletes, when assessing how and by what means to enter the professional sports level.

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I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) has long governed amateur collegiate athletics like a watchful overlord, relying on a maze of byzantine-like rules to promote, in large part, its institutional self-interests.¹ These rules have enabled the NCAA to wield broad

1. GERALD GURNEY, DONNA A. LOPIANO & ANDREW ZIMBALIST, UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 16 (2017) [hereinafter GURNEY] (describing the maze of byzantine-like rules in the NCAA Manual as being over “a thousand pages long, [with an extensive] list of quixotic regulations that purport to uphold amateurism”); see John P. Sahl, *College Athletes and Due Process Protection: What’s Left After National Collegiate Athletic Association v. Tarkanian*, ___ U.S. ___, 109 S. Ct. 454 (1988)?, 21 ARIZ. ST. L.J. 621, 624 (1989) (describing the NCAA as the “overlord of college sports”); see also *id.* at 622 (contending, contrary to the Supreme Court’s decision in

authority over its members to enforce rule compliance. The end result of NCAA's rules and broad authority is clear—the NCAA remains the leading force in college athletics with university presidents, the public, and others seeking its imprimatur.²

The steady stream of news reports about college sports and the NCAA highlights their importance in our nation's daily affairs.³ The public has a seemingly insatiable appetite for information and stories about athletics, including NCAA athletics.⁴ This appetite is fueled by 24/7 sports coverage in a wide variety of outlets and platforms.⁵ Some of the stories are positive, for example, when a collegiate championship

Tarkanian, that "college students should be entitled to constitutional due process before being deprived of their athletic eligibility").

2. One example of "others" seeking NCAA approval would include commercial vendors, like Nike and Coca-Cola, who provide products to coaches, athletes, and fans. The NCAA's broad authority may have diminished slightly over the last half-century. *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>. Students of NCAA history can point to different benchmarks to show this gradual erosion of unbridled authority. Certainly, one key development in this erosion occurred in 1984 when the University of Oklahoma Board of Regents successfully challenged the NCAA's rules limiting the televising of college football games on antitrust grounds. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 119-20 (1984). The case undermined the NCAA's absolute control over college football, a key source of revenue, and signaled to many that the NCAA's power was not absolute, foreshadowing further lawsuits to curtail at least perceived NCAA abuses of power. One such lawsuit was *NCAA v. Miller*, in which the Ninth Circuit ruled that the Nevada law violated the dormant commerce clause by unduly burdening interstate commerce by requiring NCAA members to provide student athletes with certain due process protections. 10 F.3d 633, 640 (9th Cir. 1993).

3. *See, e.g., NCAA presidents set revised financial distribution to support college athletes*, NCAA (Mar. 26, 2020, 1:23 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-presidents-set-revised-financial-distribution-support-college-athletes>; *see also, e.g., Ryan Lewis, Indians announce plans to extend protective Netting at Progressive Field for 2020 season*, AKRON BEACON J. (Jan. 29, 2020, 11:51 AM), <https://www.beaconjournal.com/sports/20200129/indians-announce-plans-to-extend-protective-netting—progressive-field-for-2020-season> (reporting all thirty teams in Major League Baseball will be extending netting after several serious incidents of fans being injured by foul balls); *The Jim Rome Show* (CBS Sports Radio 2020) (providing biweekly sports radio talk including sixty-second commentaries on the day's top sports headlines).

4. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 9 (2000) [hereinafter Smith] (underscoring the public's interest in sports, one expert referred to sport as "the religion of the American people" and noted "[a]s a people, we seem almost fixated on sport and devote much space in newspapers and newscasts to sport, with little space being allocated to religion").

5. *See, e.g., ESPN: COLLEGE FOOTBALL NATION BLOG*, <https://www.espn.com/blog/nfnation> (last visited Mar. 26, 2020); *see also, e.g., BLEACHER REP.*, <https://bleacherreport.com> (last visited Mar. 26, 2020); *see also, e.g., 247 SPORTS*, <https://247sports.com> (last visited Mar. 26, 2020).

sports team is invited to meet with the President of the United States⁶ at the White House or when a university's team engages in charitable activities.⁷

Some of the stories are negative and cause a public stir.⁸ For example, a recent investigation found that "college athletes punished for sexual assault routinely transfer and keep playing in the NCAA."⁹ This is unsettling news, especially given the #MeToo Movement and other recent efforts to raise national awareness about the significance of sexual assaults against the backdrop of high-profile sexual assault cases

6. The 2020 NCAA Division I football champions, Louisiana State University Tigers, visited with President Trump at the White House. *Trump honors national champion LSU Tigers at the White House*, CBS NEWS (Jan. 17, 2020, 4:47 PM), <https://www.cbsnews.com/news/lsu-tigers-college-football-national-champions-visit-white-house-today-2020-01-17/>.

7. See, e.g., WKYC Staff, *'We Roar with Emma': Akron Zips hold Saturday basketball doubleheader to benefit Norton teen*, WKYC STUDIOS (Jan. 17, 2020, 7:52 PM), <https://www.wkyc.com/article/news/local/summit-county/we-roar-with-emma-akron-zips-saturday-basketball-doubleheader-to-benefit-norton-teen/95-94eb0df8-ea73-4098-b0d0-04d74f734e56> (explaining that the proceeds of a basketball game between the University of Akron Zips and the University of Toledo Rockets were donated to help a local athlete at Wadsworth High School who was recovering from injuries and a coma). Of course, professional sports teams and figures also attract positive coverage for similar publicly spirited work. See Cleveland Cavaliers, *Cavs Players Serve Thanksgiving Dinner to Local Families*, NBA (Nov. 20, 2018), <https://www.nba.com/cavaliers/community/thanksgiving-dinner-181120>; John Pana, *Cleveland Cavaliers players, coaches, serve Thanksgiving dinner to young students (video)*, CLEVELAND.COM (Nov. 22, 2017), https://www.cleveland.com/cavs/2017/11/cavs_players_and_coaches_serve.html; see also Marla Ridenour, *Three-point bonus: Cavaliers' Cedi Osman, Larry Nance Jr. donate \$10,000 for Turkey earthquake relief*, AKRON BEACON J. (Jan. 26, 2020, 6:06 PM), <https://www.beaconjournal.com/sports/20200126/three-point-bonus-cavaliersrsquo-cedi-osman-larry-nance-jr-donate-10000-for-turkey-earthquake-relief>. News of a terrible earthquake in Turkey prompted Cedi Osman, who plays for the Turkish National Team, and Larry Nance of the Cleveland Cavaliers to donate \$100 and \$200 respectively for each successful three-point shot made by the Cavaliers in a game against the Chicago Bulls on January 25, 2020. *Id.* The donations were to help with the relief effort in Turkey. *Id.*

8. Although this article focuses on the NCAA, college athletics, and the NCAA's regulation of agents, professional athletics also generates both positive and negative stories. For example, the cheating scandal involving baseball and the Houston Astros attracted national attention, shocking many fans and others. See *Astros fire manager, GM after suspensions for sign-stealing*, ASSOCIATED PRESS (Jan. 13, 2020), <https://ap-news.com/a35c982320cd4a4986aef75727957c5c>; see also Ryan Lewis, *Figuring out signs has its place in baseball, but Astros committed theft*, AKRON BEACON J. (Jan. 13, 2020, 5:09 PM), <https://www.beaconjournal.com/sports/20200113/ryan-lewis-figuring-out-signs-has-its-place-in-baseball-but-astros-committed-theft>.

9. Kenny Jacoby, *NCAA president deflects blame on sexual assault policy*, USA TODAY (Dec. 18, 2019, 7:07 PM), <https://www.usatoday.com/story/news/investigations/2019/12/18/ncaa-president-mark-emmert-deflects-blame-sexual-assault-policy/2693095001/>.

involving Bill Cosby,¹⁰ Harvey Weinstein,¹¹ and Jeffery Epstein.¹² In response to news about such controversial transfers, the NCAA President, Mark Emmert, said the schools admitting these transfers bear responsibility for this situation, while some university leaders instead point the finger of responsibility at the NCAA.¹³ The NCAA's refusal to accept any responsibility for these transfers or to outline a course of action to address this problem is problematic. The NCAA missed an opportunity to take a leadership role on an important social issue and to highlight its concern for student safety.

One important takeaway from some of these stories about the NCAA and intercollegiate athletics is that the current NCAA landscape for governing intercollegiate athletics is significantly changing, buffeted by tsunami-like challenges to its authority and business model.¹⁴ One

10. Commonwealth v. Cosby, 224 A.3d 372, 380 (Pa. Super. Ct. Dec. 10, 2019); see Maryclaire Dale, *Bill Cosby sex assault verdict upheld; spokesman lashes out*, ASSOCIATED PRESS (Dec. 10, 2019), <https://apnews.com/2f4b9e6b0da6980411b4f3080434d21b>.

11. See Chris Francescani & Alexandra Svokos, *Harvey Weinstein found guilty on 2 counts in sexual assault case*, ABC NEWS (Feb. 24, 2020, 12:09 PM), <https://abcnews.go.com/Entertainment/jury-reaches-verdict-harvey-weinstein-case/story?id=69175544>; see also Chris Francescani & Aaron Katersky, *Harvey Weinstein sentenced to 23 Years on sex crime convictions*, ABC NEWS (Mar. 11, 2020, 9:29 AM), <https://abcnews.go.com/US/harvey-weinstein-despondent-faces-sentencing-york/story?id=69516249>.

12. United States v. Epstein, 425 F. Supp. 3d 306 (S.D.N.Y. 2019); see Christina Carrega, Stephanie Wash & Bill Hutchinson, *Millionaire Jeffrey Epstein's sex-trafficking trial set for next year; a million pages of discovery expected*, ABC NEWS (July 31, 2019, 2:24 PM), <https://abcnews.go.com/US/millionaire-jeffrey-epsteins-sex-trafficking-trial-set-year/story?id=64678798>.

13. Jacoby, *supra* note 9.

14. The Rice Commission noted that the more serious and confounding challenges to NCAA authority and its business model are the "legal challenges to its amateurism rule under antitrust and employment theories" (citing, in part *In re* NCAA Athletic Grant-In-Aid Antitrust Litigation, Case No. 4:14-md-2541-CW (N.D. CA 2014)) ("[C]hallenging the failure to pay Division I Men's and Women's Basketball and FBS football players the difference in the value of an athletic scholarship and the full cost of attendance"); *Jenkins v. NCAA*, Civil Action 12-CV-3:33-av-0001 (D.N.J. 2014) ("[C]hallenging agreement not to compete for services of Division I Men's and FBS players as a violation of the antitrust laws without legitimate pro-competitive purposes . . ."). COMM'N ON COLL. BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL 22 n.17 (2018) [hereinafter RICE COMMISSION or RICE REPORT]; see also Nw. Univ. & College Athletes Players Ass'n, 362 N.L.R.B. 1350, 1368 (Aug. 17, 2015) (challenging the NCAA's amateurism rule and business model under the National Labor Relations Act (NLRA) when student-athletes sought union certification and ultimately deciding that NU football players who received grant-in-aid scholarships were employees under NLRA § 2(3)). The Regional Director of the National Labor Relations Board (NLRB) rejected NU's argument that they were "primarily students" because, in part, scholarship players spend more time per-week on football-related activities than school-related activities and are subject to strict control all year. The full NLRB vacated the regional director's ruling "without deciding whether the scholarship players are statutory employees under Section 2(3)." *Id.* at 1355. Instead, the Board

important example of such change was the court's 2013 decision in *O'Bannon v. National Collegiate Athletic Association*.¹⁵

Ed O'Bannon, a former UCLA basketball star, and a group of current and former college football and men's basketball players filed an antitrust class action in 2013 against the NCAA.¹⁶ They alleged that NCAA rules prohibiting athletes from making money from their name, image, and likeness (NIL) violated section 1 of the Sherman Act.¹⁷ The district court ruled the NCAA's no compensation rules were an "unlawful restraint of trade"—marking the first time a federal court found that NCAA's amateurism rules violated antitrust laws.¹⁸

The United States Court of Appeals affirmed the trial judge's decision in *O'Bannon* that NCAA regulations are subject to antitrust review, but vacated the "judgement and injunction insofar as they require[d] the NCAA to allow its member schools to pay student-athletes up to \$5,000 per year in deferred [NIL] compensation."¹⁹ The court believed paying

declined to assert jurisdiction in this case because it would "not effectuate the policies of the [NLRA] . . ." in promoting uniformity and stability in labor relations, given the "nature of league sports and the NCAA's oversight [that] renders individual team bargaining problematic. . . ." *Id.* at 1352-54. The NLRB's decision to sidestep the important question of whether scholarship players are employees raises the ominous specter for the NCAA that student athletes should have more of a voice in college sports, including earning compensation. At the very least, the NLRB's pass on the important question of whether college athletes are employees added new impetus to the school of thought that student athletes are employees and entitled to greater legal protection and economic rewards. *See generally* Michael Pego, *The Delusion of Amateurism in College Sports: Why Scholarship Student Athletes Are Destined to Be Considered "Employees" Under the NLRA*, 13 FIU L. REV. 277 (2018).

15. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

16. *Id.* at 1055-56. O'Bannon "visited a friend's house, where his friend's son told O'Bannon that he was depicted in a college video game produced by Electronics Arts (EA), a software company, that produced video games based on college football and men's basketball games from late 1990s to around 2013."

17. *Id.* at 1049, 1052; *see also* The Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2004) (Trusts, etc., In Restraint of Trade Illegal; Penalty). The NCAA's rules barring compensation for NIL are subject to antitrust laws because amateurism rules are not categorically valid, involve commercial activity in which student-athletes anticipate compensation, and have an anti-competitive effect on the college market.

18. *O'Bannon*, 802 F.3d at 1052-53. Senior District Court Judge Claudia Wilkens conducted a bench trial and ruled that the NCAA's amateurism rules prohibiting NILs compensation constituted an unlawful restraint of trade and issued an injunction that the NCAA change its practices. To review Judge Wilkens' thoughtful decision, *see O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014) (affirmed in part, vacated in part by *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015)).

19. *O'Bannon*, 802 F.3d at 1079. The NCAA bylaws define a student-athlete as a student whose enrollment was solicited by a member of the athletic staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in the Constitution. 3.2.4.6.

“cash sums untethered to educational expenses” destroyed any pretense of amateurism and threatened the very existence of NCAA amateur athletics.²⁰ Perhaps more importantly, the same court affirmed the trial court’s injunction requiring the NCAA to permit its members to raise the grant-in-aid or scholarship cap to cover the full cost of attendance.²¹ The *O’Bannon* decision heralded a new era of compensation for student-athletes, entitling them to a share of the NIL revenue based on their athletic

NAT’L COLLEGIATE ATHLETIC ASS’N, 2019-2020 DIVISION I MANUAL, ART. 12, § 12.02.14 at 62 (2019) [hereinafter NCAA MANUAL]; see Chuck Provencio, Student-Athlete: A Study of Student-Athlete Workload Compared with Traditional Student Workload (2016) (thesis, Paper No. 1054, South Dakota State University), <https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=2053&context=etd> (noting a study that defines a student-athlete as someone who receives a scholarship in exchange for athletic participation; this definition excludes the population of “walk-ons” or student-athletes without scholarship).

20. “Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.” *O’Bannon*, 802 F.3d at 1078. The appellate majority found . . . there is a concrete procompetitive effect in the NCAA’s commitment to amateurism: namely that the amateur nature of collegiate sports increases their appeal to consumers. We therefore conclude that the NCAA’s compensation rules serve two procompetitive purposes identified by the district court: integrating academics with athletics, and ‘preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.’

Id. at 1073. However, the dissent agreed with the District Court and noted,

[t]he national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it Our task is simply to review the district court judgment through the appropriate lens of antitrust law and under the appropriate standard of review. In the end, my disagreement with the majority is founded on the appropriate standard of review. After an extensive bench trial, the district court made a factual finding that payment of \$5,000 in deferred compensation would not significantly reduce consumer demand for college sports.

Id. at 1083 (Thomas, C.J., dissenting).

21. *Id.* at 1075, 1079. “A compensation cap set at student-athletes’ full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA’s legitimate procompetitive purposes.” *Id.* at 1075. The NCAA defines COA as the “amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses [“e.g., . . . childcare costs, costs related to a disability and miscellaneous personal expenses” see § 15.02.2.1] related to attendance at the institution.” NCAA MANUAL, *supra* note 19, § 15.02.2. See also Bill Rabinowitz, *Athletic director Gene Smith discusses Ohio State football, playoff, transfers and more*, BUCKEYEXTRA (Feb. 9, 2020, 5:31 AM), <https://www.buckeyextra.com/sports/20200209/athletic-director-gene-smith-discusses-ohio-state-football-playoff-transfers-and-more>. The longstanding Ohio State University Athletic Director, Gene Smith, was asked about one of the NCAA Committees he served on that was addressing the NIL issue. Smith stated:

I think it [i.e. NILs] won’t be resolved until 2021. We need federal assistance to come up with something as standard across the country. You can’t have all these states having different laws. Otherwise, this thing falls apart. We have to do something with NIL, and the more I got into it, the more I realized there are things we can do that can be regulated. There are things that will require minimum legislation. There are things that are going to require major regulation.

services.²² In *O'Bannon's* wake, collegiate athletics programs across the nation still struggle to balance their budgets to cover the full cost of attendance.²³

The Changing Landscape of Intercollegiate Athletics—The Need to Revisit the NCAA's "No Agent Rule" (No Agent Rule), examines the NCAA's regulation of agents given recent economic and societal changes impacting its business model,²⁴ especially in light of the recent report by the blue ribbon NCAA task force, the Rice Commission on College Basketball.²⁵ NCAA President, Mark Emmert, created the commission after the United States Attorney for the Southern District of New York reported "the arrest of ten persons for involvement in fraud and corruption schemes related to college basketball."²⁶

Part II of this article briefly describes the NCAA's history and its efforts to create and enforce intercollegiate athletic rules promoting important principles, such as amateurism²⁷ and fundamental purposes, such as maintaining "a clear line of demarcation between intercollegiate and professional sports."²⁸ This background discussion is important for a fuller understanding of the NCAA's longstanding and controversial principle of amateurism that generally prohibits student-athletes and their

22. *But see* Nw. Univ. & College Athletes Players Ass'n (CAPA), 362 N.L.R.B. 1350, 1350, 2015 NLRB LEXIS 613, *1, 204 L.R.R.M. 1001, 2014-15 NLRB Dec. (CCH) P15,999, 362 NLRB No. 167 (N.L.R.B. Aug. 2015) (declining to assert jurisdiction over Northwestern's petition to treat student athletes receiving grant-in-aid scholarships as university employees).

23. Telephone Interview with Lawrence R. Williams, Athletic Dir., Univ. of Akron Athletic Director (Apr. 7, 2020) (confirming the struggle to balance university athletic budgets given the need to cover the full cost of attendance). See Elton Alexander, *New NCAA rule adds money to athletic scholarships, but can strain athletic budgets*, CLEVELAND.COM, https://www.cleveland.com/sports/college/2015/05/new_ncaa_rule_adds_money_to_at.html (last updated Jan. 11, 2019).

24. See *supra* notes 15-23 and accompanying text.

25. RICE REPORT, *supra* note 14. For a list of the Rice Commission's distinguished members, see *infra* note 192.

26. RICE REPORT, *supra* note 14, at 15. The ten individuals included "four NCAA Division I college basketball coaches, the head of Global Sports Marketing–Basketball and two individuals affiliated with a major athletic apparel company, and three athletic advisors." *Id.*; *United States v. Gatto*, 295 F. Supp. 3d 336, 338 (S.D.N.Y. 2018) (denying defendants' joint motion to dismiss the indictment); see Part IV *infra* for a more detailed discussion of *Gatto*.

27. NCAA MANUAL, *supra* note 19, § 2.9 ("Student-athletes should be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education, and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

28. *Id.* § 1.3.1 (highlighting the NCAA's longstanding "basic purpose" to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.") (emphasis added).

families from using an "agent for the purpose of marketing his or her athletics ability or reputation in that sport."²⁹

Part III of the *No Agent Rule* examines the representational role of sports agents. This part discusses the key services that agents offer athletes in helping them to realize their full potential in sports and other related endeavors. Part III also considers national and state laws affecting agent conduct.

Part IV discusses *United States v. Gatto* and its connection to the NCAA's Commission on College Basketball.³⁰ This commission, commonly referred to as the Rice Commission, in recognition of its Chair, Dr. Condoleezza Rice, has already impacted intercollegiate sports.³¹ The Rice Commission's work supports, if not portends, additional regulatory changes to intercollegiate athletics, in particular, the NCAA's rules governing the relationship between agents and student-athletes.

Part V examines interdisciplinary literature and surveys that provide a valuable context for assessing the merits of the NCAA's general rule barring student-athlete access to agents. This part balances the potential benefits and detriments of extending the Rice Commission's

29. *Id.* § 12.3.1.

An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport

Id. The NCAA's amateurism principle and its general ban on student athletes using sports agents generates substantial literature, much of it critical. *See generally, e.g.*, Christopher M. Hartley, *Double Fault: How the NCAA's No-Agent Rule Serves Legal and Policy Errors Into the Courts of Tennis*, 72 ARK. L. REV. 553 (2020); Alicia Jessop, *Students First: The Need for Adoption of Education and Incentive-Based Sport Agent Policies by NCAA Division I FBS Member Institutions*, 29 J. LEGAL ASPECTS SPORT 197 (2019); Sarah Lytal, *Ending the Amateurism Façade—Pay College Athletes*, 9 HOUS. L. REV. 158 (2019); Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275 (2018); Seth Myers, *An Intentional Foul: Corruption in NCAA Basketball & The Aftermath of the 2017 Scandal*, 15 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 65 (2019). Although the NCAA rule restricting the use of agents is the focus of this article, it is only one of several NCAA rules enforcing amateurism. *See, e.g.*, NCAA MANUAL *supra* note 19, §§ 12.2.7, 12.1.3.

30. *United States v. Gatto*, No. 17-cr-0686 (LAK), 2019 U.S. Dist. LEXIS 8901 (S.D.N.Y. Jan. 17, 2019).

31. For example, the NCAA adopted several Rice Commission recommendations, including a new, albeit limited, agent certification program for only elite Division I Men's Basketball players. NCAA Enforcement Certification and Approvals Group (ECAG), *Agent Certification Frequently Asked Questions*, NCAA (Aug. 8, 2019), https://ncaaorg.s3.amazonaws.com/enforcement/ecag/agent/ECAG_AgentCertificationFAQ.pdf. *See also* NCAA MANUAL, *supra* note 19, § 15.01.5.2.1 (authorizing financial aid based on certain conditions to support former basketball student-athletes who wish to return to college and complete their first baccalaureate degree).

recommendation for elite Division I Men's Basketball players access to agents to all intercollegiate athletes. Part V identifies several compelling reasons why student-athletes may need and benefit from the assistance of sports agents. Part V finds that the benefits of agents outweigh any risks and that such risks can be ameliorated by less restrictive regulatory measures, such as heightened agent oversight, than the current broad ban against agents.

Part VI suggests that, due to recent changes in intercollegiate sports, the time is ripe for the NCAA to adopt a Modified Agent Rule (MAR) permitting all student-athletes to enjoy the professional assistance of NCAA certified agents. The adoption of such a policy need not undermine the NCAA's commitment to amateurism.

The conclusion recommends the NCAA abandon its general ban on sports agents and replace it as soon as possible with a MAR. The MAR would incorporate some of the current NCAA restrictions concerning sports agents and also adopt provisions from other regulatory regimes, like the Revised Uniform Athlete Agent Act (RUAAA).³² Such a change will promote student-athlete welfare by alleviating some of the personal stress and other unique challenges impeding student-athlete success.

II. THE NCAA—THE OVERLORD OF COLLEGE ATHLETICS

The concept that the NCAA functions like an “overlord” regarding college athletics is not new and has been discussed by scholars,³³ current and former student-athletes,³⁴ and media sources.³⁵ The term reflects the NCAA's enormous power and control over the college sports industry. Like any industry overlord, changing the way the NCAA does business can be complex and difficult, often requiring public or other outside pressure.³⁶

32. See *infra* Part II, Section B (discussing the RUAAA).

33. See Sahl, *supra* note 1, at 624-40; Joe Nocera & Ben Strauss, *Here's How The NCAA Hurts College Athletes*, FORTUNE (Feb. 27, 2016, 9:00 AM), <https://fortune.com/2016/02/27/how-ncaa-hurts-college-players/>.

34. Jenni Fink, *89 Percent of College Varsity Athletes Think NCAA Takes Advantage of Student Athletes*, NEWSWEEK (Sept. 6, 2019, 10:00 AM), https://ncaaorg.s3.amazonaws.com/enforcement/ecag/agent/ECAG_AgentCertGuidelines.pdf; Katelyn Ohashi, *Everyone Made Money Off My N.C.A.A. Career, Except Me*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html>.

35. Jamil Smith, *The NCAA Will Evolve, or Die*, ROLLINGSTONE (Oct. 4, 2019, 4:04 PM), <https://www.rollingstone.com/politics/political-commentary/ncaa-california-gavin-newsom-895160/>.

36. Will Hobson, *NCAA softens on allowing college athletes to be paid, but provides few specifics*, WASH. POST (Oct. 29, 2019, 12:52 PM), https://www.washingtonpost.com/sports/colleges/ncaa-softens-public-stance-on-athlete-amateurism-provides-few-specifics/2019/10/29/4378b1f0-fa7a-11e9-8906-ab6b60de9124_story.html.

A. Overview—The NCAA and Regulating Intercollegiate Athletics

The need to regulate intercollegiate athletics has existed for well over a century and half.³⁷ During the period of 1840 through 1910, “there was a movement from loose student control of athletics to faculty oversight . . . to the creation of conferences, and, ultimately, to the development of a national entity for governance purposes.”³⁸ Some of the impetus for this change emanated from university presidents; for example, Harvard’s President Eliot, was alarmed by the increasing commercialization of intercollegiate athletics.³⁹ Similarly, the Massachusetts Institute of Technology’s President Walker, quipped that if the rate of commercialization continued there would be a question about whether “B.A. [stood] more for Bachelor of Arts or Bachelor of Athletics”—a quip that still resonates today as a truthful depiction of intercollegiate athletics.⁴⁰

In 1905, more than eighteen deaths and one hundred major injuries in college football prompted President Theodore Roosevelt to invite officials from major football programs to the White House to resolve the problem.⁴¹ This effort led to the creation of the Intercollegiate Athletic Association (IAA) with sixty-two members, renamed in 1910 as the NCAA, with the primary mission of formulating rules for various sports to promote fair competition and amateurism.⁴²

37. See Smith, *supra* note 4 (providing a rich and concise discussion about the NCAA’s origins and other related developments while also offering some thoughts about the future). Smith notes that “[o]ne of the earliest intercollegiate events” was a commercially sponsored “highbrow [Yale-Harvard] regatta” in which Harvard sought an unfair advantage by using a coxswain who was not a student. *Id.* at 10-11; see also RUSS VERSTEEG & JACK P. SAHL, *SPORTS LAW CASES & MATERIALS* 353, 352-59 (4th ed. 2019) [hereinafter VERSTEEG & SAHL] (providing a brief historical review of the NCAA).

38. Smith, *supra* note 4, at 12-13; see VERSTEEG & SAHL, *supra* note 37, at 353-54 (offering additional excerpts of Smith’s article, *supra* note 4).

39. Smith, *supra* note 4, at 11.

40. *Id.*

41. James v. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1985); Smith, *supra* note 4, at 12.

42. Koch, *supra* note 41, at 12 (stating “[a]n additional concern of Roosevelt and others was the preservation of amateurism.”); Smith, *supra* note 4, at 12; see United States v. Gatto, 295 F. Supp. 3d 336, 339 (S.D.N.Y. 2018). Today, “[t]he NCAA is a non-profit organization that regulates athletics for colleges and universities. NCAA member schools are organized into three separate divisions: Divisions I, II, and III. Division I is the ‘highest level of intercollegiate athletics sanctioned by the NCAA.’” *Id.* “Schools with Division I athletics programs typically have the largest athletics budgets and offer the most athletic scholarships, subject to NCAA regulations.” *Id.* Currently, Division I has 350 member schools. *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Aug. 22, 2020). In the early 1950s, the NCAA “was transformed from a coordinating organization that was largely confined to rulemaking and sponsoring championships, to one that had considerable financial clout” because the NCAA was negotiating valuable television contacts for its members and

Commercialism in intercollegiate sports continued to grow after 1910, causing the Carnegie Foundation for the Advancement of Education to issue a report in 1929, calling for the diminishment of commercialism and for college presidents to “reclaim the integrity of the sport.”⁴³ Despite the NCAA’s efforts to answer this call to reign in commercialism, it could not “keep pace with the growing commercialization of, and interest in, intercollegiate athletics.”⁴⁴ Some of this increase in commercialism was caused by sports fans’ widespread use of radio and television to follow college sports, World War II veterans returning and attending college in large numbers, and colleges adding or expanding athletic programs.⁴⁵ This period of commercial growth was emblematic of a more global concern.

That concern is the perpetual clash between two fundamental forces in the NCAA. One force involves the NCAA’s overriding commitment to amateurism and its focus on the educational and cultural development of student-athletes.⁴⁶ The second, countervailing force entails the ever-increasing commercialization of intercollegiate athletics and its corrosive effect on the principle of amateurism.⁴⁷ The end result of this clash has left the NCAA in a continuous search for a viably durable equilibrium between amateurism and commercialization in intercollegiate athletics.⁴⁸

In an effort to “reclaim” or promote integrity in intercollegiate athletics, the NCAA in 1951 created the Committee on Infractions (COI) with broad sanctioning authority to facilitate rule compliance.⁴⁹ During the 1950s and 1960s, the NCAA’s enforcement capacity increased annually, in part because of a strong executive director, Walter Byers,⁵⁰

punishing them for rule violations, including severe financial penalties. *See generally* Koch, *supra* note 41, at 13-14.

43. Smith, *supra* note 4, at 14; VERSTEEG & SAHL, *supra* note 37, at 354-55.

44. Smith, *supra* note 4, at 14.

45. *Id.* at 14-15.

46. NCAA MANUAL, *supra* note 19, §§ 2.5, 2.9.

47. Gurney, *supra* note 1, at 3-24.

48. *See generally* Kelly Charles Crabb, *The Amateurism Myth: A Case for A New Tradition*, 28 STAN. L. & POL’Y REV. 181 (2017) (examining the amateurism tradition in college sports from cultural and legal perspectives and contending it is a flawed cultural theme and that the NCAA should abandon its amateurism theme and adopt a new tradition whereby student athletes can exploit their name, image and likeness and all athletes receive reasonable compensation for their labors).

49. Smith, *supra* note 4, at 15.

50. *Id.*; Jack McCallum, *IN THE KINGDOM OF THE SOLITARY MAN*, SPORTS ILLUSTRATED (Oct. 6, 1986), <https://www.si.com/vault/1986/10/06/8075446/in-the-kingdom-of-the-solitary-man-reticent-reclusive-walter-byers-the-executive-director-of-the-national-collegiate-athletic-association-will-retire-in-1988-but-as-byers-begins-to-relinquish-his-35-year-long-grip-on-the-ncaa-h>.

and due to additional revenue from lucrative contracts to broadcast intercollegiate sports.⁵¹ In the early 1970s, the NCAA also created divisions reflecting the competitive capacity of schools.⁵² By enacting this change, the NCAA hoped to create a more balanced playing field among competitors. During this time, enhanced rule enforcement by the NCAA prompted criticism that its rules and enforcement were unfair.⁵³ The NCAA created a committee to study these criticisms and, in 1973, adopted one of its key recommendations to divide the prosecutorial and investigative roles of the COI.⁵⁴

By 1976, the NCAA obtained new authority to enforce its rules by penalizing schools directly, and thus indirectly penalizing the school's administrators, coaches, and student-athletes.⁵⁵ Perhaps because of this new authority, criticisms of the NCAA enforcement regime persisted and in 1978, the U.S. House of Representatives Subcommittee on Oversight and Investigation conducted hearings regarding the fairness of NCAA enforcement practices.⁵⁶

Against a background of high profile intercollegiate scandals that the New York Times concluded left a "stench in college sport,"⁵⁷

51. Koch, *supra* note 41, at 13-14; Smith, *supra* note 4, at 15 (noting that the NCAA negotiated its first million-dollar contract to televise intercollegiate football in the 1950s); see also Branch, *supra* note 2 ("On June 6, 1952, NBC signed a one-year deal to pay the NCAA \$1.14 million for a carefully restricted football package."); see generally Allen R. Sanderson & John J. Siegfried, *The Role of Broadcasting in National Collegiate Athletic Association Sports*, 52 REV. OF INDUS. ORG. 305, 309-11 (Oct. 24, 2017) (describing the history of broadcast deals with the NCAA from 1921 to the present).

52. Smith, *supra* note 4, at 15.

53. David F. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1071 (1981) (recognizing that a major criticism of the COI's procedures and tactics was the unfairness of COI being involved in the entire investigation and adjudication of a matter when the roles of investigator-prosecutor and adjudicator needed to be separate); Smith, *supra* note 4, at 15.

54. Gaona, *supra* note 53, at 1071-72 (acknowledging the NCAA unfused the COI's roles of being both an investigator-prosecutor and an adjudicator with the former function now performed by a special investigative staff, and the adjudicator function still handled by the COI; the NCAA Council functions as the NCAA's appellate tribunal); Smith, *supra* note 4, at 15.

55. Smith, *supra* note 4, at 16.

56. VERSTEEG & SAHL, *supra* note 37, at 356 (quoting Smith, *supra* note 4, at 16).

57. HOWARD P. CHUDACOFF, CHANGING THE PLAYBOOK: HOW POWER, PROFIT, AND POLITICS TRANSFORMED COLLEGE SPORTS 110 (Randy Roberts et al. eds. 2015) [hereinafter CHUDACOFF]. Chapter 6 provides an interesting discussion of some of the NCAA's most prominent scandals ranging from improper payments to athletes (e.g., Southern Methodist University (SMU) boosters "funneling secret payments to players" with at least the tacit support of SMU's Board of Governors and the cooperation of its head football coach, ultimately resulting in the NCAA's "death penalty" sanction or cancellation of all of its football games in 1987, *id.* at 105-06), to academic fraud (e.g., the PAC-10 Conference barred five members from participating in the 1981 Rose Bowl because of academic fraud; one of those schools was Arizona State, after eight football players passed a summer make-up mathematics course

university and college presidents faced with declining enrollments paid closer attention to intercollegiate athletics in the 1980s.⁵⁸ Presidents viewed athletic departments as an auxiliary unit with ever rising costs but also as a potential to generate non-tuition based revenue and positive publicity.⁵⁹ The presidents also appreciated that their reputations and jobs were increasingly tied to their athletic departments and intercollegiate athletics.⁶⁰ Influential university trustees, alumni, faculty, and others pressured presidents to adopt policies and strategies to create successful intercollegiate sports programs.⁶¹ In 1984, the presidents formed the President's Commission and called a special convention in 1985, in part to recommend rule changes with an eye to cost containment. The President's Commission produced mixed results.⁶²

A little over a decade later, the presidents' involvement grew to the extent that they had changed the very governance structure of the NCAA, with the addition of an Executive Committee and a Board of Directors for the various divisions, both of which are made up of presidents or chief executive officers.⁶³

In 1991, the presidents helped create a blue ribbon committee called the "Special Committee to Review the NCAA Enforcement and Infractions Process" (Special Committee)⁶⁴ headed by President Rex E. Lee of

but never attended a class, *id.* at 111) and game cheating (*e.g.*, the Tulane and Boston College men's basketball point-shaving schemes, the latter occurring in 1978-79 and involving mobster Henry Hill whose life became the subject of the 1990 movie *Goodfellas*, *id.* at 110).

58. Smith, *supra* note 4, at 16; see Sean Silverthorne, *Diagnosing the 'Flutie Effect' on College Marketing*, HARV. BUS. SCH. (Apr. 29, 2013), <https://hbswk.hbs.edu/item/diagnosing-the-flutie-effect-on-college-marketing>.

59. Smith, *supra* note 4, at 16; see Silverthorne, *supra* note 58, at 53 (discussing the Flutie Effect or the institutional impact of Doug Flutie on Boston College (BC) when he threw a legendary, last second, "Hail Mary" pass to defeat the University of Miami in football, for example, BC applications "shot up 30 percent" in the two years following the win; also reporting that in general, "[w]hen a school rises from mediocre to great on the gridiron, applications increase by 17.1 percent . . . schools become more academically selective with athletic success," and that "[w]inning programs prosper in diverse ways including ticket and product sales, alumni donations, and TV contracts").

60. Smith, *supra* note 4, at 16.

61. *Id.* This is largely still the case as evidenced by a remark from the new president of the University of Akron, Dr. Gary Anderson, when asked about what he was going to do with Akron's football program. He emphatically replied, "[t]he quickest way for a president to get fired is to either drop or add college football." This statement was conveyed to the University of Akron Law School faculty during a meeting with the president in 2019.

62. Smith, *supra* note 4, at 17 ("These efforts [at making rule changes in hopes of cost containment] were not all successful."); VERSTEEG & SAHL, *supra* note 37, at 331.

63. Smith, *supra* note 4, at 17.

64. This Commission was a response to the Supreme Court decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). In *Tarkanian*, the Court found that the NCAA was authorized to conduct investigations and hearings, but as a private entity it is not subject to constitutional due process requirements. Although not required to do so, the *Tarkanian* case caused the

Brigham Young University with other prominent members such as former Chief Justice Warren E. Burger.⁶⁵ The NCAA adopted some of the Special Committee's recommendations, for example, allowing the tape recording of witness interviews and adding outside members to the COI.⁶⁶ Although the Special Committee's efforts improved the NCAA enforcement process, it nevertheless remained flawed as the NCAA "rejected the [Special Committee's recommendation for] both an independent trier of fact and open hearings."⁶⁷ One critical assessment of the NCAA's rule enforcement process following the Special Committee's recommendations stated the following:

Given the persistent criticism and widespread agreement regarding the NCAA's flawed enforcement system, most would think it necessary to restore public confidence in this NCAA governance function. Key among important changes for all cases with the potential of significant consequences should be the installation of discovery mechanisms and enhanced procedural protections for individuals and institutions.⁶⁸

"In the late 1990s, the presidents became increasingly concerned about student welfare" and enacted rules to protect student-athletes, for example, by enacting the twenty-hour rule.⁶⁹ This rule limited the amount of time that coaches could ask student-athletes to practice and compete in their sport to twenty hours per week in hopes of safeguarding time for academic and other campus pursuits.⁷⁰ Rule 2.9 of the Division I Manual provides:

NCAA to appreciate some of the serious procedural flaws in its investigation and hearing processes. GURNEY, *supra* note 1, at 99; see Smith, *supra* note 4, at 17; see generally Sahl, *supra* note 1 (providing a detailed discussion of *Tarkanian*).

65. Smith, *supra* note 4, at 17-18.

66. Gurney, *supra* note 1, at 99.

67. *Id.* at 99-100.

68. *Id.* at 100.

69. MATHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT C. BERRY, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 106 (2d ed. 2009) [hereinafter MITTEN]. See NCAA MANUAL, *supra* note 19, § 17.1.7.1 (limiting participation in athletically related activities during the season to four hours per day and twenty hours per week) (adopted Jan. 10, 1991) (effective Aug. 1, 1991).

70. MITTEN, *supra* note 69, at 107. The twenty-hour rule represented an important official step toward preserving adequate time for athletes to focus on their academic work and cultural and social development. Unfortunately, the important benefits of this rule have been undermined by unofficial demands for the athlete's time; for example, "captain practices," voluntary practices led by team captains, and not so subtle encouragement to engage in related off-season athletic activities, such as, playing soccer for a particular summer club. See Peter Jacobs, *Here's The Insane Amount Of Time Student-Athletes Spend On Practice*, BUS. INSIDER (Jan. 27, 2015, 8:44 AM), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> (reporting that NCAA Division I FBS football players on average practice forty-three and three tenths hours per week, men's basketball

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived from such pursuits. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.⁷¹

Similarly, Rule 2.2, titled “The Principle of Student Well-Being,” states: “[i]ntercollegiate athletic programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”⁷² The NCAA’s twenty-hour rule, like the requirement that “[d]uring the playing season, all countable athletically related activities . . . shall be prohibited during one calendar day per week,” prohibition on hiring agents were designed to promote, amateurism by enhancing the amateur athlete’s student interests or educational and cultural enrichment.⁷³

The NCAA period from 1980 through 2000 has been described as “active” with a “meteoric rise” in both revenue⁷⁴ and the commercialization of intercollegiate sports.⁷⁵ This rise occurred at a time when college presidents were still grappling with the increasing costs of higher education, including expenses associated with the “arms race” or the expansion of athletic facilities and staff, declining enrollment, and daunting budgetary constraints because of an economic downturn.⁷⁶

By 2000, college presidents consolidated their power within the NCAA.⁷⁷ They launched a major academic reform effort to increase the

averages thirty-nine and two tenths hours of practice per week, and Division I Women’s Basketball practices roughly thirty-seven and sixth tenths hours per week).

71. NCAA MANUAL, *supra* note 19, § 2.9. The Principle of Sound Academic Standards is another provision emphasizing the NCAA’s commitment to amateurism and education.

Intercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.

Id. § 2.5.

72. *Id.* § 2.2.

73. *Id.* § 17.1.7.4 (Requiring Day Off—Playing Season) (adopted Jan. 10, 1991) (effective Aug. 1, 1991). For other rules during this period that were intended to promote amateurism and student-athlete interests and educational enrichment see *e.g.*, *id.* § 17.1.7.10.2 (No Class Time Missed for Practice Activities) (adopted Jan. 10, 1991) (effective Aug. 1, 1991).

74. MITTEN, *supra* note 69, at 107. For example, the NCAA and CBS agreed to a \$1.725 billion, eight-year television contract for the rights to Division I Men’s Basketball games—commonly referred to as March Madness. *Id.* at 106. This influx of money helped the NCAA expand and increase its support for Division I members. *Id.*

75. *Id.* at 107.

76. *Id.* at 106-07.

77. *Id.* at 107.

academic progress and graduation rates of student-athletes, especially in the revenue-producing sports of football and men's basketball, where graduation rates were dismal and generated much criticism.⁷⁸ Amid festering criticism about the NCAA's failure to ensure that intercollegiate athletes received a meaningful education leading to graduation, the NCAA created the Annual Academic Progress Rate (AAPR) in 2003 which generates a real-time assessment of team academic performance.⁷⁹ The AAPR requires student-athletes to declare a major and to complete a minimum number of credits per semester toward earning a degree while maintaining a minimum grade point average.⁸⁰ The AAPR enhanced institutional accountability for ensuring student-athletes met NCAA academic progress and graduation rate benchmarks, in part, by providing incentives and disincentives, for example, the loss of athletic scholarships.⁸¹ Nevertheless, some critics contend that academic cheating still continues as schools have found new and more sophisticated ways to avoid AAPR penalties.⁸²

In 2020, the intercollegiate athletics' landscape is still being shaped by the ever-growing forces of commercialism and the increasing power of big, elite football and basketball programs to drive intercollegiate regulatory policy while lesser situated athletic programs struggle to keep up.⁸³ This development was underscored in August 2014 when the "NCAA Board of Directors (now called the Board of Governors) granted legislative autonomy to the five wealthiest conferences in the Football Bowl Subdivision (FBS) representing sixty-five institutions and adopted a new governance structure to provide greater operational control to athletic directors and conference representatives."⁸⁴ The president of Boise State University characterized the autonomy legislation as a "'power

78. *Id.* at 105, 107.

79. *Division I Academic Progress Rate (APR)*, NCAA, <http://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr> (last visited Sep. 25, 2020).

80. MITTEN, *supra* note 69, at 107, 137.

81. *Id.* at 107-08 (reporting that the creation of amateurism clearinghouse legislation by the NCAA Division I and II Management Councils to deal with amateurism issues related to prospective domestic and international athletes and the AAPR "are bearing some fruit, in terms of increased academic progress . . . with the implementation of sanctions related to academic progress reporting.").

82. GURNEY, *supra* note 1, at 39 (citing Brad Wolverton, *Confessions of a Fixer*, CHRON. OF HIGHER EDUC. (Dec. 30, 2014), <https://www.chronicle.com/article/confessions-of-a-fixer/>) (describing a "vast scheme of cheating among, elite revenue-generating football and basketball athletes and coaches" where an "aspiring basketball coach took online classes at Brigham Young University and Adams State University for hundreds of elite athletes needing . . . course credit hours and grades for initial and continuing eligibility[;]" and "uncover[ing] a similar scheme for basketball players at the University of Texas.").

83. *See id.* at 18-19.

84. *Id.* at 18.

grab' that facilitated the NCAA's attempt to perpetuate the dominance of a few dozen universities with the most resources to pull the strings."⁸⁵ University and college presidents emphasized their need to retain control of athletics in order for this new governance model to work, although the validity of that assertion remains unproven.⁸⁶ "In January 2015 the NCAA formally adopted super-conference autonomy in governance [as the] presidents from the five wealthiest conferences, known as the Power Five . . . reasoned that modern big-time sport was its own-ecosystem, and its issues and the ability to resolve them were unique to their institutions."⁸⁷

Today and throughout the NCAA's long and colorful history, no matter the development, travail, or success, a key NCAA hallmark is that student-athletes must be amateurs rather than professionals.⁸⁸ The NCAA is committed to maintaining a line of demarcation between amateur and professional or commercial athletic activity. NCAA rules clearly prohibit certain activity as professional and crossing that demarcation line results in exclusion of the student-athlete from any further participation in intercollegiate sports. For example, one clear prohibition and the focus of this article concerns student-athlete use of agents. "Student-athletes, prospective student-athletes, and their relatives are prohibited from accepting any benefits, including money, travel, clothing, or other merchandise, directly or indirectly from a financial advisor or an agent."⁸⁹ The term agent "is defined broadly to include anyone 'who, directly or indirectly . . . seeks to obtain any type of financial gain or benefit . . . from a student-athlete's potential earnings as a professional athlete.'"⁹⁰ The NCAA first adopted the No Agent Rule in 1974, in part to promote the principle of amateurism and to maintain the line of demarcation between amateur and professional sports.⁹¹

85. *Id.* at 18-19. The Boise State University President further declared: "It seems they [the big elite programs] are never satisfied with their bloated athletic budgets, especially when threatened in recent years by upstart, so-called mid-major programs that steal recruits, often-times beat the big-boys, 'mess with' the national rankings and sometimes take postseason bowl games and revenue." *Id.*

86. *Id.* at 18.

87. *Id.* at 19.

88. NCAA MANUAL, *supra* note 19, § 1.3 (Article I of the NCAA Constitution highlights the NCAA's longstanding "basic purpose" to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.") (emphasis added).

89. *Id.* § 12.3.2; see *United States v. Gatto*, 295 F. Supp. 3d 336, 339 (S.D.N.Y. 2018).

90. NCAA MANUAL, *supra* note 19, § 12.02.1.

91. See *id.* § 12.3.1 ("An individual shall be ineligible for participation in an intercollegiate sport if he or she has ever agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an

It is not always clear what kind of student-athlete conduct crosses the amateur-professional demarcation line. For example, Part V of this article argues that the NCAA should permit student-athletes to retain sports agents and that such retention does not automatically and magically transform an amateur student-athlete's efforts into professional work.⁹² It is worth noting that other amateur sports organizations do not share the NCAA's belief that its commitment to amateurism requires a No Agent Rule.⁹³ For example, the *United States Golf Association's Rules of Amateur Golf* permits amateur members to hire agents and earn compensation unrelated to winning a tournament.⁹⁴ Nevertheless, the NCAA's longstanding No Agent Rule has continued largely undisturbed for decades, even with the myriad of developments and changes, such as the *O'Bannon* decision, impacting the NCAA. That period of non-disturbance changed with the Rice Commission's recommendation in 2018 that elite Division I Men's Basketball players be entitled to agents.⁹⁵

III. SPORTS AGENTS

It is important to understand the special role that sports agents play in their client-athletes' personal and professional lives before attempting to regulate agent conduct. The agent's role in helping an athlete succeed

agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport."); see David Wade, *Inside the Rules: the NCAA "No Agent" Rule*, *HARDBALL TIMES* (Feb. 8, 2011), <https://tht.fangraphs.com/inside-the-rules-ncaa-no-agent-rule/> (explaining that the rule was enacted in 1974 when the NCAA conceded to allow players to seek professional advice, but prohibited advisors from negotiating directly with professional teams).

92. See *infra* Part V.

93. See GURNEY, *supra* note 1, at 15 ("The NCAA has modified rules in ways that have little to do with the core notion of amateurism (that is, not being paid to play a sport) and are inconsistent with those of other amateur organizations.").

94. *Id.* The Amateur Athletic Union (AAU) permits payments to its athletes during training or competition periods to cover their lost earnings during this time; they can also receive endorsement income. *Id.* The NCAA's effort to protect amateurism creates some curious results; European tennis players can earn up to \$10,000 for playing tennis during high school and still be eligible for NCAA tennis whereas a similarly situated United States player would not be eligible. *Id.* at 15–16. A rule like this treating European players differently seems arbitrary on its face and could lead some to criticize the NCAA rules as unfair.

95. On August 8, 2018, the NCAA adopted the Rice Commission's recommendation that elite Division I Men's Basketball players be permitted to retain an agent's services. NCAA MANUAL, *supra* note 19, §§ 12.02.1.2, 12.3.1.2.2. This exception to the NCAA's No Agent Rule is accompanied by a related NCAA agent certification process. See ECAG, *supra* note 31, at 6–8. This process became operational in August 2019 and has raised some concerns, in part, about it imposing "overly burdensome prerequisites" for NCAA agent certification and having a "procedurally flawed" and an unfair enforcement scheme. See Marc Edelman & Richard Karcher, *The NCAA's Agent Certification Program: A Critical Legal Analysis*, 11 HARV. J. SPORTS & ENT. L. 155, 162, 167–69, 182 (2020); see *infra* Part IV for a discussion of the Rice Commission.

is multifaceted and demanding—a 24/7 job. The athlete’s first call is often to his or her agent for help with important and even minor athletics-related and other personal needs. The agent-athlete relationship is very personal and built upon trust, support, and communication—similar to the fiduciary relationship that lawyers have with clients. Agents need to be accessible for their athlete-clients or risk losing them, given the intense competition among agents for athletes.⁹⁶

A. *The Role of Sports Agents*

“Historically, the agent’s role primarily involved negotiating the athlete’s performance contract with a team or a sponsor of an event, such as a tennis tournament.”⁹⁷ While sports agents still perform this task, “agents today are often expected to provide additional services, such as financial, tax, and estate planning, public relations, travel assistance,” career counseling, “and security, or find others who can provide such services.”⁹⁸

Large talent agencies, like IMG and Creative Artists Agency, offer clients “one-stop shopping” convenience where generally all of the talent’s service needs are provided in-house by the large agency.⁹⁹ Individual agents and smaller agencies commonly assemble a team of

96. See Bob Nightengale, *Albert Pujols, agent wary of rivals aiming to land star*, USA TODAY, <http://usatoday.com/sports/baseball/story/2011-09-22/Dan-Lazono-Albert-Pujols-Scott-Boras/50522204/1> (last updated Sept. 23, 2011, 12:39 PM) (noting the efforts of other agents to lure agent Dan Lozano’s all-star baseball player-client, Albert Pujols, by criticizing Lozano and prompting one agent to state, “[u]nfortunately for our business, it’s typical . . . It’s not pretty.”).

97. VERSTEEG & SAHL, *supra* note 37, at 392; see Lionel S. Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701, 705-06 (1987).

98. VERSTEEG & SAHL, *supra* note 37, at 392; W. Jack Grosse & Eric Warren, *The Regulation, Control, and Protection of Athletic Agents*, 19 N. KY. L. REV. 49, 53 (1991); *Our Services*, WILLIS SPORTS AGENTS, <https://www.willissports.com/our-services/> (last visited Feb. 13, 2020).

99. There has been notable consolidation in the agency field. For example, in 2009 the William Morris Agency and Endeavor merged to form WME—the biggest talent agency merger ever. *Our Story*, ENDEAVOR, <http://endeavorco.com/story/> (last visited Feb. 12, 2020). In 2014, WME (William Morris Endeavor Entertainment LLC) acquired IMG, the first, large international sports agency in the United States created by Mark McCormack in 1960 and based in Cleveland, Ohio. *Id.*; Frank Litsky, *Mark H. McCormack, 72, Pioneer of Sports Marketing*, N.Y. TIMES (May 17, 2003), <https://www.nytimes.com/2003/05/17/sports/mark-h-mccormack-72-pioneer-of-sports-marketing.html>; *The tragedy of Mark McCormack and IMG*, CMG PARTNERS (Jan. 10, 2015), <http://www.cmgpartners.ca/mccormack-family> (asserting that McCormack “created the industry of sports marketing”). The combined entity was renamed Endeavor in 2017. *Our Story*, IMG, <http://img.com/story/> (last visited Feb. 12, 2020) (“[IMG] is one of the largest independent producers and distributors of sports media” and “specializes in sports training, league development; and marketing, media and licensing for brands, sports organizations and collegiate institutions.”).

outside advisors to assist in servicing some of the athlete's diverse needs.¹⁰⁰ These advisors work closely with the agent. In this scenario, the agent functions like the head of an operations control room, managing the various advisors' efforts on behalf of the athlete.¹⁰¹

The agent's role for an athlete is largely determined by the agency contract. It is important for the agent to know what kind of support the client-athlete needs or expects. Those needs should be noted in the agency contract.¹⁰² The contract may be broadly worded to include a number of functions, all of which entitle the agent to charge a commission.¹⁰³

One of the agent's first responsibilities is negotiating an employment contract between the athlete and the party (e.g., sports franchise) purchasing the athlete's services. Agents must understand the athlete's sports industry and the financial status of the prospective purchaser to effectively negotiate favorable terms in the athlete's employment contract. The agent needs to build a case for the athlete's value, for example, by noting coaching and scouting recommendations, prior athletic accomplishments (e.g., scoring records and other honors), and physical evaluations (e.g., agility and speed).¹⁰⁴ The agent compares his client's talents and accomplishments with similar benchmarks for current and former athletes in the industry to gauge the client's fair market value.¹⁰⁵ In some sports, such as basketball and football, the agent's work will be influenced by overarching collective bargaining agreements negotiated between player associations and team owners, such as in basketball and football.¹⁰⁶ These agreements will guide the agent's work and require

100. One example of a successful smaller agency was ICON Management, in Stow, Ohio that represented golfers and other talent. International Management Group (IMG) ultimately acquired ICON reflecting a common scenario where larger firms expand their market presence by acquisitions and/or consolidations. See *Icon Sports Management*, PITCHBOOK, <https://pitchbook.com/profiles/company/109234-45> (last visited Mar. 29, 2020).

101. Grosse & Warren, *supra* note 98, at 53 (noting agents will retain oversight of other personnel delivering services to their client, the talent or athlete).

102. For example, Article III of the Uniform Sports Agents Act (USAA) would require agency contracts with student athletes to specify the services to be provided. Phillip N. Fluhr, Jr., *The Regulation of Sports Agents and the Quest for Uniformity*, 6 SPORTS L. J. 1, 17 (1999).

103. Grosse & Warren, *supra* note 98, at 53.

104. Sobel, *supra* note 97, at 705-06.

105. *Id.* at 706 ("Player agents also perform another function in negotiations—one that requires the sort of knowledge usually possessed by professionals, but not by most athletes. In order to properly negotiate player contracts today, it is necessary to be familiar with the details of collective bargaining agreements and to have knowledge of the salaries that have been paid to comparable players. Acquiring this knowledge is not prohibitively difficult, but it does require some effort and a legal, financial or business background certainly helps.")

106. *Id.* at 706-07. See also NFLPA, COLLECTIVE BARGAINING AGREEMENT (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf.

that certain league-wide minimum terms be part of the athlete's contract. For example, collective bargaining agreements determine the date of free agency, the wearing of team athletic apparel, and the agent's rate of commission.¹⁰⁷

Successful agents help their client-athletes obtain product and service endorsement deals to augment their player income. For example, tennis great, Andre Agassi, appeared in Canon camera television commercials in the late 1980s and early 1990s,¹⁰⁸ as did Tiger Woods in Buick commercials.¹⁰⁹ More recently, LeBron James earned \$90 million for his product endorsement deal with Nike.¹¹⁰ Although these mega-deals attract widespread attention, finding endorsement or licensing deals for non-star athletes is challenging. Agents may struggle with this task even in local markets.

Endorsement deals are important for most athletes, not only for the money but also for the exposure. Agents might ask the athlete's team or event provider with a larger market presence for help in acquiring a licensing deal when negotiating a player's team or event contract. "Some licensing deals require athletes to use a particular sports product, for example, a golf club or tennis racket, during competition."¹¹¹ Some athletes need the agent to handle all of the athlete's business matters, ranging from scheduling appointments to handling all financial obligations (e.g., collecting, depositing, and investing earnings and paying transportation and other expenses). The line between managing business and personal affairs is not always clear; for example, an agent may help find a personal residence and then negotiate its purchase. Some athletes prefer their agent to play a greater role in managing the athletes' personal

107. See, e.g., MLBPA, 2017-2021 BASIC AGREEMENT (2017), https://registration.mlbpa.org/pdf/Basic%20Agreement_english.pdf (declaring free agency starts at 9:00 a.m. on the day following the last world series game, and that players can wear only club-issued apparel during games).

108. See Steve Tignor, 1989: *IMAGE IS EVERYTHING—ANDRE AGASSI'S INFAMOUS AD*, TENNIS.COM (Aug. 30, 2015), <https://www.tennis.com/pro-game/2015/08/image-everything-andre-agassis-infamous-ad/55425/>; Stuart Elliot, *THE MEDIA BUSINESS: Advertising: The Governing Body of Tennis Tries to Polish its Image.*, N.Y. TIMES (Aug. 9, 1993), <https://www.tennis.com/pro-game/2015/08/image-everything-andre-agassis-infamous-ad/55425/>.

109. Laura Petrecca, *GM ends 9-Year endorsement relationship with Tiger Woods*, ABC NEWS (Nov. 25, 2008, 6:48 AM), <https://abcnews.go.com/Business/story?id=6329219&page=1>.

110. Kurt Badenhausen, *LeBron James Is The NBA's Leading Shoe Salesman*, FORBES (May 22, 2013, 11:44 AM), <https://www.forbes.com/sites/kurtbadenhausen/2013/05/22/lebron-james-is-the-nbas-leading-shoe-salesmen/#6906efa689d>.

111. VERSTEEG & SAHL, *supra* note 37, at 393 ("An agent should negotiate an 'escape clause' permitting the athlete to switch to a different product if it is negatively affecting the athlete's performance.").

affairs (e.g., paying for mortgages, medical insurance), freeing the athletes to focus on their sports careers.¹¹² As fiduciaries, individual agents and small agencies are often responsible for assembling a team of experts and advisors to manage the athlete's long-term business and personal welfare, including the athlete's plans for a post-sports career.¹¹³

Many athletes' careers last only a few years. For example, an NFL player's average career length is three and one-third seasons.¹¹⁴ Agents need to assist the athletes in developing a financial plan to provide for the athlete's long-term welfare. Agents often hire investment advisors and accountants to help with this function.¹¹⁵ The landscape of sports stories is replete with athletes who earned large sums of money only to end up destitute. For example, one article reported that after two years of retirement, seventy-eight percent of former NFL players were bankrupt or under financial stress, and sixty percent of former NBA players were in a similar situation five years after retirement.¹¹⁶

An overlooked, but important agent function involves developing and marketing the athlete's public image. Agents may connect athletes to charitable and other public events and causes that not only provide intrinsic rewards for the athlete but also may enhance the athlete's market value.¹¹⁷ Effective agents directly cultivate relationships with sports writers and other media personnel (e.g., television interviews) to cover

112. See Sobel, *supra* note 97, at 708.

113. See *id.* at 704-05 (discussing the increasing complexity of financial matters for athletes).

114. Christina Gough, *Average playing career length in the National Football League*, STATISTA (Sep. 10, 2019), <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/>; see SI WIRE, *WSJ data analysis shows average length of NFL careers decreasing*, SPORTS ILLUSTRATED (Mar. 1, 2016), <https://www.si.com/nfl/2016/03/01/nfl-careers-shortened-two-years-data-analysis> (noting that "the average NFL career length was just 2.66 years" and concussions and health risks are a major reason why players walk away from the career); see also NFL PLAYERS ASSOCIATION, www.NFLplayers.com/about-us/FAOS/NFL-Hopeful-FAQs/ (last visited Mar. 24, 2020) (showing the average length of a football player's career in 2014 to be three and a half seasons). The average length of a football player's career seems to have declined at least slightly since 2014 which underscores the need for the agent and student-athlete to engage in financial planning as soon as possible in college. Once the student athlete signs a player contract with an NFL team, that player's agent must be registered and fully compliant with the players union, the NFLPA, rules governing agents.

115. See Grosse & Warren, *supra* note 98, at 53; Sobel, *supra* note 97, at 709.

116. Pablo S. Torre, *HOW (AND WHY) ATHLETES GO BROKE*, SPORTS ILLUSTRATED VAULT (Mar. 23, 2009), <https://vault.si.com/vault/2009/03/23/how-and-why-athletes-go-broke>.

117. See, e.g., *Community Relations*, KMG SPORTS SERVS., <https://www.kmg-sports.com/services/#tab-id-5> (last visited Aug. 18, 2020) (describing charitable activities the agency is prepared to assist its clients with); *General Services*, KMG SPORTS SERVS., <https://www.kmg-sports.com/services/#tab-id-1> (last visited Aug. 18, 2020) ("Our job is to build your brand and maximize your revenue.").

the athlete¹¹⁸ or hire public relations firms for the same purpose. These firms are especially important in helping to rehabilitate an athlete's image that has suffered harm because of the athlete's questionable conduct.¹¹⁹

B. Regulating Sports Agents: The Uniform Athlete Agents Act (UAAA) and Similar Rules

Sports agents have been associated with a variety of scandals ranging from improper recruitment of athletes for a particular college, as in *Gatto*,¹²⁰ to stealing from client athletes.¹²¹ The concern about rogue agent misconduct is cited as a primary justification for the NCAA's No-Agent Rule as well as for state and federal regulatory efforts.¹²² There is a general legislative consensus that sports agents require regulation.¹²³

118. Mike Florio, *Good agents do a lot more than negotiate contracts*, NBC SPORTS: PRO FOOTBALL TALK (July 23, 2015, 11:01 AM), <https://profootballtalk.nbcsports.com/2015/07/23/good-agents-do-a-lot-more-than-negotiate-contracts/> (“Good agents have relationships in the media . . .”).

119. See, e.g., Gene Wojciechowski, *Fleischer PR won't rebuild Tiger's image*, ESPN (Mar. 11, 2010), sports.espn.go.com/espn/columns/story?id=4986830 (Tiger Woods hired former President George W. Bush's Press Secretary, Ari Fleischer, to handle the adverse publicity stemming, in part, from Woods' extramarital conduct).

120. See, e.g., *United States v. Gatto*, 295 F. Supp. 3d 336 (S.D.N.Y. 2018) (ensuring high school basketball players would attend and play for the universities by paying high bribes); see *infra* Part IV for a more detailed discussion of *Gatto*.

121. See KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 72-87 (2d ed. 2008) [hereinafter SHROPSHIRE & DAVIS] (providing a good discussion of well-known criminal and civil cases of misconduct against sports agents). The authors described the landscape of agent misconduct in the following sentences:

At the extremes, agent misconduct and malfeasance, ranging from mismanagement to misappropriation of athlete client's assets to disparagement of other agents in order to gain a competitive advantage, fuel perceptions of an industry composed of individuals too willing to compromise ethics and competent representation for financial gain. Agent impropriety overlaps with the reality of largely newly or prospectively rich individuals not receiving the counseling they require to duplicate the success on the field with success off the field.

Id. at 1-2. The authors also stated that “no matter the concerns that lie at the center of the sports agent storm, it is a business that captures the attention of many.” *Id.* at 1.

122. See Myers, *supra* note 29 (discussing the global importance of and related concerns about sports, the need to protect the integrity of sports from corruption, and state and federal laws that would effectively fight corruption in Division I basketball). This author contends that sports agents have “facilitated much of the corruption in college sports.” *Id.* at 75.

123. See PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 713 (6th ed. 2019) [hereinafter WEILER] (offering a scholarly treatment of state and federal regulation. California was the first state to get into the business of regulating sports agents in 1982 when it promulgated the California Athlete Agents Act, *id.* at 710-14). See also ROBERT H. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 107 (5th ed. 2010) (confirming that California was the first state to enact a mandatory athlete-agent regulatory scheme in 1981 and noting that two years later NFLPA instituted a plan to protect football players).

By the 1990s, twenty-eight states had created a patchwork of laws regulating sports agents.¹²⁴ Most of them imposed a registration requirement.¹²⁵ The laws were largely ineffective as few agents registered, and even more unsettling from a regulatory perspective, few states devoted sufficient resources for adequate enforcement.¹²⁶

In 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) created the Uniform Athlete Agents Acts (UAAA).¹²⁷ By 2018, forty-three states had adopted some version of the UAAA.¹²⁸ The UAAA's primary purposes are the protection of student-athletes, who may lose their NCAA eligibility by being contacted prematurely by agents or improperly agreeing to sports representation, and the protection of universities, which may lose their time and financial investment in recruiting athletes and granting athletic scholarships.¹²⁹

On the federal level, the Sports Agent Responsibility and Trust Act (SPARTA) was enacted in 2004.¹³⁰ SPARTA prohibits almost the same conduct as the UAAA and uses the same definition of "athlete-agent."¹³¹ Unlike the UAAA, SPARTA treats violations as unfair trade practices, which may be prosecuted by the Federal Trade Commission (FTC) or

124. See WEILER, *supra* note 123, at 710-11.

125. See *id.* at 711.

126. *Id.*

127. See REVISED UNIF. AGENTS ACT (2015) [hereinafter RUAAA] (noting that the NCCUSL and the Uniform Law Commission (ULC) designations are interchangeable as they refer to the same organization and that as of 2020 the NCCUSL was in its 128th year. The NCCUSL is comprised of legal experts from the academy and profession with goal of creating non-partisan legislation to clarify existing law and to create national uniform legal standards).

128. WEILER, *supra* note 123, at 711; SHROPSHIRE & DAVIS, *supra* note 121, at 158 ("A clear majority of the states that have adopted the UAAA have done so without making any substantively significant variations to it.").

129. SHROPSHIRE & DAVIS, *supra* note 121, at 158 ("Early on, the focus of uniform legislation was on issues relating to recruitment, not agent quality control."); WEILER *supra* note 123, at 711-12. See Myers, *supra* note 29, at 75-76; see also Joshua Lens, *Application of the UAAA, RUAAA, and State Athlete-Agent Laws to Corruption in Men's College Basketball and Revisions Necessitated by NCAA Rule Changes*, 30 MARQ. SPORTS L. REV. 47, 64 (2019).

130. Michael L. Martin, *It's Not a Foul Unless the Ref Blows the Whistle: How to Step Up Enforcement of the UAAA and SPARTA*, 19 SPORTS LAW. J. 209, 214 (2012).

131. Sports Agent Responsibility and Trust Act (SPARTA), 15 U.S.C. § 7801(2) (2004) (defining "athlete-agent" as "an individual who enters into an agency contract with a student athlete, or directly or indirectly recruits or solicits a student athlete to enter into an agency contract, and does not include a spouse, parent, sibling, grandparent, or guardian of such student athlete, or an individual acting solely on behalf of a professional sports team or professional sports organization"); UNIF. ATHLETE AGENTS ACT § 2(2) (UNIF. LAW COMM'N 2000) (The 2000 UAAA's definition was materially identical); RUAAA, *supra* note 127, § 2(2) (expanding this definition to include financial advisors and others.); see also Myers, *supra* note 29, at 77.

state attorneys general.¹³² By 2012, the UAAA and SPARTA laws were rarely enforced despite continued agent misconduct.¹³³

In the following years, several states amended their athlete-agent acts to address perceived weaknesses and under-enforcement.¹³⁴ The NCCUSL introduced the Revised Uniform Athlete Agents Act (RUAAA) in 2015 to preserve uniformity and modernize the UAAA. As of 2019, fourteen states had enacted the RUAAA, and nine more introduced it.¹³⁵ The RUAAA is widely supported by collegiate athletic officials and coaches, as well as several prominent agents.¹³⁶

Like the UAAA, the RUAAA's central focus is the "protection [of] student-athletes and educational institutions" who may suffer harm when an athlete agrees to agent representation and, as a result, loses his or her eligibility before it has expired.¹³⁷ The RUAAA attempts to promote the protection of student-athletes in several ways. First, the RUAAA created a simplified and uniform agent registration process and also added a goal of promoting information-sharing among state agent registration bodies.¹³⁸ Agents must register with the state, providing references and disclosing their formal training to be an agent, their practical experiences as an agent, and their education.¹³⁹ The applicant must also disclose criminal convictions involving acts of moral turpitude and felonies, civil determinations of false or deceptive representations, applicant conduct that led to the imposition of sanctions on a student-athlete, and any disciplinary action against the agent.¹⁴⁰

Under the RUAAA, agents are prohibited from contacting student-athletes unless the agents are registered and, as a way of promoting compliance with the RUAAA, agent registration in one state entitles that agent to reciprocity in any other RUAAA state.¹⁴¹ Agent representation

132. Martin, *supra* note 130, at 214-15. See Myers, *supra* note 29, at 86 (proposing a "dual threat"—that individual institutions have standing to bring suit against bad agents along with the FTC for violating SPARTA, shifting some of the burden from the FTC while still allowing it to file an unfair trade practice claim; the NCAA would first file a claim with the FTC and if it elected not to pursue an unfair trade practice claim, then the NCAA could file suit).

133. See Martin, *supra* note 130, at 215.

134. Lens, *supra* note 129, at 65.

135. *Id.*

136. *Id.* at 65-66.

137. REVISED UNIF. ATHLETE AGENTS ACT, (UNIF. LAW COMM'N 2019) [hereinafter RUAAA 2019]; see SHROPSHIRE & DAVIS *supra* note 121, at 159-62.

138. RUAAA 2019, *supra* note 137, at 2-3; see also WEILER, *supra* note 123, at 711-12 ("[Under the RUAAA,] agents must register with the state and disclose training, experience, . . . and any disciplinary action against the agent. . . and [t]he agent and/or student must notify the educational institution within 72 hours that a representation agreement has been signed.").

139. See SHROPSHIRE & DAVIS, *supra* note 121, at 159; WEILER, *supra* note 123, at 712.

140. SHROPSHIRE & DAVIS, *supra* note 121, at 160; WEILER, *supra* note 123, at 712.

141. WEILER, *supra* note 123, at 712.

agreements must be in writing, signed by both parties, with clear provisions specifying compensation and the agent's registration status.¹⁴² The RUAAA also broadens the definition of "athlete agent" to include financial and career advisors,¹⁴³ requires student-athletes to sign a statement acknowledging that they may lose their amateur eligibility by entering into an agency contract, and provides the athlete with a fourteen day cancellation period.¹⁴⁴ Agents cannot offer anything of value to the athlete in exchange for signing a representation agreement, and the "agent and/or the athlete must notify the educational institution within seventy-two hours of the signing of a representation agreement."¹⁴⁵ The RUAAA gives student-athletes a right of action against agents who violate the act and provides criminal penalties for agents who encourage another to take action, which the act would prohibit the agent from taking.¹⁴⁶

The NCCUSL amended Section 14 of the RUAAA in 2019 to accommodate the NCAA's 2018 bylaw amendments implementing the Rice Commission's recommendation that basketball players who declare for the NBA draft, but who are not drafted, should be able to return to college, finish their degree, and remain eligible for college basketball.¹⁴⁷ In addition, while the 2015 version of the RUAAA flatly prohibited an agent from "furnish[ing] anything of value to the athlete before the athlete enters into [a sports agent] contract,"¹⁴⁸ the 2019 RUAAA version permits it where the agent notifies the athletic director of the athlete's institution and the athlete makes a recorded acknowledgment that receiving the "thing of value" may result in loss of the athlete's eligibility.¹⁴⁹ The apparent purpose of this 2019 RUAAA amendment, consistent with 2018 changes to the NCAA bylaws, is to allow agents to defray expenses related to the agent selection process even before the athlete has signed an agreement with the agent.¹⁵⁰

The various governmental regulatory regimes governing sports agents, such as SPARTA, are broad and comprehensive. Although there

142. *Id.*

143. RUAAA 2019, *supra* note 137, at 2.

144. WEILER, *supra* note 123, at 712.

145. *Id.*

146. RUAAA 2019, *supra* note 137, at 2-3.

147. NCAA MANUAL, *supra* note 19, § 12.2.4.2.1; RUAAA 2019, *supra* note 137, at 1-3.

148. RUAAA 2019, *supra* note 137, § 14(2).

149. *Id.* § 14.

150. *See id.* §§ 14 cmt., 14(2); *see also* RUAAA, *supra* note 127, at 2-3 (explaining that NCAA bylaws amendments adopted August 8, 2018, "allowed for payments by sports agents to student-athletes and family members for meals, hotel, and travel in connection with recruiting and signing the student-athlete as a client."). Unlike the NCAA Bylaw, the RUAAA amendment on its face interestingly does not limit the payment of expenses to only the agent selection process.

is literature suggesting ways to improve these regimes,¹⁵¹ one might think nevertheless that the broad scope of these laws ensures adequate protection for student-athletes from agent misconduct, especially when considered in conjunction with the NCAA's No Agent Rule.¹⁵² Unfortunately, widespread under-enforcement of state and federal laws, and NCAA regulations, means that student-athletes are still vulnerable to agent misconduct. "Only a handful of UAAA criminal cases have been brought under the UAAA."¹⁵³ An Associated Press study in 2010 showed "that more than half of the 42 states that had enacted a version of the UAAA had failed . . . [to] impose any penalty on a sports agent," let alone suspend or revoke an agent's registration or license.¹⁵⁴ The under-enforcement of existing agent laws may lead to broader disrespect and even encourage agents to violate other laws and rules.¹⁵⁵ A regulatory regime's effectiveness in punishing and deterring misconduct, no matter how well-crafted, is fatally undermined without a serious and active commitment to regulatory enforcement and adequate or better

151. Jessop, *supra* note 29 (noting the inadequacy of the UAAA, SPARTA and the NCAA Division I Manual's rules to protect student athletes' interests from sports agents given the *Gatto* scandal and recommending a new model whereby "NCAA Division I FBS member institutions . . . each adopt and actively impose individual sports agent regulations[;]" educate NCAA athletes about the "role and requirements of sports agents[;]" and offer "member institutional-based incentives to sports agents" in return for agent compliance); Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1233-53 (2004) (calling for a national registry and the licensure of sports agents and arguing that the threat of license revocation would deter agent misconduct); Timothy G. Nelson, *Flag on the Play: The Ineffectiveness of Athlete-Agent Law and Regulations—and How North Carolina Can Take Advantage of a Scandal to Be a Model for Reform*, 90 N.C.L. REV. 800, 820-21 (2012) ("Despite the multiple means by which agents are regulated, the current regulatory scheme is general ineffective at preventing and deterring athlete agents from engaging in improper behavior. The laws are rarely enforced, and when they are, punishments fail to adequately penalize violators enough to deter others from committing future violations.").

152. See NCAA MANUAL, *supra* note 19, § 12.1.2(g), which essentially bars an athlete from entering into an agent services agreement; and see also *id.* § 12.1.2(a)-(b), which also bars an athlete from receiving compensation or accepting a promise of payment related to athletic skill from an agent.

153. WEILER *supra* note 123, at 713.

154. *Id.*

155. See Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1006 (2002) (expressing a similar concern about underenforced advertising rules in the legal profession and concluding that this "breeds disrespect for professional regulation . . . [and] may encourage lawyers to violate or bend other professional rules."); RICE REPORT, *supra* note 14, at 2 ("Where an entire community is aware of substantial rule breaking and the governance body fails to act, the result is cynicism and contempt; and noting that all [NCAA stakeholders] expressed the belief that the current [infractions investigation and adjudication] system is not working in cases of serious violations.").

resources devoted to such enforcement.¹⁵⁶ Both of these conditions for effective regulatory enforcement seem to be lacking given the dismal enforcement record against bad agents under RUAAA-based state laws and SPARTA. Until there is effective enforcement of sports agent laws, student-athletes and NCAA member institutions will continue to be at risk of being harmed by agent misconduct, as poignantly illustrated in the recent case of *United States v. Gatto*.¹⁵⁷

IV. *UNITED STATES V. GATTO* AND THE RICE COMMISSION

United States v. Gatto is a case about corruption in NCAA Division I Men's College Basketball, a billion-dollar enterprise for the NCAA, prominent colleges and universities, and their coaches.¹⁵⁸ In 2017 the University of Louisville's team realized \$29 million in revenue from men's basketball alone.¹⁵⁹ The *Gatto* case has been described as "[o]ne of the biggest stories in college sports . . . turn[ing] the men's college basketball world upside down" because it detailed "a thriving black market in which coaches, agents, financial advisors, and shoe and apparel company employees exploited naïve, young basketball student-athletes."¹⁶⁰

The trial judge in *Gatto* noted that "[a]t the root of this situation is the NCAA's principle of amateurism"¹⁶¹—a principle that has attracted much criticism.¹⁶² Under the NCAA's rules, only amateurs can compete

156. ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 187 (1986) (noting that the regulation of other occupations, for example, the law profession, have experienced a similar dynamic where inadequate resources and/or the will to enforce an otherwise good regulatory scheme will fail to punish and deter future misconduct).

157. *United States v. Gatto*, No. 17-cr-0686 (LAK), 2019 U.S. Dist. LEXIS 8901 (S.D.N.Y. Jan. 17, 2019). For prior history, see *United States v. Gatto*, 295 F. Supp. 3d 336, 339 (S.D.N.Y. 2018) (denying the defendants' joint motion to dismiss a conspiracy indictment "among defendants, certain basketball coaches of the Universities of Louisville and Miami, and certain student basketball players and/or their families.").

158. *Gatto*, 2019 U.S. Dist. LEXIS 8901, at *1-2.

159. *Id.* at *2; see James F. Reid, *Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws*, 3 ARIZ. ST. SPORTS & ENT. L.J. 57, 78-79 (2012) (noting that college sports is a \$60 billion industry and that the NCAA received \$711 million for the 2011 television rights to the March Madness basketball tournament).

160. See Lens, *supra* note 129, at 50.

161. *Gatto*, 2019 U.S. Dist. LEXIS 8901, at *1-2 (reporting the court's reasoning for partially granting and partially denying the government's motion to exclude the defendants' expert testimony).

162. *Id.* at 3 (characterizing the NCAA's amateurism rules as "long standing, [but] not free of controversy" and noting that "[s]ome have argued that [the amateurism rules] unfairly prevent student-athletes from sharing in the financial benefits generated by the basketball games they play."); see, e.g., Reid, *supra* note 159 (discussing changes to the MLB's 2012 Draft rules that make it difficult for high school and college baseball student-athletes to assess

in intercollegiate athletics, and the difference between an amateur and a professional athlete is the receipt of a benefit or payment related to one's athletic services.¹⁶³ The student-athlete forfeits amateur eligibility if he or she accepts any form of payment directly or indirectly related to collegiate athletics that is not approved by the NCAA.¹⁶⁴ In addition, any university or individual, such as a coach, found to have violated an NCAA rule “may be subject [to additional penalties], including limitation on the school's participation in post-season play . . . , limitations on the school's funding from the NCAA, and various financial penalties.”¹⁶⁵

The *Gatto* story begins in 2015 when the FBI launched an investigation to uncover bribery schemes involving Division I Men's

their market value and whether to sign a professional contract; further contending the NCAA should change its no-agent rule and allow agents to represent baseball players in negotiating with MLB teams and also change the composition of NCAA members' Professional Sports Counseling Programs (PSCPs) to ensure student-athletes obtain the expertise to transition to professional baseball. “The NCAA's purpose and its guiding principles behind amateurism have been under heavy criticism lately, especially considering the \$60 billion industry that is college sports,” *id.* at 78).

163. NCAA MANUAL, *supra* note 19, § 12.2.10. The NCAA defines “pay” as the “receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.” *Id.*

164. *United States v. Gatto*, 295 F. Supp. 3d 336, 339 (S.D.N.Y. 2018); *see* NCAA MANUAL, *supra* note 19, § 12.2.11 (“[A professional athlete is] one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.”); *see also* Andrea C. Closa, *Corruption and College Sports: A Love Story*, 42 HASTINGS COMM. & ENT. L.J. 17, 20 (2020) (The NCAA defines “payment” as “the receipt of funds or awards or benefits not permitted by the governing legislation of the Association for participation in athletics[;]” currently, student-athletes may receive “actual and necessary expenses” that are directly-related to competition in the sport, including: lodging, meals, apparel, equipment, health insurance, and transportation.).

165. *Gatto*, 295 F. Supp. 3d at 339; *see* Charles Riley, *Penn State hit with severe financial penalties*, CNN MONEY (July 23, 2012, 6:29 PM), <https://money.cnn.com/2012/07/23/news/economy/penn-state-financial-penalties/index.htm> (reporting that Penn State was fined \$60 million by the NCAA and Big Ten conference after the school's child abuse scandal); *see also* Associated Press, *No. 12 Seton Hall Placed on Three Years' Probation by NCAA*, SPORTS ILLUSTRATED (Nov. 16, 2019), <https://www.si.com/college/2019/11/16/seton-hall-placed-on-probation-by-ncaa> (noting the NCAA fined Seton Hall \$5,000 plus one percent of the men's basketball budget for the 2020-21 season resulting from a recruitment violation for a player that ultimately transferred to the university); *see generally* *Collegiate athletics: Fair Pay to Play Act: Hearing on S.B. 206 Before the Assemb. Comm. on Arts, Ent., Sports, Tourism, and Internet Media*, cmt. 5 (2019-2020) (June 25, 2019) (reporting University of Southern California's (USC) “opposition[al] concerns” to the state's “Fair Pay to Play Act” or SB 206 and noting, in part, a concern that any reforms be addressed at a national level through the NCAA because state approved law reforms would place schools in those states at a competitive disadvantage with other national programs; further warning that “SB 206 would encourage students to violate the NCAA by-laws, [making them] ineligible and putting athletic teams and athletic departments at risk” and noting that in 2010, because two USC athletes “violated NCAA rules by accepting compensation from sports agents[.]” the USC athletic program “received some of the harshest penalties ever handed down to a Division I program.”).

Basketball.¹⁶⁶ This investigation prompted the United States Attorney's Office in the Southern District of New York to announce on September 26, 2017 the arrest of ten persons including agents, coaches, and apparel company employees alleging a "pay for play" bribe scandal involving upcoming Division I Basketball players and their families.¹⁶⁷ The "pay for play" bribery scheme violated the NCAA's longstanding amateurism rule that prohibits student-athletes and/or their families from receiving impermissible payments or other benefits to play basketball at a particular university.¹⁶⁸ Both the arrest announcement as well as the underlying investigation surprised NCAA President Emmert and others,¹⁶⁹ although the "dirty little secret" about corruption in Division I Men's Basketball was known to many associated with the sport.¹⁷⁰

Among those indicted were Adidas executive, James Gatto, Adidas consultant, Merl Code, and aspiring sports agent, Christian Dawkins.¹⁷¹ They were charged criminally with committing and conspiring to commit wire fraud resulting from the alleged funneling of high school basketball players into Adidas-sponsored Division I programs.¹⁷² They were not charged with violating any sports agent law, such as SPARTA, underscoring the concern in Part III of this article about the under-enforcement of laws regulating sports agents.¹⁷³

166. *United States v. Gatto*, No. 17-cr-0686 (LAK), 2019 U.S. Dist. LEXIS 8901, at *4 (S.D.N.Y. Jan. 17, 2019).

167. *Lens*, *supra* note 129, at 51 (noting that the FBI multiyear investigation revealed two related schemes, a "Coach Bribery Scheme" and the "Adidas Scheme."); *see Gatto*, 295 F. Supp. 3d at 339-40.

168. *Gatto*, 2019 U.S. Dist. LEXIS 8901 at *2; *see Lens*, *supra* note 129, at 50-61 (discussing the adjudication of each defendants' alleged offense and sanction).

169. Matt Norlander, *Ultimate college basketball corruption scandal primer: Explaining the latest with the FBI probe*, CBS SPORTS (Apr. 12, 2018, 3:16 PM), <https://www.cbssports.com/college-basketball/news/ultimate-college-basketball-corruption-scandal-primer-explaining-the-latest-with-the-fbi-probe/> (reporting, in part, that the FBI *Gatto* investigation began with the Securities and Exchange Commission charging financial advisor Matt Blazer with fraud who then informed the government that he could show fraud and corruption in Division I Men's Basketball recruiting); *see also Lens*, *supra* note 129, at 75-76.

170. The Rice Commission Report's Introduction underscored the widespread knowledge regarding corruption in Division I Men's Basketball stating, "The fact remains, however, that today's issues have been around a long time, and their existence is widely acknowledged. Virtually all stakeholders and others providing information to the Commission at some point uttered the discouraging phrase: 'Everyone knows what's been going on.'" RICE REPORT, *supra* note 14, at 16.

171. *Gatto*, 295 F. Supp. 3d at 339.

172. *Gatto*, 2019 U.S. Dist. LEXIS 8901, at *4.

173. *Jessop*, *supra* note 29, at 199 ("Notably, none of the 10 individuals charged amidst the FBI's three-year investigation into alleged corruption and bribery . . . were charged with violating state or federal statutes related to sports agents.") (citing *U.S. Attorney Announces The Arrest Of 10 Individuals, Including Four Division I Coaches, For College Basketball*

The *Gatto* defendants jointly filed a motion to dismiss the indictment.¹⁷⁴ They argued at trial that the prosecution improperly utilized the criminal mail and wire fraud statute to punish those who “cheated” a private association, the NCAA, by violating its amateurism rules. Stated differently, violating an NCAA rule does not mean one also has violated the law.¹⁷⁵ In addition, the defendants claimed they actually helped, rather than harmed, the universities by bringing them top high school recruits and by providing financial assistance to the poor and underprivileged families of student-athletes.¹⁷⁶ The defendants further claimed that because they never sought money from the universities, they received no benefit and thus could not have committed fraud against the universities.¹⁷⁷ The defendants also argued the fraud charge was improper because college basketball coaches implicitly asked Adidas to help the student-athletes’ families financially.¹⁷⁸

The prosecution argued that a defendant does not need to obtain money or property to violate the mail and wire fraud statutes; property can include “‘ intangible interests such as the right to control the use of one’s assets.’”¹⁷⁹ By casting the universities as victims of the fraudulent scheme, the prosecution narrowed in on the defendants’ interference with the right of such universities to control their assets, the so-called “right to control” theory.¹⁸⁰ Prosecutors argued that the defendants’ actions rendered the recruits ineligible to play college basketball, and the

Fraud And Corruption Schemes, U.S. DEP’T OF JUST. (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/video/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches>) (providing details of the FBI’s investigation in *Gatto* and charges against the ten individuals); see *supra* Part III Section B, Regulating Sports Agents: The Uniform Athlete Agents Act (UAAA) and Similar Rules.

174. *Gatto*, 295 F. Supp. 3d at 338 (providing the written opinion explaining the court’s earlier denial in open court on February 15, 2018 denying the defendants’ joint motion to dismiss the indictment).

175. *Id.* at 350.

176. *Id.* at 342.

177. *Id.*

178. *Id.*

179. *Gatto*, 295 F. Supp. 3d at 346 (citing *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017)). The prosecution relied on precedent in the Second Circuit to argue that the defendant does not need to obtain the money to violate mail and wire statutes. *Id.* at 345-46 (holding that “in the Second Circuit one may be convicted of wire fraud without the victim being ‘out of pocket’ to the defendant” thus this indictment, “adequately charges a conspiracy to use the wires in furtherance of a scheme by which student-athletes and/or their families—alleged co-conspirators all—would obtain athletic scholarships, thereby depriving the victims of money or other property.” *Id.* at 346 n.56) (citing, in part, *Finazzo*, 850 F.3d at 108-11, as endorsing the “right to control theory” and “explicitly [holding] that the deprivation of the right to control one’s assets can serve as a basis for criminal liability under the mail and wire fraud statutes.”).

180. *Gatto*, 295 F. Supp. 3d at 346.

additional acts of concealment basically scammed the universities into doling out scholarships to ineligible players, exposing the universities to economic harm.¹⁸¹ According to the prosecution's theory, a defendant only needs to interfere with a victim's property rights under the mail and wire fraud statutes.¹⁸²

The *Gatto* court agreed with the prosecution and refused to dismiss the indictment, finding that the indictment "adequately charges a conspiracy to use the wires in furtherance of a scheme by which student-athletes and/or their families . . . would obtain athlete scholarships, thereby [interfering with or] depriving the victims of money or other property."¹⁸³ The court stated that "it should surprise no one that knowingly making a false representation in order to get financial aid from a university could give rise to criminal liability."¹⁸⁴

After a three-week trial and two days of jury deliberation, the jury unanimously convicted the defendants of wire fraud, finding that defendants had (a) made payments to families of prospective student-athletes to induce those student-athletes to attend particular NCAA Division I universities; and (b) caused those student-athletes to submit certifications to the universities falsely stating that they were compliant with NCAA rules—essentially that they were amateurs.¹⁸⁵ *Gatto* was sentenced to nine months, and Merl and Dawkins were each sentenced to

181. *Id.*

182. *Id.* The indictment

alleges also that defendants and their co-conspirators conspired to 'defraud[] the universities . . . by depriving the universities of significant and necessary information regarding the non-compliance with NCAA rules by the relevant student-athletes and coaches,' thereby: '[I]nterfer[ing] with the universities' ability to control their assets and creat[ing] a risk of tangible economic harm to the universities, including, among other things, decision-making about the distribution of their limited athletic scholarships; the possible disgorgement of certain profit-sharing by the NCAA; monetary fines; restrictions on athlete recruitment and the distribution of athletic scholarships; and the potential ineligibility of the universities' basketball teams to compete in NCAA programs generally, and the ineligibility of certain student-athletes in particular.

Id. (citing Indictment ¶ 3).

183. *Id.*

184. *Id.* at 350.

185. See Lens, *supra* note 129, at 48, 59-60; see also Will Hobson & Kevin Armstrong, *All Three Defendants Found Guilty of Wire Fraud in College Basketball Corruption Trial*, WASH. POST (Oct. 24, 2018) (reporting "two Adidas officials and an aspiring NBA agent were found guilty of fraud charges" after a three-year investigation of college basketball, and writing "the jury embraced the government's theory that, by paying the families of five top recruits amounts ranging from \$2,500 to \$90,000, in violation of NCAA rules, the men defrauded Louisville, Kansas and North Carolina State. The schools would not have awarded scholarships to those recruits if they had known about the illicit payments, prosecutors argued, and now face possible NCAA sanctions and financial penalties as a result.").

six months in federal prison in order to send a “great big warning light to the basketball world.”¹⁸⁶

*A. The Rice Commission—“Everyone knows what’s been going on.”*¹⁸⁷

The public notoriety and related outrage surrounding the *Gatto* scandal forced the NCAA to take quick and public action to address the corruption in Division I Men’s Basketball. Shortly after the announcement of the charges, NCAA President, Mark Emmert, stated on October 11, 2017, that it is “very clear the NCAA needs to make substantive changes to the way we operate, and [to] do so quickly.”¹⁸⁸ He further stated, “[w]hile I believe the vast majority of coaches follow the rules, the culture of silence in college basketball enables bad actors, and we need them out of the game. We must take decisive action. This is not a time for half-measures or incremental change.”¹⁸⁹

As a first and familiar step in the NCAA’s crisis management playbook,¹⁹⁰ Emmert announced that the NCAA Board of Governors, the Division I Board of Directors, and the NCAA President were appointing a Blue-Ribbon Commission, the Commission on College Basketball, or commonly known as the Rice Commission after its chair, Dr. Condoleezza Rice.¹⁹¹ The Rice Commission’s members included a nationally prominent group of experts hailing from academia, athletic departments, professional basketball, and private industry.¹⁹²

186. Lens, *supra* note 129, at 59; *see* United States v. Gatto, No. 17-cr-0686 (LAK), 2019 U.S. Dist. LEXIS 8901, at *1 n.1 (S.D.N.Y. Jan. 17, 2019) (“All [three] defendants were charged with and convicted on one count of participating in a conspiracy to commit wire fraud and one count of wire fraud in connection with an alleged scheme to defraud the University of Louisville. Defendant James Gatto alone was charged with and convicted of one additional count of wire fraud in connection with an alleged scheme to defraud the University of Kansas.”); *see also* Redacted Brief for Defendants-Appellants at 14, United States v. Gatto, 295 F. Supp. 3d (2d. Cir. Aug. 8, 2019) (No. 19-0783, 0786, 0788).

187. This quote is a sobering, if not deeply disturbing, prefatory statement in the Rice Report’s Introduction. RICE REPORT, *supra* note 14, at 16; *see also infra* note 169. The Commission further stated, “Virtually all stakeholders and others providing information to the Commission at some point uttered this *discouraging phrase*.” RICE REPORT, *supra* note 14, at 16 (emphasis added).

188. *Statement from President Mark Emmert on the Formation of a Commission on College Basketball*, NCAA (Oct. 11, 2017, 1:55 PM), <http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball>.

189. *Id.*; *see also* RICE REPORT, *supra* note 14, at 15.

190. *See* Branch, *supra* note 2 (discussing, in part, collegiate athletic scandals and three NCAA Knight Commissions Reports, the first occurring in 1991, that addressed corruption and commercialism in college sports and calling for more control by college presidents).

191. For a list of the Rice Commission’s distinguished members, *see infra* note 192.

192. Dr. Condoleezza Rice chaired the blue ribbon commission; its members included Mary Sue Coleman, President, Association of American Universities; General Martin E.

The Rice Commission's mandate was clear and broad: "'examin[e] critical aspects of a system that clearly is not working' and [to] focus on three areas."¹⁹³ The first area was to examine "[t]he relationship between the NCAA national office, its members, their student-athletes and coaches and third parties, including apparel companies, non-scholastic basketball and *athlete agents and advisors*."¹⁹⁴ The Rice Commission's charge—to examine the relationship between "athlete agents and advisors" with the NCAA and others, apparel companies, for example—signaled a potential seismic shift in the landscape of intercollegiate athletics. This article discusses only the Rice Commission's examination and recommendations concerning the NCAA's relationship with "athlete agents and advisors" that was part of the Commission's first focus area.¹⁹⁵

The Rice Commission's initial key task consisted of "gathering information and expert opinions for making 'transformative recommendations'" to the Division I Board of Directors and NCAA Board of Governors "on legislation, policies, actions, and structure(s) to protect the integrity of college sports, with a focus on Division I Men's Basketball."¹⁹⁶ The Rice Commission highlighted an important, albeit unpleasant, fact at the outset of its report. Based on "virtually all" of the persons the Rice Commission heard from, it recognized that "the challenges identified in this report have been part of the landscape of pre-professional basketball for many years, and that others have previously made serious efforts to address them with only limited success."¹⁹⁷ The Rice

Dempsey, U.S. Army Retired, Chairman, USA Basketball; Jeremy Foley, Athletics Director Emeritus, University of Florida Athletic Association; Jeffrey Hathaway, Vice President/Director of Athletics, Hofstra University; Grant Hill, Owner/Vice Chairman, Atlanta Hawks; Rev. John I Jenkins, C.S.C., President of University of Notre Dame; Mike Montgomery, Retired Basketball Coach, Analyst, PAC-12 Networks; David Robinson, Founder, Admiral Capital Group; Kathryn Ruemmler, Former White House Counsel, Partner, Latham & Watkins LLP; Gene Smith, Sr., Vice President and Wolfe Foundation Endowed Athletics Director, Ohio State University and John Thompson III, Board of Directors, National Association of Basketball Coaches. Members were appointed for an initial six-month term with the expectation that they would provide the NCAA Boards with a report for their April 18, 2018 meetings. RICE REPORT, *supra* note 14, at 15-16.

193. *Id.* at 15. This article focuses on the first area. The remaining two areas are beyond this article's scope. For a description of the other two focus areas, see *infra* note 194.

194. RICE REPORT, *supra* note 14, at 15 (emphasis added). The Rice Commission's second focus area concerned the "relationship between the NCAA and the NBA, including the challenging effect of the NBA's current age eligibility rule which created the one and done phenomenon in men's college basketball." *Id.* The final focus area asked the Commission to consider the "creation of the right relationship between the NCAA's member institutions and its national office to promote transparency and accountability." *Id.*

195. See *supra* notes 162-64 and accompanying text.

196. RICE REPORT, *supra* note 14, at 16.

197. *Id.*

Commission emphasized that “these challenges have become more prominent in the past decade as elite basketball—pre-college, in-college and post-college—has become exponentially more lucrative.”¹⁹⁸ In short, the Rice Commission grasped the enormous difficulty it faced in transforming the pre-professional basketball culture to protect the integrity of intercollegiate athletics.¹⁹⁹

The Commission heard from a variety of stakeholders and others, even opening a portal and soliciting public input.²⁰⁰ For example, the Commission heard directly from the NBA, the National Basketball Players Association (NBPA), USA Basketball, numerous NCAA offices and departments, athletic conferences, apparel companies, agents, college and high school coaches associations, student and faculty associations, athletic directors’ associations, other interested associations and groups, the Uniform Law Commission, athletes, and other individuals.²⁰¹

The Commission devoted considerable attention to the question regarding the appropriate role of agents and whether agents should have access to athletes.²⁰² The Rice Commission noted that NCAA rules bar students and/or their family members and other representatives from entering into any oral or written contracts on the athlete’s behalf for “purposes of marketing their athletic ability or reputation for financial gain,

198. *Id.* (“Everyone knows what’s been going on.”).

199. *Id.* at 1. The Rice Report concluded

[i]t has taken some time to get here, and it will take time to change course. The Commission offers its recommendations knowing that the road ahead is long—but that the first steps must be . . . bold The indictments handed down by the Justice Department and the ongoing FBI investigation spurred the NCAA to ask for this report. [R]adical changes are long overdue. We the commissioners believe that this is a final opportunity to turn the course of college basketball in the right direction.

Id.

200. *Id.* at 17.

201. *Id.*

202. The Rice Commission’s discussion about agents occurs in the following sections of its report. *See* RICE REPORT *supra* note 14.

- 1) Executive Summary of Recommendations § 1: Realistic Pathways for Student-Athletic Success, C. Permit Students to Receive Meaningful Assessment of Professional Prospects Earlier with Assistance From Certified Agents. *Id.* at 6-7;
- 2) Report of the Commission, Summary Identification of the Issues, B.2. Substance, Including Penalties, ¶ *Agents*. *Id.* at 23-24;
- 3) Report of the Commission, Recommendations § 1: Realistic Pathways for Student-Athletic Success, C. Permit Students to Receive Meaningful Assessment of Professional Prospects Earlier with Assistance from Certified Agents. *Id.* at 33-35.

It identified and discussed the issue or topic of agents and advisors after first considering the NCAA’s “Amateurism” principle and underscoring the close connection between the two topics.

even if that agreement is limited to future representation.”²⁰³ The NCAA’s longstanding concern about agents having access to student-athletes and the threat it poses to the NCAA’s amateurism principle is poignantly illustrated by its ban on student-athletes receiving any benefits “from agents even [when] those benefits do not have strings visibly attached.”²⁰⁴

NCAA stakeholders testifying before the Commission essentially reflected three schools of thought regarding agents’ access to athletes. One school of thought argued that agents should have early access to athletes at the beginning of each college academic year and perhaps as early as high school.²⁰⁵ They believed athletes and their families lacked sufficient knowledge about collegiate, post-collegiate, and professional options to allow them to develop a “path for success.”²⁰⁶ This knowledge deficiency, and the tendency of athletes and their families to misjudge the athlete’s professional prospects, hamper their ability to develop the best plan for advancing the athlete’s interests.²⁰⁷

The Commission noted that many elite high school and college basketball players believe they will play professional basketball, but the data suggests that belief is unfounded.²⁰⁸ Only approximately one and two-tenths percent of men’s basketball players advance to the NBA, the most prized professional basketball league.²⁰⁹ Nevertheless, a Rice Commission study showed that fifty-nine percent of Division I players expect to play professional basketball.²¹⁰ Even more striking is additional NCAA research that shows seventy-six percent of Division I, forty-eight percent of Division II, and twenty-one percent of Division III basketball players think “they have a chance to play at the next level.”²¹¹ Such expectations of playing at the “next level” are simply unwarranted given existing data.

203. RICE REPORT, *supra* note 14, at 23 (“Prohibited marketing includes negotiations with professional teams, seeking product endorsements, and efforts to place an athlete at a particular school.”).

204. *Id.* (citing NCAA MANUAL, *supra* note 19, §§ 12.3.1, 12.3.1.2, 12.2.1, 12.3.3, 12.3.1.3).

205. RICE REPORT, *supra* note 14, at 23.

206. *Id.*

207. *Id.*

208. *Id.* at 5.

209. *Id.*

210. *Id.*

211. RICE REPORT, *supra* note 14, at 5 (citing *So, you’re telling me there’s a chance...*, NCAA (Dec. 2013), <http://www.ncaa.org/about/resources/research/so-you-re-telling-me-there-s-chance>). Immediately following these percentages in the Rice Report, the Commission opines:

[E]rroneously entering the NBA draft is not the kind of misjudgment that should deprive student-athletes of the valuable opportunity to enter college or to continue in college while playing basketball. While this rule change may inconvenience

Some stakeholders offered a second school of thought about agents. They contended that agents are determined to contact prospects and persons who may influence them and that agents will find ways to circumvent NCAA restrictions on such athlete-agent contact.²¹² After all, an agent's recruitment of a top athletic prospect is a long, complex undertaking fraught with surprises, disappointment, and no guarantees of success, much like participating in the grueling Alaska Iditarod Sled Dog Race.²¹³ Agents are always looking for some advantage over competitors to land such elite talent. Indeed, this group of stakeholders told the Rice Commission that they believe that agents are already contacting elite high school and collegiate players to gain a competitive advantage in representing them.²¹⁴

The third school of thought, embraced by some agents, believes that allowing agents to contact high school athletes will enable agents to help with important decisions at an even earlier stage in the athlete's decision making.²¹⁵ For example, the agent would presumably advise the athlete about the selection of a non-scholastic coach, such as an academy or club level coach; which high school to attend; which "showcase" tournaments to play in; and which brand of equipment and apparel to use, such as, Nike, Adidas, or Under Armour.²¹⁶ These stakeholders advocate for higher "barriers to entry" for professional agents seeking access to student-athletes.²¹⁷ A more stringent certification process would ensure agents are competent and possess the requisite good character to serve

coaches seeking to set their rosters for the following season, we conclude that the student-athlete's interest should govern here. A player chagrined to discover that he lacks an NBA future may grow into his collegiate experience and adopt a different plan of the future.

The Commission concludes "[i]n sum, student-athletes should have more information about their professional prospects and more flexibility to test those prospects and return to school. This change and other related changes should make it easier for them to do so without losing their collegiate eligibility." *Id.* at 6.

212. RICE REPORT, *supra* note 14, at 23-24.

213. *See also* JERRY MAGUIRE (Gracie Films 1996) (chronicling Maguire's rise to becoming a successful agent and noting that at one point Maguire had so many clients he could barely keep track of them; and showing how Maguire spent almost 100 percent of his time on the road travelling to recruit athletes and make lucrative deals). Sports agent Jerry Maguire, played by Tom Cruise, was at the height of his career where he had so many clients that he did not care about any of them. Maguire was a road warrior spending most of his time travelling for deals. Maguire is fired by his firm when he pens a letter to his office saying agents should care more about their clients than they do about the money. Upon his termination, only one client (a baseball player) stayed with him. *See id.*

214. RICE REPORT, *supra* note 14, at 23-24.

215. *Id.* at 24.

216. *Id.* ("recognizing that the NBPA has recently taken important steps to improve the quality of the agent cadre").

217. *Id.*

as fiduciaries for student-athletes.²¹⁸ This group of stakeholders calls for higher penalties for agents who violate NCAA rules, either through enforcement of state and other laws or by reporting violations to the NBPA.²¹⁹

The Rice Commission accepted the collegiate model of athletics as the premise for making its reform recommendations.²²⁰ The key purpose of that model, according to the NCAA, "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."²²¹ Member institutions are responsible for ensuring that their athletic programs comport with NCAA rules, including the No Agent Rule, that are designed to implement the NCAA's basic purpose of keeping collegiate athletics non-professional.²²² The NCAA's longstanding commitment to the principle of amateurism is the cornerstone of its lucrative business model, and agents have been viewed historically as a threat to that fundamental principle. Thus, the Commission's recommendations were designed with the stated goal of supporting and furthering the NCAA's basic purpose of maintaining amateurism and also encouraging its members to accept responsibility for achieving that purpose.²²³

The Rice Commission recommended that the NCAA permit students to receive a meaningful assessment of their professional prospects with the assistance of certified agents at an earlier time in their decision making process.²²⁴ This recommendation is clearly premised on the NCAA and its member institutions adopting a certification process for agents with "strict standards" that would warrant their earlier contact with student-athletes.²²⁵ The NCAA and member institutions would be

218. *Id.* at 33. Although the precise contours of any certification regime for agents is beyond the scope of this article, that regime should require that there be clear and convincing evidence of a violation before sanctioning an agent. This intermediate evidentiary standard of proof takes into consideration the significant property and other interests that an agent has in providing such services and the need to protect the athlete and public from bad agents. *Cf.* MODEL RULES FOR LAWYERS, DISCIPLINARY ENFORCEMENT r. 18.3 (establishing the clear and convincing evidentiary standard as the basis for sanctioning or disciplining lawyers for violating professional responsibility norms in the legal services field).

219. RICE REPORT, *supra* note 14, at 24.

220. *Id.* at 28.

221. *Id.* (citing NCAA MANUAL, *supra* note 19, § 1.3.1).

222. *Id.* (citing NCAA MANUAL, *supra* note 19, § 2.1.1).

223. *Id.* (citing NCAA MANUAL, *supra* note 19, §§ 2.1.1, 2.2.1).

224. *Id.* at 3. The precise wording of the Recommendation follows: § 1: "Realistic Pathways for Student-Athlete Success," C. "Permit Students to Receive Meaningful Assessment of Professional Prospects Earlier With Assistance From Certified Agents." *Id.*

225. RICE REPORT, *supra* note 14, at 33.

authorized to allow “certified agents to engage with student-athletes at school at specific times during the calendar year.”²²⁶ Not surprisingly, the Commission noted that the NCAA “must appoint a Vice-President level executive to develop detailed [NCAA certification standards] and [to] administer the program.”²²⁷ In addition, the NCAA “should also educate elite [basketball players] about NCAA eligibility rules . . . [and their] professional prospects.”²²⁸

The Commission noted that currently, student-athletes may retain lawyers and advisors to obtain professional services provided they do not perform the representational activities of agents, namely negotiating directly with colleges or professional teams to obtain a benefit or payment related to the student’s athletic services or reputation.²²⁹ The Commission also recommended that “high school players considering entering the draft should be allowed to engage NCAA-certified agents and advisors just as high school baseball players may engage agents for advice about the draft.”²³⁰ The Commission learned that agents or their associates are sometimes directly or indirectly paying many elite athletes and/or their families as early as their sophomore year in high school.²³¹ Current NCAA rules prohibit this practice and also bar players and their families from orally or in writing agreeing to be represented by an agent.²³² “Virtually all agents” who spoke to the Commission advised it not to allow high school or college athletes or their families to enter into agreements with agents in advance of their professional careers—such a practice would increase the influence of corrupt agents.²³³ Nevertheless, these agents argued that the NCAA should allow “good” agents “to talk

226. *Id.*

227. *Id.*

228. *Id.*

229. *See id.* at 34.

230. *Id.* (citing NCAA MANUAL, *supra* note 19, § 12.3.1.1).

231. RICE REPORT, *supra* note 14, at 34.

232. *Id.*; *see* *Walters & Bloom v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987) (holding that an agreement entered into by running back Brent Fullwood with a sports agency during the football season of his senior year of college for representation rights at the NFL draft was unenforceable as the agreement violated public policy because Fullwood signed the agreement before becoming eligible to sign).

233. RICE REPORT, *supra* note 14, at 34. Contrary to the advice of these agents, the Rice Commission ultimately recommended that elite Division I Men’s Basketball and high school players “should be allowed to engage NCAA-certified agents and advisors . . . for advice about the draft.” *Id.* The Commission presumably determined that athletes’ “desperate” need for such agent access and information about the draft and more outweighed these agents’ concerns about the influence of corrupt agents. *See id.* In addition, the Rice Commission addressed this concern about “corrupt agents” by “recommend[ing] serious consequences,” including decertification, for agents who violated acceptable agent representation rules. *Id.* at 35, 43.

with high school and collegiate players [to] make their cases so that players would have all available options before . . . [entering] the professional market."²³⁴ The Commission agreed and directed the NCAA certification program to offer such opportunities for "good" agents.²³⁵

The Rice Commission's recommendations about agents reflects its finding that athletes misjudge their professional prospects. The Commission concluded that high school and college athletes should be permitted to contact NCAA certified agents to avoid any misunderstanding about their prospects.²³⁶ The families of these athletes also should be permitted to obtain objective, credible evidence about their athlete's professional prospects from agents.²³⁷ All students and their families "need timely, reliable and trusted sources of information about their likelihood of professional success."²³⁸ The Commission recommended that the NCAA should bring into the light all discussions between certified-agents and elite student basketball players concerning their professional prospects.²³⁹ This recommendation would help ensure that "good" agents feel safe in communicating with and providing desperately needed information to student-athletes about their professional and other prospects.²⁴⁰

V. AN INTERDISCIPLINARY PERSPECTIVE—OPENING ACCESS TO SPORTS AGENTS FOR ALL STUDENT-ATHLETES

Student-athletes, most of whom are adolescents, constitute a special population on most university campuses with unique challenges and needs that differ from their non-athlete peers.²⁴¹ In particular, student-athletes devote considerable time and effort to athletics, not just to their

234. *Id.* at 34.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. See RICE REPORT, *supra* note 14, at 34.

240. *Id.*

241. Joy Gaston Gayles, *The Student Athlete Experience*, 144 NEW DIRECTIONS FOR INSTITUTIONAL RES. 33 (Dec. 2009), https://www.researchgate.net/publication/229574190_The_student_athlete_experience. The term adolescence generally describes the transitional period from childhood to adulthood (ages ten to twenty-four years)—a "developmental epoch during which children become adults intellectually, physically, hormonally, and socially." Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449 (2013) [hereinafter Arain]. Medical and other experts report that this is a "tumultuous time, full of changes and transformation." *Id.* Most collegiate student athletes are adolescents. "Brain maturation" during this time may be influenced by several factors, for example, "heredity, environment . . . nutritional status . . . physical, mental, economical, and psychological stress; drug abuse (caffeine, nicotine, and alcohol) and sex hormones . . ." *Id.* at 450.

academics and future employment prospects.²⁴² Such devotion prompted one expert to conclude, “[b]alancing the combination of the time commitment of intercollegiate athletics, the academic expectations, and the avenues of social relationships, student-athletes are presented with a level of transitional stress that no other students have to face”²⁴³ Another group of psychologists and sports experts similarly noted,

[a]lthough there is variability from school to school, sport to sport, and time of year, the unique physical and psycho-social demands of often year-round training, competition, travel, and increasing pressure to perform academically can compromise their health status more than others In view of similar lifestyle concerns and other issues (e.g., social isolation, identity conflicts, career-vocational issues, fear of failure and success) . . . [these experts] suggested that student-athletes represent a population that is probably ‘at risk’ to

242. Gayles, *supra* note 241, at 33. See Provencio, *supra* note 19, at 4. “[B]etween 11% and 23% of student-athletes had paying jobs in addition to school and athletics” according to the 2015 GOALS Study. *Id.* at 7.

The percentage of Division I athletes with jobs were FBS football players at 23%. The average hours per week worked rose from 8.1 hours per week in 2010 to 8.8 hours per week in 2015. Among Division I athletes 36% of men and 40% of women reported that they would like to spend more time working at a job.

Id. See also Edward F. Etzel et al., *Understanding and Promoting College Student-Athlete Health: Essential Issues for Student Affairs Professionals*, 43 NASPA J. 518, 521 (2006) [hereinafter Etzel]. “Under the regular close scrutiny of coaches, compliance officers, the media, and influential others, student athletes must somehow learn how to balance the numerous demands and expectations of school, sports, and social and personal development on a daily basis.” *Id.*

243. See Joseph P. Williams, *The Influence of the Components of Psychosocial Mentoring on the Academic, Athletic, and Social Outcomes of Male Student Athletes* (Sept. 2017) (unpublished Ed.D. dissertation, Northcentral University), <https://search.proquest.com/docview/1964266641?pq-origsite-%20gscholar> (noting “[s]tudent-athletes may benefit from positive mentoring relationships” and discussing the athlete’s coach as such a mentor; stating that “[a] mentor assists the protégé by providing support, direction, and counsel as he or she achieves this task”). It is important to note that “[a] substantial body of research suggested that college student-athletes may be at-risk for developmental obstacles, in addition to facing the same developmental challenges that their non-athletes peers do.” *Id.* See also Etzel, *supra* note 242.

Despite the fact that student athletes confront the same long-standing developmental tasks of other college-age students (e.g., becoming independent, finding a sense of purpose, coping with uncertainty, dealing with authority, clarifying values) . . . it is clear that on top of their developmental challenges, athlete lifestyles, competitive pressures, and daily experiences are quite unlike those of their nonathlete peers.

Id. at 520. “Others have observed that considerable numbers of [student-athletes] suffer from clinical mental health problems that warrant professional attention.” *Id.* at 521.

experience a range of distressful reactions linked to general health and mental health.²⁴⁴

The NCAA Growth, Opportunities, Aspirations, and Learning of Students (GOALS) in College Survey periodically collects information from student-athletes to enable NCAA committees, policymakers, and member institutions to better understand student-athletes.²⁴⁵ The GOALS College Survey in 2016 revealed that student-athletes, both men and women and across all divisions, spent more time on athletic pursuits than the last GOALS survey in 2010.²⁴⁶ For example, the median time devoted to Division I athletics rose from thirty-two hours per week in season in 2010 to thirty-four hours per week in season in 2015.²⁴⁷ "FBS football players . . . report[ed] the highest weekly in-season time commitments [with a] median 42 hours per week, up from 39 hours in 2010[]." ²⁴⁸ Two-thirds of Division I and II student-athletes spent at least as much or more time offseason on athletics as during the competitive season.²⁴⁹

Beside the challenge of committing a large amount of time to athletics, student-athlete success in sports, academics, and a career, may be further complicated because of sports-related personal injuries,²⁵⁰

244. See Etzel, *supra* note 242, at 521 (reporting that an investigation into various aspects of student-athlete health found "that alcohol, dysfunctional eating behaviors and related clinical issues (e.g., eating disorders), coping with injury, keeping up with academics, and general stress were prominent health-related problems that point to the need for comprehensive healthcare planning and services for this group").

245. NCAA GOALS Study of the Student-Athlete Experience Initial Summary of Findings January 2016, NCAA (Jan. 2016), https://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf [hereinafter NCAA GOALS]. See Provencio, *supra* note 19, at 5-6. The NCAA GOALS is a survey study concerning various matters that affect a student-athlete, for example, one's athletic and academic experience, recruiting, finances and time commitments. The GOALS survey occurred in 2006, 2010 and 2015. *Id.* at 24.

246. NCAA GOALS, *supra* note 245, at 2.

247. *Id.* (noting that the median time spent on Division II athletics increased from thirty hours per week in season in 2010 to thirty-two hours per week in season in 2015 and for Division III the median time increased from twenty hours per week in season in 2010 to twenty-eight and a half hours per week in season in 2015).

248. *Id.* (reporting that FCS football and Division I baseball spend forty or more hours per week and, among women's sports, Division I softball registered the highest weekly figure at thirty hours).

249. *Id.* (revealing that at least seventy-five percent of Division I and II student athletes in baseball, football, and men's and women's track spend as much time off season in their sport as in-season).

250. See Etzel, *supra* note 242, at 521 (highlighting student-athlete injuries and stating that "coping with injury, keeping up with academics, and general stress were prominent health-related problems . . .").

fatigue, and even missed classes when their sport is in season.²⁵¹ “Approximately one-third of student athletes . . . noted struggling to find energy for other tasks because of the physical demands of their sport.”²⁵² Almost one-quarter of the student-athletes surveyed reported being exhausted from the mental demands of their sport and approximately thirty percent reported feeling “intractably overwhelmed during the past month,” representing an increase over the 2010 GOALS Study.²⁵³ Perhaps even more unsettling, given the arduous schedule and highly structured environment of student-athletes, is the GOALS finding that “nearly two-thirds of men and three-quarters of women . . . expressed a preference for more opportunities to visit home and family.”²⁵⁴ Similarly, a “high percentage” of survey participants desired more time for socialization and relaxation, especially among student-athletes with a high combination of academic and athletic time commitments.²⁵⁵ “The median self-reported weekly time spent socializing/relaxing during the athletic season was 17.1 hours in 2015, down from 19.5 hours in 2010”²⁵⁶

In short, the GOALS Study and other literature reflect the formidable time management and health challenges confronting the relatively small, unique, and vulnerable student-athlete population. Agents can help mitigate some of these challenges and related concerns, causing

251. Gayles, *supra* note 241 (reporting student athletes “miss a fair number of classes when their sport is in season”). Cf. NCAA GOALS, *supra* note 245, at 2 (“Although time spent on athletics has increased, 2015 reports of missed classes were generally low and very similar to those seen in 2010.”).

252. NCAA GOALS, *supra* note 245, at 5 (highlighting that the percentage of student-athletes struggling to find sufficient energy is higher in Division I and in some sports like football).

253. *Id.* at 4-5. See Etzel, *supra* note 242, at 521.

In view of similar lifestyle concerns and other issues (e.g., social isolation, identity conflicts, career-vocational issues, fear of failure and success), psychologists Pinkerton, Hinz, and Barrow (1989) suggested that student athletes represent a population that is probably ‘at risk’ to experience a range of distressful reactions linked to general health and mental health.

Id. For example, studies consistently show “that excessive alcohol consumption and negative alcohol-related consequences and behaviors are major health issues among college students and that intercollegiate athletes are truly an at-risk population in this area.” *Id.* at 523 (emphasis added). Studies have showed that student-athletes “average[] more drinks per week and engage[] in more frequent binge drinking episodes than non-athletes.” *Id.* at 524. Studies also show that student-athletes are more likely to engage in the negative consequences of drinking, such as “impaired academic work, getting into trouble with the police or other authorities, being taken advantage of sexually[,] . . . have more sexual partners, and perpetrate more sexual violence than nonathletes.” *Id.*

254. NCAA GOALS, *supra* note 245, at 2.

255. *Id.* at 4.

256. *Id.*

student-athletes to feel less stressed or "overwhelmed" by providing independent counsel and advocacy to further their interests.²⁵⁷ The agent's involvement can even assist the student-athlete in mature decision making.²⁵⁸ Research reveals that

where emotional and social influences on judgment are minimized or can be mitigated and where there are consultants [like sports agents] who can provide objective information about the costs and benefits of alternative courses of action, adolescents are likely to be just as capable of mature decision making as adults.²⁵⁹

Traditional principles of agency law should facilitate such counsel and advocacy by agents. It recognizes that agents owe their principals, here student-athletes, a fiduciary duty of loyalty, the protection of their confidences, competence, and the advancement of their general welfare.²⁶⁰ These fiduciary principals should encourage student-athletes to fully communicate with and confide in their agent.

Agents offer student-athletes a number of valuable services, including advice about their careers and finances.²⁶¹ This advice is especially helpful to student-athletes, many of whom are young and inexperienced when it comes to career and financial matters. These important matters warrant student-athlete attention. However, such matters compete for space in the student-athlete's busy schedule and structured environment

257. See *supra* note 242 and accompanying text (noting that some student athletes feel overwhelmed).

258. RICE REPORT, *supra* note 14, at 34.

259. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583, 583-94 (Oct. 9, 2009) [hereinafter *Adolescents Less Mature*] (discussing the American Psychologist Association's (APA's) seemingly inconsistent positions regarding adolescent decision-making in *Roper v. Simmons*, 543 U.S. 551 (2005), that abolished the death penalty for juveniles under the age of eighteen and *Hodgson v. Minnesota*, 497 U.S. 417 (1990), where the Court upheld a parental notification requirement with a judicial bypass option for minors seeking an abortion). The APA argued that an adolescent's decision making was not comparable to an adult's in *Simmons* while arguing in *Hodgson* that an adolescent's decision making was comparable to an adult's and making parental notification unnecessary or less compelling. The authors conclude that developmental science should "contribute to debates about the drawing of legal age boundaries, but caution[ed]" that it is important to undertake a "careful and nuanced consideration of the particular demands placed on the individual for 'adult-like' maturity in different domains of functioning"—i.e., that adult-like maturity by adolescents depends on the context. *Id.* at 593.

260. Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, 7 DARTMOUTH L.J. 246, 247 (2009) (explaining that upon signing a contract with an agent, an athlete manifests consent for the agent to act on the athlete's behalf and subject to the athlete's control, imposing fiduciary duties on the agent); see also JOHN P. SAHL, R. MICHAEL CASSIDY, BENJAMIN P. COOPER & MARGARET C. TARKINGTON, PROFESSIONAL RESPONSIBILITY IN FOCUS 241 (Rachel E. Barkow et al. eds. 2018) (describing the attorney-client relationship as a fiduciary one).

261. See *supra* Part III (discussing the various services and role of agents).

that generally leaves little time for the athlete to undertake matters beyond meeting their significant athletic,²⁶² academic,²⁶³ and possible employment responsibilities.²⁶⁴ Devoting sufficient time to these core responsibilities becomes even more challenging for athletes who are also trying to develop and maintain personal relationships with peers, family, and others. One psychologist reported “that compared with their non-athlete peers, student-athletes scored significantly lower on measures of their educational plans, career plans, and mature relationships.”²⁶⁵ The sobering conclusion from GOALS and other sources is clear. The amount of student-athlete discretionary time for understanding and engaging in career and financial planning and other endeavors is very limited. Agents potentially offer student-athletes an independent source of advice and assistance on these matters. Any agent certification process must require up-to-date education and training in financial and career planning, including knowledge of alternative career choices, since the vast majority of student-athletes will not play professionally or for a long period. The Rice Commission Report acknowledged this important point when it noted that “[o]nly a very small percentage of NCAA’s men’s basketball players make it to the NBA (around 1.2%) let alone have successful careers.”²⁶⁶ The importance of student-athletes, and others, understanding their financial welfare is reflected in the social

262. *Cal. Assemb. Hearing re S.B. 206 by the Comm. on Arts, Ent., Sports, Tourism, and Internet Media* (2019-2020) (June 25, 2019). “University studies have found that athletes are spending thirty-two to forty-four hours a week on their respective sports. The time commitment athletes dedicate make it practically impossible for athletes to obtain outside employment to provide for themselves or families.” *Id.* at 3.

263. NCAA GOALS, *supra* note 245, at 2.

264. NCAA Research, *Results from the 2015 GOALS Study of the Student-Athlete Experience*, NCAA (Jan. 2016), http://ncaa.org/sites/default/files/GOALS_convention_slidebank_jan2016_public.pdf.

265. Williams, *supra* note 253, at 7; *see also* Steinberg, et al., *supra* note 259, at 586 (“[A]dolescents are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in *Roper*—capacities such as impulse control and resistance to peer influence.”).

266. RICE REPORT, *supra* note 14, at 5; *see generally* Grant Sharretts, *Why student athletes should value their education*, PATRIOT (Jan. 22, 2016), <https://jcpatriot.com/sports/2016/01/22/why-student-athletes-should-value-their-education/> (explaining the importance of student-athlete education finding that while only two percent of college athletes make it to the pros, a UNC Greensboro study found that sixty percent of 183 student-athletes at UNC-Chapel Hill read between a fourth and eighth grade level; *but see* Sara Ganim, *NCAA: It’s not our job to ensure educational quality*, CNN (Apr. 2, 2015, 12:54 PM), <https://www.cnn.com/2015/04/01/sport/ncaa-response-to-lawsuit/index.html> (arguing that the NCAA took a drastically different view than its stated “student’s first, athlete’s second” mantra when it stated in response to a UNC former athlete lawsuit that, “it has no legal responsibility to ensure the academic integrity of the courses offered to student-athletes at its member institutions.”).

movement promoting financial capability.²⁶⁷ This movement is endorsed by many governmental and nongovernmental entities in the United States, including the President's Advisory Council on Financial Capability.²⁶⁸ "Financial capability refers to people's ability to manage and take control of their finances."²⁶⁹ Financial capability is particularly important today with the "weakening of the government-managed economic safety net" that shifts more responsibility to the individual for his or her "long-term economic security."²⁷⁰ For example, in coming years, the government's underfunding of social security, "the traditional retirement income source," along with company-sponsored pension programs "changing from mainly defined benefit programs to mainly defined contribution retirement programs," underscore the need for individuals, including student-athletes, to be financially capable and to plan for their retirement.²⁷¹ "These trends suggest that ordinary consumers should worry about their long-term economic security and start to manage their retirement savings in the early years,"²⁷² including during adolescence, a time when student-athletes and others may be developmentally less capable of handling such matters.²⁷³ Some agents who have registered

267. Jing Jian Xiao, Cheng Chen & Lei Sun, *Age Differences in Consumer Financial Capability*, 39 INT'L J. CONSUMER STUD. 387, 387-94 (2015) ("The purpose of this study is to examine age differences in financial capability" which "is measured by five variables: objective financial literacy, subjective financial literacy, desirable financial capability, perceived financial capability, and a financial capability index." *Id.* at 387.).

268. *Id.* at 387.

269. *Id.* (citing Mark Taylor, *Measuring Financial Capability and its Determinants Using Survey Data*, 102 SOC. INDICATORS RES., 297 (2011)).

270. *Id.*

271. *Id.* See RUXIN, *supra* note 123, at 17 (discussing the challenge of retirement from a professional athlete's perspective; the same athlete concerns are arguably applicable to student-athletes in college or high school).

Given that most professional athletes have a short career span, an area of vital concern is the athlete's post-career transition. An NFLPA survey of former football players revealed that job hopping, emotional and financial problems, and lingering injuries replace the NFL glamour and glory for many players. One former Washington Redskins player noted, 'Unless, you are a superstar with tons of money, you go from a high income . . . to the real world of knocking doors looking for a job.'

Id. at 16.

272. Xiao, *supra* note 267, at 387; see RUXIN, *supra* note 123, at 17 ("The players who make the smoothest transition are typically those who began early. Hockey Hall of Famer Tony Esposito believes that the toughest time for an athlete is quitting. 'From day one an agent should help a player plan for retirement.'").

273. See Jennifer J. Valentine & Deborah J. Taub, *Responding to the Developmental Needs of Student Athletes*, 2 J. COLL. COUNSELING 164 (1999); see generally Mark Vermillion, *Division I Student Athletes' Perceptions: How Well Does the Athletic Department Promote Student Athlete Development in an Urban-Serving University?*, 25 Metro. U. J. 79 (2014), <https://journals.iupui.edu/index.php/muj/article/view/20563> (explaining the factors that Division I student-athletes face that affect development and the effectiveness of student-development initiatives).

with a professional athletes union, such as the National Football League Players Association (NFLPA), have received some financial training or materials as part of the union's certification process.²⁷⁴

Agents can be especially helpful in educating student-athletes about their financial situation. In addition to operating a daily agent business, the agent's success is dependent, in large part, on keeping abreast of recent developments in the sports industries.²⁷⁵ These industries are interconnected to other industries, such as lending institutions, food and beverage manufacturers, and governmental actors, such as the state or local tax authorities. The agent may have some knowledge of these related industries that he or she can use to help a student-athlete's financial planning. Financial education or literacy has the "potential to . . . change consumer financial behaviors . . . [and] improve financial well-being."²⁷⁶

Agents can also be a valuable source of information and assistance in helping student-athletes to understand and plan their career choices.²⁷⁷ The importance of such information to athletes, in general, is reflected, in part, on at least one professional athletes union's website sharing information concerning possible off-season employment opportunities.²⁷⁸ Agents working in the sports field should have information and insights about future career opportunities for a particular athlete. Agents, especially seasoned agents, may have employment leads and a network of contacts in the sports world to help advance a student-athlete's career aspirations.²⁷⁹

The agent constitutes an independent source for such information and perspective and is less susceptible to the potentially competing

274. See also NFLPA, REGULATIONS AND CODE OF CONDUCT: GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS (2017), <https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/FinancialAdvisors/Final%20Financial%20Advisors%20Regs%20October%2024.pdf>.

275. See Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 364-65 (1997) (emphasizing the value of agents by contending that only two groups of persons, agents and people who work for NFL teams, are sufficiently aware of recent league developments and otherwise possess the requisite expertise to analyze the NFL draft and determine whether or not a student athlete should enter the professional draft).

276. Xiao, *supra* note 267, at 387.

277. See RUXIN, *supra* note 123, at 17 ("Agents often serve a valuable role as counselor. They help their clients adjust to personal and professional problems. 'My agent was a good friend and a steady influence on me,' Rudy Tomjanovich said, commenting on his 13-year NBA career. 'You need that in a league where the emotions run from red hot to ice cold.'").

278. NFLPA, CAREER DEVELOPMENT, <https://nflpa.com/active-players/career-development> (last visited Aug. 30, 2020).

279. See RUXIN, *supra* note 123, at 17 ("[A] good agent does more than help a player convert his athletic skills into financial security. He protects the player's rights, prepares the player for a second career, and, as a former baseball executive said 'keeps the player in a frame of mind where he can perform best for himself and his team.'").

interests of the student-athlete's institution, especially the interests of some of its key constituents, such as the athletic director and coaches. For example, the student-athlete's basketball coach may desire the athlete's return to keep his roster set for the following season. The coach's self-interest in a set roster could potentially influence the coach's advice about entering the draft or seeking a new career to the detriment of the student-client's interests. Some coaches may believe that they can filter out any potential or actual conflicting interests when advising the athlete about important decisions, such as remaining on the school's team. Yet their vested institutional and personal interests in having the student return to play for another season creates a risk that a coach may unconsciously shape his or her advice.²⁸⁰ A coach has a strong self-interest in fielding a winning team and in maintaining a familiar and comfortable coaching environment with a set roster. In addition to the risk of a coach's unconscious bias, there is another broader concern about the self-interest of coaches. Their self-interest may lead them to try to minimize any potential third-party influence by agents on the student-athletes. In effect, coaches may seek to construct an informational silo around student-athletes making access to agents, a source of information and advice untethered to the athlete's university, even more important in broadening the student-athlete's context for decision-making. It is important to remember that coaches occupy a central and powerful role in the lives of their student-athletes, perhaps best underscored by the coach's determination of which athletes get playing time. This makes it very difficult for a student-athlete to legitimately question a coach's actions and having access to an agent may offer the student-athlete a safer alternative for expressing concerns. The agent can then act as convenient foil for the athlete by raising these same concerns with the coach.

Today, in our media-driven society, it is important for student-athletes to have a strong and positive public image. Such an image is good for a student-athlete's self-esteem and for the possibility of generating additional revenue separate from his or her athletic performances. Although there may not be much value in a student-athlete's image at the beginning of his or her college career, "[t]he building of an image starts

280. There is much scholarship in recent years about the risks associated with unconscious bias. Some of this literature supports the concern that coaches may not appreciate that their advice and efforts on behalf of the student-athlete is not merely altruistic but instead biased or motivated by some other reason, such as the coach's interest in retaining employment or transferring to a better position. *See, e.g.,* Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U.L. REV. 1259, 1289-91 (2004).

early”²⁸¹ and “[a]gents play a vital role in helping shape and protect their clients’ interests.”²⁸² Agents and their student-athlete clients will want to devote considerable time to developing a strategy for cultivating and promoting the athlete’s image.²⁸³ For example, student-athletes, like their pro-counterparts, can create a fan following on Twitter and other social media platforms that might translate into future value; for example, when the athlete turns professional and agrees to participate in an advertising campaign.

A positive image can be developed, “promot[ed] and preserv[ed]” by “orchestrating or suppressing publicly reported personal actions.”²⁸⁴ For a recent example, consider the New Orleans Saints quarterback, Drew Brees, and his wife, who donated five million dollars to help Louisiana’s citizens contend with the effects of the coronavirus disease 2019 (COVID-19). This generous donation was nationally reported and warmly received by the public, given the grave threat posed by the COVID-19 pandemic.²⁸⁵ This gesture likely enhanced Brees’ public standing with the Saints franchise, his teammates, the NFL, and the residents of Louisiana and elsewhere. The value of a future Drew Brees product endorsement has likely increased because of this charitable public act and its subsequent coverage by the media.²⁸⁶ Agents and

281. Shane T. Johnson, *An Athlete’s Primer - Image Development, Protection and Preservation*, 15 ENT. & SPORTS L. 3 (1997); see Kristi Dosh, *How Student Athletes Can Prepare to Become Entrepreneurs*, ENTREPRENEUR (Dec. 20, 2019), <https://www.entrepreneur.com/article/343870> (“[S]tudent athletes have to focus on building their channels [or methods for branding] as early as possible.”); see also Kristi Dosh, *Nebraska First To Launch Program To Help Student Athletes Maximize The Value Of Their Individual Brands*, FORBES (Mar. 10, 2020, 11:51 AM), <https://www.forbes.com/sites/kristidosh/2020/03/10/nebraska-first-to-launch-program-to-help-student-athletes-maximize-the-value-of-their-individual-brands/#53efa5cb6303> (reporting that the University of Nebraska is partnering with OpenDorse, a social publishing platform, to develop student-athlete brands with one expert noting that social media provides the “most immediate and significant opportunity for name, image and likeness monetization for student-athletes.”).

282. RUXIN, *supra* note 123, at 15; see Johnson, *supra* note 281, at 5-6 (discussing the different types of agency services available to an athlete).

283. Johnson, *supra* note 281, at 4. Agents will also want to protect the student-athlete’s image, for example, by making sure there are no unauthorized uses of the athlete’s image. However, the agent’s efforts during the student-athlete phase of one’s athletic career will be mostly devoted to cultivating and promoting the athlete’s image rather than taking legal or other action to protect the image. *Id.*

284. *Id.* at 3.

285. Michael Middlehurst-Schwartz, *Saints QB Drew Brees to donate \$5 Million in Louisiana coronavirus relief effort*, USA TODAY (Mar. 26, 2020, 12:35 PM), <https://www.usatoday.com/story/sports/nfl/saints/2020/03/26/drew-brees-donate-coronavirus-relief-louisiana-new-orleans-saints/2916543001/>.

286. See Gary Phillips, *Drew Brees And His Wife Pledge \$5 Million To Help Louisiana Battle Coronavirus Outbreak*, FORBES (Mar. 26, 2020, 12:31 PM), <https://www.forbes.com/sites/garyphillips/2020/03/26/drew-brees-wife-brittany-pledge-5->

student-athletes will want to be careful when image building so as not to violate any NCAA rules “endanger[ing] a scholarship or the ability to compete in sanctioned competitions.”²⁸⁷ Nevertheless, college athletes should develop a plan for building an image that can be monetized after the student-athlete exits the college ranks. The agent and student-athlete might appoint an advisory committee to advise them about the right strategy for building and cultivating an image. “With proper planning, [the student-athlete’s agent and other] advisors can help craft and protect a marketable image that will still have value after the athlete retires from the arena.”²⁸⁸ As with financial and career counseling, agents offer student-athletes a valuable source of independent advice and support in developing an image. Agents’ attention to these important matters promises to enhance student-athlete welfare by reducing some of the significant stress from their core responsibilities of athletics, academics, and a possible job. This is an important benefit that should be available to all student-athletes.

VII. THE TIME IS RIPE TO REPLACE THE “NO AGENT” RULE—SOME THOUGHTS FOR A “MODIFIED AGENT” RULE

The NCAA’s “Basic Purpose” in regulating intercollegiate amateur athletics²⁸⁹ is to govern competition in a fair, safe, equitable, and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is

million-to-help-louisiana-battle-coronavirus-outbreak-hurricane-katrina/#39c216391277.

For an infamous example of publicity with more mixed results consider the notorious incident involving figure skaters Tonya Harding and Nancy Kerrigan who were competitors, see Johnson, *supra* note 281, at 3 (noting how “Tonya Harding gained notoriety of the undesirable type” by conspiring to injure Kerrigan so that Harding would win the skating championship).

287. Johnson, *supra* note 281, at 5.

288. See *id.* at 7 (highlighting the importance of monetizing one’s image for retirement purposes by noting that Michael Jordan earned \$44 million in 1995—“\$3.9 million in salary and \$40 million in endorsements” and contrasting that with the situation of the boxer, Mike Tyson, who earned \$40 million in prize money and no money from endorsements.”); see also Akiko Arai, Yong Jae Ko & Stephen Ross, *Branding Athletes: Exploration and Conceptualization of Athlete Brand Image*, 17 SPORTS MGMT. REV. 97 (2014) (reporting that “managing brands for athletes is becoming an essential task for agents” and emphasizing this point by noting that “IMG, the world’s largest sports agency, announced their mission statement as ‘[t]oday, we help hundreds of elite athlete, coaches, industry executives and prestigious sports organizations maximize their earnings potential and build strong personal brands.’”).

289. NCAA MANUAL, *supra* note 19, § 1.3.1. The NCAA also mandates that student-athletes be amateurs and that their conduct not cross the line of demarcation between amateurs and professionals. *Id.* § 1.3.1 (stating that a core purpose of the NCAA is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports”) (emphasis added).

paramount.²⁹⁰ The Basic Purpose further provides that the integration of intercollegiate athletics into higher education and a focus on the student-athlete's academic interest will help "to retain a clear line of demarcation between intercollegiate [or amateur] athletics and professional sports."²⁹¹ Thus, the NCAA's "Basic Purpose" provision reflects the NCAA's key principle of amateurism.²⁹² This principle should not be viewed as mutually exclusive from a policy that would permit student-athletes to contract with sports agents. An agent's presence in a student-athlete's life does not automatically transform his or her participation in amateur collegiate competition into professional sports.²⁹³ Even with the assistance of a sports agent, the student-athlete remains bound by a myriad of other NCAA non-agent rules, such as the NCAA's twenty-hour rule that caps the amount of weekly practice time.²⁹⁴ Instead, the NCAA should view the agent's role as an aid in helping to maximize the student-athlete's "educational experience."²⁹⁵

The NCAA should replace the No Agent Rule with a MAR.²⁹⁶ A MAR approach to NCAA reform, like the Rice Commission's

290. NCAA MANUAL, *supra* note 19, § 1.3.1; see Glenn M. Wong, Warren Zola & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L. J. 553, 557 (2011); Reid, *supra* note 159, at 78.

291. NCAA MANUAL, *supra* note 19, § 1.3.1.

292. *Id.* §§ 1.3.1, 2.9.

293. See Matthew Stross, *The NCAA's "No-Agent" Rule: Blurring Amateurism*, 2 MISS. SPORTS L. REV. 167, 179 (2012) (contending that "merely allowing legal [and arguably agent] representation during the course of contract negotiations will not destroy the principles of amateurism[;]" emphasizing that "[c]ollegiate sports and professional sports remain different in many aspects," *id.* at 179; acknowledging that the NCAA has often blurred the lines of demarcation between amateur and professional sports, *id.* at 180-83; and noting that while the NCAA bylaws prohibit the use of agents, "the NCAA allows students to perform essentially the same actions" [i.e., negotiate contracts with professional sports organizations] on their own or without expert assistance and still retain their amateur status, *id.* at 181).

294. See *supra* notes 69-70 and accompanying text (discussing the NCAA's twenty-hour rule); see also Stross, *supra* note 293, at 185, 191 (allowing student-athletes to have representation during contract negotiations "does no more to destroy the separation between amateurism and professionalism than the Professional Sports Counseling Panel[,] [a three-person panel, that an NCAA member school may have to educate and even negotiate with a professional sports organization on behalf of an athlete] currently does.").

295. See NCAA MANUAL, *supra* note 19, § 1.3.1; see also William W. Berry III, *Educating Athletes Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 803-04, 825-26 (2014) (examining the NCAA's amateurism principle and its intersection with the commercial realities of intercollegiate football and basketball and suggesting, in part, that six-year scholarships and an academic in-season load reduction to three credits as "improving the ability of student-athletes to be students" by allowing them more time for a "robust" educational experience).

296. MAR stands for Modified Agent Rule. See *supra* note 95 (noting the NCAA adopted the Rice Commission's recommendation to modify the NCAA's No Agent Rule and permit agents for elite basketball players).

recommendations, recognizes and attempts to preserve the NCAA's overriding commitment to a policy of amateurism. Although a complete and detailed description of a MAR is beyond the scope of this article, any NCAA MAR should ideally embrace the following key elements.

First, and most importantly, a MAR should permit *all* college student-athletes, irrespective of their division or conference affiliation, to enter into a written agreement with a NCAA-certified "agent for the purpose of marketing his or her athletics ability or reputation in that sport."²⁹⁷ Allowing every student-athlete to engage the services of an agent would facilitate the integration of athletics into higher education by allowing the student-athlete to devote more time to academics, athletics, and perhaps employment.²⁹⁸ Some student-athletes may not be interested in agent representation, and some agents may not have an interest in representing athletes whose professional or commercial prospects are minimal.²⁹⁹ The intensely competitive marketplace to play

297. See NCAA MANUAL, *supra* note 19, § 12.3.1. The quoted language in the text is from the current NCAA "no agent" rule that forbids any student-athlete from entering into any oral or written agreement for the purposes of marketing the athlete's athletic ability. The MAR breaks with this longstanding "no agent" tradition by permitting such agreements, but only in writing; memorializing and impressing upon the agent and the student-athlete the seriousness of their services agreement. The current NCAA's "no agent" rule for enrolled elite basketball players or prospective players requires the student athlete to terminate the written sports agent agreement "before full-time enrollment in the ensuing academic term" if the student-athlete does not sign a contract with a professional team. See *id.* § 12.3.1.2.5. The failure to terminate the sports agent agreement renders the athlete ineligible for NCAA competition. A MAR should not require the termination of the sports agent agreement and instead should permit an on-going relationship between the agent and the student-athlete in which the agent provides important counseling benefits to the student, for example, providing financial and career planning advice among other matters. Unlike the current NCAA rules, a MAR would permit an athlete to enter a sports agent agreement with an agent for representation in future professional sports negotiations. *Contra id.* § 12.3.1.3. Also, any MAR should continue the new NCAA rule exempting a "prospective or enrolled student-athlete [from having] to compensate an NCAA-certified agent for his or her services." *Id.* § 12.3.1.2.6. Following the student's completion of his or her eligibility for a sport, the agent should be entitled to the reasonable cost of his or her post-eligibility services and related expenses.

298. See *supra* Part V (discussing how agents can help student-athletes find more time to focus on these core responsibilities). See also Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best of Interest of the Amateur Athletics?*, 7 VAND. J. ENT. L. & PRAC. 215 (2005); see also Edelman, *supra* note 95, at 215 (rejecting the NCAA's claim that its no-agent rule's goal is to protect student-athletes because the rule exposes them to significant harm by prohibiting them from having an agent or competent representation to deal with professional sports organizations and the complex business and legal issues that the surround the world of professional sports, *id.* at 215-16).

299. An agent's interest in representing a certain student-athlete may extend beyond the mere possibility of negotiating a future professional sports contract. For example, a student athlete may have little prospect of playing for a professional sports team but nevertheless possesses other market or commercial value. The athlete may be able to work for a team's

professional sports will help determine which student-athletes are likely to have an agent's services.

As the Rice Commission highlighted, the NCAA "must appoint a Vice-President level executive to develop meaningful standards for NCAA certification and administer the program" to protect student-athletes from bad agents.³⁰⁰ This Rice Commission mandate for vice-president executive level support for an agent certification program should be an essential part of any future MAR, signaling the importance of the MAR to agents and other NCAA stakeholders, such as student-athletes and coaches. In addition, the NCAA should adopt some provisions of the RUAAA, especially its detailed registration provisions.³⁰¹

The NCAA must be committed to enforcing the MAR against miscreant agents. Adequate resources and a willingness to enforce the MAR is critical to having a viable agent regulatory regime.³⁰² The NCAA's agent certification department should keep in close contact with its state and federal counterparts to make sure miscreant agents appearing before the NCAA will not continue similar misdeeds at the professional level. Close contact with state and federal agent regulatory bodies also could alert the NCAA to agent misconduct at the professional level, enabling the NCAA to take preemptive action against bad agents to protect student-athletes.

business or public relations office or act in a television commercial unrelated to sports, such as promoting health club memberships or selling clothes.

300. RICE REPORT, *supra* note 14, at 6.

301. RUAAA, *supra* note 127, § 4 (Athlete Agent: Registration Required: Void.) and § 5 (Registration As Athlete Agent: Application Requirements: Reciprocal Registration.). Other RUAAA provisions that warrant serious consideration for a MAR include section 10, which requires an agency contract signed by all parties to include "a description of the services to be provided to the athlete . . . the amount and method of calculating consideration to be paid by the student athlete for the [agent's] services . . .", *id.* § 10; section 14 was recently amended in July 2019 to comport with the Rice Commission's recommendations that were implemented by the NCAA in August 2018, *id.* § 14; and section 16, which offers a student-athlete and his or her educational institution the right to sue the athlete agent for damages stemming from a RUAAA violation and notes that any RUAAA violation constitutes an unfair trade or deceptive practice, implicating possible federal oversight under SPARTA, *id.* § 16. See RUAAA, *supra* note 127; see also *supra* Part III Section B (discussing SPARTA and how violations of it are treated as unfair trade practices).

302. See RICE REPORT, *supra* note 14, at 20 ("[T]he Commission heard from many commenters who identified both the NCAA's enforcement process and the substance of the NCAA's rules as inadequate to deal with the challenges presented by Division I Men's Basketball."). A potential funding source for the enforcement of a MAR could come from the registration fees paid by sports agents to the NCAA. A similar funding model exists in some states where a portion of the lawyer registration or license fees are directed to lawyer regulation. See SAHL, *supra* note 260, at 45. Additional funding sources would likely be necessary to cover the cost of the NCAA's regulation of sports agents.

The NCAA's "Vice-President level executive" for agent certification should attempt to separate the functions of registration, investigation, prosecution, and adjudication within the NCAA certification office in hope of avoiding any conflicts of interest and due process concerns.³⁰³ For example, an NCAA employee who encountered difficulties with an applicant for certification should not subsequently be involved in investigating or possibly disciplining that same applicant. This separation of functions, involving different NCAA personnel, should help foster neutral fact finding and an independence of judgment, thus producing fairer determinations. Separating these regulatory functions should also reassure agent-respondents that due process is part of the NCAA agent disciplinary process.³⁰⁴

It is important that agents not be viewed as adversaries but rather as partners of the NCAA and any other state or federal regulatory effort to protect and enhance student-athlete interests. As partners with the NCAA, a MAR should require agents who know of another agent's misconduct to report that agent to the NCAA's agent certification department and/or an appropriate college's NCAA compliance office. A similar self-reporting requirement model exists in the legal profession where lawyers are required to report a fellow lawyer's misconduct to the appropriate disciplinary authority.³⁰⁵ The failure of lawyers to honor the reporting requirement constitutes professional misconduct and subjects them to discipline, including suspension or disbarment.³⁰⁶ Adoption of a similar reporting requirement for agents should help incentivize their full compliance with a MAR.

303. See LEGISLATIVE ATTORNEY, CONG. RESEARCH SERV., RL32529, THE NCAA AND DUE PROCESS: LEGAL ISSUES (2004). A congressional research report was conducted in 2004 reviewing and analyzing the *NCAA v. Tarkanian* and *NCAA v. Miller* decisions determining that the NCAA's actions to investigate and enforce its rules is beyond state regulation. *Id.*

304. See Aidan Middlemiss McCormack, *Seeking Procedural Due Process in NCAA Infractions Procedures: States Take Action*, 2 MARQ. SPORTS L.J. 261 (1992). See also *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Cong. 106 (2004).

305. See MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2020). "Reporting Professional Misconduct Conduct, (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." *Id.* at r. 8.3. Thus, a sports agent's duty to report another agent under the ABA approach is triggered only when the agent knows of another's misconduct that raises a "substantial question" about that lawyer's fitness to practice. That is a less onerous standard than some states that require reporting whenever another lawyer's conduct raises "a question"—something less than a substantial question—about that agent's ability to act as a fiduciary for a student-athlete. See OHIO RULES OF PROF'L CONDUCT r. 8.3 (imposing a duty to report when there is "a question" of another lawyer's fitness to practice). See also SAHL, *supra* note 260, at 71 (discussing a lawyer's duty to report misconduct).

306. See SAHL, *supra* note 260, at 61, 71.

Although a MAR would permit all student-athletes to have access to an agent's services, it should still maintain some restrictions on that relationship.³⁰⁷ For example, the current prohibition on agents providing student-athletes payment or other benefits to represent them should be maintained, as such payments are contrary to the NCAA's principle of amateurism.³⁰⁸ As currently the case for only Division I elite basketball players, a MAR should permit agents to pay athletes' and their families' reasonable expenses related to the agent selection process. Such expenses would include travel, housing, food, and related costs. The NCAA, along with individual colleges and the state office charged with overseeing agents, should closely monitor the payment of such expenses to avoid opening a door for abuse. Although there is always some risk that rogue agents will engage in abusive conduct regarding the reimbursement of expenses related to the selection of agents or in some other regard, this risk and others are ultimately outweighed by the potential benefits to student-athletes having agent representation, including agent counseling, experience, moral support, and advocacy.

VIII. CONCLUSION

Sports are an important thread in our social fabric, as poignantly illustrated by the widespread disappointment in the cessation of professional and college sports due to the COVID-19 pandemic.³⁰⁹ Some fans have struggled to adapt to a life without sporting competitions, not only in the United States, but globally.³¹⁰ When sports resume, it will

307. RICE REPORT, *supra* note 14, at 23-24. The Rice Commission noted that many stakeholders believe that agents should be able to have earlier access to student athletes and that such access is probably happening already, albeit contrary to NCAA rules. These stakeholders argued that it is better to have these agent-athlete communications "open and regulated by the NCAA, including by requiring NCAA certification and registration with schools and by restricting contact to specific times and places." *Id.*

308. See NCAA MANUAL, *supra* note 19, § 12.3.1.4 (barring benefits based on athletic skills from prospective sports agents to student athletes, their family members or friends).

309. See Ryan Lewis, *MLB, MLBPA reach agreement on coronavirus shutdown, according to reports*, AKRON BEACON J. (Mar. 27, 2020, 6:02 PM), <https://www.beaconjournal.com/sports/20200327/mlb-mlbpa-reach-agreement-on-coronavirus-shutdown-according-to-reports> (discussing an agreement between the baseball players union and owners covering a wide range of issues involving the work stoppage forced by the coronavirus outbreak); see also Marla Ridenour, *UA athletes find positive in Olympic postponement due to coronavirus: 'This is going to be a huge step for the world coming together'*, AKRON BEACON J. (Mar. 23, 2020, 8:04 PM), <https://www.beaconjournal.com/sports/20200323/ua-athletes-find-positive-in-olympic-postponement-due-to-coronavirus-isothis-is-going-to-be-huge-step-for-world-coming-togetherrsquo> (reporting that although "disappointed that their dream will be delayed," these athletes believe whenever the next games are held it "will be a celebration of the human spirit as the world unites to fight the deadly virus").

310. See Peter Landers & Rachel Bachman, *Japan, IOC Agree to Postpone 2020 Tokyo Olympics by About One Year*, WALL ST. J. (Mar. 24, 2020, 5:57 PM),

hopefully usher in a new era where the NCAA continues its long, albeit flawed, tradition of amateurism with a renewed spirit to protect the interests of student-athletes by eliminating the No Agent Rule and replacing it with a MAR.³¹¹

<https://www.wsj.com/articles/japans-abe-agreed-with-ioc-to-delay-tokyo-olympics-by-about-one-year-11585052548> ("Japanese Prime Minister Shinzo Abe and IOC President Thomas Bach agreed . . . to delay the Games, previously scheduled to start July 24, for around one year."); *see also* Ryan Lewis, *MLB to consider realignment, leagues in Arizona and Florida in 2020, according to report*, AKRON BEACON J. (Apr. 10, 2020, 10:35 PM), <https://www.beaconjournal.com/sports/20200410/mlb-to-consider-realignment-leagues-in-arizona-and-florida-in-2020-according-to-report> (reflecting the strong consumer demand for baseball by stating "[a]t this point, just about any idea to get in as many games as possible in 2020 is on the table;" including having teams play in their spring training facilities that are located in Florida and Arizona with the winner of the Grapefruit League (FL) playing the winner of the Cactus League (AZ) for the World Series in November).

311. For articles critically examining the NCAA's amateurism principle, *see generally* Pego, *supra* note 14; *see also* Katherine Kargl, *Is Amateurism Really Necessary or is it an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 U. ILL. L. REV. 379 (2017); *see also supra* note 29 (identifying additional articles that critically discuss the NCAA's amateurism principle). For an article more supportive of the NCAA's commitment to amateurism, *see, e.g.,* McDavis, *supra* note 29.