Show Me the Money: How the ABA Model Rules of Professional Conduct Can Deter NCAA Rules Violations Involving Sports Agents & College Athletes

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SHOW ME THE MONEY: HOW THE ABA MODEL RULES OF PROFESSIONAL CONDUCT CAN DETER NCAA RULES VIOLATIONS INVOLVING SPORTS AGENTS & COLLEGE ATHLETES

INTRODUCTION

The National Collegiate Athletic Association's ("NCAA") fundamental purpose 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." This line is becoming increasingly blurred as major universities such as the University of Southern California ("USC"), the University of North Carolina ("UNC"), the University of Miami, and others are investigated for violating NCAA bylaws. When the NCAA conducts


4. Miami is recently tied up in one of the largest scandals to hit the NCAA involving booster/agent Nevin Shapiro, a convicted felon, who alleges that he provided thousands of impermissible benefits to University of Miami players. Charles Robinson, Renegade Miami Football Booster Spells Out Illicit Benefits to Players, YAHOO SPORTS (Aug. 16, 2011, 5:37 PM), http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

5. See John Taylor, Alabama May Be Latest School Entangled In Growing Player-Agent Scandal, NBCSPORTS.COM (July 20, 2010, 6:39 PM), http://collegefootballtalk.nbcports.com/2010/07/20/alabama-may-be-latest-school-entangled-in-growing-player-agent-scareland/ (discussing the possible investigation into South Carolina football player Weslye Saunders, Alabama football player Marcel Dareus, and Florida football player Maurkice Pouncey for accepting gifts from agents); see also Chris Low, Report: Trips to Miami Under Scrutiny, ESPN.COM (July 23, 2010, 11:55 AM), http://sports.espn.go.com/ncf/news/story?id=5402211 (implicating University of Georgia wide receiver A.J. Green in rumors of the South Beach agent party). Marcel Dareus is alleged to have attended a party at an agent's house in South Beach. Taylor, supra note 5. Weslye Saunders is alleged to have also been at the party in South Beach and investigators are looking into who paid for the plane tickets and accommodations. Taylor, supra note 5. Maurkice Pouncey is alleged to have received up to $100,000 from the runner of an unnamed sports agent. Taylor, supra note 5.
an investigation and uncovers a violation of a bylaw, student-athletes may be exposed in the media, their eligibility to participate in games and events may be stripped, and their scholarships may be revoked.6

While some high-profile players are fortunate enough to only receive minimal punishment,7 the school administration, athletic director, and coach are publicly questioned as to their involvement and why they did not prevent the violations from occurring.8 The NCAA may then prohibit post-season appearances, forfeit university athletic scholarships, and/or impose strict recruiting standards, which make it difficult to obtain high caliber athletes.9 Somehow the agent avoids the media frenzy and merely loses a potential client.

Universities and athletes suffer the harshest penalties in the aftermath of athlete agent scandals. Although states have adopted statutes to help prosecute violators, these agents often escape the ordeal professionally unscathed.10 Athletes, universities, and coaches are generally forced to answer to the media after word of the scandal has been

6. See Aaron Beard, Little Issues Apology After NCAA Ruling, THE BOSTON GLOBE, http://www.boston.com/sports/colleges/football/articles/2010/10/12/little_issues_apology_after_ncaa_ruling/ (last visited Nov. 19, 2011) (reporting that North Carolina wide receiver Greg Little and defensive end Robert Quinn were declared by the NCAA as ineligible for accepting gifts and travel accommodations from an agent and both were released from the football team, exposed by the media, and lost their scholarships).

7. See Marcel Dareus of Alabama Ruled Ineligible for Two Games, FANHOUSE (Sept. 2, 2010, 8:50 PM), http://ncaafootball.fanhouse.com/2010/09/02/marcell-dareus-of-alabama-ruled-ineligible-for-two-games/?cid=spire_newsao1_inpage_fanhouse2 (stating that Marcel Dareus, an outstanding football player for the University of Alabama, was caught receiving nearly $2,000 worth of improper gifts and travel accommodations from an agent and was ordered by the NCAA to repay $1,787 to the charity of his choice before regaining his eligibility without further sanctions).

8. For instance, Pete Carroll, the former head coach of the University of Southern California football team was asked how the Reggie Bush scandal happened and he responded by saying, “It just did. We didn’t have the awareness to know. I wish I would have had the awareness I have now, going back.” Danny O’Neil, Pete Carroll’s Story Looks Different Amid All the Fallout, THE SEATTLE TIMES, July 16, 2010, available at http://seattletimes.nwsource.com/html/dannyoneil/2012378504_onei117.html.

9. Billy Witz, Trojans’ Culture of Fun Meets Era of Compliance, N.Y. TIMES, July 21, 2010, available at http://www.nytimes.com/2010/07/22/sports/ncaafootball/22usc.html (referring to the NCAA imposing 2 years of probation resulting in the forfeiture of the opportunity to attend two postseason bowl games and the loss of 30 scholarships on the University of Southern California during the wake of the Reggie Bush scandal). Participation in a postseason bowl game is the ultimate goal for a college football team because of the money involved. See Ethan Trex, Bowling for No Dollars, College Bowl Game Economics, MENTAL FLOSS BLOG (Jan. 6, 2011, 3:31 PM), http://www.mentalfloss.com/blogs/archives/78756 (noting that the 2010 national championship game resulted in a payout of close to $2 million each to the University of Texas and the University of Alabama).

leaked. However, it is often easiest for the university to recover because it can comply with the sanctions and reinvest the money it earns through its athletic department to rebuild its reputation.

While the university may rebuild itself, the athlete’s life may be essentially over in terms of playing an intercollegiate sport or receiving an education. Many college athletes come from poverty and rely on their athletic ability to earn a scholarship to afford the high price of a college degree. These promising individuals, some of whom have the prospect of earning millions of dollars playing professional sports or, in the alternative, would at least have a quality education to rely on, may be substantially damaged.

This problematic situation occurs because agents, universities, and student-athletes do not have enough incentive to act ethically in an inherently competitive and unethical environment. The current system has failed because the NCAA has no legal authority to discipline agents. An NCAA bylaw related to agents has even been declared无效.


12. USC has taken steps to repair its reputation by firing the athletic director under which the wrongdoing occurred, hiring Pat Haden, returning Reggie Bush’s Heisman trophy (awarded for the most outstanding player in college football each year), and complying with the NCAA sanctions. USC Hires Haden as AD, Will Return Bush’s Heisman, SPORTING NEWS, July 20, 2010, available at http://www.sportingnews.com/ncaa-football/story/2010-07-20/report-haden-replace-garrett-usc-ad.


14. Maurice Clarett, an outstanding freshman running back for the Ohio State University, was expelled from school after he was found to have taken money from boosters and agents, such as Josh Luchs. See Tom Friend & Ryan Hockensmith, Clarett Claims Cash, Cars Among Benefits, ESPN.COM (Nov. 9, 2004) http://sports.espn.go.com/ncf/news/story?id=1919059 (noting that Clarett was projected as a first round draft pick, but was denied the opportunity to enter the NFL draft because he took benefits and was expelled from Ohio State as a freshman and was consequently too young to enter the draft); see also George Dohrmann, Confessions of an Agent, SPORTS ILLUSTRATED, Oct. 18, 2010, (Magazine), available at http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html?hpt=C2 (alleging that agents provided benefits to Clarett).

15. Diane Sudia & Rob Remis, Statutory Regulation of Agent Gifts to Athletes, 10 SETON HALL J. SPORT L. 265, 268-69 (2000); see also Cottrell v. NCAA, 975 So.2d 306 (Ala. 2007) (addressing an action against the recruiting coordinator and coaches of the University of Alabama football program involving an athlete signing a contract with an agent).
void by an Ohio state court. A solution must be found to preserve the integrity of college sports and bring the line of demarcation back into focus.

Part I of this Comment provides a background of the regulation of athlete agents and details some of the more recent scandals. Part II focuses on why the current regulations have generally failed to deter improper conduct committed by athlete agents. Part III offers a solution founded on the ABA Model Rules of Professional Conduct and how they may be used to deter improper agent practices in college athletics.

I. RECENT SCANDALS AND THE STATE OF ATHLETE AGENT REGULATION

Athlete agents are currently regulated by a blend of poorly drafted state statutes and untested federal acts. While there are penalties in place for unethical athlete agents, they have failed to deter agents from violating NCAA bylaws. Nearly every season, new allegations of student-athletes receiving improper benefits emerge and new university athletic departments are investigated.

A. Recent Scandals in College Athletics

College athletes have been receiving improper benefits from agents and boosters for decades. With billions of dollars involved in college athletics and product marketing, this is not surprising. Agents compete intensely to sign the most talented and marketable athletes.

sanctioned by the NCAA while the agent was not joined in the action and barely mentioned in the case. Id. at 317-18.


17. See generally Kelly W. Bhirdo, Linda A. Haviland & Thomas J. Warth, McCormack v. National Collegiate Athletic Association: College Athletic Sanctions From An Antitrust and Civil Rights Perspective, 15 J.C. & U.L. 459 (1989) (noting that Southern Methodist University received a cancellation of its 1987 regular football season and had its 1988 season limited to only eight games, which had to be played at the opponents’ location, because the players on the football team were being paid by the boosters to play for SMU). Ohio State University head football coach Jim Tressel was involved in a similar scandal during his tenure as head coach at Youngstown State University. Adam Lazarus, Cam Newton and the Top 50 Scandals in College Football History, BLEACHER REPORT (Dec. 2, 2010), http://bleacherreport.com/articles/531572-cam-newton-and-the-top-50-scandals-in-college-football-history#page/7.


19. Agents make their money from signing contracts with athletes that stipulate to the agent receiving 2-3% of the athlete’s contract amount with the professional team who the athlete signs
Recently, a scandal involved improper gifts to University of North Carolina football players. After an investigation launched in summer 2010, the NCAA declared defensive end Robert Quinn and receiver Greg Little permanently ineligible after it concluded that both players had received jewelry and travel accommodations from agents. The university then removed defensive tackle Marvin Austin from the team after the NCAA concluded that Austin had received up to $13,000 in improper benefits from an agent.

The investigation that led to the termination of these players was initiated by rumors of a party held by an agent in Miami. Several prominent college players from major universities such as UNC, the University of South Carolina, and the University of Alabama were rumored to have attended. These players allegedly received money for flights, hotels, and other expenses. Moreover, University of Florida offensive lineman Maurkice Pouncey allegedly received up to $100,000 of benefits from an agent at the party.

Perhaps the most startling recent scandal involved Reggie Bush during his tenure as a running back for USC. After a four year investigation, the NCAA sanctioned USC by declaring its football team ineligible for two postseasons, deducting ten scholarships for each of the next three seasons, and stripping USC of its 2004 BCS National Championship.


22. Beard, supra note 6. *See also* Heitner, supra note 3 (discussing how Austin was seen driving an agent’s car and also staying at his apartment while the agent was out of town).
23. Taylor, supra note 5.
24. Taylor, supra note 5.
25. Taylor, supra note 5.
26. Taylor, supra note 5.
27. Gray, supra note 2. Reggie Bush was a star running back at USC during which he won the Heisman trophy (given for the best player in college football that year) and helped the team win a national championship. *See Reggie Bush Biography*, RegenburgOnline.com, http://www.regenburgonline.com/reggie-bush-biography.php, (last visited Jan. 10, 2011) (noting that Bush was considered one of the best college running backs of the decade and now plays in the National Football League for the New Orleans Saints).
28. Gray, supra note 2. ESPN’s Tom Luginbill describes why this punishment is severe:

When a program loses scholarships, it has fewer talented bodies on its roster, so there’s a significant drop-off between the top player and the next player on the depth chart. In today’s world of rotating in players and situational substitutions, that’s huge. Coaches already complain about having only 85 scholarships. Now USC is going to be down 10 a year, and there’s a trickle-down effect that will impact how the Trojans set up their rotations, their depth and how they overcome injuries to players.

The punishment was a result of allegations that Bush’s parents were provided a home in exchange for Bush’s agreement to sign a representation contract with an agent. Earlier in the year, USC was forced by the NCAA to impose sanctions on its women’s tennis team and men’s basketball team for similar violations. These recent issues have led many to question whether the athletic programs at USC would have been as successful without the alleged cheating. USC has been accused of “having too much fun” and turning their head while the violations occurred. Incoming athletic director Pat Haden has taken a tougher stance on NCAA compliance and USC is in the process of adding two more compliance officers to their athletic department.

Yahoo! Sports conducted its own investigation of USC and Reggie Bush and published a surprising account of what benefits may have been given to the Bush family. The agents allegedly involved are Bush’s current agent Michael Ornstein and previous agents Michael Michaels and Lloyd Lake. According to the report, Bush’s family was provided $529.20 in airfare for his mother, stepfather, and brother to attend a USC game in Berkeley, California. In addition, the Bush

This punishment makes the jobs of coach Lane Kiffin and his assistants that much harder, as their margin for error goes from small to nonexistent. Recruiting is already tough enough. Coaches have to project the physical and mental potential of a 17-year-old not only on the field but also in the classroom and away from his family. Now, USC’s coaches will have to be correct nearly 100 percent of the time because they’ll have fewer scholarships to give out. The pressure will rise in every meeting about every player because coaches will know they can’t afford to miss on a kid.

Id.

29. BCS stands for “bowl championship series.” This is the committee responsible for creating the schedule of postseason bowls for Division I college football.


32. Gray, supra note 2.

33. Bush’s tenure at USC lasted from 2003-05 during which the team appeared in the Rose Bowl twice, the Orange Bowl once, won the national championship in 2004, and had an overall record of 37-2.

34. Witz, supra note 9.

35. Witz, supra note 9.


38. Id.

39. Id.
family was provided a limousine and stayed at the Ritz-Carlton hotel during the same trip. Bush was also provided suits during the Heisman Trophy presentation weekend and his family was provided a limousine for transportation. Yahoo! Sports uncovered that weekly payments of $1,500 were presented to the Bush family along with a makeover for Bush's mother. It was also revealed that these agents paid for numerous hotel stays for Bush, provided him with money for a car, paid off some of the Bush family's debt, and permitted Bush's family to live in a $700,000 house rent-free for a year. All of the expenses were alleged to total over $100,000, which begs the question of how these benefits went unnoticed by then-head football coach Pete Carroll and USC.

Agents' exploitation of college athletes and general lack of respect for the sanctity of college football has led coaches at major programs to lash out. Recently, head football coach Nick Saban of the University of Alabama classified agents as "pimps" and questioned whether the National Football League ("NFL") should be permitted to send scouts to attend college practices. Saban further stated that what the "NFL Players Association and the NFL need to do is if any agent breaks a rule and causes ineligibility for a player, they should suspend [the agent's] license for a year or two." Saban's tirade followed allegations of Alabama football player Marcel Dareus receiving

40. Id.
41. Id.
42. Id.
43. Id. The house belonged to one of the agents, Michaels, who was trying to sign Bush to a contract.
44. Id.
47. Ivan Maisel & Mark Schlabach, Dareus May Have Attended Agent's Party, ESPN.COM (July 22, 2010, 12:44 PM), http://sports.espn.go.com/ncf/news/story?id=5396236 (**"I'm [Saban] about ready for college football to say, 'Let's just throw the NFL out. Don't let them evaluate players. Don't let them talk to players. Let them do it at the combine. If they are not going to help us, why should we help them?'**). Many college football teams open up their practices to scouts, who evaluate players for potential in the NFL. Brent Zwerneman, Sherman Camp Always Open to NFL Scouts, CHRON.COM (Aug. 14, 2010), http://blogs.chron.com/aggsies/2010/08/sherman_camp_always_open_to_nf_2.html.
48. Maisel, supra note 47.
improper benefits from an agent. Saban has also made it clear that he believes that schools should not be penalized for the actions of the agents and players.

At least one prominent coach has come up with his own idea to prevent athlete agents from tarnishing the reputation of college athletics. University of Oklahoma head football coach Bob Stoops suggests giving amnesty to players who report agent violations even after they may have been involved themselves. Stoops believes NCAA bylaws penalize only universities and athletes, which decreases incentives for schools to conduct their own investigations. He claims that during his twelve years of coaching college football, the athlete agent problem is worse than ever. Stoops’ suggestion creates an incentive for players to report prohibited conduct by agents and provides a partial solution to the problem. It is important to note that student-athletes are implicitly allowed to meet with agents under NCAA rules. However, they are expressly prohibited from signing contracts or accepting benefits from agents.

B. The State of Athlete Agent Regulation

The crux of the regulation surrounding college athletics is the NCAA manual containing the operating bylaws, which prohibit student-athletes from receiving any benefits from agents. If the bylaws did not exist, there would be few statutes regulating agents. The few

49. Id.
50. Id.
52. Id.
53. Id.
54. Id. There is no rule in the NCCA bylaws that prohibit student athletes from meeting or talking to an agent as long as there is no contract negotiation or benefits being conferred.
55. Id. “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.” NCAA Manual, supra note 1, at § 12.3.1.
56. See discussion infra Subsection 1.B.2.a (detailing the purpose of the NCAA Manual and the relevant bylaws dealing with contact between student athletes and agents).
57. Sudia, supra note 10, at 70 (“The real reason legislatures enact athlete agent statutes directly transcends from the NCAA rules and regulations. Were it not for the NCAA, state legislatures likely would not find a need to regulate athlete agents.”).
state and federal regulations that do exist resemble the NCAA bylaws and provide the NCAA with indirect enforcement ability.⁵⁸

I. How Agents Sign College Athletes

Before discussing the state of athlete agent regulation, it is important to provide an example of the process by which unethical agents sign athletes to representation contracts. Many different techniques are employed by these agents. For example, former agent Josh Luchs explained the process in an interview with Sports Illustrated, in which he recounted his first experience attempting to sign a student-athlete, Kanavis McGhee.⁵⁹ Luchs flew to Colorado and figured out where McGhee lived.⁶⁰ Luchs sat outside McGhee’s dormitory room until he arrived home from practice.⁶¹ McGhee allowed Luchs into his room and Luchs explained to him that he was an agent and could help him out.⁶² McGhee responded by requesting $2,500 to help prevent his mother from being evicted from her home, which Luchs eventually provided after some deliberation.⁶³ Although Luchs violated NCAA rules to accommodate McGhee, he did not end up representing him.⁶⁴

This is a simplified version of how agents make contact with athletes. Many independent, non-lawyer agents set up their own business with aspirations of signing a major client that will make them millions.⁶⁵ Because they are not lawyers, they have no ethical code to follow but their own.⁶⁶ With the state of regulation as it is now, the average person only needs to file a license form with the state to become a registered sports agent.

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⁵⁸. See discussion infra Subsection I.B.2.b (explaining that state statutes penalize the same behavior as the NCAA bylaws).

⁵⁹. Dohrmann, supra note 14 (noting that Kanavis McGhee was a standout on the University of Colorado football team and was “a big, pass-rushing linebacker who was expected to be a high pick in the 1991 NFL draft”).

⁶⁰. Id.

⁶¹. Id.

⁶². Id.

⁶³. Id.

⁶⁴. Id.

⁶⁵. Landis Cox, Targeting Sports Agents with the Mail Fraud Statute: United States v. Norby Walters & Lloyd Bloom, 41 Duke L.J. 1157, 1162 (1992) (discussing that agent Lloyd Bloom, a former high school football player, and Norby Walters joined to start their own agency wherein Bloom had no experience as an agent).

⁶⁶. The ABA Model Rules of Professional Conduct normally do not apply to non-lawyers and technically do not apply to lawyers until adopted and enforced by the state. Stephen Gillers et al., Regulation of Lawyers: Statutes and Standards 3 (2010).
2. The Current Regulatory Scheme

The current regulatory scheme is made up of three different types of regulations. The NCAA annually publishes rules that each member university must follow. Similar rules are found in state legislatures in the form of statutes. Congress has also passed acts involving the regulation of athlete agents.

a. NCAA Operating Bylaws

The NCAA annually publishes a set of bylaws that regulate the activities of member institutions. Article 12 lists prohibitions on agent activity involving student-athletes and the penalties the players and universities face for violations. Under section 12.01.1, only amateurs are allowed to participate in NCAA intercollegiate events. A student-athlete will lose amateur status and be declared ineligible to participate in NCAA sporting events if the student-athlete receives any of the prohibited forms of pay. The NCAA prohibits these forms of pay: salary, gratuity, or compensation; division or split of surplus; educational expenses; and expenses, awards, and benefits. The class of prohibited pay that invokes the most controversy involves expenses, awards, and benefits that agents offer to student-athletes. Section 12.3.1 provides:

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.

This bylaw prohibits contract execution between agents and student-athletes. The NCAA further describes the types of gifts that will render a student-athlete ineligible in section 12.3.1.2:

67. See discussion infra Subsection 1.2.B.a (discussing the NCAA bylaws).
68. See discussion infra Subsection 1.2.B.b (discussing state statutes and licensing requirements).
69. See discussion infra Subsection 1.2.B.c (discussing Congress’ regulation of agents).
70. See generally NCAA MANUAL, supra note 1 (detailing every NCAA bylaw).
71. NCAA MANUAL, supra note 1, at § 12.
72. NCAA MANUAL, supra note 1, at § 12.01.1.
73. NCAA MANUAL, supra note 1, at § 12.1.2.1.
74. NCAA MANUAL, supra note 1, at § 12.1.2.1.1.
75. NCAA MANUAL, supra note 1, at § 12.1.2.1.2.
76. NCAA MANUAL, supra note 1, at § 12.1.2.1.3.
77. NCAA MANUAL, supra note 1, at § 12.1.2.1.4.
78. NCAA MANUAL, supra note 1, at § 12.3.1.
An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from:

(a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or

(b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport.79

Notice that the bylaw includes the term “or his or her relatives or friends.” The inclusion of this language is important because many agents attempt to conceal their direct solicitation of a student-athlete by providing the gifts to the athlete's family or friends.80

Interestingly, the NCAA provides an exception to the rule in Article 16 of the NCAA Manual.81 If a student-athlete, family member, or friend receives an improper gift from an agent, but can prove that the same benefit is “generally available” to the rest of the student body or a certain group of the student body that is unrelated to athletics, the gift will not render the student-athlete ineligible.82 Another exception exists under section 16.01.1.1, which allows a student-athlete who has received a prohibited gift of $100 or less to repay the gift to the charity of their choice to regain their eligibility.83 It is also important to note that the NCAA does not place a minimum or maximum dollar amount on the gift to an athlete in determining whether it is improper.84 Any type of gift that has monetary value potentially renders a student-athlete ineligible for the rest of his or her college career.85

79. NCAA Manual, supra note 1, at §§ 12.3.1.2, 16.01.1 (applying the no gift rule to any person, not just agents in general).
80. See Robinson, supra note 37 (reporting that many of the benefits given to Reggie Bush were for the benefit of his family).
81. NCAA Manual, supra note 1, at § 16.02.3 (“Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution’s students or their relatives or friends or to a particular segment of the student body (for example, international students, minority students) determined on a basis unrelated to athletics ability.”).
82. Id.
83. NCAA Manual, supra note 1, at § 16.01.1.1 (“For violations of Bylaw 16 in which the value of the benefit is $100 or less, the eligibility of the student-athlete shall not be affected conditioned upon the student-athlete repaying the value of the benefit to a charity of his or her choice. The student-athlete, however, shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the student-athlete repays the benefit.”).
84. Sudia, supra note 15, at 271.
85. Id.
Unfortunately, the NCAA lacks the authority to penalize athletes or agents.\(^8\)\(^6\) It can only penalize schools because they are member institutions pursuant to section 14.11.1.\(^8\)\(^7\) Therefore, it indirectly punishes athletes by mandating that the university sanction athletes for violations of the bylaws.\(^8\)\(^8\) The schools must comply with the bylaws to retain their member status.\(^8\)\(^9\) One commentator summarizes why universities comply with the bylaws:

[T]he universities have every incentive to comply with the NCAA’s mandates. First, to be associated with the NCAA, the member institution must agree to assist the NCAA in investigating rules violations and enforcing its rules against student-athletes. Failure to do so may result in devastating financial consequences due to potential NCAA sanctions imposed against the university for such failure.\(^9\)\(^0\)

Because virtually every major university is a member of the NCAA, the NCAA has the influence to negatively affect the reputation and financial situation of a university who chooses to disobey its fundamental policies.\(^9\)\(^1\)

b. State Law and Regulation

In addition to the NCAA bylaws, more than half of the fifty states have passed legislation prohibiting gifts from agents to amateur ath-

\(^8\)\(^6\) See Cottrell v. NCAA, 975 So.2d 306 (Ala. 2007). An agent signed an Alabama football player in violation of NCAA bylaws. Id. at 317. The University was sanctioned and the coaches and recruiting coordinator filed an action against the NCAA for inter alia, defamation. Id. at 318, 325. The agent was not joined in the trial and was not found liable for any legal wrongdoing. Id. at 317.

\(^8\)\(^7\) NCAA MANUAL, supra note 1, at § 14.11.1. According to the bylaw:

If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition. The institution may appeal to the Committee on Student-Athlete Reinstatement for restoration of the student-athlete’s eligibility as provided in Bylaw 14.12 if it concludes that the circumstances warrant restoration.

\(^8\)\(^8\) Sudia, supra note 15, at 273 (“Rather, the NCAA only indirectly regulates student-athletes by imposing mandates on the universities (that enroll and play the student-athletes) to enforce the NCAA regulations and sanctions on its student-athletes.”).

\(^8\)\(^9\) NCAA MANUAL, supra note 1, at § 1.3.2 (“Obligations of Member Institutions. Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting. Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.”).

\(^9\)\(^0\) Sudia, supra note 15, at 273.

\(^9\)\(^1\) There are 326 active Division I members of the NCAA. Hofstra University Receives NCAA Certification, GoHofstra.com (Aug. 20, 2009), http://www.gohofstra.com/ViewArticle. dbm?DB_OEM_ID=22200&ATCLID=204778575. There are over 960 total colleges and universities affiliated with the NCAA. Cox, supra note 65, at 1158.
Because the statutes vary in construction from state-to-state, it is useful to group the statutes according to their method of prohibition. The groupings include “absolute prohibition,” “conditional prohibition,” and “prohibition on timing.”

“Absolute prohibition” statutes explicitly prohibit an agent from providing any sort of gift or benefit to a student-athlete. However, California is the only state that has passed a statute that completely bans agent gifts to athletes. The statute provides: “No athlete agent or athlete agent’s representative shall, directly or indirectly, offer or provide money or any other thing of benefit or value to a student athlete.” The language of the statute specifically bans anything of value passing from agent to athlete. It is somewhat surprising that only one state employs an absolute prohibition when the NCAA expressly prohibits gifts to student-athletes. California’s statute is similar to NCAA Bylaw 12.3.1.2, which bans all gifts to athletes.

“Conditional prohibition” statutes classify gifts from agents to athletes as illegal upon the occurrence of a conditional event. Eighteen states have statutes that prohibit agents from giving gifts to student-athletes if it is used “to induce” the athlete into signing a contract with the agent. Therefore, the gift is only prohibited if the agent is trying to persuade the athlete to sign a contract with him. For instance, the relevant Ohio statute reads in pertinent part: “No athlete agent shall . . . [o]ffer anything of value to a person in order to induce an athlete to enter into an agreement pursuant to which the athlete agent represents the interests of the athlete.” It is argued that this type of statute “makes a mockery” of the attempt to prohibit gifts to student-athletes because they may be evaded by agents who assert

92. Sudia, supra note 10, at 68.
93. Sudia, supra note 15, at 277 (“A detailed reading of the statutory provisions that do regulate agents gifts to athletes reveals that such provisions categorize into three basic forms. First, some statutory provisions absolutely prohibit gifts. Second, some statutory provisions conditionally prohibit gifts. In other words, the gifts are prohibited only if certain conditions are met. Third, some gifts are prohibited only if provided to the athletes during certain designated time frames.”).
94. Sudia, supra note 15, at 277-92 (discussing each category of state statutes).
95. Sudia, supra note 15, at 277.
96. Id.
99. See discussion supra Subsection 1.B.2.a (discussing NCAA Bylaw 12.3.1.2 which bans all gifts to athletes).
100. Sudia, supra note 15, at 278.
101. Id.
that they were not attempting to induce the athlete into signing a contract.103

"Prohibition on timing" statutes "prohibit agent gifts to athletes only if the gifts occur within certain statutorily designated time frames."104 These time periods are defined as the time before the student-athlete's college eligibility expires or up until the athlete's last intercollegiate contest.105 The statutes are intended to prohibit gifts to student-athletes while they still possess NCAA eligibility.106 An example of this type of statute is found in Pennsylvania, whose statute reads in pertinent part:

Prohibited Acts. An athlete agent may not:

(8) Before the student athlete’s eligibility for collegiate athletics
has expired, give, offer or promise anything of value to:

(i) a student athlete;

(ii) any member of the student athlete's immediate family; or

(iii) any individual who substantially contributes to the economic
support of the student athlete.107

The time frame for the Pennsylvania statute runs until the athlete’s collegiate eligibility expires, no matter what age.108

Louisiana has enacted a unique statute that falls outside the three above categories. The statute allows an agent to give gifts to a student-athlete as long as it does not result in the loss of eligibility for an athlete or in sanctions imposed on the university.109 It clearly fails to capture the essence of the NCAA policy in terms of prohibiting gifts

103. Sudia, supra note 15, at 279. The author argues:

This 'inducement' condition makes a mockery of the statutory prohibition on agent gifts to athletes. The only thing an agent needs to do to evade the statute is provide the athlete with a gift without inducing contract execution or employment. True, one can argue that the only reason an athlete agent would give an athlete anything of benefit or value is to induce that athlete to sign with the agent. The fallacy of this argument, however, lies with the burden of proof and superfluous language. First, as to the burden of proof, one must remember that the prosecution in a criminal case must prove the defendant agent violated the statute beyond a reasonable doubt, and the plaintiff in a civil suit must prove the case-in-chief by a preponderance of the evidence or with clear and convincing evidence.

105. Id.
106. Id.
108. § 3313(8).
109. LA. REV. STAT. ANN. § 4:433 (West 2003). The Louisiana statute reads:

Unlawful Payments; Penalties.

A. Notwithstanding any other provision of this Chapter to the contrary, it shall be unlawful for any person to make or offer a monetary payment, or anything of value to an athlete or any other person where such offer does any one or both of the following:
to student-athletes and maintaining NCAA athletics as an amateur event.

Some states also employ licensing statutes that require an athlete agent to register with the state. Ohio's statute reads as follows:

No person shall serve as an athlete agent in this state unless the person holds a current and valid certificate of registration as an athlete agent issued under section 4771.08 of the Revised Code, a temporary certificate issued under section 4771.08 of the Revised Code, or a temporary certificate of convenience issued under section 4771.09 of the Revised Code.110

However, these registration statutes do little to punish athlete agents from providing benefits to student-athletes.

c. Federal Acts

The federal government has also attempted to regulate athlete agents who engage in improper conduct through passage of the Sports Agent Responsibility and Trust Act of 2004 ("SPARTA").111 Pursuant to section 7802(a)(1)(B), the Act "prohibits a sports agent from giving anything of value to a student athlete or anyone associated with him, until the student athlete has signed an agency contract."112 Section 7801 defines "athlete agent" and also defines the term "student-athlete" similar to NCAA bylaws and state statutes.113 Section 7803 provides that a violation shall constitute an unfair or deceptive act or practice and that the Federal Trade Commission will be responsible for enforcement of SPARTA.114

Section 7804 provides a state cause of action against an agent who engages in illegal conduct and gives the state attorney general the au-

112. Id.
113. § 7801 (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 "student athlete" as "an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, an intercollegiate sport").
114. § 7803.
tority to prosecute. It gives states the authority to bring a civil suit against an agent who has tampered with one of their student-athletes and/or harmed a state educational institution. However, section 7805 takes this a step further and provides that "an educational institution has a right of action against an athlete agent for damages" if the athlete agent and the student-athlete enter into an agency contract before the athlete's eligibility has expired.

At first glance, SPARTA seems to provide the solution to this problem. It expressly prohibits gifts to student-athletes as well as other actions concluded by Congress to be detrimental to collegiate athletics. It grants states and the Federal Trade Commission the power of enforcement. However, SPARTA has also failed to deter unethical conduct any more than the state statutes currently in place.

II. Examination of Why the Current Regulatory Scheme Fails

One of the major reasons that athlete agents have evaded prosecution for prohibited conduct towards student-athletes is because the NCAA lacks legal authority to enforce its bylaws against agents. The NCAA has no jurisdiction to bring an enforcement action against an athlete agent for violating a bylaw because the agent is not a member of the NCAA and lacks incentive to cooperate. This responsibility falls upon the member universities to report the conduct to the state or to bring an action under 15 U.S.C. § 7802.

A. NCAA Bylaws Unenforceable

Recently, an NCAA bylaw was successfully invalidated in an Ohio court action by a student-athlete, who was declared ineligible after an

115. § 7804.
116. § 7805. The damages available to the university may include actual losses and expenses incurred because, as a result of the conduct of the athlete agent, the educational institution was injured by a violation of this chapter or was penalized, disqualified, or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference, or by reasonable self-imposed disciplinary action taken to mitigate actions likely to be imposed by such an association or conference.
117. § 7801.
118. §§ 7801-7807.
119. See discussion infra Section II.C (examining why federal acts have failed to deter unethical agent conduct).
120. Sudia, supra note 15, at 273 ("The NCAA, however, lacks jurisdiction to enforce its rules against athlete agents. The NCAA must enforce its rule through its university constituents.").
121. See NCAA Manual, supra note 1, at § 1.3.2; see also § 7802.
agent reported him to the NCAA. The athlete had retained Robert and Tim Baratta to represent him while he was contemplating bypassing college to play professional baseball. After the student-athlete decided to enroll in a university, he refused to pay the Barattas for their services. Subsequently, it was uncovered that he had signed a contract with the agents and the NCAA declared him ineligible before an NCAA tournament baseball game. The athlete filed a lawsuit against the NCAA to restore his eligibility. The Ohio court ruled that the "no Agent Rule was arbitrary and capricious and NCAA Bylaw 19.7 (the Restitution Rule) was overreaching." Eventually, a settlement was negotiated wherein the NCAA essentially "agreed to pay $750,000 in order to reinstitute both the No Agent and Restitution rules." If a student-athlete can challenge an NCAA bylaw and have it declared void by a court of law, it likely would not prevent an agent from doing so as well.

B. State Statutory Weaknesses

State statutes have also failed to punish and deter athlete agents from engaging in prohibited conduct. The statutes have been criticized as unconstitutionally vague and containing many loopholes in which agents can avoid being prosecuted or penalized. The vagueness results from the fact that they are poorly drafted by state legislatures.

Athlete agents can also escape state statutes by asserting lack of personal jurisdiction. A court of law must possess general or specific jurisdiction over a non-resident defendant for a judgment to be valid. The NCAA Manual, supra note 1, at § 19.7.

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123. Id. at 206.
124. Id. at 207.
125. Id.
126. Id.
127. Morgan, supra note 16, at 305.
128. Morgan, supra note 16, at 314. The Restitution rule permits the NCAA discretion to vacate wins, awards, or championships during the time period in which the player found to have violated NCAA bylaws participated. NCAA Manual, supra note 1, at § 19.7.
129. Sudia, supra note 10, at 85-91.
130. Sudia, supra note 10, at 85. The author provides an example of poor statutory drafting: The Oklahoma statute then includes within the definition of "athlete agent" the term "athlete," a term that the statute does not define. The Oklahoma legislature then proceeded to define the term "Oklahoma non-NCAA athlete" and made several provisions of the statute applicable only to such athletes. The end result achieved by Oklahoma amounts to a statutory piece of artwork containing incomprehensible definitions and provisions.
131. Sudia, supra note 10, at 87-88.
valid and given full faith and credit. The problem with the statutes is that they “flourish with unconstitutional attempts at obtaining jurisdiction over non-resident athlete agent defendants.” Most of them attempt to stretch their jurisdiction where there is no general personal jurisdiction, and the non-resident athlete agent lacks the requisite minimum contacts for specific personal jurisdiction. Therefore, if an athlete agent receives a complaint from a foreign state court where he conducted minimal business, he only need assert lack of personal jurisdiction to escape penalty.

State statutes are also full of loopholes and exemptions which allow athlete agents the opportunity to escape punishment. An example is one that requires the athlete agent “induce” the student-athlete into signing an agency contract. This is an implicit loophole that an athlete agent may claim as a defense to punishment. It is nearly impossible to prove the subjective intent of an athlete agent who has knowledge that the statute includes the inducement requirement. There are many methods the agent may use to offer gifts to a student-athlete while appearing like he did not intend to “induce” the student athlete into signing a contract. Consider the situation in which an agent leaves a gift at the dormitory door of a student-athlete on his birthday without mention of signing a contract. It would be unlikely that sufficient evidence of inducement could be offered by the prosecution. It cannot be proven beyond a reasonable doubt that it was left in exchange for signing a contract. This is further complicated if the agent employs a runner to deliver the gift without the agent’s physical presence. Moreover, these state laws have been ineffective because “there have been relatively few cases where agents have seen any real

132. Sudia, supra note 10, at 87.
133. Sudia, supra note 10, at 88.
134. Sudia, supra note 10, at 88. The author notes:

The Ohio statute serves as one of the worst abuses of due process principles. The Ohio statute provides that ‘a court may exercise personal jurisdiction over an athlete agent who resides or engages in business outside [Ohio] as to a cause of action arising from the athlete agent entering into an agent contract with a student-athlete outside [Ohio] without complying with section 4771.02 of the Revised Code.
135. Sudia, supra note 10, at 89.
137. Sudia, supra note 10, at 90.
138. Sudia, supra note 10, at 91.
139. Runners are people employed by agents to make contact with student athletes without the agent having to be present. See Dohrmann, supra note 14 (detailing how Josh Luchs and other agents made contact with athletes).
jail time and the prospect of fines is not a true deterrent in [the] industry."\(^{140}\)

For example, in *Abernathy v. State*, an Alabama appellate court reversed the conviction of a sports agent who gave an Auburn University football player monthly payments and $100 per every interception he made.\(^{141}\) Not only did the court refuse to apply the Alabama Athlete Agents Regulatory Act, but it stated that "[m]ere tampering with a player's eligibility in violation of N.C.A.A. rules is not a criminal offense unless done with the specific intent to influence the outcome of a sports contest."\(^{142}\) The court went on to hold that the agent could not be convicted of tampering and that his retrial was barred by double jeopardy.\(^{143}\) The prosecutors were accused of stretching the four corners of the tampering statutes and the trial judge doubted that they were even applicable to the case.\(^{144}\)

**C. Federal Acts No Stronger**

Federal acts have also failed to prevent athlete agents from providing gifts to student-athletes. The recently enacted Sports Agent Responsibility and Trust Act of 2004 has been criticized as "no stronger than deterrents that have already proved unsuccessful."\(^{145}\) Although SPARTA has created a cause of action for educational institutions against the athlete agents, "[i]t seems that the problem lies in the penalties, remedies, and potential deterrents the statutes attempt to employ."\(^{146}\) Therefore, because it is essentially a uniform set of state-like statutes, it will likely provide no more deterrence than the state statutes that are already in place. There are few, if any, cases that have been brought under SPARTA.\(^{147}\)

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142. *Id.* at 188, 191.

143. *Id.* at 191.

144. *Id.* at 190.


146. Willenbacher, *supra* note 140, at 1243 ("First, finding an unfair or deceptive act or practice affecting commerce will only cause the FTC to order the actor to cease such activity. If the actor continues the unfair practice, the Commission may then seek a maximum civil penalty of $11,000 for each act. This fine is certainly on par with criminal and civil penalties that already exist on state and federal levels.").

147. This conclusion is the result of an extensive Westlaw and Lexis search for relevant cases.
Other more creative attempts to use federal law to punish agents have also failed, such as use of the federal mail fraud statute.\textsuperscript{148} Two sports agents, Norby Walters and Lloyd Bloom, were convicted in district court, but the Seventh Circuit later reversed the conviction on other grounds.\textsuperscript{149} However, the appellate court failed to reach a decision on the challenge to the government’s novel interpretation of the statute.\textsuperscript{150} Therefore, some argue that the mail fraud statute may be a creative deterrent to athlete agents with certain obvious limitations.\textsuperscript{151}

\section*{III. The Solution}

According to one commentator, “[w]hen you have people who need to win, rules don’t apply.”\textsuperscript{152} This statement represents the attitude of agents who compete to sign premier college athletes. Their blatant lack of respect for the NCAA’s bylaws can be analogized to Southern Methodist University’s (SMU) booster club who paid players to play for the football team, which resulted in the imposition of the “death penalty.”\textsuperscript{153} During the SMU scandal, the NCAA handed down the

\textsuperscript{148} United States v. Walters, 913 F.2d 388 (7th Cir. 1990). The two agents were charged with offering college football players money, cars, gifts, and trips in return for signing contracts with the agents to represent them during their professional careers. \textit{id.} at 389. Each player signed a post-dated contract which was kept by the agents until the players’ eligibility expired. \textit{id.} at 390. The government’s argument was that the agents’ “plan of signing college athletes in violation of NCAA rules constituted a scheme to defraud universities of their property interests in athletic scholarships.” Cox, \textit{supra} note 65, at 1158.

\textsuperscript{149} Walters, 913 F.2d at 939 (reversing the judgment because the trial judge failed to issue an advice of counsel jury instruction).

\textsuperscript{150} Cox, \textit{supra} note 65, at 1159.

\textsuperscript{151} \textit{id.}

\textsuperscript{152} \textit{PONY EXCESS} (ESPN Films 2010). The quote above opens the film and is spoken by the director of \textit{Pony Excess}, Thaddeus D. Matula.

\textsuperscript{153} \textit{id.} The SMU scandal involved a secret membership of SMU boosters who recruited high school football players to sign letters of intent with the university through substantial payments and gifts during the 1980s. \textit{id.} Numerous athletes were given upwards of $150,000 to play football for SMU. \textit{id.} When SMU began stealing away top recruits from other national powerhouse programs, the NCAA began investigating and found that one athlete, Sean Stopperich, had received $5,000 and other benefits to play for SMU. \textit{id.} The NCAA placed SMU on probation and also took action by amending the NCAA bylaws to include the “repeat violators” rule, which later became known as the “death penalty.” \textit{id.} The “death penalty” stated that if a school was found in violation of NCAA rules twice within five years, the program would be terminated for an entire season. \textit{id.} Within five years of the first violation, another SMU recruit, who was expelled from the university due to drug abuse, appeared on national television and confessed that he received payments to attend SMU. \textit{id.} The athlete, David Stanley, cooperated with the NCAA. \textit{id.} On February 25, 1987, NCAA director of enforcement, David Berst, announced the termination of the football program for the 1987 season and allowed no more than seven games in 1988, none of which could be played at SMU. \textit{id.} The news was so shocking that Berst actually fainted after he had made the announcement. \textit{id.} The “death penalty” dealt to SMU left its football program in ruins for over 20 years. \textit{id.}
most severe punishment ever imposed on a university. The NCAA terminated SMU’s football season for one year and severely limited games during the next few seasons. The rationale for the punishment, as stated by NCAA investigator Dan Beebe, was that “[SMU] just didn’t get the fact that they couldn’t continue to do this [violate NCAA rules].” Although the proposed solution may be viewed as Draconian by current agents, it is justifiable because agents should understand that they cannot continue to compromise college athletics without consequence.

A. State Licensure

Although numerous states already have licensure requirements in place, they are simply not enough. The current licensure statutes contain no requirement that athlete agents also function as licensed attorneys. Therefore, the average person who complies with skeletal provisions of the statute may become a licensed athlete agent in that state. If the average agent is required to be an attorney, they are consequently held to a higher standard of conduct and must comply with legal ethics rules. They are also subject to punishment.

To increase functionality of the licensing statutes, the statutes should contain a clause that requires a person registering as an athlete agent to be a licensed attorney. Such a clause may read:

No person shall serve as an athlete agent in [state] unless they have obtained a Juris Doctor from a graduate law school course of study and achieved passage of the bar examination of [state]. In addition, no person shall become a licensed athlete agent until they have demonstrated [compliance with state licensing standards].

The licensed attorney requirement serves many legitimate purposes other than notification to the state of one’s intent to become an athlete agent. Presently, non-lawyer athlete agents arguably engage in the unauthorized practice of law. Their ignorance of the law results in non-lawyer agents drafting unconscionable and non-conforming contracts that “typically [give] the agents full power of attorney over the

154. Id.
155. Id.
156. Id.
157. See OHIO REV. CODE ANN. § 4771.06 (West 2006) (detailing the language of an Ohio statute that does not contain any licensing requirement).
financial matters of the player." In an attempt to make a profit, agents negotiate unfair contracts with student-athletes who possess little contract knowledge and bargaining power.

For example, in Walters v. U.S., the athletes who entered into contracts with the defendants were threatened with physical violence if they wanted to rescind the contract. It must be remembered that college athletes are mostly young adults between the ages of eighteen and twenty-two. These athletes have minimal experience with negotiation and may be taken advantage of by an athlete agent who pressures a young athlete into signing away a portion of his professional paycheck through sophisticated sales puffery or violence.

Moreover, in Cottrell v. NCAA, the court described a contract between a University of Alabama football player and an agent that was written on a napkin. The agreement stated the agent agreed to represent the student-athlete for $400. The athlete did not notify anyone that he signed with an agent. This is another example of the unsophisticated nature of many agents and why attorney licensure is necessary.

Although it is arguable that a lesser regulatory scheme may suffice, it would not prevent the conduct that is occurring. Professional licensing does not stop the unlicensed practice of law, and revoking licenses is not enough to deter agents from giving gifts to athletes. If a shady agent loses their license, he may simply ask a friend to become licensed just to comply with the state requirements. The unlicensed agent can keep giving benefits to the athlete and the newly licensed agent can give the unlicensed agent a percentage of the contract. On the other hand, a lawyer must comply with the ethical requirements.

159. Cox, supra note 65, at 1175 (noting that the Walters representation contracts failed to meet NFLPA [National Football League Players' Association] guidelines).

160. Cox, supra note 65, at 1174 (discussing that the "secret nature of the [Walters] contracts, combined with the players' youth and inexperience, did not provide the best setting for a fair exchange between parties" and that the players were unsophisticated in bargaining for a representation contract).


162. Cox, supra note 65, at 1174-75 (discussing that the athletes represented by Walters and Bloom "had never before signed or negotiated a contract such as the one presented by [the agents]" and the agents talked so fast they never had a chance to think for themselves).


164. Id.

165. Id.

166. For example, health professionals must be licensed to practice medicine and the state can investigate complaints and revoke licenses. See LARA – Licensing for Health Care Professionals, MICHIGAN.GOV, http://www.michigan.gov/lara/0,1607,7-154-27417_27529---,00.html (last visited July 6, 2011).
the profession entails and stands to lose more than his license—his ability to practice law.

B. State Adoption of Model Rule 8.4

Most importantly, requiring athlete agents to become attorneys grants state bar associations the authority to bring an action before an ethics committee for a violation of the Model Rules of Professional Conduct.167 Lawyers must comply with the Model Rules,168 but only because the state has adopted some form of them through its highest court.169 The Model Rules and the American Bar Association (ABA) have no authority to discipline lawyers and no control over the state’s own ethical rules.170 Because representing an athlete will be considered within the scope of their duties as an attorney, state bar associations can discipline lawyer agents who violate any of the Model Rules which the state has adopted.171 For example, Model Rule 8.3 provides that lawyers must report misconduct by other lawyers, which imposes a greater duty on lawyer agents.172 Not only will agents face discipline for their own actions, but they may be held accountable for actions of other agents whom they know engage in misconduct.

Although no Model Rule addresses the issue of agents conferring benefits upon student-athletes, Model Rule 8.4 provides the means of discipline. First, to become binding, states should adopt Model Rule 8.4173 so enforcement can be sought by state bar associations. Other-

167. LISA G. LERMAN & PHILIP G. SCHARG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 25 (Vicki Been et al. eds., 2nd ed. 2008) (noting that state courts delegate authority to regulate the conduct of the lawyers within its state to the state bar association).

168. The Model Rules of Professional Conduct are drafted by the American Bar Association to govern the conduct of lawyers. An ABA committee of lawyers and scholars drafts a rule which is then debated, amended, and eventually passed by the ABA. The state’s highest court can then accept, reject, or amend the rule to incorporate state policies. Id. at 27-28.

169. Gillers, supra note 66, at 3.

170. Id.

171. Lerman, supra note 167, at 25-26 (discussing that state bar associations establish disciplinary committees called “bar counsels or disciplinary counsels”).

172. Lerman, supra note 167, at 97-98.

173. Model Rule 8.4 states:

It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) Engage in conduct that is prejudicial to the administration of justice; (e) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rule of judicial conduct or other law.
wise, the rule is powerless until adopted by the state. This is done by the highest court in the state, which is responsible for promulgating the rules that govern lawyer conduct within its borders. State courts delegate some responsibility of enforcement upon the state bar association. State bar associations often create disciplinary agencies made up of lawyers called "bar counsel's offices," which investigate and prosecute misconduct. Rule 8.4 should be adopted because it is a sound catch-all rule that can be used to target agent lawyers who act unethically and prosecute them for fines, sanctions, or even disbarment. As one commentator notes:

This provision is a kind of catch-all that exhorts people to act honorably, without defining the behavior that could cause a lawyer to be disciplined or even disbarred. It has been challenged on the ground that it is unconstitutionally vague, but all of the challenges have been rejected by the courts.

Subsections (b) and (c) provide the most teeth to punish agent lawyers who provide gifts to student-athletes. Violating NCAA bylaws or lying to NCAA investigators would constitute a violation of subsection (c) because it involves dishonesty and deceit. Moreover, any violation of a state athlete agent statute would suffice as a violation of the rule under subsection (b); committing a criminal act that reflects poorly on the lawyer's honesty.

Model Rule 8.4, is unlikely to be invalidated with claims of unconstitutional vagueness, over-breadth, or lack of personal jurisdiction. Most states already have some form of Rule 8.4 adopted into their legislation with amendments or deletions.

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**Model Rules of Prof'l Conduct R. 8.4 (2002).**

174. Gillers, supra note 66, at 3.
175. Lerman, supra note 167, at 20 (noting that the state's highest court is responsible for enforcement of the rules and that the courts consult the state bar association when drafting the rules).
176. Lerman, supra note 167, at 25.
178. Lerman, supra note 167, at 726.
179. See infra note 184 and accompanying text (discussing NCAA's investigative procedures).
180. Many of the state statutes provide for a civil cause of action against the agent but also make it a criminal act to violate a section of the state's athlete agent statute. For example, providing "transportation, material goods, or any other services to an athlete" is a first degree misdemeanor in Ohio. **Ohio Rev. Code Ann. §§ 4771.17(K), 4771.99(A)** (West 2006).
181. Many of the state versions of the ABA Model Rules of Professional Responsibility have been challenged as "vague" and "overbroad," but these claims have failed. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075-78 (1991) (holding that ABA Model Rule 3.6 was not overbroad or vague); see also People v. Meier, 954 P.2d 1068, 1071 (Colo. 1998) (holding that Colorado's version of Model Rule 8.4 was not unconstitutionally vague).
182. For example, Ohio has adopted Model Rule 8.4 but adds 8.4(g)-(h), making it professional misconduct for a lawyer to engage in any conduct that discriminates according to race,
coaches, and athletes may then report improper conduct to the NCAA or state bar associations and disciplinary committees may sanction athlete agents who violate NCAA rules.\textsuperscript{183}

Additionally, this will help the NCAA investigation process. The NCAA investigates allegations of possible violations itself.\textsuperscript{184} Because the NCAA cannot force witnesses to cooperate or obtain subpoenas, it often deals with untruthful and reluctant witnesses.\textsuperscript{185} As previously noted, current athlete agents cannot be punished by the NCAA.\textsuperscript{186} Therefore, they have little incentive to truthfully respond to investigators attempting to uncover wrongdoing. However, if athlete agents are lawyers, they would be required to respond truthfully and cooperate under Model Rules 8.3 and 8.4.\textsuperscript{187}

\section*{C. Disbarment as the “Death Penalty” for Athlete Agents}

After almost a decade of repeatedly violating NCAA rules by paying football players, SMU was dealt the “death penalty.”\textsuperscript{188} As put by one member of the Dallas media, “[t]he death penalty was a horrible penalty, but something had to stop what was going on at SMU.”\textsuperscript{189} In the aftermath, the “death penalty” put an end to the booster payoffs, but left a college football program in shambles for over two decades.\textsuperscript{190} Nonetheless, the SMU situation provides an example of how to effectively prevent NCAA violations. In regard to the current case of unethical agents, something has to stop what continues to occur throughout college athletics.

The state bar associations punish lawyers who violate the Model Rules of Professional Conduct by issuing a private or public reprimand, fines, or even disbarment.\textsuperscript{191} In order for this system to effectively deter unethical behavior by athlete agents, punishment for

\textsuperscript{183} See discussion infra Section III.C (briefly describing how disciplinary committees disbar lawyers).
\textsuperscript{184} Michelle B. Hosick, \textit{Many NCAA Infractions Cases Move Quickly, But Complications Can Slow the Process}, NCAA.ORG, (Dec. 1, 2010) http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/How+We+Work/Enforcement+process/Infractions (detailing the process by which the NCAA investigates possible violations and noting that the NCAA does not possess the same authority as a court of law).
\textsuperscript{185} Id.
\textsuperscript{186} See discussion supra Subsection I.B.2.a.
\textsuperscript{187} See discussion supra Section II.A.
\textsuperscript{188} \textit{PONY Excess}, supra note 152.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Lerman, supra note 167, at 75.
providing gifts to a college athlete should range from suspension of the agent license to complete disbarment as an attorney. As previously noted, fines have not been an effective deterrent in this industry.\textsuperscript{192}

For example, the North Carolina State Bar has the power to reprimand and disbar lawyers who violate the Model Rules of Professional Conduct.\textsuperscript{193} In North Carolina State Bar v. Alston, Jr., the North Carolina Bar Association punished a lawyer who violated multiple professional responsibility rules by disbarring him.\textsuperscript{194} Because the lawyer misappropriated his client's funds and there was a pattern of misconduct and multiple offenses, he was disbarred and ordered to pay the fees for the action against him.\textsuperscript{195} This method will be effective at punishing lawyer agents who continually violate NCAA rules.

Although the above requirements and punishment seem drastic, they provide a solution to the current problem. Critics will argue this strategy is too burdensome on current athlete agents, requiring an investment of tens of thousands of dollars for law school.\textsuperscript{196} It will also entail states to amend or create licensing statutes.\textsuperscript{197} However, the benefits substantially outweigh the burdens. These strict standards will effectively eliminate those who do not possess the ethical standards required to be a responsible agent. It will also create a higher standard of competency in the athlete agent profession. Law schools teach ethics and the importance of maintaining a professional reputation, not only for one's own benefit, but for the benefit of the profession.\textsuperscript{198} Viewed from a utilitarian perspective, it is more important to protect the numerous student-athletes and universities that make college athletics entertaining.

\textsuperscript{192} See discussion supra Section II.B (noting that fines and threats of jail time have not solved the problem).


\textsuperscript{194} Id. at 32-34.

\textsuperscript{195} Id. at 33-34.


\textsuperscript{197} See discussion supra Section III.A (explaining the need for states to adopt or amend licensure requirements for agents).

\textsuperscript{198} It is argued that the occupation of law is self-regulating which promotes competency and assures the public that lawyers are trustworthy and not self-interested. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS, 15 (Vicki Been et al, eds., 8th ed. 2009).
D. Incentivized Reporting: A Circular Balance of Powers

Allegations of wrongdoing must be reported to the NCAA and the bar associations so sanctions can be administered and wrongful conduct deterred. As Oklahoma head football coach Bob Stoops mentioned,199 the current system provides little incentive for student-athletes, coaches, parents, and university administration to report allegations.200 Reporting that a student-athlete took a benefit from an agent reflects poorly on the university and its coaches and may result in NCAA sanctions.201 The student-athlete does not want to report misconduct because she will face suspension or loss of eligibility.202 Furthermore, parents and friends do not want to cause the athlete to lose his or her scholarship or playing time.

The SMU scandal reached its breaking point when former player David Stanley was refused readmission into SMU so he could complete his degree.203 After he was denied admission, he cooperated with the NCAA.204 Dale Hansen of WFAA Dallas, who reported the David Stanley story, described it accordingly: “When a booster thinks he buys the athlete, the problem is the athlete actually owns him.”205 This is the type of scenario that should be created with regard to athlete agents. Currently, if an athlete agent provides a student-athlete with a car to induce the athlete to sign with the agent, the agent “owns” the athlete because the athlete is also violating NCAA rules.206 If the athlete reports the agent, he is reporting himself. No athlete wishes to turn themselves in to the NCAA. While the agent may lose the athlete, he will most likely not face any harsh penalties for his behavior.

199. See ESPN.com, supra note 51.
200. See Cottrell v. NCAA, 975 So.2d 306 (Ala. 2007) (noting that the athlete failed to disclose the fact that he had signed with an agent to the university); see also ESPN.com, supra note 51 (mentioning Stoops’ suggestion that there is no incentive for players).
201. See Witz, supra note 9 (discussing the sanctions dealt to USC by the NCAA in the aftermath of the Reggie Bush scandal).
202. See Beard, supra note 6 (detailing the dismissal of two UNC football players after they were found to have received improper benefits from an agent).
203. Stanley was a paid recruit who was removed from the team and expelled from SMU after drug abuse. Pony Excess, supra note 152. He accepted his removal from the team but asked SMU administration that they reinstate him into school so he could finish his degree. Id. SMU refused and he decided to blow the whistle on the entire scandal, which eventually caused SMU to receive the “death penalty.” Id.
204. Pony Excess, supra note 152.
205. Id.
206. The student athlete will also violate NCAA Bylaw 12.3.1.2 for accepting a gift from an agent and will be declared ineligible for athletic competition. NCAA Manual, supra note 1, at § 12.3.1.2.
To solve this problem, student-athletes should be granted immunity for their wrongdoing in order to incentivize reporting agent misconduct, a solution also endorsed by Bob Stoops.\textsuperscript{207} Immunity should only be granted if the athlete reports their actions before they are caught or fully cooperate with the investigation when they are caught. The student-athlete must then issue a public apology for his actions and donate the ill-gained benefits to a charitable organization. This retribution coincides with NCAA Bylaw 16.01.1.1, which allows an athlete who receives a benefit of $100 or less to return the benefit to charity to regain their eligibility.\textsuperscript{208} However, the $100 limit should be removed to allow for benefits of any monetary value to qualify. If student-athletes can repent past wrongs, they will be much more likely to report the agents who exploit the system.

It can be argued this regime creates no incentive for student-athletes to refuse benefits from agents. Assuming, \textit{arguendo}, there is no incentive, this regime creates a much larger problem for the agents and shifts the burden onto them. The athlete can report the agent to the NCAA, who will in turn be able to report to the state bar and bring an enforcement action. Therefore, it becomes too precarious for athlete agents to confer gifts upon student-athletes. The athlete now has the power to demand more money, reinforced by threats that he will report the agent's wrongdoing to the proper authority. "When you give a player the leverage of they know you paid them and you know you paid them, that's the leverage you don't want a college kid to have, and then to go take something away from them, they're going to use that leverage on you."\textsuperscript{209} The student-athletes become de facto whistleblowers. With the risks of disbarment looming, lawyer agents will think twice about offering benefits to collegiate athletes.

It may be further argued that this system will fail to catch athletes and agents in collusion where the violation may never be uncovered. If an athlete accepts benefits from an agent and is satisfied, he will never report the violation if he is never caught. In turn, the agent will also never disclose the behavior. Realistically, many of these "perfect" schemes are unlikely to succeed because college sports are highly scrutinized by the media.\textsuperscript{210}

\textsuperscript{207} See ESPN.COM, \textit{supra} note 51 (pointing out that Stoops believes players should be granted amnesty).

\textsuperscript{208} NCAA MANUAL, \textit{supra} note 1, at § 16.01.1.1.


\textsuperscript{210} Ethan J. Skolnick, \textit{In Modern Sports Coverage, It's All Fair Game}, NBCSPORTS.COM (Aug. 4, 2008), http://nbcSports.msnbc.com/id/25998182/ (noting that athletes' lives are not private anymore and that once an athlete becomes a public figure, everything is open for scrutiny).
These incentives should also apply to coaches. In the midst of the Reggie Bush scandal, Pete Carroll was accused of turning his head while the violations took place and resigned as USC’s coach just before the scandal broke. Coaches do not wish to expose their players’ wrongdoings because it leads to loss of scholarships, loss of postseason games, and bad publicity for the university and team.

If a player notifies the coach and the coach reports the violation, the coach should also be granted immunity. A complex situation arises when an athlete conceals his reception of benefits, but the coach subsequently discovers the conduct. In this case, the coach will likely be looking out for his job and his team. If he suspects that the NCAA will sanction the team for reporting the misconduct, he is less likely to disclose. However, the coach has incentive to report if the NCAA is only able to sanction the agent. If the coach reports the conduct, he will save his team from NCAA sanctions while the player and agent will bear the punishment for their actions. In addition, the possibility that an athlete will be singled out and embarrassed for wrongdoing further incentivizes compliance. This circular balance of powers may solve this widespread problem.

E. The Reggie Bush Scandal Revisited

The Reggie Bush scandal rocked the college football world and resulted in one of the stiffest punishments handed down by the NCAA. Today, Bush has moved on and is now a prominent NFL player and 2010 Super Bowl champion. USC, on the other hand, is still facing the repercussions of Bush’s actions. Because many of the details have been released, it is useful to examine how this scandal could have been prevented and mitigated if the proposed measures were in place.

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211. O’Neill, supra note 8. The situation with Pete Carroll abruptly leaving USC before the Reggie Bush scandal broke is similar to SMU head football coach Ron Meyer leaving for the NFL while the NCAA was investigating SMU for recruiting violations. Skip Bayless, a member of the Dallas media described it as, “Ron Meyer made a move to exit stage right before the stuff hit the fan.” Pony Excess, supra note 152. Another commentator described it as, “The posse was getting close. The NCAA investigation was heating up and Ron Meyer left just in time.” Id.

212. See Witz, supra note 9 (listing the sanctions imposed on the USC football team for NCAA violations).

213. See discussion infra Section I.A.


215. See discussion infra Section I.A.
Bush was provided prohibited benefits in excess of $100,000 from agents Michael Ornstein, Lloyd Lake, and Michael Michaels. This is a violation of NCAA Bylaw 12.3.1.2, which prohibits the acceptance of gifts by a student-athlete from an agent. Both Bush and his family were provided benefits, creating a situation in which the family does not want to report the agent misconduct because they are also indebted to the agent. If the family reports the misconduct, the benefits are taken away and Bush will be ineligible to play. Bush obviously does not want to report his wrongdoing because he knows he will put himself and his team at risk. In this context, the agent has the power to report Bush to the NCAA if Bush decides to quit cooperating. Bush will then be ineligible to play and USC will be investigated by the NCAA.

If Bush knew that he would have been immune from sanctions, this may have drastically changed the outcome. He may have decided to come clean with what he had received from the agents. This would have prevented the NCAA from severely sanctioning USC and tarnishing Bush's legacy. He would have been able to report the agents' misconduct while saving himself from ineligibility and the agents would be subject to disciplinary action.

There was speculation that Pete Carroll knew about the benefits as well. If he could have saved his star player from ineligibility, he may have persuaded Bush to come clean. This creates an incentive for Pete Carroll to put a stop to the benefits in order to save his team, his university, and maybe his job. Because Ornstein, Lake, and Michaels would be required to be licensed attorneys under the new system, they would be subject to a disciplinary action by the state bar for, inter alia, a violation of Model Rule 8.4. If the conduct was found to be a severe violation by the NCAA, they would be disbarred and never represent a student-athlete again.

Meanwhile, Bush would return the benefits he received to the charity of his choice. He would be able to continue his illustrious col-

216. Robinson, supra note 37.
217. See discussion supra Section I.B.2.a (discussing NCAA bylaws that prohibit gifts from agents).
218. Robinson, supra note 37 (noting that benefits were given to Bush and his family).
219. See discussion supra Section III.D (explaining the balance of power between the athletes and agents).
220. See discussion supra Section I.A (detailing the NCAA sanctions dealt to USC).
221. See O'Neil, supra note 8 (criticizing Pete Carroll's actions).
222. Immunity is proposed for players and coaches who report misconduct. See discussion supra III.D.
223. See discussion supra Section III.D (arguing that athletes should be granted immunity for their actions if they return the benefits to charity and issue a public apology).
lege football career, enter the NFL draft, and earn a legitimate salary. He would not have returned his Heisman Trophy and USC would not have forfeited their 2004 BCS National Championship. The USC football team would not have lost scholarships or postseason bowl appearances. Moreover, Pete Carroll would not be criticized in the media for turning a blind eye to the scandal. Instead of a villain, Bush might be viewed as a hero. He might be recognized as the athlete who put his team and university ahead of himself. Bush’s legacy as an outstanding college running back would live on and his brief transgressions might soon be forgotten.

**CONCLUSION**

If the NCAA intends to maintain its policy of amateur student-athletes and prevent further tarnishing of its reputation, then stricter penalties must be implemented. In the 1980s, the NCAA put a stop to SMU boosters who paid athletes to play for their football team by enforcing the “death penalty.” Although the punishment involved boosters, it can be used as a paradigm to solve the current agent problem. With new allegations of NCAA violations emerging frequently, the law must adapt to the current situation surrounding college athletics. The “death penalty” must be dealt to agents who continually provide benefits to student-athletes and ignore NCAA regulations. The proffered solution, requiring agents to be licensed attorneys, promotes accountability for wrongdoing agents and effective deterrence of prohibited behavior in an inherently unethical and competitive climate.

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224. See *supra* note 12 (noting that USC has returned Bush’s Heisman trophy in an effort to restore its reputation).

225. See Zinser, *supra* note 30 (reporting that the NCAA stripped USC of its 2004 national championship due to the conduct of Reggie Bush during his tenure as a USC running back).


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