

Conflicts of Interest and the Shifting Paradigm of Athlete Representation

Scott R. Rosner*

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* Lecturer, Legal Studies Department, Wharton School, University of Pennsylvania. Professor Rosner thanks Craig Fenech, Douglas Frenkel, Mike Principe, Kim Rosner, Kenneth Shropshire, and John Walton for their valuable feedback and Kenny Nick for his contribution to the first draft of this article.

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I. INTRODUCTION

The modern day sports agent is more than a negotiator of contracts. The sports agent must also be a psychologist, babysitter, social planner and counselor for his clients. In addition, full service agencies now perform a variety of services for their clients, including financial management and accounting, athletic training, public relations, investment, tax and estate planning and legal counseling.¹ Members of the sports agent industry are in fierce competition to sign athletes.² Yet the “landing” of a client is often only the beginning of the recruiting process. Even after a sports agent signs a client, other agents will continue to pursue the athlete. Thus, agents are under constant pressure to keep the client happy or risk “losing” him to another agent.³ These demands have made client maintenance increasingly difficult for many of the

¹ Bryan Couch, *How Agent Competition And Corruption Affects Sports And The Athlete-Agent Relationship And What Can Be Done To Control It*, 10 SETON HALL J. SPORTS L. 111, 112 (2000); see also Kenneth Nick, *Conflicts Arising from Consolidation in the Sports Agency Industry*, N.Y. ST. B.A. ENT. ARTS & SPORTS LAW J., Summer 2001, 13-19.

² The ratio of players to agents evidences the level of competition in the industry. In 2002, there were 1900 players in the NFL and 1196 certified agents, 800 of whom had no clients playing in the League. Fifty agents represent fifty percent of NFL players. Mike Freeman, *Players Union Taking Steps to Exert More Control Over Agents*, N.Y. TIMES, Mar. 10, 2002, §8, at 5. In 2001, the NHL had 690 players and 186 certified agents. There were 1200 players on the 40-man rosters and 750 players on the 25-man rosters of Major League Baseball teams; however, only 328 agents certified by the Major League Baseball Players Association had clients. In the NBA, there were approximately 350 players and 350 registered agents, but fewer than 100 had clients in the NBA. Mark Fainaru-Wada & Ron Kirochick, *Agents of Influence: Massive Conglomerates Now Wield Tremendous Power Over the Games You See on the Field*, S.F. CHRON., Mar. 11, 2001, at C1.

³ Sports agent Steve Kauffman recently stated, “In our business, we have a theory: Every hour of every day, directly or indirectly, someone is trying to steal your client.” Mark Hyman, *Sparks Fly at SFX*, BUS. WK., June 25, 2001, at 68. It is widely thought that client

small firms and independent agents that cannot offer the same range of services as the large agencies. This has led to a structural change in the sports agent industry, with numerous previously independent agents forming conglomerates in an effort to stay equipped to service today's professional athlete.

Sports agency consolidation has been spurred in part by the dramatic increase in athlete salaries over the past decade. The prospect of capturing the additional revenues available from the corresponding increase in the fees generated from agent commissions,⁴ and the potential integration of athletes into other existing areas of their businesses, has lured several historically non-sports related companies to the sports agent industry. Some have predicted that this trend will continue in the future.⁵ The intersection of a highly competitive marketplace chasing a highly compensated athlete in a largely unregulated environment predisposes the sports agent industry to ethical dilemmas.⁶ The synergies sought by consolidation leads to an increased likelihood of yet another ethical dilemma—conflicts of interest. Though often difficult to prove, these conflicts may be manifested in several forms and are becoming widespread, yet the stakeholders—the large agencies, the independent

stealing is currently at its all-time worst. *See, e.g.,* Liz Mullen, *Sleaze Factor Off the Charts, Agents Allege*, SPORTSBUSINESS J., June 24, 2002, at 1, 30.

⁴ An agent representing a player in certain leagues “who signs for \$10 million over four years stands to earn \$400,000, or four percent over that four-year period, not including endorsement contracts, where the athlete’s earnings often exceed the value of the player’s contract.” Couch, *supra* note 1, at 113-14. The NFL, NBA and MLB players associations impose compensation regulations on agents for the playing contract only. In the NBA, the agent is limited to a \$2000 maximum fee if a player makes the league’s minimum salary or a 4% maximum if a player makes more than the minimum. In the NFL, the agent may earn a 3% maximum fee. In MLB, there is no maximum fee proscribed, but a player must make the League’s minimum salary after paying the agent’s fee. The NHL has not established any limitations on the fee that the agent may earn. In practice, competition among sports agents frequently results in the athlete paying less than the maximum fee. The players associations do not set limits on the fee that the agent receives for performing other services. For example, the fee for negotiating an endorsement contract is typically between twenty and twenty-five percent of the value of the contract. Richard Sandomir, *Sale of Agency Opens New Doors for Falk and Client*, N.Y. TIMES, May 6, 1998, at C6. This increased fee reflects the important role that the agent has in arranging such deals.

⁵ Sports agent David Falk stated, “I do think that there will be a consolidation in the business. I do think that one of the things that’s going to differentiate agents is their ability to do things other than negotiate contracts, whether it’s financial services, marketing, public relations, entertainment.” *Q & A: David Falk*, SPORTSBUSINESS J., May 17, 1999, at 30.

⁶ Robert E. Fraley & F. Russell Harwell, *The Sports Lawyer’s Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM. & ENT. L.J. 165, 191 n.132 (1989).

agent, the players associations, the individual athletes and the leagues—have largely ignored this situation thus far.⁷

Part II of this article discusses the business justification for this strategy. Part III presents the history of consolidation in the sports agency industry. Additionally, it discusses the four major corporations involved in this process. Part IV is an analysis of the conflicts of interest created from consolidation in the sports agency industry. In addition, a situation involving a consolidated sports agency illustrates the manner in which these conflicts of interest occur. Part V establishes the tenets of the applicable agency and professional responsibility laws and applies them to this movement. Part VI discusses the efficacy of the consolidated sports agency business model. Part VII offers solutions to these conflicts of interest dilemmas. The article concludes in Part VIII.

II. BUSINESS JUSTIFICATION FOR CONSOLIDATION IN THE SPORTS AGENCY INDUSTRY

Almost nonexistent several decades ago, in a time when sports franchises typically negotiated directly with athletes, the once-small business of sports agents has become a lucrative industry. Sports agents were long excluded from the negotiation process by teams that refused to negotiate with them.⁸ The athletes who played for teams that did negotiate with agents were represented by relatives, friends or individuals who represented them in other matters.⁹ The Major League Baseball Players Association (“MLBPA”) collectively bargained for

⁷ Jamie E. Brown, *The Battle the Fans Never See: Conflicts of Interest for Sport Lawyers*, 7 GEO. J. LEGAL ETHICS 813, 814 (1994).

⁸ One oft-repeated story is that former Green Bay Packers coach Vince Lombardi traded star offensive lineman Jim Ringo because he had the audacity to arrive at a contract negotiation with an agent. DAVID MARANISS, WHEN PRIDE STILL MATTERED 354 (Simon & Shuster eds., 1999). The situation in Major League Baseball mirrored the NFL. Donald Fehr, Executive Director of the Major League Baseball Players Association, states:

The clubs' position at the time was very, very simple. In essence, clubs would tell players, "You are my potential employee, or you are my actual employee, and if you want to talk to me about a new contract or a raise, I will be glad to talk to you, by yourself, on my terms, for as long as I want to, and you cannot bring anyone with you." In those days, the circumstances were such that if you showed up with an agent, (if the meeting was not canceled immediately) the agent remained out in the hall. Every once in a while the player would be permitted, if his personality was strong enough, to walk out into the hall and talk to his agent. The player would try to recapitulate what had happened in the meeting so far, in an attempt to elicit advice from his agent to take back in and try to carry out individually. That is a very difficult thing to do.

Donald Fehr, *Union Views Concerning Agents: With Commentary on the Present Situation In Major League Baseball*, 4 MARQ. SPORTS L.J. 71, 72 (1993).

⁹ Donald Dell, an industry pioneer and founder of ProServ, began his career as a sports agent after his good friend Arthur Ashe won Wimbledon and needed help in negotiating his endorsement deals.

the right of its players to be individually represented by agents in negotiations with Major League clubs in the early 1970's.¹⁰ The mid and late 1970's were an important time of growth for the sports agent industry. A series of favorable arbitration awards and court decisions, the existence of several viable competitors to the established professional sports leagues and the increased strength of player unions allowed players to gain increased access to a less-restricted labor marketplace.¹¹ Simultaneously, the revenues accruing to the professional sports leagues from television, ticket sales, and sponsorships continued to grow. The combination of increased owner wealth and the existence of new leverage for athletes created both a need for agents, who could allow the athletes to maximize their wealth through the skillful exercise of this leverage, and a marketplace for agents who specialized in sports. This dynamic has remained in place.¹²

This increased compensation has come with a price, as athletes have become increasingly dependent on their agents. Agents are no longer thought of solely as negotiators of player contracts. Though player salaries in professional sports continue to increase every year, the combination of competition amongst sports agents and fee limitations imposed by the players associations has led agents to go beyond mere player contract negotiation and into other areas in order to increase their revenues. Financial management and accounting, public relations, athletic training, investment, tax and estate planning and legal counseling have all become common services offered to athletes by sports agencies. This allows the agency to increase its revenues. Thus, many sports agencies are now operating as full-service organizations, with personnel dedicated exclusively to taking care of all of the athlete's needs;¹³ this includes dealing with professional issues, such as badgering teams about playing time, to performing mundane personal tasks, such as paying the client's bills and coordinating the client's relocation upon a trade.¹⁴ The increase in services being offered by sports agencies has unevenly impacted the marketplace, because many small agents lack the resources and/or expertise to operate independently¹⁵

¹⁰ Fehr, *supra* note 8.

¹¹ Michael A. Weiss, *The Regulation of Sports Agents: Fact or Fiction?*, 1 SPORTS LAW. J. 329, 329 (1994).

¹² However, some well-known athletes still negotiate their own playing contracts, including the recently retired John Stockton of the NBA's Utah Jazz and Tedy Bruschi of the NFL's New England Patriots. Matt Morris, a pitcher for the St. Louis Cardinals, negotiated his own three-year, \$27 million contract at the beginning of 2002. *Morris and Cards Agree to Deal*, N.Y. TIMES, Jan. 4, 2002, at D7.

¹³ Nick, *supra* note 1, at 13-14.

¹⁴ *Id.*; see also Fainaru-Wada & Kroichick, *supra* note 2.

¹⁵ Couch, *supra* note 1, at 115-16.

and compete with large full-service agencies such as SFX Sports, Octagon Athlete Representation, Assante Corporation and International Management Group. Instead, many small agents have been forced to focus on a particular niche—and garner the lower revenues that flow from this type of representation—if they choose to continue to exist independently at all.¹⁶ As with the plight of many small, independent shops that have been driven close to extinction by monolithic chain stores, the small sports agencies are currently losing ground to large, full-service agencies, and so they consolidate in order to remain viable.¹⁷

Consolidation is prevalent in almost every industry, because the resulting entity is able to combine the resources of the merged companies, and benefit from each of the merged companies' strengths.¹⁸ The newly-formed entity hopes that these benefits outweigh the potential costs that flow from consolidation, and that a financial gain will result.¹⁹ The situation in the sports agency industry is no different. As the sports and entertainment industries have converged, both corporate customers and professional athletes have created a demand for a streamlined method of conducting business within these industries. For corporate customers, the ability to deal with only one company for all of its sports-related needs is quite attractive; the diversified sports agency can package the various steps in the distribution chain—the athlete, marketing, event management, and media—for its corporate clients.²⁰

The athletes can also benefit from this business model. The ability to have the entirety of their needs addressed under one roof is very attractive because it offers the athlete a simple way to conduct business; most athletes do not want to be troubled with the vagaries of engaging disparate individuals to provide them with various services when they can have one firm provide them all. They seek convenience rather than complexity. Beyond the benefits reaped from this “one stop shopping,” athletes—theoretically—can earn more income from endorsements and

¹⁶ Nick, *supra* note 1, at 14.

¹⁷ Fainaru-Wada & Kroichick, *supra* note 2.

¹⁸ Nick, *supra* note 1, at 14.

¹⁹ *See id.*

²⁰ Roy Clark, the founder of the Marketing Arm, sold his sports-services firm to Omnicom Group, Inc., a large advertising and public relations company, for \$12 million in 1999. He stated, “Sports has gone from a fun thing to do to a sophisticated marketing vehicle. Consolidation is running rampant because corporate clients want it. They don’t want 15 sports marketing agencies. They want one that can solve all their needs.” Richard Alm, *Power Play: Some Small Sports Marketers Join Big Teams, Other Cherish Control*, DALLAS MORNING NEWS, Dec. 28, 1999, at 1D.

“crossover” into the music, television, and film industries by taking advantage of the larger firm’s increased contacts with potential sponsors and its involvement in multimedia projects.²¹

The large agencies—some of which have little prior experience in the sports agent industry—see acquisitions as a way to gain instant access to a number of clients.²² Breaking into the sports agent industry is particularly difficult for most competitors; often, an agent’s biggest challenge is landing his first client. From there, an agent can generally retain new clients more easily. Thus, by acquiring the practice of an already-established sports agent, the large agency avoids one of the pitfalls of the industry: it obtains immediate credibility by acquiring the business of a reputable agent. This credibility comes at a high price, however, because the acquisition expenditures by large agencies can be staggering—likely because they are paying prices well above market value.²³ For these large corporations, acquiring sports agencies also means that they can integrate athletes into other areas of their business, for promotional and commercial purposes.²⁴ To this end, the large firms have also acquired sport and event marketing firms, as well as other sport-related businesses. The corporations can also use the athletes as in-house endorsers for their own products.²⁵

The individual agents also benefit, not only due to the financial security that a merger can bring, but because the merger grants the individual agent entrée into other worlds, such as marketing, financial planning and entertainment, with the hope of greater exposure and increased profit.²⁶ Not surprisingly, the more areas of the entertainment industry that the agents can access, the more they stand to earn. Thus, the firms that are purchased seem to reap significant benefits; they receive tremendous amounts of money *and* maintain their ability to compete in the marketplace. However, there are some drawbacks associated with being acquired by a larger firm. For instance, the small-firm agents become less autonomous, as they are forced to work within a more formal, corporate structure; their future earning power may be somewhat limited, as the fees owed to them accrue to the larger agency rather than to the individual agent; and their ability to work in the in-

²¹ *Id.*

²² *Id.*; see also Nick, *supra* note 1, at 14.

²³ See *infra* Part III (discussing the costs of specific firms). Referring to SFX, Mark McCormack, then CEO of IMG, stated, “[E]verything they did in sports, they vastly overpaid for.” Hyman, *supra* note 3.

²⁴ Hyman, *supra* note 3; see also Nick, *supra* note 1, at 14.

²⁵ Josh Gotthelf, *SFX Slaps Golden Handcuffs on David Falk & Co.*, SPORTSBUSINESS J., May 11, 1998, at 3; see also Nick, *supra* note 1, at 14.

²⁶ Gotthelf, *supra* note 25.

dustry can be restricted, as the individual agents are subject to non-compete agreements that are triggered if they ever leave the firm. Nonetheless, many prominent agents have decided that these costs are outweighed by the aforementioned benefits.

III. HISTORY OF CONSOLIDATION IN THE SPORTS AGENCY INDUSTRY

Consolidation has transformed sport agent industry from a “mom and pop” environment into the world of big business. Few independent sports agents remain prominent today, as many sports agents have adopted the belief that an agency must exist in a large, corporate form in order to thrive.²⁷ Consolidation in the industry began in 1995 when the Marquee Group acquired several sports-related agencies to complement its burgeoning, publicly-traded sports management agency. These acquisitions included the purchases of North American athlete-management companies ProServ—for \$10.8 million in cash and 250,000 shares of stock²⁸—and Athletes & Artists—for \$3.6 million in cash and nearly one million shares of stock²⁹— as well as the purchases of the prominent English soccer agencies of Jon Holmes and Tony Stephens,³⁰ and the purchase of Sports Marketing and Television International.³¹ As previously mentioned, there are currently four corporations that have become significantly involved in the consolidation of the sports agency industry. The following sections describe the consolidation strategy adopted by each of these entities, beginning with SFX Sports Group, the most aggressive acquirer of sports agencies to date.

A. *SFX Entertainment*

SFX Sports Group is a sports management and marketing company that is seeking to take advantage of the apparent convergence of the sports and entertainment industries. SFX Sports Group is a division of SFX Entertainment, a promoter, producer and venue operator for live entertainment events.³² SFX began to acquire several prominent sports agents and agencies in the spring of 1998. Its initial purchase was that of David Falk’s agency, Falk Associates Management

²⁷ Alm, *supra* note 20. Scott Boras, Craig Fenech, Bill Duffy, and Herb Rudoy are among the few prominent sports agents who have maintained their independence thus far.

²⁸ Sandomir, *supra* note 4.

²⁹ *Id.*

³⁰ *Shake-up Creates Powerful Players Agents*, FIN. TIMES (London), Sept. 25, 1998, at 14.

³¹ Alm, *supra* note 20.

³² *SFX Sports Group Might Be Put in Play By Clear Channel*, SAN ANTONIO BUS. J., March 10, 2000, at 12; *see also* Eric Miller, *SFX Sports Group Dominates the Sporting World*, TAMPA TRIB., June 19, 2000, at 5.

Enterprises (“FAME”), for \$82.9 million in cash, one million shares of stock worth \$38.75 million, and \$15 million in incentives for reaching certain revenue levels within a five-year period.³³ FAME represented thirty-five clients, with numerous NBA superstars, including Michael Jordan, Alonzo Mourning and Dikembe Mutombo.³⁴ According to noted sports agent Leigh Steinberg, the transaction “highlight[ed] the synergy between Big Entertainment and Big Sports, to the extent that sports have become content and programming in a much larger world.”³⁵ Shortly thereafter, SFX acquired the Marquee Group for \$115 million in stock and incentives,³⁶ despite receiving a preliminary inquiry notice from the antitrust division of the Department of Justice. Undaunted by the government inquiry, SFX also purchased Hendricks Management Company, the business of baseball agents Alan and Randy Hendricks, for \$15.7 million cash, \$5.7 million in deferred payments, and certain other incentives.³⁷ That firm had 55 clients including Roger Clemens, Andy Pettitte and Al Leiter.³⁸ Later that year, SFX purchased Arn Tellem’s agency for more than \$25 million.³⁹ Tellem & Associates represented 20 baseball players, including Jason Giambi and Nomar Garciaparra, and 35 basketball players, including Kobe Bryant.⁴⁰ As a result of these acquisitions, SFX represented nine NBA first-round draft picks and three top NHL draft picks in 2001.⁴¹

In February 2000, SFX acquired the sports agency Speakers of Sport (“Speakers”), which was owned and operated by Jim Bronner and Bob Gilhooley.⁴² Speakers represented 90 baseball players, includ-

³³ Gotthelf, *supra* note 25, at 3. Falk also signed a five year employment contract with a starting salary of \$315,000 and 4% minimum raises, an option to purchase an additional 100,000 shares of SFX stock in the future at its closing price on the closing date of FAME’s sale to SFX, and annual options to purchase at least 30,000 shares for the first four years of the deal. Falk cannot compete with SFX in the sports agent industry for one year if he leaves the company before his contract expires. *Id.*

³⁴ Fainaru-Wada & Kroichick, *supra* note 2.

³⁵ Sandomir, *supra* note 4.

³⁶ Adam Rubin, *Gobbling Up Agents & Players*, N.Y. DAILY NEWS, Feb. 8, 2001, at 78.

³⁷ Rubin, *supra* note 36.

³⁸ Fainaru-Wada & Kroichick, *supra* note 2; *see also* T.R. Sullivan, *Two Rangers Linked to Rivera Dispute*, FORT WORTH STAR-TELEGRAM, Feb. 11, 2001, at 15.

³⁹ Franz Lidz, *The Arn of the Deal; Employing a Mix of Integrity and Absurdity, Arn Tellem is the Strangest of Beasts: A Powerful Sports Agent You Can Actually Like*, SPORTS ILLUSTRATED, May 27, 2002, at 72.

⁴⁰ Fainaru-Wada & Kroichick, *supra* note 2.

⁴¹ L. Jon Wertheim, *SFX Needs an Rx*, SPORTS ILLUSTRATED, Nov. 5, 2001, at R2.

⁴² Press Release, SFX Entertainment, SFX Sports Group Acquires Major League Baseball Representation Company Speakers of Sport; Pedro Martinez, Juan Gonzalez, Larry Walker Among Players Added to Client Roster (Feb. 3, 2000) (on file with BUSINESS WIRE).

ing Pedro Martinez, Mariano Rivera and Larry Walker.⁴³ The acquisition of Speakers continued SFX's effort to build an athlete management and marketing business by aligning itself with nationally prominent sports agents.⁴⁴ After this acquisition, SFX Sports represented approximately 16 percent of the players on the 40-man rosters of the Major League Baseball teams.⁴⁵ SFX paid almost \$30 million for Speakers, with the possibility of an additional \$10 million in future payments.⁴⁶ The company then signed both Bronner and Gilhooley to \$1 million, 5-year contracts.⁴⁷

Having acquired a dominant role in the representation of basketball and baseball players, SFX next turned its attention to football. Despite its \$17.8 million purchase of Integrated Sports International in 1999, a sports marketing firm that represented Steve Young, Ricky Williams, and Vinny Testaverde,⁴⁸ SFX sought to gain a stronger foothold in the representation of NFL players. In 2000, it bought football agent Jim Steiner's Sports Management Group, adding Jerry Rice, Mike Alstott, Elvis Grbac, Trent Green and fifty-six other players to its client roster.⁴⁹ SFX subsequently added to its reach by purchasing SME Power Branding, the leading producer of sports logos, with clients such as the NBA, the NFL, and numerous other sports properties.⁵⁰

Interestingly, SFX went from being an acquirer of companies to being an acquisition target in 2000, when Clear Channel Communications acquired its parent company, SFX Entertainment, for \$3.3 billion in stock and \$1.1 billion in assumed debt.⁵¹ Undeterred by its own acquisition, in 2001 SFX purchased Signature Sports Group, a golf management company with over 30 clients, including Tom Lehman and

⁴³ *Id.*

⁴⁴ *Id.* Then SFX Sports Group President and COO Bill Allard commented, "With Speakers of Sport, we have added yet another premier talent representative agency to SFX" *Id.*

⁴⁵ Ronald Blum, *SFX Buys Bronner, Gilhooley Concern*, Associated Press Online, Feb. 3, 2000.

⁴⁶ Andy Bernstein, *Sports Finds Its Place at Clear Channel*, SPORTSBUSINESS J., Dec. 23, 2002, at 1, 29-31.

⁴⁷ Ronald Blum, *Two Agents Sue SFX for \$60 Million*, Associated Press Online, Feb. 8, 2001.

⁴⁸ Rubin, *supra* note 36. The deal was for \$14.1 million in cash and 60,000 shares of stock, which traded at approximately \$61 per share when the deal closed. *Id.*; see also Josh Gottlieb, *Is SFX Eyeing More New Moves After Buying ISI?*, SPORTSBUSINESS J., Feb. 1, 1999, at 8.

⁴⁹ Fainaru-Wada & Kroichick, *supra* note 2.

⁵⁰ Alm, *supra* note 20.

⁵¹ Richard Sandomir, *SFX Expands With Top Agency*, N.Y. TIMES, May 16, 2000, at D7. This transaction created a novel dilemma for SFX Sports. See *infra* Part IV (discussing this dilemma).

Scott Simpson.⁵² In addition, SFX formed an alliance with the NBA in order to create a new minor league basketball league, the National Basketball Development League (“NBDL”).⁵³ Upon completion of its acquisition spree, SFX had pervaded almost all areas of athlete representation.⁵⁴ SFX renamed its constellation of firms SFX Sports, appointed David Falk as CEO and gave Falk the title of “Founder, SFX Basketball.”⁵⁵

B. *Octagon*

Octagon is the sports marketing and entertainment subsidiary of the Interpublic Group, the largest advertising and marketing communications company in the world.⁵⁶ Octagon seeks to use sports as a vehicle through which to extend its global dominance in marketing. Octagon was formed in May 1997 when the Interpublic Group purchased Advantage International, an athlete representation and marketing firm, for \$30 million and API, a sport marketing firm.⁵⁷ In 1998 and 1999, Octagon acquired CSI, a sports television production and distribution company;⁵⁸ the Flammini Group, a motorsports agency;⁵⁹ and formed a partnership with Koch Tavares, a Brazilian sports marketing agency.⁶⁰ Octagon rebranded its new properties in late 1999, reorganizing into four operating companies and a regional partner: Octagon Athlete Representation (formerly Advantage International), Octagon Marketing, Octagon CSI, Octagon Motorsports, and Octagon Koch Tavares, its Latin American regional partner.⁶¹

⁵² Press Release, SFX Entertainment, SFX Acquires Signature Sports Group (June 26, 2001), available at <http://www.promo.sfx.com/pressreleases/releasedetail.asp?id=176>.

⁵³ Press Release, SFX Entertainment, National Basketball Developmental League (NBDL) and SFX Entertainment Announce Alliance (July 20, 2000), available at <http://www.promo.sfx.com/pressreleases/releasedetail.asp?id=16>.

⁵⁴ According to its filing with the Securities and Exchange Commission, “SFX Sports Group is one of the world’s leading fully integrated sports marketing and management agencies, providing marketers, athletes, broadcasters, teams, leagues, universities, events and properties unrivaled access to each other.” Miller, *supra* note 32.

⁵⁵ Press Release, SFX Entertainment, SFX Announces Sports Group Management Team as Sports Companies are Formally Consolidated and Renamed (Dec. 13, 1999), available at <http://www.promo.sfx.com/pressreleases/releasedetail.asp?id=43>; see also Bryan Burwell and Liz Mullen, *SFX: Falk Nearly Walked*, *SPORTSBUSINESS J.*, Apr. 23, 2001, at 4, 43.

⁵⁶ Octagon, www.octagon.com/who_we_are/background.php.

⁵⁷ The Interpublic Group of Companies, <http://www.interpublic.com/companies/octagon/>.

⁵⁸ The Interpublic Group of Companies, <http://www.interpublic.com/companies/octagoncsi/>.

⁵⁹ The Interpublic Group of Companies, <http://www.interpublic.com/companies/octagonms/>.

⁶⁰ The Interpublic Group of Companies, <http://www.interpublic.com/companies/octagonkt/>.

⁶¹ The Interpublic Group of Companies, <http://www.interpublic.com/companies/octagon/>.

Octagon has purchased numerous sports representation agencies to complement its other acquisitions. In 1998, it bought former NHL player Brian Lawton's firm, Lawton Sport & Financial Group, the representative of numerous hockey players including Sergei Fedorov and Sean Burke.⁶² In 1999, Octagon acquired Pros Inc., a top golf representation agency with 25 clients, including Davis Love III, Tom Kite, and Justin Leonard.⁶³ Octagon continued its buying spree in 2000, acquiring another hockey representation firm, Kelly Management Group, a firm with a considerable number of NHL clients.⁶⁴ With this purchase, Octagon represented 70 NHL players.⁶⁵ Octagon's acquisition of Sullivan and Sperbeck added 25 NFL players to its roster, including Trent Dilfer and William Floyd, as well as college coaches Mike Bellotti and Sonny Lubick.⁶⁶ Octagon's purchase of Greg Clifton and Joe Urbon's firm, the baseball division of Bob Woolf Associates, landed it thirty clients, including David Wells, Mark Mulder and Tom Glavine.⁶⁷ Finally, Octagon added to its stable of clients when it purchased Ray Anderson's firm, AR Sports, in late 2001.⁶⁸ AR Sports represented NFL coaches Brian Billick, Tony Dungy, Herman Edwards, and Dennis Green.⁶⁹ The acquisition adds to Octagon's already impressive list of football coaches that includes Bill Cowher, Dan Reeves, Marvin Lewis, and Tyrone Willingham.⁷⁰

C. *Assante*

Assante Corporation is a publicly-traded, Canadian financial management firm with approximately \$23.6 billion in assets.⁷¹ Assante uses sports as a vehicle to grow its financial management business, implementing a corporate strategy to acquire companies with a client base of affluent, high worth individuals in need of its services.⁷² Assante entered the sports agency industry by acquiring Steinberg, Moorad &

⁶² Fainaru-Wada & Kroichick, *supra* note 2.

⁶³ Press Release, Octagon, Octagon Announces Major Move in Golf Representation Through Partnership with Pros, Incorporated (Mar. 3, 1999).

⁶⁴ *American Sports Marketing Company Acquires Kelly Management Inc.*, CAN. PRESS NEWSWIRE, Oct. 9, 2000.

⁶⁵ *Id.*

⁶⁶ Press Release, Octagon, Octagon Acquires Football Agents Mike Sullivan and Jeff Sperbeck (Dec. 18, 2000). Bellotti is the coach at the University of Oregon and Lubick coaches at Colorado State. *Id.*

⁶⁷ Fainaru-Wada & Kroichick, *supra* note 2.

⁶⁸ Octagon, http://www.octagon.com/221101_ar.htm.

⁶⁹ Octagon, <http://www.octagon.com/clients/athletes.php>.

⁷⁰ *Id.*

⁷¹ Assante Corp., <http://www.assante.com/main/aboutassante/overview.cfm>.

⁷² Assante Corp., <http://www.assante.com/main/aboutassante/history.cfm>.

Dunn for \$120 million in 1999.⁷³ While less than half of this sum was paid in cash up front, the remainder was payable in the form of earn outs if the group reached certain performance levels.⁷⁴ Among the clients involved in the transaction were 80 football and 60 baseball players, including high profile athletes such as Drew Bledsoe, Troy Aikman, Ricky Williams, Manny Ramirez, Ivan "Pudge" Rodriguez and Darin Erstad.⁷⁵

Leigh Steinberg was named CEO of Assante Sports and Entertainment Group.⁷⁶ Assante's strategy in entering the sports agency industry seems to be twofold: to garner revenues from the assets invested by the athletes in the company and to use these highly visible athletes to lure additional wealthy individuals to the company. In furtherance of this strategy, Assante planned to purchase ten to twelve additional sports agencies.⁷⁷

Its first such purchase was of agent Eugene Parker's firm, Maximum Sports Management for approximately \$18 million.⁷⁸ The firm represented 48 NFL players, including Deion Sanders, Emmitt Smith, and Curtis Martin, as well as several NBA players.⁷⁹ Assante then gained a foothold in hockey when it acquired agent Mike Gillis's firm in April 2000;⁸⁰ M.D. Gillis & Associates represented 35 NHL players.⁸¹ Assante's foray into the NBA gained considerable momentum when it acquired Fegan & Associates in late 2000 for over \$10 million, with emerging stars Shawn Marion and Kenyon Martin among the list of Dan Fegan's 30 NBA clients.⁸²

Finally, in late 2001, Assante Sports and Entertainment Group gained considerable strength in its sports marketing capabilities when it entered into a joint venture with Omnicom's The Marketing Arm.⁸³ The newly-formed Assante Marketing Solutions will match Assante Sports and Entertainment Group's athletes and properties with en-

⁷³ Liz Mullen, *Dunn: Steinberg's Firm a Mess*, SPORTSBUSINESS J., July 23, 2001, at 1, 40.

⁷⁴ *Id.*

⁷⁵ Fainaru-Wade & Kroichick, *supra* note 2.

⁷⁶ Steinberg & Moorad, http://www.steinbergandmoorad.com/about_us/leigh.htm.

⁷⁷ *Id.*

⁷⁸ ASSANTE CORP., 2000 ANNUAL REPORT 47 (2001), available at <http://www.assante.com/main/aboutassante/pdf/annual2000/financialinfo.pdf>.

⁷⁹ Fainaru-Wade & Kroichick, *supra* note 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; see also ASSANTE CORP., 2000 ANNUAL REPORT 35 (2001), available at <http://www.assante.com/main/aboutassante/pdf/annual2000/financialinfo.pdf>.

⁸³ Press Release, Assante Corp., Assante Partners with Omnicom's *The Marketing Arm* to Launch Assante Marketing Solutions (Dec. 18, 2001), available at http://www.assante.com/main/aboutassante/newpress.cfm?nr_id=NR82.cfm.

dorsement, marketing, and sponsorship opportunities.⁸⁴ This will allow the company to better compete with its rivals in the industry.

In early 2002, Assante restructured its U.S. operations to integrate its sports agencies, hiring Harvey Schiller to oversee these firms⁸⁵ and Leigh Steinberg to serve as the president of Assante Enterprises, a new group focusing on creating new sports businesses.⁸⁶ In 2001, the company's revenues from sports representation were \$32.9 million.⁸⁷ In 2002, these revenues decreased to \$25.7 million.⁸⁸ This decline was primarily due to a \$6.7 million decrease in revenues attributed to the loss of approximately forty NFL clients when David Dunn left Assante to start Athletes First.⁸⁹ Though Assante successfully pursued litigation—and, in November 2002, a jury awarded it \$4.66 million from Dunn and \$40 million from Athletes First, plus attorney's fees of \$2.7 million—its NFL client base was decimated.⁹⁰ Several months later, Assante lost the remainder of its 35 NFL clients when it sold back to Leigh Steinberg his athlete representation business for \$4.1 million.⁹¹ This transaction may be a signal of future transactions, as there have been indications that Assante may be attempting to sell its other athlete representation firms and exit the sports industry entirely.⁹²

D. *International Management Group (IMG)*

Founded on a handshake between Arnold Palmer and the late IMG Chairman Mark McCormack in the early 1960's,⁹³ IMG is the oldest and largest sports agency in the world, with nearly 3,000 employees working in eighty-five offices in thirty-three countries.⁹⁴ IMG is a comprehensive, full-service agency with highly regarded talent representation, event management and television operations. Though its participation in the consolidation trend has been minimal due to its al-

⁸⁴ *Id.*

⁸⁵ Liz Mullen, Schiller Takes Over Assante's U.S. Operations, SPORTSBUSINESS J., June 10, 2002, at 54.

⁸⁶ Liz Mullen, Assante Searching for U.S. Chief of Operations, SPORTSBUSINESS J., Mar. 11, 2002, at 54.

⁸⁷ ASSANTE CORP., 2002 ANNUAL REPORT 40 (2003), available at www.assante.com/main/aboutassante/pdf/annual2002/financialinfo02.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.* at 40, 43.

⁹⁰ *Id.* at 43.

⁹¹ Liz Mullen, Steinberg Buys Back Firm, Will Add Basketball, SPORTSBUSINESS J., Apr. 7, 2003, at 4.

⁹² Liz Mullen, Assante Wants Out of Agent Business, Sources Say, SPORTSBUSINESS J., Sept. 29, 2003, at 4.

⁹³ IMG, <http://www.imgworld.com>.

⁹⁴ IMG, <http://www.imgworld.com/imgworldwide/defaultbody.htm>.

ready wide, global reach, IMG sought out a partnership with Merrill Lynch in forming Investment Advisors International, a financial planning group for professional athletes.⁹⁵ This unsuccessful partnership ended when IMG bought out Merrill Lynch in late 2002.⁹⁶ In December, 2000, IMG purchased Muhleman Marketing, a firm specializing in the sale of facility naming rights, seat licensing plans, and NASCAR marketing.⁹⁷ In 2001, after top hockey agent Mike Barnett resigned to become the general manager of the Phoenix Coyotes,⁹⁸ IMG quickly reacted by acquiring Pat Brisson's Horizon Sports hockey agency with its approximately 35 NHL players.⁹⁹ It is likely that IMG will occasionally fortify itself with additional acquisitions as the opportunity presents itself in the future; however, following the death of Mark McCormack in 2003, there has been speculation that IMG may be sold.¹⁰⁰ The acquisition of IMG would immediately make any acquiring company a sports agency behemoth; in addition, purchase of IMG by any of the other three aforementioned dominant sports agencies would likely result in government scrutiny under the antitrust laws.

IV. CONFLICTS OF INTEREST CREATED BY CONSOLIDATION IN SPORTS AGENCY

A. *Agencies and Teams Owned by Same Parent Company: The SFX Story*

By the end of its expansion period, SFX Sports was so diversified that it was forced to alter its business model when its parent company, SFX Entertainment, was acquired by Clear Channel Communications for \$3.3 billion in stock and \$1.1 billion in assumed debt in 2000.¹⁰¹ "Clear Channel is a global leader in the out-of-home advertising industry with radio and television stations and outdoor displays in 36 countries around the world."¹⁰² After Clear Channel acquired SFX, Tom Hicks became vice chairman and a director of the company and Red

⁹⁵ IMG, <http://www.imgfootball.com/services.htm>.

⁹⁶ Daniel Kaplan, *IMG-Merrill Venture Fades Away*, SPORTSBUSINESS J., June 16, 2003, at 7.

⁹⁷ Alm, *supra* note 20.

⁹⁸ Frederick Klein, *Agents Take Skills to Other Side of the Table*, SPORTSBUSINESS J., Feb. 4, 2002, at 32.

⁹⁹ Liz Mullen, *Shift Is On for Cleveland Slugger as Gonzalez Moves to Agent Moorad*, SPORTSBUSINESS J., Oct. 8, 2001, at 21.

¹⁰⁰ Jason Nisse, *It's Break Point in Octagon Versus IMG*, LONDON INDEP. ON SUNDAY, June 24, 2001, at B9.

¹⁰¹ Sandomir, *supra* note 51.

¹⁰² *SFX Sports Acquires Award-Winning Television Sports Company Black Canyon Productions*, BUSINESS WIRE, May 15, 2000.

McCombs became a member of its board of directors.¹⁰³ In addition to his executive position at Clear Channel, Hicks was also the controlling owner of baseball's Texas Rangers¹⁰⁴ and hockey's Dallas Stars, and part-owner of two other baseball clubs, the Colorado Rockies and the Tampa Bay Devil Rays.¹⁰⁵ McCombs is the owner of the NFL's Minnesota Vikings.¹⁰⁶ These individuals' involvement with SFX has created a unique situation in which the same company—Clear Channel—could be sitting on both sides of a player-team transaction. Therefore, many industry observers believed that SFX's agents would have a conflict of interest in representing players in negotiations with these clubs.¹⁰⁷ Even within SFX, certain agents were also concerned that other agents would try to gain leverage off of this corporate relationship by claiming that SFX's agents could not fairly represent certain athletes because the agent's employer would be on both sides of the deal.¹⁰⁸

Hicks has denied that there existed any conflict of interest due to his position at both Clear Channel and the Rangers and Stars.¹⁰⁹ Hicks said that he and other top Clear Channel executives "don't have any access to information about anything that has to do with anybody in sports."¹¹⁰ Nonetheless, Hicks and SFX attempted to eliminate the specter of any such conflict in 2001, when Clear Channel placed the baseball group of SFX Sports in a separate, autonomous company.¹¹¹ The name of this new entity is SFX Baseball Group LLC. SFX Baseball president and CEO Randy Hendricks stated, "This is something we very much wanted to achieve and we've done so. This, in my judgment removed the appearance of conflict because in reality, we don't ever want to have a situation where there is even the appearance of conflict,

¹⁰³ Miller, *supra* note 32. SFX changed its name to Clear Channel Entertainment in 2001. Clear Channel Entertainment's Sports Division is known by the following names: SFX Motor Sports is now Clear Channel Motor Sports Group; SFX Media is the company's broadcaster representation agency; SFX Golf and SFX Tennis encompass the company's golf and tennis representation and event management businesses; and SFX Baseball, SFX Basketball, and SFX Football are the company's independent athlete representation agencies. Press Release, SFX Entertainment, SFX Announces Name Change to Clear Channel Entertainment (July 9, 2001), <http://www.promo.sfx.com/pressreleases/releasedetail.asp?id=178>.

¹⁰⁴ Murray Chass, *Rivera's Agent is Fired, Setting Back Negotiations*, N.Y. TIMES, Feb. 8, 2001, at D2.

¹⁰⁵ *Id.*

¹⁰⁶ See Wertheim, *supra* note 41, at R2.

¹⁰⁷ Ronald Blum, *Clear Channel Creates New Company for SFX's Baseball Agents*, Associated Press, Mar. 22, 2001.

¹⁰⁸ Liz Mullen, *Fired Agents Blame Losses on SFX Merger*, SPORTSBUSINESS J., Feb. 12, 2001, at 1, 31.

¹⁰⁹ Sullivan, *supra* note 38.

¹¹⁰ See *id.*

¹¹¹ Blum, *supra* note 107.

much less an actual conflict.”¹¹² Clear Channel can only receive the profits of SFX Baseball and does not have the right to remove the company’s directors or officers.¹¹³ In an additional effort to avoid future conflicts, SFX Sports separated its basketball representation business into a different entity, SFX Basketball Group LLC.¹¹⁴ Arn Tellem runs this group.¹¹⁵ In response to concerns raised by the National Hockey League Players Association (“NHLPA”) about the perception of conflicts of interest caused by Clear Channel Communications Vice Chairman Tom Hicks’s ownership of the Dallas Stars, SFX Sports hockey agent Jay Grossman reacquired his hockey practice from the company and renamed it Puck Agency LLC in early 2002.¹¹⁶ This seems to be a “paper” transaction, because SFX continues to handle the marketing and public relations for all of the new firm’s clients, and Grossman maintains his former office space but rents it from SFX Sports.¹¹⁷

The SFX case illustrates that consolidations involving sports agencies can lead to problems for the agents involved, as well as its corporate parent. In the event that a flawed union is formed, it is not only the athletes who are potentially harmed by the creation of a conflict of interest, but also the agents can suffer economic and social consequences. Faced with the prospect of representing clients in negotiations despite the existence of potential conflicts of interest, agents find themselves in a no-win situation. Whether the new relationships formed by consolidation ultimately influence agents may not be relevant; athletes may not see a reason to be patient and give the agents the opportunity to prove their neutrality, particularly given the competition amongst agents. Rival agents attempting to lure a new client will emphasize the existence of a potential conflict of interest that eventually may cost the athlete money. Agents may have a hard time recovering from the stigma of failing to dutifully represent their client. This is especially true in the sports agent industry, where agents’ reputations are extremely important in signing and retaining clients.¹¹⁸

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ Eric Fisher, *Like Baseball Arm, SFX Basketball Breaks Off Into a Separate Group*, WASH. TIMES, Apr. 20, 2001, at B2.

¹¹⁵ *Id.*

¹¹⁶ Liz Mullen, *Hockey Practice Back to Grossman, But Firm Maintains SFX Ties*, SPORTSBUSINESS J., Mar. 25, 2002, at 17.

¹¹⁷ *Id.*

¹¹⁸ Fehr, *supra* note 8, at 71-72. Donald Fehr notes:

As all of you know, reputation spreads whether it is good or bad, right or wrong, or indifferent. The most common recommendations as to whom to hire or whom not to hire as an agent come from another player. Although sometimes those opinions are informed, very often they are not.

B. *Agencies Representing Multiple Players in the Same League*

A far more common type of conflict that has resulted from the consolidation in the sports agent industry is the divided loyalty of agents who represent multiple athletes in the same sport.¹¹⁹ In this context, it is often difficult for the agent to fulfill his duty to one of his clients without compromising the interests of the other(s).¹²⁰ The agent must zealously protect the best interests of each of his clients. A Catch-22 situation frequently results: it is nearly impossible to be an agent for a very long time with only one client, yet it is equally difficult to have a stable of clients without compromising the interests of any one of them. This situation can arise when sports agencies consolidate successfully and/or represent a large number of athletes. In either case, the agent may not be able to sufficiently service his clients. The situation at SFX Sports both before and after its acquisitions is instructive. Before the acquisitions, the agents that comprised SFX Sports—David Falk and Arn Tellem in basketball and the Hendricks brothers and Speakers in baseball—were the preeminent agents in their fields.¹²¹ After SFX brought together all of these top agents, it now represents a staggering number of athletes in baseball and basketball: SFX Basketball represents about 18% of active NBA players and SFX Baseball represents about 16% of Major League Baseball players.¹²² With such a large number of clients and the increased responsibility that comes with the growth of the firm, it is easy to see how agents might not be able to devote enough time to their clients or keep their individual clients' interests separate. Many of the premier agents working in the consolidated sports agencies have sought to resolve this potential dilemma by assigning additional responsibility to their younger colleagues. While this allows the client to receive the same amount of attention and service, it creates another problem for the agencies—an increased likelihood that the young agent will defect from the firm to start his own agency and take clients with him if he is unsatisfied with the work envi-

Id.

¹¹⁹ Nick, *supra* note 1, at 16.

¹²⁰ *Id.* Even though no one raised the conflict issue at the time, in 1995 agent Leigh Steinberg represented all three quarterbacks on the Pittsburgh Steelers roster: Neil O'Donnell, Kordell Stewart and Mike Tomczak. Fainaru-Wada & Kroichick, *supra* note 2. Jim Steiner of SFX Football took the highly unusual step of voluntarily removing himself from the competition to become the agent for top draft prospect Julius Peppers because he was near signing another top draft prospect, Bryant McKinnie, and felt that representing both players was a potential conflict of interest even though the athletes play different positions. Liz Mullen, *Adviser's Blitz to Find Agent for Peppers Started With Hands-Off Warning*, SPORTSBUSINESS J., Jan. 21, 2002, at 16.

¹²¹ Nick, *supra* note 1, at 16.

¹²² Hyman, *supra* note 3, at 86.

ronment or his compensation. Thus far, SFX Sports has been largely successful in avoiding this type of defection; the company has been able to keep its younger agents satisfied. Assante has not been as successful and, hence, was embroiled in a lawsuit with one of its former agents who left the company and took dozens of clients with him.¹²³

C. *Agencies Representing Multiple Players on the Same Team*

An agent can represent multiple players on the same team only if he can represent all of his clients to the best of his ability and the clients all consent to such representation after full disclosure.¹²⁴ This is a delicate situation that must be handled carefully. The failure to represent a client with single-minded purpose is arguably the most egregious result of the conflict of interest created by the representation of multiple players on the same team. Thus, one commentator suggests that sports agents should only represent multiple players on the same team if they can answer the following question in the affirmative: "Can I the agent separate and carry out my functions as a sports agent as if the players were represented by different agents?"¹²⁵

This situation is especially problematic in the leagues in which players divide a more or less fixed amount of money: the NBA and the NFL. In the NBA, each team has a prescribed amount of money that it may spend on player salaries each year. This cap, however, is "soft," in that teams may exceed it in numerous situations.¹²⁶ Even the NFL's purportedly "hard" salary cap, under which a team has a specific amount of money to spend on all of its players, may be circumvented, even though it does not offer many exceptions or loopholes.¹²⁷ NFL teams must make difficult choices regarding the best way to allocate these scarce funds; as a result, quality players often are released—ostensibly—so that the team may comply with the salary cap rules. For-

¹²³ See discussion *infra* Part VI.

¹²⁴ See *infra* Part VII (discussing consent after full disclosure).

¹²⁵ Robert H. Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, the NCAA, and Agents*, 8 J.C. & U.L. 347, 361 (1981).

¹²⁶ See NBA-NBPA Collective Bargaining Agreement, available at <http://www.nbpa.com/cba/articleVII.html#section6>.

¹²⁷ *Id.* at 78. One exception to the NFL salary cap rules allows the team to offer excessive signing bonuses and prorate the player's signing bonus over the duration of his contract rather than allocate it as salary in the year(s) in which the bonus is actually paid for the purposes of calculating the contract's value against the salary cap. This allows many teams to have player payrolls that exceed the salary cap. See National Football League, Collective Bargaining Agreement, Article XXIV Guaranteed League-Wide Salary, Salary Cap & Minimum Team Salary (1997); see also CBA 101, Highlights of the Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Players Association (Prepared by the NBA Communication Group, November, 1996).

mer New York Giant executive George Young noted the obvious problem emanating from agents' representation of multiple players on the same team when he observed that "agents get into situations where the more people they represent, the more they cost people jobs."¹²⁸ That is, an agent who negotiates a lucrative playing contract for one client may unwittingly lead another client on the same team to be cut for salary cap purposes. This problem is only worsened when an agent represents players on the same team who play the same position, yet it has not prevented at least two well-known agents from doing so. In 1995, Leigh Steinberg faced the difficult task of representing all three Pittsburgh Steelers quarterbacks—Neil O'Donnell, Kordell Stewart and Mike Tomczak.¹²⁹ Steinberg was recently reported to represent eighteen NFL quarterbacks. Similarly, Ralph Cindrich negotiated a free agent contract for quarterback Gus Frerotte with the Denver Broncos, despite the fact that he represented the individual with whom Frerotte would compete for the starting job, Brian Griese.¹³⁰ While both of these situations involved independent agents, the consolidation that has occurred in the industry only heightens the likelihood of similar dilemmas.

In addition, a single agent or agency that represents many players on one team could attempt to exercise considerable leverage over that team.¹³¹ Agents could influence general managers by packaging star athletes with their lesser clients. Agents could direct superstar clients to certain teams if general managers would also sign the athletes of lesser stature.¹³² Thus, consolidation could force teams to acquiesce to an agent's demands for one player when they ordinarily would not do so, out of fear of damaging the relationship with the agent when there is an upcoming negotiation with another player represented by the same individual or agency.¹³³ This scenario has occurred in the past. In

¹²⁸ Fainaru-Wada & Kroichick, *supra* note 2.

¹²⁹ *Id.* This situation ended when O'Donnell left the team as a free agent after the 1995 season, signing with the New York Jets.

¹³⁰ Fainaru-Wada & Kroichick, *supra* note 2. Cindrich claims that he told both players of the conflict and got their approval before completing the transaction; he felt that it benefited the players because it forced the team to be more truthful with him about its plans for them. *Id.*

¹³¹ For example, Scott Boras's friendship with Kevin Malone, former general manager of the Los Angeles Dodgers, may have helped Boras get his clients to represent four-fifths of the Dodgers starting pitching rotation. *See id.*

¹³² Prior to his stepping back from controlling the day-to-day operations of the agency in 2001, SFX's David Falk was unquestionably the NBA's top power broker, and openly celebrated his ability to not only steer players to certain teams, but to orchestrate blockbuster trades. *See id.*

¹³³ Nick, *supra* note 1, at 16.

1981, baseball agent Tony Pace represented Hal McRae and Frank White of the Kansas City Royals in their contract negotiations with the team.¹³⁴ While negotiating a new contract for White, Pace refused to settle until the team agreed to extend McRae's contract beyond its expiration in 1983.¹³⁵ The Royals later stated that White could have signed a new deal a month earlier if Pace would have excluded McRae from the discussion.¹³⁶

There is an increased likelihood that similar situations will occur more often in the future as consolidation continues. SFX Sports Group represented three members of the Los Angeles Clippers—Elton Brand, Quentin Richardson and Corey Maggette—during the summer of 2003.¹³⁷ Brand became a free agent in 2003 and sought the maximum contract extension allowable under the league's collective bargaining agreement; the others will become free agents in 2004.¹³⁸ David Falk represents Brand and commented, "The responsibility is theirs to take care of a much-valued employee at the first opportunity" and that the Clippers will engage in "block negotiations" with SFX Sports Group in the near future.¹³⁹ The implication was that Falk intended to use his leverage over the club to obtain the best deal possible for Brand; the agent essentially told the Clippers that if they hoped to retain the other players represented by SFX, they would have to capitulate to Brand's salary demands. Ironically, other players represented by the same agent may suffer as a result of their agent's power; if the team has a poor relationship with the agent or finds its dealings with the agent to be particularly difficult, it may steer away from the agent's other clients to avoid doing so. It has long been speculated that many teams stay away from the clients of Scott Boras for precisely this reason.

Beyond the conflicts of interest that may be created, another problem with consolidation in the sports agent industry is that substantial power rests in the hands of a few agents who represent a significant percentage of the players in each league. Many agents have developed a sense that they are part of a team's management and can dictate the

¹³⁴ Martin J. Greenberg & James T. Gray, 1 *SPORTS LAW PRACTICE* §10.17(1) (2nd ed. 1998), at 1073.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Ian Thomsen, *The 'I' in Clippers; Contract Worries and Their Owner's Stingy Ways Have L.A.'s Players Thinking Selfishly*, *SPORTS ILLUSTRATED*, Mar. 25, 2002, at 52.

¹³⁸ *Id.* Brand subsequently resigned from his position with the team. Falk had also represented another member of the Clippers, Darius Miles, but he was traded to the Cleveland Cavaliers prior to the 2002-03 season. NBA, http://www.nba.com/playerfile/darius_miles/index.html?nav=page.

¹³⁹ Thomsen, *supra* note 137.

team's player personnel moves in a manner usually reserved for coaches and general managers.¹⁴⁰ These agents feel empowered enough to complain to teams about their clients' roles on the team, playing time and even game strategies.¹⁴¹ The small agents are excluded from this scene; with only a few players in their sway, they cannot exert the same influence over teams as the mega-agencies. Thus, the resentment between the have's and have-not's in the sports agent industry has grown.¹⁴²

D. *Agencies Representing Players and Coaches/Management*

A blatant conflict of interest can arise when an agency represents both players and coaches or front office employees in the same league. Many coaches take an active role in the personnel decisions made by the team, including the acquisition of playing talent. Typically, coaches and players have adverse interests in negotiations, with players seeking the highest possible salary and coaches aligning themselves with management and desiring to pay a lesser amount.¹⁴³ In addition, disputes may arise between coaches and players over playing time, the player's role on the team and any number of other issues due to the nature of their relationship. It is for these reasons that the players associations in each professional sports league enacted agent regulations that prevent the dual representation of players and coaches.¹⁴⁴ When asked about this practice, baseball agent Scott Boras remarked:

I don't think it's a good idea. If one of my clients suddenly had an opportunity to be a manager, I would probably cut the contract so long as he understood that my representation would end once that contract is negotiated. Managers are making money and agents are going to look at it as a revenue stream. I like having that relationship with a manager where you know what side of the fence you're on.¹⁴⁵

In a memorandum sent to all NFL clubs, legendary NFL Commissioner Pete Rozelle warned teams about the dangers inherent to the

¹⁴⁰ Nick, *supra* note 1, at 16. San Francisco Giants assistant general manager Ned Colletti recently commented, "I think the power [of agents] will grow exponentially and with that, the agents' grasp and hold over the field." Fainaru-Wada & Kroichick, *supra* note 2.

¹⁴¹ Fainaru-Wada & Kroichick, *supra* note 2.

¹⁴² *Id.* Some agents became jealous of the Boras-Malone relationship because they thought that Malone was practically "under the agent's spell." The two sat together at games frequently and negotiated a lucrative, above-market value contract for pitcher Darren Dreifort with the Dodgers. *Id.*

¹⁴³ This is particularly true in the NBA and NFL, where the presence of salary caps further limits a coach's willingness to spend money on any one individual player in order to allow the team to acquire and/or retain additional players.

¹⁴⁴ See *infra* Part VII (discussing the union regulations).

¹⁴⁵ Pete Williams, *Flying Solo . . . and Feeling Free*, SPORTSBUSINESS J., July 23, 2001, at 25.

dual representation of players and coaches.¹⁴⁶ Despite the union regulations and Commissioner Rozelle's proclamation, Octagon's acquisition of AR Sports and its stable of approximately twenty NFL players and coaches Brian Billick, Tony Dungy, Herman Edwards, and Dennis Green places the firm in an difficult position;¹⁴⁷ Octagon currently represents six head football coaches and approximately fifty NFL players, including several players and coaches with the same teams.¹⁴⁸

This situation is likely to get worse in the future as more high profile athletes become involved in the management and ownership of professional sports franchises after the completion of their playing careers. As the salaries of professional athletes have increased, many players have become extremely wealthy individuals with the ability to accumulate the amount of money necessary to acquire an ownership interest in a professional team after they retire from playing. Magic Johnson,

¹⁴⁶ Pete Rozelle, Memorandum to NFL Club Presidents Re: Player Agents-Multiple Representation of Player and Non-Player Employees, Sept. 4, 1987, *reprinted in* Fraley & Harwell, *supra* note 6, at 216-17. Rozelle wrote:

In my view, common representation of players and management employees can cause significant problems and should be avoided. At the least, such situations create an appearance of impropriety that can be detrimental to particular clubs or to the league as a whole.

...

One result can be player dissatisfaction. When a player learns that his agent also represents a club management official (particularly, but not exclusively, one involved in personnel decisions or contract negotiations), the player may have reason to suspect that his agent is 'low-balling' him because of the agent's relationship with management. Such suspicions could affect the player's morale and performance, produce demands for contract renegotiations, or both.

...

While agents who are attorneys are subject to conflict-of-interest sanctions under the professional-responsibility rules of their respective bar associations, those rules only partially meet the problem. Where agents are not licensed attorneys, they are not subject to the rules at all. Further, the right to voice objections rests primarily with the agent's clients; NFL clubs do not necessarily have standing to enforce bar associations' conflict-of-interest rules. Finally, these ethical prohibitions can usually be avoided altogether by full disclosure to all interested parties.

...

Club management employees, including coaches, should therefore be advised to avoid representation by agents who also represent players. At least one club has gone so far as to refuse to negotiate regarding a management employee with an agent who also represented players. We suggest that other clubs seriously consider adopting policies directed at avoiding these troublesome situations.

Id.

¹⁴⁷ Liz Mullen, *Octagon Ready to Up NFL Total with Acquisition*, SPORTSBUSINESS J., Nov. 19, 2001, at 6.

¹⁴⁸ *Id.* Octagon already represented coaches Bill Cowher and Dan Reeves. Two examples of this dual representation are the firm's representation of Atlanta Falcons players Michael Vick and Bob Whitfield and coach Reeves, and Baltimore Ravens former player Jermaine Lewis and coach Brian Billick.

Michael Jordan, Wayne Gretzky, Mario Lemieux, and Bernie Kosar have become owners of professional sports franchises after finishing brilliant athletic careers.¹⁴⁹ It seems likely that more players will follow their lead in the future.

Moreover, the situation is further complicated when agents represent both active and retired players, because of competition for endorsement deals. Since today's professional athletes often retain their popularity as endorsers well into retirement, their agents continue to negotiate lucrative new marketing and sponsorship deals.¹⁵⁰ If the agent also represents active players, this creates a potential conflict of interest; if a team owner and player share the same agent and enter into negotiations for a playing contract, then a conflict of interest will arise. Though the agent and owner will sit on opposite sides of the negotiating table, the agent will have a conflict of interest. A similar situation occurred while Michael Jordan served as the president of basketball operations and part owner of the Washington Wizards during the 1999-2000 and 2000-2001 seasons.¹⁵¹ David Falk represented both Jordan and at least two members of the Wizards, Juwan Howard and Rod Strickland, as well as numerous potential Wizards players.¹⁵² While Falk, Jordan, and the NBA argued that no conflict of interest existed, the arrangement was criticized for its apparent unwieldiness.¹⁵³

E. *Agencies Representing Events and Athletes*

Another troubling situation involves sports agencies that engage in the representation of professional athletes and the management of the sporting events in which these individual sport athletes compete. All of the large agencies involved in the consolidation of the industry currently have such relationships, which are particularly ripe for conflicts of interest. Octagon, SFX Sports and IMG are all involved in the management of both golf and tennis events and athletes. Athletes may find their agents negotiating appearance fees and other contractual agreements with themselves. This blatant conflict of interest is often over-

¹⁴⁹ Johnson has an ownership interest in the Los Angeles Lakers, Gretzky is part of the ownership group of the Phoenix Coyotes, Lemieux owns the Pittsburgh Penguins and Kosar owned part of the Florida Panthers. Jordan was part owner of the Washington Wizards and Washington Capitals until returning to an active playing career, when the NBA forced him to sell his interests in the teams. Lemieux's ownership interest was placed into a blind trust when he came out of retirement and resumed his playing career.

¹⁵⁰ Steve Rosner, *Yesterday's Stars, Today's Marketing Giants*, SPORTSBUSINESS J., July 23, 2001, at 29.

¹⁵¹ Jack McCallum, *I Own You*, SPORTS ILLUSTRATED, Feb. 14, 2000, at 50.

¹⁵² Richard Sandomir, *Jordan-Falk Relationship Poses Conflict of Interests*, N.Y. TIMES, Jan. 30, 2000, at C15.

¹⁵³ *Id.*

looked, especially in light of the lack of union protection for athletes competing in individual sports. Tennis great Ivan Lendl once sued ProServ, his former management company, for taking advantage of his status by packaging its other clients in his merchandising contracts, appearances, and exhibitions in an attempt to maximize the company's revenues.¹⁵⁴ Claiming that this arrangement came at his financial expense, Lendl ultimately received a settlement in his case against Proserv.¹⁵⁵

V. CONFLICT OF INTEREST LAWS IMPLICATED

"In a general framework, this is not a traditional attorney/client relationship. This is not a traditional personal representative relationship in any way, shape, or form, even though many of the activities may be similar."¹⁵⁶ No matter the truth of this statement, the sports agent-athlete relationship often implicates the Model Rules of Professional Responsibility and other laws, as over fifty percent of sports agents are attorneys.¹⁵⁷ Despite the fact that attorney-agents often attempt to avoid the ethical requirements of the legal profession by claiming that they act as agents and not attorneys in representing professional athletes,¹⁵⁸ they remain bound by the laws governing lawyers.¹⁵⁹ This sec-

¹⁵⁴ Greenberg and Gray, *infra* note 270, at 1072-3.

¹⁵⁵ Greenberg and Gray, *infra* note 270, at 1073.

¹⁵⁶ Fehr, *supra* note 8, at 71.

¹⁵⁷ Charles B. Lipscomb & Peter Titlebaum, *Selecting a Sports Agent: The Inside for Athletes & Parents*, 3 VAND. J. ENT. L. & PRAC. 95, 99 (2001).

¹⁵⁸ Brown, *supra* note 7, at 816.

¹⁵⁹ *In re Dwight* is a seminal case involving lawyer discipline in this area. The Arizona Supreme Court held that attorneys are bound by the ethical code governing lawyers even when they work in another profession. The Court wrote:

As long as a lawyer is engaged in the practice of law, he is bound by ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity. For only in this way can full protection be afforded to the public

In re Dwight, 573 P.2d 481, 484 (Ariz. 1977). The California Supreme Court reached a similar decision in *Kelly v. State Bar of California*. The court held that "when an attorney serves a single client both as an attorney and one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services." *Kelly v. State Bar of California*, 808 P.2d 808 (Cal. 1991). In an Advisory Opinion lacking the weight of law, the Illinois State Bar Association considered "whether the representation of athletes is actually the practice of law in that it may include a wide range of business counseling, as well as contract negotiation. This doubt could be prompted by the fact that nonlawyers frequently engage in these activities." The committee concluded that "[w]hen an attorney engaged in the private practice of law represents a client in contract negotiations and general business counseling, these activities constitute the practice of law and it would be professionally proper to handle them from the same office in which he engages in the general practice of law." Illinois State Bar Association, ISBA Advisory Op. on Prof. Conduct 700 (Nov. 1980), available at <http://www.illinoisbar.org/CourtsBull/EthicsOpinions/700.asp>.

tion identifies and discusses the relevant conflicts of interest regulations that consolidation in the sports agent industry effects, as well as the likely impact of the adoption of the Ethics 2000 Commission's changes to the Model Rules on the industry.

A. *Model Rules of Professional Responsibility*

1. Rule 1.7

The American Bar Association's Model Rules of Professional Conduct are the basis of the regulations governing lawyers in forty-two states and the District of Columbia.¹⁶⁰ The Model Rules serve to further the overriding values of the legal profession; mainly, loyalty to clients, the maintenance of client confidentiality, and the zealous advancement of client interests.¹⁶¹ While these values may not be compromised, it is important to recognize that few attorneys represent only one client and that an overly expansive view of conflicts of interest would impact upon clients' autonomy in selecting their attorney.¹⁶² Thus, the attorney must balance these values with the practical realities of serving more than one client. It is impossible to completely eliminate conflicts of interest from the legal profession.¹⁶³ These competing loyalties have been recognized since biblical times. Matthew 6:24 states that, "[n]o man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one and despise the other."¹⁶⁴ Rather than focus on whether a conflict exists, the modern view of conflicts of interest recognizes that they are unavoidable, and instead centers on an analysis of the risk of material, adverse harm to either the quality of the attorney's representation of the client or the attorney-client relationship.¹⁶⁵ If the risk of actual harm to either is substantial, then the attorney must respond appropriately.¹⁶⁶ Con-

¹⁶⁰ American Bar Association, www.abanet.org/journal/may01/fcle.htmlcpr/mrpc/alpha-states.html.

¹⁶¹ Fraley & Harwell, *supra* note 6, at 172-74.

¹⁶² GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROF'L CONDUCT* R. 10.2, at 10-8 (3d ed. 2001).

¹⁶³ *Id.*

¹⁶⁴ *Matthew* 6:24 (King James).

¹⁶⁵ Hazard & Hodes, *supra* note 162, §10.4, at 10-10 to 10-11. This view is also espoused in the Restatement of the Law Governing Lawyers: "A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 121 (2000).

¹⁶⁶ Hazard & Hodes, *supra* note 162, § 10.4, at 10-11.

versely, if the risk is only potential, then no response is required.¹⁶⁷ The attorney-agent continually must walk this fine line.

Model Rule 1.7 is especially important in addressing the conflicts of interest faced by sports agents in the situations discussed in the previous section. Under this rule, an attorney-agent must identify any competing interests that may impact his judgment or capacity to be diligent and loyal to his client, decide whether it is appropriate to continue the representation in light of these competing interests, and, if so, then seek the client's consent before continuing the representation.¹⁶⁸ Though Rule 1.7 has been criticized for providing little practical guidance to attorneys facing a conflict of interest,¹⁶⁹ a lawyer who refuses to withdraw himself and violates the conflicts of interest provisions may be subjected to state bar association discipline, court disqualification from continuing the representation, civil liability and/or forfeiture of fees.¹⁷⁰

Rule 1.7 contains two general rules guiding lawyers with respect to conflicts of interest. Model Rule 1.7(a) provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As they have different rationales and apply to different types of conflicts of interest, the individual clauses of each of these rules must be parsed in order to fully understand the obligations that the sports agent faces.

¹⁶⁷ *Id.* § 10.5, at 10-14.

¹⁶⁸ *Id.* § 10.4, at 10-12 to 10-13.

¹⁶⁹ John A. Walton, *Conflicts for Sports and Entertainment Attorneys: The Good News, The Bad News, and the Ugly Consequences*, 5 VILL. SPORTS & ENT. L.J. 259, 264 (1998).

¹⁷⁰ Hazard & Hodes, *supra* note 162, § 10.10, at 10-31 to 10-32.

Rule 1.7(a) is a strictly-applied rule meant to protect the integrity of the relationship between the lawyer and each of his clients.¹⁷¹ This is particularly important in the representation of professional athletes because of the great dependence that the athlete places on the attorney. Trust is integral to this close relationship. The possibility of disloyalty or a breach of confidentiality is increased when an attorney represents two clients with directly adverse interests;¹⁷² thus, the rule mandates that the attorney not represent two such clients.¹⁷³ This requirement needs further interpretation, as it is unclear when the interests of clients are directly adverse as opposed to indirectly so.¹⁷⁴ While mere competition between two businesses in the same industry may be insufficient to place them in direct conflict with each other, a competition between these two businesses for a limited resource such as the same government contract or the last available broadcast license would place them in direct adversity.¹⁷⁵ A lawyer representing both parties in the preparation of their bids or applications would be subject to Rule 1.7(a).¹⁷⁶

In *Fiandaca v. Cunningham*, the Court of Appeals for the First Circuit held that a law firm's representation of a plaintiff class became materially limited by its responsibilities to another plaintiff class when the acceptance of a proposed settlement offer may have caused one

¹⁷¹ *Id.* §11.2, at 11-4 to 11-5. The comment to Rule 1.7 states:

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 (4th ed. 1999).

¹⁷² Hazard & Hodes, *supra* note 162, § 11.3, at 11-5 to 11-6. The fact that player salary information is readily attainable through various sources alleviates many of the concerns about a loss of confidentiality in the professional sports setting.

¹⁷³ *Id.* § 11.3, at 11-6.

¹⁷⁴ This definitional uncertainty is recognized in a comment to the Model Rules:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 (1999).

¹⁷⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 illus. 1 (2001); *see also* Hazard & Hodes, *supra* note 162, § 11.4, at 11-8; Bar Association of New York City, Comm. on Prof'l and Judicial Ethics, N.Y.C. Eth. Op. 2001-3, 2001 WL 1870201 (holding that Rule 1.7(a) "would surely be applicable" if the same lawyer prepared bids for two businesses competing for the same government contract).

¹⁷⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 121 illus. 1 (2001).

group of its clients to benefit at the cost of its other clients.¹⁷⁷ While the acceptance of the settlement offer would have been advantageous to the one class of plaintiffs, the law firm could not accept the offer, because it would have disadvantaged the other class; thus, the interests of the clients became directly conflicted, and their representation became adversely affected under Rule 1.7.¹⁷⁸ The court disqualified the law firm from further representation.¹⁷⁹ The Texas Committee on Professional Ethics has opined that an attorney's representation of multiple clients when a defendant has a limited amount of funds to pay them violates its rules of professional conduct if one client benefits at the expense of another.¹⁸⁰ Similarly, an attorney has been disbarred in North Carolina for representing two plaintiffs seeking recovery from the same limited fund without fully disclosing the possible adverse effect of the multiple representations to each client.¹⁸¹

This situation occurs often in the attorney-athlete relationship, especially in the representation of coaches and athletes in any league, and of NFL and NBA players in particular. The salary cap systems used in the NFL and NBA creates a dilemma for sports agents representing multiple players on the same team during the same negotiation period; the problem is exacerbated when the athletes play the same position. The team must pay its players from a limited fund and each athlete expects the agent to negotiate a contract that will yield him the most amount of money possible. A higher salary for one player may lead to a lower salary for another player, especially if the athletes play the same position. The application of the salary cap typically precludes a successful team from allocating a disproportionate share of its payroll to any one position; the quality of the team is usually higher if it is able to spread its most talented and highly compensated players over several positions. This creates the paradigmatic zero-sum game. A zero-sum game is a situation in which "the amount of 'winnable goods' (or resources in our terminology) is fixed. Whatever is gained by one actor, is therefore lost by the other actor: the sum of gained (positive) and lost (negative) is zero."¹⁸²

¹⁷⁷ *Fiandaca v. Cunningham*, 827 F.2d 825, 829-830 (1st Cir. 1987).

¹⁷⁸ *Id.* at 830.

¹⁷⁹ *Id.* at 831.

¹⁸⁰ Tex. Comm. on Prof'l Ethics, Op. 500, 58 Tex. B.J. 380, 381 (1995), available at <http://www.law.uh.edu/ethics/Opinions/401-500/O500.html>.

¹⁸¹ N.C. State Bar v. Whitted, 347 S.E.2d 60, 65 (N.C. Ct. App. 1986), *aff'd* 354 S.E.2d 501 (N.C. 1987).

¹⁸² Francis Heylighen, *Principia Cybernetica*, available at <http://pcp.lanl.gov/ZESUGAM.html>.

For the attorney-agent, the negotiation of contracts for coaches and players in the same league or multiple players on the same NBA or NFL team in the same period of time is a “directly adverse” conflict of interest under Rule 1.7(a). Under Rule 1.7(a)(1), however, the representation of each client may continue if the attorney has a “reasonable belief” that doing so will not “adversely affect” his relationships with each client.¹⁸³ The reasonable belief requirement has both subjective and objective aspects; not only must the lawyer have an actual belief that the relationship with each client would not be affected, but a reasonably prudent and competent lawyer should agree with him that this is the case.¹⁸⁴

If the attorney actually and reasonably believes that he is able to continue the relationship with each client without adversely affecting the attorney-client relationship, he must then receive the consent of each client “after consultation” before proceeding with the representation under Rule 1.7(a)(2).¹⁸⁵ The representation may not continue absent the consent of each client.¹⁸⁶ The consent must be informed; that is, the attorney must fully disclose to the client all “information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”¹⁸⁷ A mere recitation of the existence of the conflict is insufficient.¹⁸⁸ Instead, this information usually includes the source, risks, and current status of the conflict of interest, the potential

¹⁸³ MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (1999).

¹⁸⁴ MODEL RULES OF PROF'L CONDUCT § Terminology para. 7, 8 (1999). The concept of relying on the attorney's reasonableness in determining whether the relationship will be adversely affected is problematic. Note, *Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1304-5.

[A]ttorney may not even be competent to determine the possible impairment of his judgment. To do so, the attorney would first have to decide ‘objectively’ what would be the optimal legal course for each client. Only after concluding this analysis could the attorney determine whether the clients’ interests are incompatible and the representations therefore inadequate. Yet these very assessments are likely to be tainted by the compromising pressures of the conflicting interests.

Id.

¹⁸⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (1999).

¹⁸⁶ *Id.* cmt. 5. Comment 5 to Rule 1.7 provides:

A client may consent to representation notwithstanding a conflict. However, . . . when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent.

Id.

¹⁸⁷ MODEL RULES OF PROF'L CONDUCT § TERMINOLOGY para. 2 (1999).

¹⁸⁸ Richard Zitrin, *Risky Business . . . Representing Multiple Interests*, 1 Cal. State Bar Ethics Hotliner 1, Winter 1992-93 at 1, 11.

ways in which the conflict could improve or worsen, and the potential harm that could result from the conflict.¹⁸⁹ The use of an if/then approach – “if this happens, then here’s what happens next,” to explain the potential ramifications of the representation is likely to be useful in explaining the ways on which the conflict could improve or worsen.¹⁹⁰ In addition, the attorney must objectively advise the client on the wisdom of consenting and give the client the opportunity to seek independent counsel.¹⁹¹ The client’s level of sophistication will impact the adequacy of the amount of information communicated by the lawyer; the less sophisticated the client, the more the information that must be communicated.¹⁹² Courts conduct a probative examination in order to determine whether the consent of unsophisticated clients was indeed informed.¹⁹³ If the client gives his or her consent, then the representation may continue. Thus, the goal of ensuring client autonomy will be furthered, as the client can retain the attorney of his choice if he determines that the benefits of being represented by a particular attorney outweigh the detriments of a conflicted representation.¹⁹⁴

There are situations, however, in which the concern for the protection of the integrity of the attorney-client relationship will outweigh the desire for client autonomy and the conflict of interest will be deemed “nonconsentable.”¹⁹⁵ The Restatement of the Law Governing Lawyers explains this as a circumstance in which “it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.”¹⁹⁶ This situation is more likely to occur with a client who is unsophisticated in retaining lawyers, inadequately informed, or incapable of appreciating the risks of the conflict than it is with a sophisticated client advised by independent counsel.¹⁹⁷

¹⁸⁹ Hazard & Hodes, *supra* note 162, at 10-21; *see also* ABA Comm. on Ethics and Prof’l Resp., Formal Op. 372 (1993):

What is required for consultation or full disclosure will, of course, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client’s familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues involved and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived.

Id.

¹⁹⁰ Zitrin, *supra* note 188, at 11.

¹⁹¹ Hazard & Hodes, *supra* note 162, § 10.8, at 10-22.

¹⁹² Zitrin, *supra* note 188, at 41 n.4.

¹⁹³ Brown, *supra* note 7, at 830.

¹⁹⁴ Jamie P.A. Shulman, *The NHL Joins In: An Update on Sports Regulation in Professional Team Sports*, 4 SPORTS LAW J. 181, 201 (1997).

¹⁹⁵ Hazard & Hodes, *supra* note 162, § 11.4, at 11-15.

¹⁹⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(2)(c) (2000).

¹⁹⁷ *Id.* at § 122 cmt. g(iv).

For attorney-agents representing coaches and players in the same league or multiple players on the same team during the same negotiation period, it is debatable whether their conflict of interest is a consentable one. The risk of an adverse effect on the quality of the attorney's representation of the athlete is substantial. In addition, it may be unreasonable for the attorney to expect the relationship between the athlete and attorney to survive under these conditions, as is required under Rule 1.7(a)(1).¹⁹⁸

Even if it is determined that Rule 1.7(a) does not apply, the conflict of interest must be analyzed under the broad language of Rule 1.7(b) to ascertain whether each client's representation may be materially limited by any competing interests, including the representation of the other client.¹⁹⁹ Rule 1.7(b) addresses the quality of the *representation* provided to each client and requires the likelihood of a material limitation on the representation before it can be invoked.²⁰⁰ It stresses the import of the lawyer maintaining independence of judgment unclouded by competing loyalties, so that all alternatives remain available to each client.²⁰¹ Rule 1.7(b) requires the possibility that the representation may be *materially* limited before it is invoked;²⁰² the risk must be substantial.²⁰³ This higher threshold renders Rule 1.7(b) less stringent than Rule 1.7(a).²⁰⁴ Nonetheless, similar to Rule 1.7(a), the attorney may represent each client only if he reasonably believes that the conflict will not adversely affect the representation and each client gives informed consent.²⁰⁵ Further, the commentary to Rule 1.7(b) contemplates situations in which the representation will be nonconsentable.²⁰⁶

¹⁹⁸ Hazard & Hodes, *supra* note 162, § 11.4, at 11-7.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 11.2, at 11-5. The comment to Rule 1.7 provides:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. . . . A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (1999).

²⁰¹ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (1999).

²⁰² Hazard & Hodes, *supra* note 162, at 11-26.

²⁰³ *Id.* § 11.12, at 11-28.

²⁰⁴ *Id.*

²⁰⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)-(2) (1999).

²⁰⁶ *Id.* cmt. 12 (1999). The comment provides, "For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each

B. *Ethics 2000 and the New Rule 1.7*

A comprehensive review of the Model Rules of Professional Conduct was completed by the American Bar Association's "Ethics 2000" commission in 2001.²⁰⁷ Officially called the "Commission on Evaluation of the Rules of Professional Conduct," the association's House of Delegates subsequently adopted many of the changes proposed by this group.²⁰⁸ While the only intended substantive change to Rule 1.7 is the new requirement that all conflict of interest waivers be confirmed in writing,²⁰⁹ the structure and language of the Rule have been revamped and commentary added to clarify the meaning of the rule so that lawyers better understand their obligations under Rule 1.7.²¹⁰ As amended, Rule 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.²¹¹

other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them." *Id.*

²⁰⁷ Mark Hansen, *Model Rules Rehab*, 87 A.B.A. J. 80 (Oct. 2001).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 81.

²¹⁰ American Bar Association, Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates, Reporter's Explanation of Changes to Model Rule 1.7 (Aug. 2001) available at <http://www.abanet.org/cpr/e2k-rule17rem.html> [hereinafter Reporter's Explanation of Changes to Model Rule 1.7].

²¹¹ Amendments to Model Rules of Prof'l Conduct (Ethics 2002) Rep. 401 (as passed by the House of Delegates Feb. 5, 2002), available at http://www.abanet.org/cpr/e2k-202report_passed.html [hereinafter Amended Model Rules of Professional Conduct].

A discussion of these changes is warranted to determine the likely impact on the attorney-athlete relationship. Rule 1.7(a) now establishes the two types of conflicts of interest that are prohibited—directly adverse conflicts and material limitation conflicts.²¹² It mandates that there be a “significant risk” of material limitation.²¹³ Rule 1.7(b) more clearly defines what constitutes a lawyer’s “reasonable belief” that the representation may continue, sets forth the situations in which a conflict of interest is nonconsentable, and conveys more adequately that clients must receive full disclosure of the conflict of interest.²¹⁴ In addition, it requires that the client’s informed consent be confirmed in a writing from the lawyer to the client,²¹⁵ incorporating the adoption of the term “informed consent” throughout the Amended Model Rules.²¹⁶

²¹² Reporter’s Explanation of Changes to Model Rule 1.7, *supra* note 210, at 65; *see also* Margaret Colgate Love, Final Report—Summary of Recommendations, ABA Ethics 2000 Commission (June 9, 2001), *available at* http://www.abanet.org/cpr/e2k-mlove_article.html [hereinafter Summary of Recommendations].

²¹³ Reporter’s Explanation of Changes to Model Rule 1.7, *supra* note 210, at 65.

²¹⁴ Reporter’s Explanation of Changes to Model Rule 1.7, *supra* note 210, at 66-67; *see also* Summary of Recommendations, *supra* note 212.

²¹⁵ Reporter’s Explanation of Changes to Model Rule 1.7, *supra* note 210, at 67.

²¹⁶ AMENDED MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (1999). The Amended Model Rules provide, “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.*; *see also* American Bar Association, Comm’n on Evaluation of the Rules of Prof’l Conduct, Report with Recommendation to the House of Delegates, Reporter’s Explanation of Changes to Model Rule 1.0 (Aug. 2001), *available at* <https://www.abanet.org/cpr/e2k-rule10rem.html>. The commentary explains the reasoning behind the adoption of this new term in the place of ‘consent after consultation,’ though no substantive change was intended:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

The commentary to Rule 1.7 was substantially altered to aid in the clarification of the rule.²¹⁷ At the outset, the new comments set forth the rationale for the rule²¹⁸ and outline a process to allow the lawyer to identify and address conflicts of interest.²¹⁹ The rationale for prohibiting directly adverse conflict of interest is discussed further in the commentary,²²⁰ with an explanation of how they can occur in transactional matters.²²¹ The commentary also discusses of the likelihood of the risk of harm in the context of a material limitation on representation in

AMENDED MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (amended 2002).

²¹⁷ *Id.*

²¹⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (amended 2002). The commentary provides, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests." *Id.*; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 68.

²¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (amended 2002). The commentary provides:

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 68.

²²⁰ Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 68. The commentary provides:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (amended 2002); see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 68.

²²¹ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 (amended 2002). The commentary provides:

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 68.

both litigation²²² and transactional matters.²²³ In addition, the situations in which a client may not consent to a conflict of interest are elaborated upon.²²⁴ Finally, the introduction of the requirements for obtaining a client's informed consent²²⁵ with a written confirmation²²⁶

²²² MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (amended 2002). The commentary provides:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 69.

²²³ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 26 (amended 2002). The commentary provides:

Conflicts of interest . . . arise in contexts other than litigation Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 72.

²²⁴ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 14 (amended 2002). The commentary provides:

Ordinarily, clients may consent to representation notwithstanding a conflict. However . . . some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 70. The commentary provides:

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, . . . representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 15 (amended 2002); see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 70.

²²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (amended 2002). The commentary provides:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 70.

is an important addition to the commentary; it will allow attorneys to better understand their responsibilities.

C. Agency Law

Both attorney and non-attorney agents are subject to common law agency requirements in forming relationships with athletes. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."²²⁷ The agency relationship in professional sports is contractual in nature, as the players association in each league has adopted a model agent-athlete contract that must be used by all registered agents establishing relationships with athletes.²²⁸ The athlete is the principal to whom the agent owes the fiduciary duties of loyalty, obedience, reasonable care, notification, and accounting.²²⁹ The duty of loyalty obliges the agent to avoid conflicts of interest.²³⁰ "Undivided loyalty means that the agent cannot get himself in a situation in which there is an actual, or even apparent conflict between his interests and the interests of the player he represents."²³¹ The athlete may consent to the conflict of interest upon full disclosure of all material facts that might affect his judgment if it is clear that the agent can adequately represent his interests.²³² An agent whose conflict of interest results in a breach of the duties owed

²²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 20 (amended 2002). The commentary provides:

Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Id.; see also Reporter's Explanation of Changes to Model Rule 1.7, *supra* note 210, at 71.

²²⁷ RESTATEMENT (SECOND) OF AGENCY, § 1(1) (1958).

²²⁸ RAY YASSER, JAMES R. MCCURDY, & C. PETER GOPLERUD, *SPORTS LAW: CASES AND MATERIALS* 588 (4th ed. 2000).

²²⁹ *Id.*

²³⁰ See, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 548 (E.D. Mich. 1984).

²³¹ George Cohen, *The Second Annual Sports Dollars & Sense Conference: A Symposium on Sports Industry Contracts and Negotiations: Ethics and the Representation of Professional Athletes*, 4 Marq. Sports L.J. 149, 155 (1993).

²³² RESTATEMENT (SECOND) OF AGENCY, § 391-92, 394 (1958); see also *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. at 548; Brown, *supra* note 7, at 824.

under agency law loses the right to compensation in the form of any commission that is owed to him by the disaffected client.²³³

The seminal case in the application of agency law principles to conflicts of interest in the agent-athlete context is *Sims v. Argovitz*.²³⁴ In this case, the court found that agent Jerry Argovitz breached his fiduciary duty to running back Billy Sims of the Detroit Lions while negotiating his client's contract with the Houston Gamblers of the United States Football League.²³⁵ Argovitz was the president and 29 percent owner of the Gamblers and therefore had a disabling conflict of interest in the representation of Sims²³⁶ that could not continue absent the client's consent upon the agent's full disclosure of both the conflict of interest and "every material fact known to the agent which might affect the principal."²³⁷ Though Argovitz sought to vitiate the conflict of interest by obtaining a waiver from Sims over four months after the original contract was signed without advising him to seek independent counseling, the court refused to recognize it.²³⁸ The court emphasized that Argovitz needed to inform Sims, an "unsophisticated young man,"²³⁹ of "every material fact that might have influenced Sims' decision whether or not to sign the Gamblers' contract."²⁴⁰ This strict requirement was not met, and the conflict of interest occurred when Argovitz did not inform the client about the relative values of the Gamblers' contract offer and the Lions' likely offer; the differences between the USFL and NFL in both financial stability and available fringe benefits; the extent of his Gamblers' ownership interest and compensation package; his failure to attempt to obtain for Sims valuable contract clauses that the Gamblers had given to another player; and the fact that Sims had great leverage that Argovitz refused to exploit through a bidding war that could substantially increase his client's salary.²⁴¹ Thus, while the contract may have been fair to Sims, the court found that Argovitz egregiously breached his fiduciary duty by not fully disclosing his interests to Sims and rescinded the Gamblers' contract with Sims.²⁴² The demanding requirement established in *Detroit Lions, Inc. v. Argovitz* allows a conflicted representation to continue but makes it

²³³ *Wadsworth v. Adams*, 138 U.S. 380, 388 (1890).

²³⁴ *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984).

²³⁵ *Id.*

²³⁶ *Id.* at 544.

²³⁷ *Id.* at 548.

²³⁸ *Id.* at 546, 549.

²³⁹ *Id.* at 546.

²⁴⁰ *Id.* at 549.

²⁴¹ *Id.* at 549.

²⁴² *Id.* at 547-48.

very difficult to conceive how a client could possibly consent to a conflicted representation after disclosure.²⁴³

VI. EFFICACY OF THE CONSOLIDATED SPORTS AGENCY BUSINESS MODEL

Ultimately, there may not be a need to devise an elegant solution to the conflict of interest problems created by consolidation in the sports agency industry. Thus far, the business model has proven to be flawed, with numerous difficulties encountered at these newly-consolidated agencies. Chief among these problems is the inability of the agents involved in the deals to adjust to a new, corporate working environment. As with many mergers, there is frequently a clash of corporate cultures when disparate companies come together in a new sports agency. It is not surprising that this would occur in an industry known for its fiercely competitive nature, as agents have struggled to put aside their differences and find a common ground from which to operate. In order for these newly-conjoined sports agencies to properly assimilate, a sense of cooperation and teamwork must replace this antagonism and individuality. This has yet to occur. Power plays and ego clashes among these former rivals have been *de rigueur*. Craig Fenech, an independent agent, remarked, "These are people who are successful and often ego-driven. At this stage in their lives, they're not going to take well to getting approvals from someone who knows less about how to operate a sports-agent business than they do."²⁴⁴ SFX Sports has been plagued by internal problems since its inception.²⁴⁵ Its acquisition of the Marquee Group led to a battle to run SFX between David Falk and Bob Gutkowski, the head of the Marquee Group;²⁴⁶ Falk emerged victorious, and Gutkowski left the company.²⁴⁷ Falk left SFX Sports in 2001, purportedly for personal reasons;²⁴⁸ his connection with daily operations of the company is now minimal and Falk has focused his attention on several clients.²⁴⁹ Similarly, several other prominent agents left SFX in 2001 because of internal politics; former ProServ agents Bill Allard, Ivan Blumberg, and Patricio Apey and former FAME agent Curtis Polk departed after much infighting.²⁵⁰

²⁴³ Brown, *supra* note 7, at 826.

²⁴⁴ Hyman, *supra* note 3.

²⁴⁵ Wertheim, *supra* note 41, at 36.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

Another personnel issue that has the potential to do great harm to the trend towards consolidation in the industry is the defection of entrepreneurial agents from the large firms to start up their own agencies and the corresponding migration of existing clients to these newly-formed entities. While this has always been an issue in the sports agent industry, consolidation seems to increase the likelihood that an agent will defect from the firm to start his own agency and take clients with him. After an acquisition spree, the more experienced agents typically take on additional responsibilities in the newly formed conglomerate. Due to the increased responsibility that comes with the growth of the firm, the agent must cede authority to a less experienced associate in order to properly service the client. This allows the less experienced agent to build the client relationships and professional experience necessary to form his own firm; if the agent grows unhappy with the work environment or his compensation, the groundwork has been laid for him to defect.

This situation occurred at both Assante and IMG.²⁵¹ Assante ultimately received a jury award of \$44.6 million from one of its former agents, David Dunn, and his new firm, Athletes First, after Dunn departed with numerous clients despite the presence of a covenant-not-to-compete clause in his employment contract.²⁵² While the National Football League Players Association (“NFLPA”) did not take sides in the dispute, the union opposed any action that would have prevented a player from selecting the agent of his choice.²⁵³ Thus, they necessarily oppose the inclusion of covenant-not-to-compete clauses in agent employment contracts. Longtime IMG hockey agent Jiri Crha recently left that firm, taking approximately 25 players with him;²⁵⁴ the resulting dispute is in arbitration.²⁵⁵ While independent firms have not been immune from agent defections, the possibility of losing an agent and numerous clients may dampen the enthusiasm of a company planning the acquisition of a smaller sports agency. Despite the influx of large multinational companies, athlete representation remains a personality-driven industry. IMG’s Bob Kain remarked, “When you are in the service business, you don’t have a product. You don’t have a patent. [The defection of agents] is going to happen.”²⁵⁶ This presents a significant

²⁵¹ Liz Mullen, *Dunn Departure Leaves Rivals Leery, Feeling Lucky*, SPORTSBUSINESS J., July 23, 2001, at 24.

²⁵² Liz Mullen, *Dunn: Steinberg’s Firm a Mess*, SPORTSBUSINESS J., July 23, 2001, at 1, 38.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Liz Mullen, *Dunn Departure Leaves Rivals Leery, Feeling Lucky*, SPORTSBUSINESS J., July 23, 2001, at 24.

²⁵⁶ *Id.*

problem for an acquiring company. In purchasing an independent firm, the most important asset is the agent. If the agent defects, the entire purpose of the acquisition is nullified. As the doctrine of *caveat emptor* governs this marketplace, the onus is on the acquiring firm to perform due diligence, lest it be spurned by a defecting agent. Thus, the resolution of the dispute between Assante and Athletes First could have had a significant impact on the industry. If David Dunn would have been allowed to continue his representation of the various clients who migrated to Athletes First without facing any financial consequences, it may have a chilling effect on the consolidation of the sports agent industry. With the players associations in other sports likely to follow the lead of the NFLPA in supporting the athlete's right to choose, acquiring companies would have to restructure their deals with independent firms in order to provide significant incentives for subordinate agents to continue their employment at the newly consolidated firm well into the future. This would prove to be very expensive—and yet it still would not guarantee that there would be no defections. It is, quite simply, an inherent aspect of the sports agent industry.

In addition to these internal problems, sports agencies have struggled to operationalize the potential synergies in their newly-formed conglomerates. Thus far, firms have been unable to successfully package the various steps in the distribution chain—the athlete, marketing, event management, and media—for the benefit of its clients. This difficulty has been apparent at SFX Sports, where one commentator notes that “[b]y most accounts, SFX Sports is little more than a loose association of autonomous branch offices.”²⁵⁷ Says one formerly independent agent who sold his firm to SFX Sports, “It’s a lot of competent agents doing their thing but my biggest connection to SFX is that it’s on my letterhead.”²⁵⁸ This may be in part the result of the need to avoid conflicts of interest. Similar difficulties beset Cornerstone Sports, a golf representation firm with thirty clients acquired in 1998 by Gaylord Entertainment Corp., a large media company seeking to expand into the sports business.²⁵⁹ Frustrated by the inability to take advantage of the potential synergies available in this marriage, Cornerstone’s former president, Rocky Hambric, left the company within 18 months, taking only four clients with him.²⁶⁰ The dissolution of Artists Management Group (“AMG”) is also telling. Founded by Hollywood agent Michael Ovitz, the firm’s sports division was created in 1999 and headed by ten-

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Alm, *supra* note 20.

²⁶⁰ *Id.*

nis and basketball agent Jeff Schwartz.²⁶¹ Though once home of several prominent agents and the representative of superstar tennis players Pete Sampras and Marcelo Rios, NBA players Jason Kidd, Lamar Odom, Paul Pierce and Tyson Chandler, and 30 NHL players, AMG incurred significant financial losses, all of its agents departed, and most of its assets were eventually sold to The Firm in 2002.²⁶²

Should these problems continue, players might be affected in many ways; while compromised service and/or representation are the primary concerns, the model simply may not work well for most professional athletes. Even if potential synergies can be found, it is likely that only superstar athletes will be able to take full advantage of them. It seems improbable that any more than a few elite athletes could exploit the fact that sports is part of the larger entertainment industry; the consolidated sports agency's goal to package the athlete, event, marketing and media is an unattractive business model absent a marquee athlete to lead the way. Therefore, the vast majority of athletes—all but the transcendent few—are unlikely to realize fully the benefits of a consolidated sports agency. A lingering dissatisfaction in this segment of the labor market may cause it to reject the larger agencies and return to smaller, independent firms.²⁶³ Thus, the conflict of interest problems would be minimized.

Despite using similar tactics, SFX Sports, Assante and Octagon have vastly different motives for pursuing consolidation strategies. The long term viability of each company's sports agency may turn not on the aforementioned external factors, but instead on the soundness of its business model. SFX Sports is a sports management and marketing company seeking to take advantage of the theoretical convergence of the sports and entertainment industries; its business model necessarily requires that this convergence actually occur in order for SFX Sports to maximize its efficiency. For SFX, sports and entertainment is the end in itself; it is the core of the company's business. The business models of both Assante and Octagon stand in contrast to that of SFX. For these companies, the sports agency industry is a means to an end, rather than the end in itself. Assante uses sports as a vehicle through which it can grow its financial management business. Octagon uses sports as a vehicle through which to extend its parent company's global dominance in marketing. Though Assante and Octagon's end goals are

²⁶¹ Liz Mullen, Schwartz on His Own with AMG Clients, *SPORTSBUSINESS J.*, May 13, 2002, at 43.

²⁶² *Id.*

²⁶³ *SFX Sports Group Might Be Put in Play By Clear Channel*, 14 *SAN ANTONIO BUS. J.* 7, March 10, 2000, at 12.

different, their sports agencies play similar roles: they serve to extend the parent company's core business. Thus far, this model seems to be the more effective one. SFX Sports has struggled, while Assante and Octagon have been more successful. While any definitive answer is likely premature, it may be that the sports industry is better used as a means by which to accomplish a corporate strategy rather than as a corporate strategy itself. However, in the event that the operational and personnel difficulties are significantly reduced and the consolidated business model endures, other solutions to the conflict of interest problems must be developed.

VII. POTENTIAL SOLUTIONS TO AVOID CONFLICTS OF INTEREST

A. *Blind Trusts*

There are several defensive tactics available to consolidated agencies that may allow them to lessen the negative impact of these conflicts. SFX was able to ensure that their basketball and baseball representation businesses would not face further criticism through the formation of SFX Baseball and SFX Basketball as limited liability companies. In establishing autonomous agencies through which Clear Channel can only receive profits, and not remove directors or officers, SFX Sports Group deftly assuaged the concerns of the players associations in these sports.²⁶⁴ This "blind trust" is an effective tactic for SFX to avoid both perceived and actual conflicts of interest. While it is difficult to believe that these conflicts actually would have manifested through the behavior of Tom Hicks, even the appearance of a potential conflict could have been problematic for SFX, as other agents could have attempted to use it against the company when recruiting SFX's potential and current clients.

This strategy is not without a substantial drawback. By establishing autonomous agencies, SFX Sports has limited the ability of the Clear Channel family to take full advantage of the synergies between its members. This negates the main purpose of SFX Sports Group's consolidation strategy. While an athlete represented by SFX Sports Group may be able to get some media exposure by exploiting the company's relationship with a wide network of radio stations and outdoor advertisers, these gains are likely to be of minimal value. In addition, despite the measures taken by the SFX Sports Group, it still seems that,

²⁶⁴ *Id.* The company satisfied the NHLPA when it sold its hockey practice back to its top agent, Jay Grossman, who renamed it Puck Agency LLC; however, the parties are still connected in that SFX does all of the marketing and public relations for the new firm's clients and serves as its landlord. Mullen, *supra* note 116.

if Clear Channel executives were actually intent on manipulating negotiations, then there would be little way to prevent this from occurring short of full divestiture²⁶⁵; though courts will not hesitate to rescind contracts that are not negotiated at arm's length in instances when an agent callously disregards a conflict of interest.²⁶⁶ Although the blind trust creates the appearance of neutrality, and it should be enough to alleviate most people's concerns,²⁶⁷ others may remain concerned about the true nature of the relationship between the SFX Sports Group and its directors.²⁶⁸

B. *Consent Upon Full Disclosure*

The most direct way to address most potential conflicts of interest is for the agent to fully disclose to his client any issues that may lead to a conflict.²⁶⁹ Upon full disclosure by the agent, the athlete can either consent to the conflict of interest and continue the representation or refuse to do so and seek new representation. This assumes that the clients of sports agents have the sophistication and business acumen to understand the facts and comprehend the nature of the conflicts presented.²⁷⁰ It may not be possible, however, for the athlete-client to make an informed determination as to the implications of the conflict

²⁶⁵ Nick, *supra* note 1, at 16. When Pittsburgh Penguin owner Mario Lemieux came out of retirement in December of 2000, there were concerns about the conflicts of interest involving an owner playing in the NHL. To alleviate these concerns, League rules required that Lemieux place his ownership interest into a blind trust. Lemieux ultimately did so, and the discussion of the conflict dissipated. Terry Frei, *Lemieux Should Return as Player Only* (Dec. 12, 2000), www.espn.com.

²⁶⁶ Nick, *supra* note 1, at 16; *see also* *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984); Shulman, *supra* note 194, at 193-94.

²⁶⁷ Nick, *supra* note 1, at 16.

²⁶⁸ Similar concerns about the neutrality of a blind trust and a conflict of interest in professional sports were raised when it was reported that Major League Baseball Commissioner Bud Selig's former team, now operated in a blind trust controlled by his daughter, received an unapproved loan in 1995 from a company owned by Carl Pohlad, the owner of the Minnesota Twins. Apparently, this is in contravention of Major League Rule 20(C), which prevents such loans without the consent of the other teams. It was speculated that Selig was repaying the favor to Pohlad by offering him an above-market sum of \$150 million for the Twins, which would then be eliminated as part of Major League Baseball's contraction plan. Murray Chass, *Baseball Owners Come to Defense of Selig on Loan Issue*, N.Y. TIMES, Jan. 9, 2002, at D1-D2.

²⁶⁹ There are certain situations, however, in which the agent cannot represent the client despite obtaining his consent upon full disclosure. A situation in which the lawyer knows that the client is certain to get shortchanged is one such example. In the salary cap settings of the NFL or NBA, the representation of multiple members of the same team may result in a situation in which it is impossible for the agent to represent one client without another necessarily getting less money.

²⁷⁰ Martin J. Greenberg & James T. Gray, *SPORTS LAW PRACTICE*, Vol. 10341(2nd ed. 1998), at 1034.

and possible diminution of their interests.²⁷¹ Conflict issues are too difficult for many players to understand. Indeed, players sometimes select a conflicted agent to represent them because they feel that they may be helped rather than hindered by the conflict; the player believes that the opportunity exists for the agent to exploit the conflict for the player's own benefit.²⁷² This is a shortsighted view.²⁷³ To the extent that the lack of sophistication and business acumen among many athletes creates additional difficulties with respect to informed consent, the problem becomes magnified as professional athletes grow increasingly younger. In particular, many of the young people who become professional athletes directly out of high school are neither mature enough nor experienced enough to appreciate their situation. This problem is only exacerbated if the agent is not completely forthcoming in his disclosure, which some individuals might be wont to do when dealing with a valuable client in an ultra-competitive marketplace where full disclosure could lead to losing the client to another agent. The agent must "talk straight with dignity"²⁷⁴ to convey the seriousness of the situation to the athlete-client; this requires that the agent not "mince words, dance around or be embarrassed about" talking to the client.²⁷⁵ Though full disclosure is the most pragmatic solution to dealing with conflicts, the difficulty is that one client's level of understanding may not be identical to another's.²⁷⁶ Thus, the agent must endeavor to find out what each client can and cannot understand.

C. *Uniform Guidelines for Sports Agents*

While many conflicts may be micro-managed through setting up separate corporate divisions or by mandating full disclosure by agents, it may be that conflicts of interest in the agent-athlete relationship are better addressed at a macro level. One potential alternative is the adoption of an industry-specific set of guidelines for sports agents that suggest a standard method of addressing conflicts of interest. Such guidelines could originate from a professional trade group such as the Sport Lawyers Association, and take the form of a proclamation addressing how conflicts should be resolved. These guidelines, not unlike

²⁷¹ Nick, *supra* note 1, at 17.

²⁷² Charles Grantham, Remarks at Conflicts of Interest for Sports Agents Panel at the Fordham Law School Symposium on Current Legal Issues in Sports, New York City, New York (March 15, 2002).

²⁷³ *Id.*

²⁷⁴ Geoffrey C. Hazard, Jr., Remarks at the Ethics in Sports Law Panel at the Sports Lawyers Association Annual Meeting, Philadelphia, Pennsylvania (May 18, 2001).

²⁷⁵ *Id.*

²⁷⁶ Nick, *supra* note 1, at 17.

other model rules, would not necessarily regulate activities, but rather serve as a moral compass for sports agents.

The Association of Representatives of Professional Athletes (“ARPA”) made such an attempt to institute a code of ethics. Formed in 1978 to develop a set of uniform professional standards, ARPA was a voluntary, self-regulating organization of approximately 400 members.²⁷⁷ While well-intentioned, ARPA was ultimately unsuccessful in regulating sports agents, because it lacked an enforcement mechanism and was, by definition, voluntary.²⁷⁸ An agent desiring to avoid the rule simply could choose not to join the organization.²⁷⁹ Indeed, ARPA is now defunct.²⁸⁰

D. *State Bar Associations*

The state bar associations could work from the aforementioned proclamations to create a codified set of standards in order to assist agents in handling conflicts. The bar associations, though, could not serve as the policing body of these rules; since only half of the agents certified by the professional sports leagues are lawyers, the bar associations would not have jurisdiction over all agents, which could lead to inconsistent enforcement. In addition, the bar associations may not have the time or resources to investigate claims based upon sports agents’ violation of these rules.²⁸¹ Bar associations usually only investigate cases in which the facts are clear cut, which is often not the case in claims against sports agents, because of the subjective nature of accusations made by agents’ clients. Additionally, the bar associations generally focus their inquiries on violations involving less fortunate clients who need greater protection from unscrupulous lawyers, as opposed to highly-paid athletes.

E. *State Laws*

An alternative to state bar regulation could be the inclusion of any conflict of interest guidelines adopted by a professional trade group as part of either the state laws that govern sports agents or the uniform agent regulation law meant to provide for consistent laws from state-to-state. After working closely for several years with the Sports Lawyers Association, the National Conference of Commissioners on Uniform State Laws adopted such model legislation in 2000 in the form of the

²⁷⁷ Greenberg & Gray, *supra* note 270, at 1034.

²⁷⁸ *Id.* at 1035.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Hazard & Hodes, *supra* note 162, at 10-32.

Uniform Athlete Agent Act.²⁸² Eleven states have adopted the model legislation and the Act has been proposed in seventeen others thus far.²⁸³ Twenty-eight states currently regulate sports agents.²⁸⁴ Most of these laws, however, are meant to protect college athletes; professional athletes are largely ignored by state and model legislation. The state laws vary in form, as some merely require registration, while others force a bond to be posted by the agent; others provide for criminal prosecution if ignored, and some prevent contacting athletes with remaining college eligibility. Prosecution under these laws, though still rare, is beginning to increase.²⁸⁵

F. *Players Associations*

The players associations in each professional sports league have become increasingly important in monitoring agent activity. These unions' power to regulate agents flows from their status as the players' exclusive bargaining unit, as provided by the National Labor Relations Act.²⁸⁶ The players associations allow agents to perform this function in their stead via the collective bargaining agreement in each league, though only with respect to contract negotiation. In order to monitor the activity of player agents and protect its athletes, the players association in each league has adopted regulations governing player agents.²⁸⁷ All unions require agents to be certified by the union before allowing the teams to negotiate player contracts with the agent. The certification process in all leagues requires agents to complete forms, and the NFL certification process requires agents to pay fees and pass a certification exam. Each players association's agent regulations prohibit the agent from engaging in certain activities, and specifically addresses con-

²⁸² Robert N. Davis, *Exploring the Contours of Agent Regulation: The Uniform Athlete Agent Act*, 8 VILL. SPORTS & ENT. L.J. 1 (2001).

²⁸³ Alabama, Arizona, Arkansas, Delaware, Idaho, Indiana, Mississippi, Nevada, Tennessee, Utah and West Virginia have adopted the legislation thus far. The legislation has been proposed in California, Connecticut, District of Columbia, Florida, Illinois, Iowa, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, South Carolina, Texas, U.S. Virgin Islands, Washington, and Wisconsin.

²⁸⁴ Prefatory Note, Uniform Athlete Agent Act (2000 (Prefatory Note)).

²⁸⁵ Tank Black and Jeff Nalley are two sports agents who have been prosecuted recently under state agent laws.

²⁸⁶ 29 U.S.C. § 159(a) (2001). Section 9(a) of the NLRA provides, in pertinent part: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives for all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Id.

²⁸⁷ Couch, *supra* note 1, at 133-34.

flicts of interest.²⁸⁸ The Major League Baseball regulations mandate that “Player Agents shall provide the individual Players whom they represent with effective representation free from any actual or potential conflict of interest.”²⁸⁹ The NFLPA, National Basketball Players Association (“NBPA”), and NHLPA have similar statements in their respective agent codes of conduct.²⁹⁰ The NFLPA Regulations Governing Contract Advisors prohibit an agent from engaging in the following conduct:

6. Holding or seeking to hold, either directly or indirectly, a financial interest in any professional football Club or in any other business entity when such investment could create an actual conflict of interest or the appearance of a conflict of interest in the representation of NFL players;
7. Engaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL players;
8. Soliciting or accepting money or anything of value from any NFL Club in a way that would create an actual or apparent conflict with the interests of any player Contract Advisor represents;
- ...
- ...
11. Concealing material facts from any player whom the Contract Advisor is representing which relate to the subject of the player’s individual contract negotiation;²⁹¹

Again, similar provisions apply to agents in the other leagues.²⁹²

Interestingly, the players associations’ agent regulations differ somewhat in addressing the agent who represents multiple players on the same team. The NBPA, MLBPA and NHLPA explicitly allow agents to represent more than one player on a team.²⁹³ The NBPA disallows “[e]ngaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NBA players; provided that the representation of two or more players on any

²⁸⁸ Shulman, *supra* note 194, at 204.

²⁸⁹ MLBPA Regulations Governing Player Agents § 3.

²⁹⁰ *See, e.g.*, NFLPA Regulations Governing Contract Advisors § 3, available at www.nflpa.org/agents/main.asp?subPage=Agent+Regulations.

²⁹¹ *Id.* § 3(B)(6)-(8),(11).

²⁹² MLBPA Regulations § 3(B)(5)-(8), NHLPA Agent Certification Program § 3(B)(d)-(g), NBPA Regulations Governing Player Agents § 3B.

²⁹³ MLBPA Regulations Governing Player Agents § 3(B)(8), NHLPA Agent Certification Program § 3(B)(f), NBPA Regulations Governing Player Agents § 3(B)(g). The MLBPA Regulations Governing Player Agents provide that the multiple representation of players on one team is not a *per se* violation of the provision. The NHLPA provision mimics the NBPA’s.

one club shall not itself be deemed to be prohibited by this provision.”²⁹⁴ The NFLPA does not include such a provision.

Finally, all of the players associations except the NFLPA have rules governing agents who wish to represent both players and coaches in the league. The NBPA rule is instructive on this point, as it prohibits

[r]epresenting the General Manager or coach of any NBA team (or any other management representative who participates in the team’s deliberations or decision concerning what compensation is to be offered individual players) in matters pertaining to his employment by or association with any NBA team; or any other matters in which he has any financial stake.²⁹⁵

By including this type of provision in its agent regulations, three players associations have acknowledged that this type of dual representation represents an actual conflict of interest for agents.²⁹⁶ Despite the continuing efforts of its general counsel, the NFLPA has not yet adopted this provision.²⁹⁷ There is at least one agency that represents both NFL players and coaches—Octagon.²⁹⁸

Recently, the NHLPA has been vigilant in protecting its constituents from conflicts of interest, and so its stance warrants further discussion. The union has enforced its rules against potential conflicts of interest at least four times, preventing an agent from representing both players and management in each instance. In the fall of 2000, the NHLPA forced IMG Hockey President Mike Barnett to terminate his representation of Wayne Gretzky when his most famous client became

²⁹⁴ NBPA Regulations Governing Player Agents § 3B(g).

²⁹⁵ NBPA Regulations Governing Player Agents § 3B(f). The NHLPA uses similar language. NHLPA Agent Certification Program § 3(B)(e)(ii). The MLBPA’s Regulations ban these dealings absent the union’s prior approval. MLBPA Regulations Governing Player Agents § 3(B)(6). Rather than specifically prohibiting an agent from representing both players and management personnel, the NFLPA requires that agents must “[d]isclose in an addendum attached to the Standard Representation Agreement between the Contract Advisor and player, the names and current positions of any NFL management personnel whom Contract Advisor represents or has represented in matters pertaining to their employment by or association with any NFL club.” NFLPA Regulations Governing Contract Advisors § 3(A)(16).

²⁹⁶ Cohen, *supra* note 231, at 155.

[T]he rules expressly state that: no player agent can represent the general manager, the coach of an NBA team, or any other NBA official responsible for negotiating player contracts with players. Agents who do this will have an actual conflict. To illustrate, an agent who represents both the coach and the player who is about to be disciplined by that coach is in a classic conflict of interest.

Id.

²⁹⁷ Richard Berthelsen, NFLPA General Counsel, Remarks at the Sports Lawyers Association Annual Meeting in Phoenix, Arizona (May 31, 2002).

²⁹⁸ Liz Mullen, *Octagon Ready to Up NFL Total with Acquisition*, SPORTSBUSINESS J., Nov. 19, 2001, at 156.

part of the ownership group of the Phoenix Coyotes.²⁹⁹ In early 2001, the union made Steve Reich choose between continuing his representation of Pittsburgh Penguins player-owner Mario Lemieux or resigning as an NHLPA-certified agent.³⁰⁰ Reich opted for the former, effectively leaving himself with only one client. His new company, Reich Publishing & Marketing, handles all of Lemieux's off-ice business.³⁰¹ His former firm represented Reich's fifty hockey clients until it was acquired by IMG in late 2001.³⁰² In March 2001, the union forced IMG to end a sponsorship sales agreement with the NHL regarding the NHL's preseason "Challenge Series" event in Scandinavia.³⁰³ Even though European Hockey Marketing was created as a part of IMG-Sweden's office in Stockholm, it had only two full-time employees, it generated less than \$1 million in revenue, and it operated separately from IMG Hockey, the NHLPA still found that the agreement was in violation of its conflict of interest rules.³⁰⁴ The union's concerns about the perception of conflicts of interest caused by Tom Hicks's ownership of the Dallas Stars forced SFX Sports hockey agent Jay Grossman to reacquire his hockey practice from the company in early 2002.³⁰⁵ While the players associations in Major League Baseball, the NBA, and NFL were satisfied with SFX establishing separate entities for agents in each sport, the NHLPA was not and insisted on complete divestiture.³⁰⁶ Finally, in response the increasing number of agents such as Mike Barnett, Brian Burke of the Vancouver Canucks, Pierre Lacroix of the Colorado Avalanche and George McPhee of the Washington Capitals, all of whom have joined the front offices of NHL teams, the NHLPA now requests that agents voluntarily pledge not to become club employees for nine months after terminating their agent certification.³⁰⁷

²⁹⁹ Andy Bernstein, *IMG Cuts Tie to NHL After Conflict Alleged*, SPORTSBUSINESS J., Apr. 16, 2001, at 41.

³⁰⁰ Liz Mullen, *Longtime Agent Reich Chooses Lemieux Over Union*, SPORTSBUSINESS J., Jan. 29, 2001, at 21.

³⁰¹ *Id.*

³⁰² Liz Mullen, *Shift Is On for Cleveland Slugger as Gonzalez Moves to Agent Moorad*, SPORTSBUSINESS J., Oct. 8, 2001, at 21.

³⁰³ Bernstein, *supra* note 299.

³⁰⁴ *Id.* at 41.

³⁰⁵ Liz Mullen, *Hockey Practice Back to Grossman, But Firm Maintains SFX Ties*, SPORTSBUSINESS J., Mar. 25, 2002 at 17.

³⁰⁶ *Id.*

³⁰⁷ Darren Rovell, *Super Market Streak*, June 5, 2002, available at <http://espn.go.com/sports/business/s/2002/0605/1391275.html>. According to NHLPA Executive Director Bob Goodenow, Mike Barnett's movement to the Phoenix Coyotes "created very many problems for players . . . I can tell you that there was a unanimous response by players who said, 'Wow, this just doesn't feel right. Instinctually, this doesn't look right. We're uncomfortable.'" Bob Goodenow, NHLPA Executive Director, Remarks at the Sports Lawyers Association An-

The sensitivity of the NHLPA in conflict of interest matters is understandable given the union's checkered past. Former NHLPA Executive Director Alan Eagleson ran the organization from its creation in 1967 until late 1991 despite having numerous conflicts of interest that cost NHL players a significant amount of money.³⁰⁸ These conflicts ultimately led to Eagleson serving prison time and paying a \$1 million (CDN) fine after pleading guilty to three counts of fraud in both the United States and Canada for stealing money from NHL players.³⁰⁹

Despite the efforts of the NHLPA, the other sports unions have had minimal success in curbing agent abuses of conflict of interest provisions. Indeed, while the NFLPA recently adopted new regulations for financial advisers and revamped its agent regulations to better protect its members from agent misconduct by instituting, among other requirements, criminal background checks of all agents, it did nothing to address conflicts of interest.³¹⁰ Unions have been criticized for rarely imposing sanctions on agents for conduct violations,³¹¹ until recently, only the most blatant instances of agent misconduct resulted in punishment.³¹² Thus, it is not surprising that enforcement of the conflict of interest provisions has been virtually nonexistent outside of the NHL. This makes little sense. Unlike other agent abuses that can cause great harm to athletes, potential conflict of interest situations are readily apparent to the unions. Since they know the identity of each player's agent, the unions should be proactive and intervene before conflicts of interest are manifested and any damage is done. Increased vigilance by the various players associations could best ensure that both the existing and/or proposed guidelines are followed. Upon investigation of a potential conflict, if the union determined that an agent had a conflict of interest in a pending negotiation due to multiple client representation, it could appoint another agent to represent one of the interested par-

nual Meeting, Phoenix, Arizona (June 1, 2002), reprinted in Liz Mullen, *Hunter Says Hoops Union Will Not Support Luxury Tax in Next Go-round*, SPORTSBUSINESS J., June 10, 2002, at 13.

³⁰⁸ Andy Bernstein, *Union Future Rosy Despite Shaky Past*, SPORTSBUSINESS J., Nov. 23, 1998, at 26.

³⁰⁹ National Hockey League Players Association, http://www.nhlpa.com/Content/ABOUT_THE_NHLPA/What_Is_The_NHLPA.asp.

³¹⁰ 2002 Agent Regulation Amendments, available at <http://www.nflpa.org/agents/main.asp?subPage=Agent+Amendments>.

³¹¹ Shulman, *supra* note 194, at 205.

³¹² *Id.* The NFLPA recently responded to the increase in improper behavior by hiring a former state prosecutor to handle disciplinary cases brought against agents. Liz Mullen, *NFLPA Hires Prosecutor to Target Outlaw Agents*, SPORTSBUSINESS J., June 3, 2002, at 1, 33. Since 1996, the NFLPA has disciplined over 50 agents with letters of reprimand, fines, and, rarely, decertification. *Id.*

ties. Pre-existing fee splitting arrangements could be employed to determine the compensation due to each agent. While agents would certainly balk at such an idea due to their fears of losing clients to the union-appointed agents and claim that the client is harmed by the lack of continuity in representation, these fears would not likely be realized. Perhaps the agents would be appeased if they had a choice as to whether or not to allow a union-appointed agent to replace them. If they declined the union appointment, the agents would face a mandatory union investigation upon the conclusion of the negotiation. If this union investigation resulted in a determination that its conflict of interest regulations were violated, it could enact punishment, including the fining or decertifying of the agent. It is likely that this power to punish would be sufficient to compel agents to comply with the conflict of interest guidelines. While this proposal is radical, it goes a long way towards protecting athletes from conflicts of interest.

G. *Decreased Agent Utility*

Another way to reduce conflicts of interest would be to decrease the utility of the agent in contract negotiations through the use of high-end and entry-level salary limitations. A maximum salary for NBA players has been established that increases along with the years of playing experience in the league.³¹³ The players who are likely to receive the maximum allowable salary are better off retaining attorneys to negotiate their contracts on a traditional hourly rate and can thereby avoid paying an agent's commission on a contract that requires little negotiation over salary.³¹⁴

Pay scales are also in effect for entry-level players, whether specifically enumerated in the league collective bargaining agreement or via a *de facto* pay scale called slotting.³¹⁵ The rookie salary caps in place in the NFL and the NBA operate in different manners. In the NBA, each first round draft slot has set salary parameters that can only be negotiated up to twenty percent higher. In the NFL, each team is allotted a certain amount of money based on a percentage of defined gross revenues to spend on their draft picks.³¹⁶ The NBA has substantially decreased the utility of the agent in the negotiation process by adopting

³¹³ CBA 101, *supra* note 127.

³¹⁴ Grant Hill and Ray Allen hired Washington attorney Lon Babby to handle their most recent contract negotiations and saved millions of dollars by doing so.

³¹⁵ Slotting involves paying draft choices the same amount of money that the player in the previous draft, drafted in the same position, or slot, received, plus a percentage raise to reflect inflation. NFL-NFLPA Collective Bargaining Agreement 1993-2000, at 17.

³¹⁶ NFL-NFLPA Collective Bargaining Agreement 1993-2000, at 17.

these measures, and the NFL has been marginally successful in doing so as well.

VIII. CONCLUSION

Though it is uncertain whether the recent consolidation in the sports agency industry will continue to occur in the future, the conflicts of interest created by this trend will endure absent any action. While the wisdom of the business model upon which consolidation is based is debatable, the conflicts of interest that have resulted are indisputable. Whether one entity controls agencies and sports teams concurrently, represents both a player and his coach, or engages a disproportionate share of the athletes in a sport or on a team, conflicts of interest are pervasive. Both the athlete and the agent are potentially harmed when a conflict of interest occurs. Thus, something must be done to protect both. This article has proposed several solutions to conflict of interest problems. There is, however, no cure-all for the conflict of interest problems ailing professional sports. It is left to the stakeholders—the large agencies, the independent agents, the players associations, the individual athletes and the leagues—to see that these problems are addressed. If they are not adequately addressed, consolidation in the sports agent industry will not be a desirable outcome.

