

GLADIATOR TRAPS: A PRIMER ON THE REPRESENTATION OF BLACK ATHLETES

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INTRODUCTION

In ancient Rome, gladiator battles were waged in the circus maximus of the Coliseum.¹ Many of the combatants involved in these battles were slaves from conquered nations who had fought in Rome to gain their individual freedom. They fought in the Coliseum until a combatant was subdued. But the fate of the losing gladiator was not only defeat, many athletes' lives were determined by an arbitrary twist of the Roman Emperor's thumb.² Such is the irony of human affairs that many modern black athletes fall into *gladiator traps*.³ A *gladiator trap* exists when an athlete's ability to realize his potential by means of a sports career is frustrated by the athlete's choice of representatives and advisers. The economic fate of a young black athlete may be just as uncertain as the life or death of an ancient gladiator.

The importance of sports agents is tremendous for they exert near absolute control over an athlete's career.⁴ This influence may have a very positive or very destructive effect upon the life and career of the young black athlete.⁵ It is the nature of the athlete-agent relationship that determines "thumbs up" or "thumbs down" as to the athlete's sports life.

As athletes' salaries skyrocket, more and more people are entering the field of sports representation.⁶ This has resulted in fierce competition among agents for potential superstars and the necessity for professional agents to solicit athletes early in their youth in order to beat the competition.⁷ For the

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1. Scanlan & Cleveland, *The Past as Prelude: The Early Origins of Modern American Sports Law*, 8 OHIO N.U. L. REV. 433, 440 (1981).

2. *Id.*

3. When many of these [Black] athletes leave the colleges and universities to embark upon the world of professional sports, it's much like lambs being led to the wolves of the world They have no idea about the nature of the industry they are about to go into, and that makes them prime candidates for ripoff artists.

Leavy, *The Billion-Dollar Ripoff of Black Athletes*, EBONY, Sept. 1984, at 153, 154 (quoting Fred Slaughter); see generally Edwards, *Preface to the Revolt of the Black Athlete*, in SPORT IN THE SOCIO-CULTURAL PROCESS 304 (1974) (discussion of inequities faced by the black athlete).

4. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 319 (1979).

5. See *infra* note 11 and accompanying text.

6. See Kennedy & Williamson, *Money the Monster Threatening Sports*, SPORTS ILLUSTRATED, July 17, 1978, at 46-51; see also Black, *A Hard Look at Agents*, SPORT, November 1979 at 81.

7. Over the last 20 years, as more and more agents have gotten a foothold on the top players, the rest of the agents have been forced to approach athletes earlier and earlier in their careers. "There's an incredible solicitation of athletes that goes right down to the high school level"

athlete, especially the younger athlete, such cutthroat competition among agents makes it difficult for him to choose the right agent; the problem is compounded by the relative lack of business sophistication on the part of young athletes.⁸ These problems are complicated even further by the lack of information pertaining to agents available to the young athletes.⁹

Considering the impact that an agent has upon an athlete's career, it is extremely important that the athlete, in choosing an agent, is able to arrive at a well-reasoned choice and can recognize what the parameters of the agency relationship should be in order to fit his individual needs. When the choice of an agent is made arbitrarily by the athlete, or is made under subtle or not-so-subtle forms of coercion,¹⁰ the agent's influence is more likely to become negative and can result in the destruction of the athlete's career.¹¹

Thus, the purpose of this article is two-fold. First, it is to educate the athlete and his advisers with regard to the realm of sports agency. Second, it is to analyze the adequacy of legal protection of athletes from abusive agents. It is only through knowledge and understanding by the athlete that the keys to this gladiator trap shall be revealed.

I. SPORTS AGENT DEFINED

An agent has been defined as "one who acts for or in the place of another by authority from him" or "a business representative whose function is to bring about, modify, effect . . . contractual obligations between the principal and third persons."¹² The agent typically serves as the "exclusive representative" of the athlete.¹³ Often the sports agent will assist the athlete in seeking employment and contract negotiation, give investment advice, and give promotional services.

Because of the lack of entry barriers,¹⁴ individuals displaying a wide variety of backgrounds have become agents for professional athletes.¹⁵ This also

Korn, *Never Be a Sports Lawyer*, 11 BARRISTER 12, 56 (1984) (quoting Bob Woolf).

8. Note, *Agents of Professional Athletes*, 15 NEW ENG. L. REV. 545 (1980).

9. Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, the NCAA, And Agents*, 8 J.C. & U.L. 347, 362 (1981-82).

10. "An agent sometimes will write out a check to an athlete with a notation on the back, stating that when the athlete endorses the check he is agreeing to be represented by the drawer of the check." Johnson & Reid, *Some Offers They Couldn't Refuse*, SPORTS ILLUSTRATED, May 21, 1979, at 28 (quoting David Berst). See generally J. WEISTART & C. LOWELL, *supra* note 4, at 320 (discussion of financial inducements, misrepresentation and other coercive ploys).

11. Ruxin, *supra* note 9, at 347. See generally J. WEISTART & C. LOWELL, *supra* note 4, at 321 n.709-714 and accompanying text. *But cf.*, Leavy, *supra* note 3, at 153 ("[S]tars such as Willie Gault of the Chicago Bears and James Worthy of the Los Angeles Lakers are among those who say they are pleased with their agents because they 'took time to make a careful selection.'").

12. RESTATEMENT (SECOND) OF AGENCY § 1 (1958) defines "agency" in pertinent part as: [T]he 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.

13. J. WEISTART & C. LOWELL, *supra* note 4, at 323.

14. "The single factor which causes the most difficulty in the field is the ease of entry into the occupation of agents of professional athletes. . . . "[t]he sole requirement for becoming the agent of a professional athlete is that the athlete grant the agent permission to act on his behalf." Note, *supra* note 8 at 547.

15. Look at Randy Hundley, now with the Minnesota Twins, who used his father, a builder, as his representative; or Duane Thomas of the Washington Redskins, who used former football player Abner Haynes. Others who have become athletic agents include a

places the burden on the athlete to recognize which background demonstrates the agent's ability to deliver the services the athlete will require.

By use of their knowledge, skill, and experience, agents may help athletes make greater use of their bargaining power.¹⁶ A superior agent may improve the star athlete's bargaining position very little,¹⁷ but that same agent may dramatically improve the position of a talented athlete with marginal chances to become a professional.¹⁸

Regardless of the athlete's bargaining position, agents are basically retained to ensure that the athlete receives proper compensation for his services.¹⁹ The method by which agents obtain proper compensation is contract negotiation.²⁰

Athletes also retain agents to provide or secure investment advice.²¹ With respect to investments, the agent should be able to obtain a reasonable rate of return subject to a normal level of associated risk.²² More importantly, the agent must act in accordance with the athlete's financial goals.²³

Another service agents provide is promotion of the athlete. Typically, the agent has an obligation to help the athlete capitalize on his publicity value by securing product endorsements, personal appearances etc., etc.²⁴

It is essential that the agent also provide or secure competent tax advice. Proper tax-planning is absolutely necessary to enable the athlete to receive lifetime security from the economic gains of a relatively short career.²⁵ The sudden acquisition of immediate wealth creates a formidable tax problem for young athletes.²⁶ The agent, therefore, must utilize planning possibilities that

dry-cleaning manager, a building contractor, a college professor, a stockbroker, a college athletic trainer, and an accountant.

Agents of Professional Athletes, *supra* note 8, at 547 n.15 (citation omitted). According to Harry Glickman (executive vice-president of the Portland Trailblazers), two-thirds of the agents he deals with are attorneys; the non-attorney agents hire attorneys to review contracts, accountants to take care of tax implications and investment counselors to manage the money. Korn, *supra* note 7, at 14. See generally R. WOOLF, *BEHIND CLOSED DOORS* (1976).

16. See Ruxin, *supra* note 9, at 348.

17. Korn, *supra* note 7, at 15.

18. Consider professional football, for example:

[The agent's] job is to make that player marketable . . . [s]end out letters to each of the 27 [NFL] teams, search for a hole in that team, get on the telephone to scouts and general managers you know, ask them who might be interested. Sometimes a general manager is going to know that so and so in such and such a city is in need of competition at cornerback The attorney climbs into the boat with his client and just tries to weather the seas.

Id. (quoting Robert Berry). Moreover, the agent of the prospective football player may find opportunities for such a client in Canadian football or the United States Football league.

19. J. WEISTART & C. LOWELL, *supra* note 4, at 319.

20. The contract negotiation is successful if the athlete's compensation bears a reasonable relationship to the compensation of comparably talented athletes. *Id.* at 326.

21. *Id.*

22. An agent should not expose the athlete to high-risk investments because the short span of the average athlete's career makes it difficult to recover from losses and because severe reversals in business ventures may affect the athlete's on-the-field performance. *Id.* at 319.

23. *Id.* at 327.

24. The typical agency contract obligates the agent to "[s]eek profitable offers for [] endorsements and service in Radio, T.V., Advertising, Merchandising, and other commercial fields." See S. GALLNER, *PRO SPORTS: THE CONTRACT GAME* 174 (1974).

25. See Wietmarschen, *Planning for the Professional Athlete: Deferred Compensation Arrangements & Loans in Lieu of Compensation*, 8 OHIO N.L. REV. 499, 502 (1981).

26. Thomas, *Income Averaging and the Professional Athlete: A Re-Examination*, 19 NEW ENG. L. REV. 335 (1984).

maximize the athlete's economic gain and minimize his present tax liability.²⁷ An otherwise successful contract negotiation may be fatally flawed and result in illusory long-term benefits because of a failure to consider the tax ramifications of a negotiated contract.²⁸

A good agent will help the athlete in several other ways, including; protecting the athlete's rights under his contract and the sport's basic agreement and regulations, and counseling the athlete on post-career occupational security.²⁹ In addition to his agent, most athletes will also require the services of an attorney and an accountant, to the extent that the agent is not part of a firm that provides these professional services.³⁰

The four most common methods agents use in calculating their fees are: percentage of gross income, hourly rate, flat fee, or a combination of these methods.³¹ No consensus exists as to which method is most appropriate.³² However, the percentage method appears to be the most popular method of fee calculation among agents.³³

Ultimately, the appropriate method depends on the situation in which the athlete finds himself.³⁴ In considering the agent's method of fee calculation, the athlete should keep in mind:

(1) Most reputable agents consider about five percent of the contract's value to be the maximum appropriate fee for contract negotiation, regardless of the method of calculation.³⁵

(2) An agent who provides additional services will charge an additional fee.³⁶

(3) Fees should be collected as the athlete earns his compensation. In other words, the agent should not take his fees "up front."³⁷

27. One of the most commonly used techniques is the deferred compensation arrangement which may be achieved through qualified pension and profit-sharing plans, deferral by contract, and deferral by the receipt of so-called "restricted property." Lowell, *Planning Contractual Deferred Compensation Arrangements for Professional Athletes*, TAX ADVISER 68 (Feb. 1979).

28. J. WEISTART & C. LOWELL, *supra* note 4, at 321.

29. Ruxin, *supra* note 9, at 355.

30. *Id.* (It is also advisable that the athlete obtain independent financial advice.).

31. *Id.* at 359.

32. Tom Collins, business manager for Kareem Abdul-Jabbar, suggests that "[a] percentage may be in order if the person/firm is to provide total personal financial management. If he is only serving you in contract negotiations, then you should be charged an *hourly rate* . . . You should always be given a stated minimum and maximum limit." Note, *supra* note 8, at 571 (citation omitted) (emphasis in original). Professor Robert Berry has observed, however, that the hourly rate method may be unreasonable when representing a player with marginal chances for becoming professional. The agent representing such a player may have to negotiate contracts with several different teams because of the distinct possibility that the athlete will get "cut." Berry argues that the percentage method is fairer in this situation as the consumption of time will make the bill for hours spent extravagant. Remarks of Professor Robert C. Berry, *Entertainment and Sports Law Practice: What's It Really Like and How Can I Get a Piece of the Action?* (panel discussion in Detroit, Michigan (Feb. 16, 1985)).

33. Ruxin, *supra* note 9, at 359.

34. See note 32, *supra*.

35. Ruxin, *supra* note 9, at 360 (If additional specialized tax advice is necessary, the amount may be greater.).

36. *Id.*

37. 'Up front' collection cheats a player in two ways: first because he may be cut and not receive part or all of his salary; second due to inflation, a dollar today buys more than a dollar will buy next year and much more than a dollar will buy in 20 years when the player may be collecting deferred compensation. But an agent who collects 'up front' receives his entire fee in present dollars rather than in the inflated dollars the player will earn.

The agent must be able to avoid actual and potential conflicts of interest among his clientele. One primary role of the agent is to insulate the athlete from hassles, and to do that, the agent must devote large amounts of personal attention to the athlete. As Professor Berry has stated, "[athletes] find themselves at age twenty-one the subject of a glamorous lifestyle, being pursued by all different kinds of people, all kinds of different ideas. They're having money thrown at them both under and over the table."³⁸

If the agent represents too many athletes, he may have to sacrifice personal attention to less favored clientele.³⁹ More importantly, the greater the number of athlete-clients, the better the chance that the agent will be exposed to potential and actual conflicts of interest.⁴⁰ For example, where two or more athletes represented by the same agent vie for contracts with the same team, the agent may tend to compromise one athlete's bargaining position for the sake of another's.⁴¹ This problem would be further compounded if the two or more athletes referred to in the preceding example were competing for the same position on the same team. Similar compromises may also arise with respect to collateral arrangements such as investments and promotional services.⁴²

Therefore, the athlete should ask his prospective agent for full disclosure of other athletes for whom he has provided services.⁴³ Before the athlete consents to representation by an agent, he should be satisfied that the agent will treat him fairly because "[t]he agent commits no breach of duty by acting for competitors if at the time of his employment, the athlete has reason to know that the agent believes he is privileged to do so."⁴⁴

II. CHOOSING AN AGENT

[A]ny young man making a decision like that should have the advice of counsel . . . It can be a family attorney . . . who genuinely has his best interests in mind.⁴⁵

It is wise for the young athlete to ask his parents or a coach to help screen agents.⁴⁶ After the athlete narrows his choices, a personal attorney is invaluable in interviewing prospective agents and in reviewing the agency contract before the athlete signs.⁴⁷ The attorney can also help the athlete to determine the services he needs and the entity or combination of entities that could best deliver those services at an economical price.⁴⁸

Id. Note also that "[i]n baseball and basketball, over 50 percent of the contracts are guaranteed, meaning the club must pay the player even if he is cut from the team. In the NFL, only three percent of the contracts are guaranteed." Korn, *supra* note 7, at 14.

38. *Id.* at 55.

39. See Note, *supra* note 8, at 571 n.152.

40. "Unless otherwise agreed, an agent is subject to a duty not to act or agree to act . . . for persons whose interests conflict with those of the principal in matters in which the agent is employed." RESTATEMENT (SECOND) OF AGENCY § 394 (1958).

41. S. GALLNER, *supra* note 24, at 68.

42. *Id.*

43. Note, *supra* note 8, at 571 n.152.

44. RESTATEMENT (SECOND) OF AGENCY § 394 comment b (1958).

45. Ruxin, *supra* note 9, at 353 (quoting Dean Smith of the University of North Carolina).

46. *Id.* at 356.

47. *Id.*

48. *Id.* NCAA rules allow "[a]n athlete to retain an attorney for matters of a personal nature, including evaluating the terms of a proposed professional sports contract providing the attorney does

In terms of qualifications to look for, an agent with a legal background has an advantage in protecting his client's rights both during and after contract negotiations.⁴⁹ Also, an agent must be able to make use of resources in the fields of tax planning and investments in order to effectively negotiate deferred compensation arrangements and to ensure sound financial planning.⁵⁰

In terms of knowledge of the sports industry itself, the agent must possess a true understanding of the sport to be able to recognize the athlete's value within it.⁵¹ This is vital because to negotiate salaries and incentives, the agent must be able to determine the proper market value for the athlete he represents.⁵²

In short, the athlete who takes advantage of sophisticated legal and financial advice in choosing an agent is obviously better off in the long run than the athlete who retains an agent with a marginal or questionable background.⁵³ "Sophisticated," here, refers to well-established law firms having members with a fundamental understanding of the customs and usages of the particular sports industry involved. This is not to exclude well-established and reputable solo practitioners who specialize in sports law.

It is critical that the athlete execute a precisely written agreement with his agent that details the parties' understanding of the services that the agent will provide.⁵⁴ The agreement should also address: (1) the period that the athlete is to bind himself; (2) the circumstances under which the athlete may cancel the contract without liability; (3) the amount of compensation the agent is to receive; (4) the agent's right to receive compensation; and (5) the agent's right to commit the athlete without the athlete's consent.

Some respectable agents reject the idea that a written agency contract is necessary between the athlete and his agent.⁵⁵ However, "even an attorney's fee arrangement should be in writing."⁵⁶ The "handshake" agreement may later lead to misunderstandings of the nature of the relationship and inadequately protect the athlete in case he believes the agent is not performing his duty satisfactorily.⁵⁷

III. ASPECTS OF LEGAL PROTECTION FOR ATHLETES

A. *Judicial Protection*

Very few cases have been litigated with regard to disputes involving the athlete-agent relationship. The cases below provide some insight into how courts deal with agent-athlete conflicts. While some courts appear to be in-

not represent the athlete in negotiating such a contract and the student-athlete pays normal fees." *Id.* at 350-51 (quoting NCAA manual) (footnotes omitted).

49. See, e.g., Korn, *supra* note 7, at 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. Smith, *Sports Attorneys: Scoring from the Sidelines*, 1 CALIF. LAW. 41, 42 (Dec. 1981).

54. Ruxin, *supra* note 9, at 357.

55. "Like [Bob] Woolf, [George] Andrews has no written agreement with the athletes he represents, only handshakes 'because that's how an attorney's supposed to work.'" Korn, *supra* note 7, at 55 (quoting George Andrews).

56. Ruxin, *supra* note 9, at 358 ("while this does not bind the athlete to the lawyer, it sets forth the basis for determining compensation of the lawyer").

57. "A written statement concerning the fee reduces the possibility of misunderstanding." *Id.* See ABA MODEL RULES OF PROFESSIONAL CONDUCT, *infra* note 107.

clined to protect the athlete from overreaching agents, as a practical matter, judicial remedies are largely ineffective.

In *Detroit Lions v. Argovitz*,⁵⁸ plaintiffs Billy Sims and the Detroit Lions, Inc. ("Lions") sought a judicial determination that a contract executed between Sims and the Houston Gamblers, Inc. ("Gamblers") was invalid because defendant Jerry Argovitz breached his fiduciary duty when negotiating the Gamblers contract (the "contract") and because the contract was otherwise tainted by fraud and misrepresentation.⁵⁹ The court held that Argovitz breached his fiduciary duty, as Sims' agent, and therefore granted rescission of the contract.⁶⁰

The case's plot began when Billy Sims, having signed a contract with the Gamblers on July 1, 1983, executed a second contract with the Lions on December 16, 1983.⁶¹ Prior to signing with the Gamblers, Sims did not realize the extent of Argovitz' interest in the Gamblers.⁶² The court found that Argovitz knew, or should have known, that he could not act for Sims as his agent when dealing with the Gamblers without creating an untenable conflict of interest.⁶³

Pending approval of his application for a USFL franchise in Houston, Argovitz continued his negotiations with the Lions on behalf of Sims.⁶⁴ However, on May 3, 1983, with his Gamblers franchise assured, Argovitz significantly reduced his offer to the Lions.⁶⁵ Moreover, although negotiations between the Lions and Argovitz were progressing normally, Argovitz represented to Sims that the Lions were "dragging their feet." The evidence established that on June 22, 1983, the Lions and Argovitz were very close to reaching an agreement on the value of Sims' services.⁶⁶ Apparently, in the midst of his negotiations with the Lions, Argovitz decided that he would seek an offer from his new Gamblers franchise for the services of Sims. Bernard Lerner, one of Argovitz' partners in the Gamblers, agreed to negotiate the contract with Sims.⁶⁷ Lerner admitted that he had no knowledge whatsoever about football. The court therefore inferred that Argovitz had at least informed Lerner as to the amount of money required to sign Sims and further impressed upon Lerner the Gamblers' desire to obtain Sims' services.⁶⁸ On June 29, 1983, on Lerner's invitation, Sims and his wife went to Houston to

58. 580 F. Supp. 542 (E.D. Mich. 1984).

59. *Id.* at 544.

60. *Id.* at 549.

61. *Id.* at 543.

62. *Id.* at 544. Although Sims attended a press conference in May 1983 at which Argovitz announced that his application for a USFL franchise had been approved, the court held that Sims did not know the amount of Argovitz' original investment or that Argovitz was president of the Gamblers.

63. *Id.* (The USFL Constitution itself prohibits a holder of any interest in a member club from acting "as the contracting agent or representative for any player.")

64. *Id.* (Argovitz offered Sims' services for \$6 million over a four-year period, including a \$1 million interest-free loan, in addition to skill and injury guarantees. The Lions counter-offered in the amount of \$1.5 million.)

65. *Id.* (Argovitz offered Sims' services for \$3 million over four years including a \$50,000 annuity.)

66. *Id.* (On May 30, 1983 Argovitz asked for \$3.5 million, thus, Argovitz and the Lions were only \$500,000 apart.)

67. *Id.* at 545.

68. *Id.*

negotiate with the Gamblers. When Sims arrived in Houston, he had the understanding, as a result of Argovitz' representations, that the Lions' organization was not negotiating in good faith.⁶⁹ The negotiations began on the morning of June 30, 1983 and ended that afternoon. At the morning meeting, Lerner offered Sims a contract.⁷⁰ Argovitz took Sims and his wife away from the meeting temporarily to discuss the offer; since Sims believed that the Lions' organization was not interested in acquiring his services, he requested that Argovitz not call the Lions to determine whether they would match the Gamblers' offer. When Sims returned to the meeting with Lerner, he agreed to sign with the Gamblers on the terms offered.⁷¹ The court held that at that moment, Argovitz irreparably breached his fiduciary duty to Sims.⁷² The court reasoned that Argovitz, as agent for Sims, had the duty to telephone the Lions, receive its final offer, and present the terms of both offers to Sims. Then, and only then, could it be said that Sims had made an intelligent and knowing decision to accept the Gamblers offer.⁷³

On the surface, it appears that the legal remedies available to Sims in this case were sufficient. In reality, however, Sims lost a great deal by not having a loyal agent competently handle his affairs. Sims probably received a much lower price contract than he normally would have received. In the same season as the Sims deal, the Gamblers agreed to give Jim Kelly, an untested rookie quarterback, a compensation package worth only \$60,000 less than Sims (a former Heisman Trophy winner and a proven star in the NFL).⁷⁴ Kelly's agent, having "shopped" the Gamblers' offer, was also able to obtain a number of favorable contractual clauses from Argovitz; the most impressive clause being: That Kelly was assured of being among the three top earners at his position in the USFL if he performed up to expectations.⁷⁵ Had Argovitz not had interests conflicting with those of Sims, he clearly would have demanded similar benefits.⁷⁶ Thus, although the court enabled Sims to rescind his contract with the Gamblers, the court could not restore the bargaining leverage that Sims had lost.

In *Burrow v. Probus Management, Inc.*,⁷⁷ Norman Young, an accountant, structured Probus Management to act as agent and business manager for professional athletes. The company signed prospective draft picks to representation contracts, and named Young as the athletes' agent.⁷⁸ These contracts provided that Young would handle all the athlete's funds and negotiate his professional contracts. All salary and bonus payments were delivered directly to Young, who was to pay the player's bills, provide living expenses, and invest any remaining funds. In return for these services, Probus Management

69. *Id.*

70. *Id.* (Lerner offered Sims a \$3.5 million five-year contract, including skill and injury guarantees and a \$500,000 loan at one percent interest over prime. Argovitz was to receive \$100,000 from this loan for acting as Sims' agent.)

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 546.

75. *Id.*

76. *Id.*

77. Civ. No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order).

78. FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. REP. NO. 1786, 94th Cong., 2d Sess. 70, 73 (1977).

received a percentage, usually ten percent, of the athlete's income from any source.⁷⁹

While a student at San Diego State University, Ken Burrow was solicited by Young for the purpose of representing Burrow as his agent and personal manager.⁸⁰ Although Burrow was ineligible to sign with an agent without jeopardizing his amateur status, Probus obtained from Burrow a management contract dated in blank, prior to his senior year. Subsequently, Burrow was drafted by the Atlanta Falcons.⁸¹ Young negotiated an NFL contract for Burrow which provided for an initial lump sum bonus of \$25,750, a first year salary and several incentive bonuses.

Young represented to Burrow that he would provide total financial management for him.⁸² Based on these representations, Burrow authorized the Falcons to deliver his bonus and salary to Probus Management.

Burrow and the other clients of Probus Management soon realized that Probus Management was not satisfying its obligations.⁸³ Several players found that they could not gain access to their money on demand. They all "found that their bills were not being paid, promises of off-season employment and endorsement contracts were not being kept, and phone calls of inquiry were not being answered."⁸⁴ Some players alleged that Young took his percentage fee on their new contracts even though he did not negotiate them.⁸⁵ Three players alleged that Young prepared tax returns or withheld money for income taxes without actually paying the taxes due to the Internal Revenue Service or to the state tax revenue services;⁸⁶ at one point Young actually filed a *false* federal tax return for Burrow.⁸⁷ Burrow began to receive inquiries from creditors concerning delinquent bills and had other problems with his personal financial affairs. Young continually assured Burrow that there was no problem.⁸⁸

The court found in *Burrow* that Young made the alleged representations as to the services he would provide and that Burrow reasonably relied on them to his detriment.⁸⁹ The court determined that, in addition to other abuse, Young's advice that Burrow accept all of his bonus in one lump sum was not in Burrow's best interest, but was for Young's benefit and created additional

79. *Id.* at 73-74.

80. *Burrow* at 1.

81. The court commented:

The evidence shows that this practice was utilized in signing numerous other college football players during their senior year when they were likewise ineligible to sign professional football player contracts.

This court, as a sidelight, finds this a corrupting factor in the youth of today, in a practice which this Court has observed with other collegiate ballplayers, not only in the field of football but also in basketball in which those things are often done, corrupting their morals in business ethics and doing improper and otherwise unethical acts.

Id. at 2.

82. *Id.* at 2-3.

83. FINAL REPORT, *supra* note 78, at 74 (Probus had signed contracts with at least eleven prominent NFL players.)

84. *Id.*

85. *Id.* (Young took his commission based on newspaper accounts of the player signing on his own.)

86. *Id.*

87. *Burrow* at 4.

88. *Id.* at 3.

89. *Id.* at 5.

tax liability for Burrow.⁹⁰ The court granted compensatory damages to Burrow in the amount of \$30,000. Furthermore, the court found that Probus had acted in bad faith and that the fraudulent acts it engaged in constituted aggravating circumstances sufficient to entitle Burrows to punitive damages of \$60,000.⁹¹

It appeared in this case, as in the *Sims* case, that legal remedies were sufficient to protect the athlete. As in the *Sims* case, however, the remedies proved to be inadequate. An investigation by the National Football League Players Association (NFLPA) found that at the time of the suit, Young and Probus Management had court judgments against them totalling hundreds of thousands of dollars but they had no discoverable assets.⁹² The athletes never recovered on their claims against Probus. Their collective loss is estimated to be in excess of \$150,000.⁹³ Thus, although the court was receptive to Burrow's claim and returned a favorable judgment, Burrow's loss was not compensated.

Some of the questionable practices used by agents to induce college athletes to enter into representational contracts have recently been exposed.⁹⁴ In *Trope v. Anderson*,⁹⁵ Michael Trope brought an action for breach of contract against an athlete, Otis Anderson, who dismissed Trope after he had been retained to negotiate Anderson's professional football contract.⁹⁶ Trope claimed that he entered into a contract with Anderson under the terms of which he was to be the exclusive agent in connection with professional contract negotiation for Anderson.⁹⁷

The device by which Trope secured student-athletes is called the "offer sheet."⁹⁸ The offer sheet was developed by Trope in an attempt to avoid the NCAA rule which prohibits a student-athlete from contracting to be represented by an agent.⁹⁹ The offer sheet sets out all the terms of the agency agreement between the athlete and Trope. However, the agreement remains signed solely by the athlete until some time after expiration of the athlete's college eligibility.¹⁰⁰ At that point, Trope would sign the agreement if the athlete had not executed a prior revocation and the offer sheet would give rise to a *prima facie* contract.¹⁰¹ Trope's theory was that during such time that the agreement contained only the signature of the athlete, it was merely an offer, and

90. *Id.* at 4-5.

91. *Id.* at 6.

92. FINAL REPORT, *supra* note 78, at 74 (The NFLPA brought a separate action on behalf of some of Probus Management's clients).

93. *Id.*

94. See generally Black, *supra* note 6, at 75-82.

95. No. C 280119 (Cal. Super., filed April 12, 1979) (dismissed by plaintiff's attorney on July 23, 1979).

96. Michael Trope has brought similar breach of contract actions against thirteen other players for thousands of dollars of lost commissions and loans. Johnson & Reid, *Some Offers They Couldn't Refuse*, SPORTS ILLUSTRATED, May 21, 1979 at 29. Most of these cases have been or will be settled.

97. See *supra* note 95.

98. See generally Note, *The Offer Sheet: An Attempt to Circumvent NCAA Prohibition of Representational Contracts*, 14 LOY. L.A. L. REV. 187 (1980).

99. *Id.* at 188 n.8 and accompanying text. The NCAA Constitution, Article III, Sec. 1(C) provides for the forfeiture of college eligibility status if a student-athlete "contracts" with a professional sports agent.

100. Note, *supra* note 8, at 566.

101. Note, *supra* note 98, at 188.

not a valid contract.¹⁰² Trope's acceptance of the offer, barring prior revocation, after the eligibility of the college athlete expired would then allegedly constitute an enforceable contract and the NCAA rule forbidding student-athletes from contracting with an agent would not be violated.¹⁰³ The primary value of the offer sheet to the agent is that he is able to secure a non-contractual relationship with the student-athlete prior to the expiration of his college eligibility.¹⁰⁴

The NCAA claims that the offer sheet is illusory and that it is clearly in violation of NCAA rules.¹⁰⁵ Ultimately, the question of whether an agency contract exists when the athlete signs the offer sheet appears to depend upon whether the athlete and agent intended to be bound without a writing.¹⁰⁶ The "offer sheet" cases serve to underscore the importance of the student-athlete's selection of competent, loyal agent *at the right time* if he does not wish to jeopardize his college eligibility.

B. Regulatory Protection

1. American Bar Association Model Rules of Professional Conduct¹⁰⁷

The ABA influences the conduct of its members through its Model Rules of Professional Conduct. Some of the rules are imperatives and define proper conduct for purposes of professional discipline.¹⁰⁸ Others are permissive and define areas under the rules in which the lawyer has professional discretion.¹⁰⁹

There are, however, two major deficiencies in the ABA's power to prevent abusive agent practices. First, the ABA Model Rules have no effect on non-lawyers who constitute a substantial percentage of agents. Second, the

102. Trope's reasoning, and the practice, were divulged in 1979, when he told a reporter for the *Miami News*:

Technically, according to contract law, you do not have a contract until there is an offer and an acceptance. I do not sign or accept the player's offer sheet until one month after his eligibility has expired If I haven't heard from the player by January 29 [the date of notarization], that constitutes his acceptance of the contract.

Korn, *supra* note 7, at 54.

103. Note, *supra* note 98, at 191. Observe, however, that there is some speculation that Trope does not wait until expiration of the athlete's college eligibility before he signs the offer sheet:

Trope represented Mike Rozier when the University of Nebraska tailback signed with the Pittsburgh Maulers of the USFL Rozier played in the Orange Bowl Game the day before he signed, leading to speculation that Rozier had hired Trope as his agent before the Orange Bowl Game

Sobel, *The Regulation of Players Agents*, in REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 13, 28 (1984). Moreover, "[a]fter it was reported that Trope's fee for the deal was \$300,000, the agent was fired by [Rozier's] attorney." Korn, *supra* note 7 at 13.

104. Note, *supra* note 98, at 191.

105. The NCAA's Director of Enforcement has stated:

By signing a so-called offer sheet, an athlete would in effect be agreeing to be represented at some time in the future by the agent. That would clearly be a violation of our regulations.

Even an oral agreement to be represented by an agent is sufficient to constitute a violation.

Johnson & Reid, *supra* note 96, at 30.

106. If the athlete and agent intended to be bound without a writing, their contract is formed without it because an agency contract need not be in writing if the parties have expressed their assent. On the other hand, if there were no intent to be bound unless both parties signed the offer sheet, the athlete's signature is merely an offer. Note, *supra* note 8, at 567 n.129.

107. ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983).

108. *Id.* (Preamble: A Lawyer's Responsibilities).

109. *Id.*

restraining effect of the ABA Model Rules on lawyers themselves is questionable.

There are numerous ABA rules that have a direct bearing on a lawyer acting as an athlete's agent. Perhaps the most pertinent of these rules is Model Rule 7.3 which provides that "[a] lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."¹¹⁰ This Rule should have the effect of banning "inappropriate" solicitation of athletes as legal clients.¹¹¹ However, the lawyer may use professional discretion in this area and may not be disciplined for acting within the bounds of such discretion.¹¹²

Model Rule 7.2(c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's service"¹¹³ This rule should have the effect of prohibiting the payment of money to athletes, their coaches, or family to induce them to retain the lawyer as the athlete's agent. These two practices are vital to the operation of some agents' businesses and also tend to invite abuse. However, when the Select Committee¹¹⁴ questioned lawyer-agents on how they dealt with the former Disciplinary Code's ban on solicitation,¹¹⁵ the Committee found that Disciplinary Code had been avoided.¹¹⁶

Other provisions of the Model Rules have a bearing on the athlete-agent relationship when the agent is a lawyer. Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹¹⁷ This Rule should prevent a lawyer-agent who is incompetent from negotiating sports contracts.¹¹⁸

Model Rule 1.7¹¹⁹ provides in pertinent part:

(a) 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.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interest unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple cli-

110. *Id.* "[L]awyer advertising under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services." *Id.* (comment to Rule 7.3).

111. Solicitation is "inappropriate" when the lawyer engages in "undue influence, intimidation [or] over-reaching to secure a client." *Id.* (comment to Rule 7.3).

112. This is because the Rule is cast in the term "may." *Id.* at 1.

113. *Id.* at 24 (The lawyer is subject to disciplinary action for violation of this Rule.).

114. *Hearings Before the House Select Committee on Professional Sports*, 94th Cong., 2d Sess. (1976).

115. *Id.*

116. *Hearings*, *supra* note 114, at 297-98. Note that the Model Rules have lifted the former ban on solicitation.

117. ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 107.

118. *Id.* The comment to Rule 1.1 recognizes, however, that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar A lawyer can provide adequate representation . . . through necessary study."

119. *Id.*

ents in a single matter is undertaken, the consultation shall include explanation of the implications of the common representations and the advantages and risks involved.

This Rule should provide clear guidance for the lawyer-agent on how to proceed in a conflict of interest situation which might occur when an agent represents more than one athlete.¹²⁰ Rule 1.7 does not appear to require the lawyer-agent to obtain consent from his client to represent another athlete affiliated with or trying out for a different team.¹²¹ When, however, the lawyer-agent represents two or more athletes who must compete directly, each against the other, he probably must obtain each client's consent.¹²²

Model Rule 1.5 may curb problems with lawyer-agents who charge excessive fees. It provides, in pertinent part, that "[a] lawyer's fee shall be reasonable."¹²³ The threat of disciplinary action may therefore restrain the lawyer-agent from fee-gouging.

The Model Rules do provide some enforceable ethical standards to a field which is otherwise devoid of them. However, the ABA is powerless to exercise authority over the conduct of non-lawyer agents. In addition, the Model Rules leave a wide range of professional discretion to the less scrupulous lawyer-agent. On balance, the presence of lawyers in the sports agency field should have a positive effect because the attorney must at a minimum possess an academic degree, from an approved law school and pass a state competency examination (which evidences a certain level of training).

2. *Association of Representatives of Professional Athletes Code of Ethics*

The Association of Representatives of Professional Athletes (ARPA) is a voluntary membership association, similar in many respects to the American Bar Association.¹²⁴ The ARPA has a code of ethics which proscribes conduct such as fee gouging, breach of fiduciary relations, conflicts of interest and fraud.¹²⁵ ARPA, however, has no mechanism to enforce its ethical code. Membership in ARPA is not mandated by any league or player association, nor has ARPA's ethical code been enacted into law by any state. As a result, ARPA cannot resolve any of the complaints that have been lodged against its members, nor has it improved the image of agents within the organization or as a class.¹²⁶

3. *The California Athlete Agencies Act*¹²⁷

In 1981, the California legislature adopted the nation's first player-agent

120. The lawyer should approach the situation in which a conflict arises from the "disinterested lawyer's" viewpoint. For example, the comment to this rule states, "[a] client may consent to representation notwithstanding a conflict. However . . . when a disinterested lawyer would conclude that the client should not agree to representation . . . the lawyer involved cannot . . . provide representation . . ." *Id.*

121. "Simultaneous representation in unrelated matters of clients whose interests are only generally adverse . . . does not require consent of respective clients." *Id.* comment to Rule 1.7.

122. *Id.*

123. The Rule also lists several factors which determine "reasonableness" including time and labor spent, difficulty or novelty of the issues involved, custom, and results obtained. *Id.*

124. Sobel, *supra* note 103, at 18.

125. *Id.*

126. *Id.*

127. CAL. LAB. CODE, § 1500 *et. seq.* (West 1981).

law.¹²⁸ The act requires "athlete agencies" to register with the state labor commissioner.¹²⁹

The Act, which took effect January 1, 1982, has been surprisingly controversial.¹³⁰ For the most part the Act is being ignored by traditional sports agents.¹³¹

The Act requires agents to obtain approval from the labor commission of the form of the written contracts they sign with their clients.¹³² The contract form must not be "unfair, unjust or oppressive" to the athlete,¹³³ but neither the Act nor the labor commissioner's regulations state whether the commissioner will review fees under this standard, or whether the inclusion of certain provisions in such a contract would make it unfair, unjust or oppressive.¹³⁴ The law does require the contract to contain a legend warning the athlete that signing the contract may jeopardize his or her amateur standing.¹³⁵ The Act requires agents to file a schedule of their fees with the labor commissioner,¹³⁶ but the Act is silent about what, if anything, the commissioner may do in response to agents' fees which are considered to be unreasonable.¹³⁷

The Act also requires agents to post a \$10,000 surety bond.¹³⁸ Among other purposes, the bond is to ensure that the agent will pay over to his client all sums of money due when the agent has received funds on his client's behalf.¹³⁹ However, if for some reason an agent is receiving compensation on behalf of his client and fails to pay it over, a \$10,000 bond is hardly adequate security considering the amount of compensation today's athletes generally earn.¹⁴⁰ The bond is intended to cover damages caused by misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions by the agent; but simple negligence or incompetence is not covered.¹⁴¹

Certain substantive protections are afforded the athlete by prohibiting agents from making false or misleading representations,¹⁴² thereby making such conduct not only tortious but criminal as well.¹⁴³ Before contacting a student-athlete, the agent must file his registration statement with the athlete's school.¹⁴⁴ A copy of the agent's contract with the athlete must be filed with the athlete's school within five days after the athlete signs it.¹⁴⁵ The Act voids any contract signed by an athlete with (1) an unregistered agent, (2) an agent who has not filed his or her certificate with the student-athlete's school, or (3) an agent who has not filed a copy of the contract with the student-athlete's

128. 1981 CAL. STAT. 3487.

129. CAL. LAB. CODE § 1510.

130. Sobel, *supra* note 103, at 18.

131. *Id.*

132. CAL. LAB. CODE § 1530.

133. *Id.*

134. Sobel, *supra* note 103, at 19.

135. CAL. LAB. CODE § 1530.5.

136. *Id.* at § 1531.

137. Sobel, *supra* note 103, at 19.

138. CAL. LAB. CODE § 1519.

139. *Id.* at § 1520.

140. Sobel, *supra* note 103, at 20.

141. *Id.*

142. CAL. LAB. CODE § 1537.

143. *Id.* at § 1547.

144. *Id.* at § 1545.

145. *Id.*

school within five days after the athlete signs it.¹⁴⁶ Finally, the Act gives the labor commissioner jurisdiction to hear and adjudicate disputes between agents and athletes, though the parties are entitled to *de novo* review in the California Superior Court.¹⁴⁷

The chief problem with the Act is that few agents have registered under its provisions.¹⁴⁸ The failure of agents to register may be explained, in part, by their ignorance of the law and by an ambiguous exemption for lawyers.¹⁴⁹ Also, the labor commissioner has not yet sought to enforce the Act by prosecuting any one for failing to register.

4. *National Football League Player Association Regulations*

Faced with a lack of effective state regulation, players' associations in different professional sports have attempted to regulate the behavior themselves. A recent attempt has been the National Football League Players' Association's "formulation of Regulations Governing Contracts Advisors" (hereinafter NFLPA Regulations), which became effective in September, 1983. The National Football League Players Association has attained the right to act as the exclusive bargaining representative for all athletes employed by NFL teams.¹⁵⁰ The NFLPA Regulations has created a system in which the players' agents must become agents of the NFLPA itself.¹⁵¹ Agents who are not certified by the NFLPA are not eligible to represent NFL players in contract negotiations according to the regulations adopted by the NFLPA in September, 1983.¹⁵² The certification application asks for information regarding the prospective agent's education, occupation, membership in professional organizations, criminal convictions, disciplinary actions, and character. The regulations further provide that a certification may be denied if the applicant has committed fraud, misrepresentation, embezzlement, misappropriation of funds, theft, or any other conduct which adversely affects the competence, credibility, or integrity of the applicant.¹⁵³

As a condition of certification, agents are required to comply with NFLPA Regulations.¹⁵⁴ The Regulations specify a standard form representation agreement that must be used by certified agents.¹⁵⁵ The Regulations also specify the maximum fees that a certified agent may charge a player.¹⁵⁶ Among other requirements, the NFLPA Regulations require agents to attend

146. *Id.* at § 1546 (The agent's failure to do these things, as required, is also a misdemeanor.).

147. *Id.* at § 1543.

148. Sobel, *supra* note 103, at 20.

149. *Id.* at 21. The Act, however, limits the exemption to members of the State Bar of California only when acting as legal counsel. CAL. LAB. CODE § 1500(b).

150. Sobel, *supra* note 103, at 24 (The NFLPA was certified as the collective bargaining representative of all players employed by NFL teams in 1971.).

151. *Id.*

152. "No person shall be entitled to represent an NFL player on individual contract negotiations with NFL clubs unless he or she is first certified as an NFLPA Contract Advisor pursuant to these Regulations." *NFLPA Regulations Governing Contract Advisors* § 1, reprinted in REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 29, 35.

153. See generally *id.*

154. *Id.* at § 2B.

155. *Id.* at § 4A.

156. *Id.* at § 4B (The maximum fee depends on the amount by which the athlete's salary exceeds the minimum, whether the contract is guaranteed, and the "contract year.").

an annual NFLPA briefing on contract negotiations,¹⁵⁷ and agents are prohibited from having a financial interest in any professional football team.¹⁵⁸

The primary problem with the plan is that agents for unsigned rookies are not required to be certified because unsigned rookies are not members of the unit of employees the NFLPA was certified to represent.¹⁵⁹ To the extent that players are abused by their agents, a significant proportion of abuses tend to occur in connection with rookie contracts.¹⁶⁰ Therefore, this gap in the plan's coverage is substantial.¹⁶¹ Also, it is not clear whether the National Labor Relations Act gives the NFLPA the exclusive right to bargain for its members individually, although it is clear that the NFLPA does have the right to bargain collectively for its members.¹⁶²

IV. SUMMARY

As the reader may have observed, the conventional wisdom and legal analysis applied in this article does not suggest that the black athlete requires special guidance departing from that which would be given to any other athlete. While at least one commentator has suggested that the majority of athletes who suffer from agent abuse are black,¹⁶³ it is not necessarily true that black athletes suffer agent abuse solely because they are black. Decrying that sports agents are mercenary racists and that most athlete abuse is the result of such racism is a flight of fantasy that the black athlete cannot afford and which does little to help him find competent representation.

Rather, the two questions addressed by this article are: What can the black athlete do to prevent being abused by a sports agent that will be more effective than present inadequate legal protection? And, how can the black athlete select and use a sports agent to further his pursuit of success?

This article's answer to the former question, simply put, is education. Awareness of the various methods of solicitation and potential areas of dispute within the athlete-agent relationship can result in avoidance of problems before they occur. Judicial resolution of such problems after-the-fact is too often ineffective, especially considering the time-consuming nature of the judicial process and the short span of the athlete's career. Regulation has also proven to be largely ineffective because of gaps in coverage and lack of enforceability. Realistically, an effective regulatory system would be so difficult to construct and maintain that the extent of the problem may not justify its cost.

As to the latter question, a portion of this article has been devoted to educating the athlete as to the services he may require of a sports agent and the methods by which these services can be obtained. While this nutshell of information does not purport to set out "everything the athlete ever wanted to know about agents but was afraid to ask," it should provide a fundamental

157. *Id.* at § 5A(6).

158. *Id.* at § 5B(1).

159. Sobel, *supra* note 103, at 25.

160. *Id.* at 26.

161. *Id.* (The NFLPA intends to petition the NLRB for an amendment to the definition of the unit of employees the NFLPA is certified to represent.).

162. *Id.*

163. Leavy, *supra* note 3.

understanding of the sports agent's services, methods of operation, and other areas that the athlete should inquire into when approached by an agent. Furthermore, it should provide a basis for discussion among the athlete, his parents, and personal advisers.

CONCLUSION

Black athletes suffer from the abuse of sports agents primarily because of their youth and lack of business sophistication. However, the agent can be a useful tool for furthering the goals of the black athlete.

Since present legal protections available to the athlete are inadequate, the burden is on the athlete and his advisers to educate themselves with respect to the sports industry generally, and sports agents in particular. The athlete thereby places himself in the position to make a well-reasoned choice among competing offers of representation.